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Code of Criminal Procedure, 1973 - Section 482 – Inherent powers – Exercise of - Quashing of FIR registered for rape etc., pursuant to compromise between parties – Held, Sessions Judge has framed charges against the accused – Petition seeking quashing of FIR and consequential proceedings is not accompanying the copy of order vide which charges were framed – Petition can not be construed to be one for quashing charges - Petition being defective, is dismissed. (Para 14). Title: Smt. Reena Devi and others vs. State of Himachal Pradesh. Page – 431

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers – Quashing of FIR in non-compoundable cases pursuant to compromise – Held, FIR involving non-compoundable cases may be quashed in view of compromise of parties provided offences(s) are not heinous or serious in nature and the wrong is basically done to victim. (Para 4). Title: Sh. Saurav Sharma vs. State of Himachal Pradesh. Page - 48

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers – Exercise of – Quashing of FIR pursuant to compromise in non-compoundable cases – Held, powers conferred by Section 482 of Code to quash criminal proceedings for non-compoundable offences can be exercised in matters having overwhelmingly and predominantly civil character particularly in cases arising out of commercial transactions or matrimonial relationship or family disputes, when parties have resolved the entire dispute amongst themselves. (Para 3). Title: Manish Choudhary vs, State of H.P & another. Page - 559

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers – Quashing of complaint – Held, in exercise of its inherent powers under Section 482 of Code, High Court can quash proceedings if it comes to conclusion that continuation of such proceedings would be an abuse of process of law – Where discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on material which is wholly irrelevant or inadmissible or where complaint suffers from fundamental legal defects, High Court would be justified in quashing it, in exercise of its powers under Section 482 of Code. (Para 9 & 10) Title: M/s Kings Surgicals Memoodpur Mafi and others vs. State of Himachal Pradesh. Page - 586

Code of Criminal Procedure, 1973 – Sections 125 & 126 – Maintenance – Recovery of arrears - Death of father - Held, maintenance granted under Section 125 of Code to minor child is recoverable from the estate of father. (Para 29) Title: Tara Devi & another vs. Kumari Uma Devi and another. Page – 562

Code of Criminal Procedure, 1973 – Sections 173 (8) & 190 – **Prevention of Corruption Act, 1988** – Section 13 – Disproportionate assets – Cancellation report by police – Non –acceptance thereof by Special Judge - Petition against – Held, court has the discretion to accept or reject cancellation/closure report filed by the investigating officer – But this discretion has to be exercised only after evaluating the said report vis-a-vis material placed on record – Cancellation/closure report clearly mentioning that benefit of doubt can be given to accused for acquiring 9.38% disproportionate assets as laid in Krishnanand vs. State of Madhya Pradesh AIR 1977 SCC 796 – Refusal to accept cancellation report without going into the details given in closure report, was erroneous - Petition allowed –Order of trial court set aside – Matter remanded. (Paras 6 to 9). Title: Pushpinder Singh vs. State of Himachal Pradesh. Page – 248

Code of Criminal Procedure, 1973 – Sections 320 & 482 – Inherent powers – Quashing of FIR in non-compoundable cases pursuant to settlement between parties – Permissibility – Held, power of High Court in quashing FIR, complaint or other criminal proceedings in exercise of its inherent powers is distinct and different from power of criminal court of allowing compounding of offences under Section 320 of Code – Powers under Section 482 are not circumscribed by Section 320 of Code. (Para 11 & 15). Title: Ashish Kumar Guleri vs. State of Himachal Pradesh and others. Page – 619

Code of Criminal Procedure, 1973 – Sections 320 & 482 – Inherent powers – Quashing of FIR in non-compoundable cases pursuant to settlement between parties – Permissibility – Held, power of High Court in quashing FIR, complaint or other criminal proceedings in exercise of its inherent powers is distinct and different from power of criminal court of allowing compounding of offences under Section 320 of Code – Powers under under Section 482 are not circumscribed by Section 320 of Code. (Para 10 & 13).Title: Satish Kumar vs. State of Himachal Pradesh and others. Page – 630

Code of Criminal Procedure, 1973 - Sections 320 & 482- Inherent powers – Quashing of FIR pursuant to compromise between parties in case involving non-compoundable offences – Held, under Section 482 of code , High Court has inherent power to quash criminal proceedings even in cases involving non-compoundable offences pursuant to compromise between parties. (Para 8) Title: Gulam Navi vs. State of Himachal Pradesh and another. Page – 187

Code of Criminal Procedure, 1973 – Sections 397, 401 & 438 – Bail order – Challenge thereto by victim – Locus standi – Held, victim aggrieved of offence and having bonafide connection with cause of action has the locus standi to challenge bail granted by the trial court. (Para 3) Title: Anil Kumar Sharma vs. Naresh Kumar alias Nika & Anr. Page - 726

Code of Criminal Procedure, 1973 –Section 438 – Recovery of commercial quantity of charas – Pre-arrest bail – Grant of - Held, on facts, person holding rucksack had fled away from spot – Bail petitioner not identified by any police personnel as the same person – Cell phone recovered from bag though found to be being used by petitioner in fact, had been lost by him – Earlier police had filed an untrace report in the case – Identity of petitioner is not connected with recovery of commercial quantity of charas – Pre-arrest bail granted subject to conditions. (Paras 7, 8 & 15) Title: Diwan Chand vs. State of Himachal Pradesh. Page – 196

Code of Criminal Procedure, 1973 –Section 482 – Inherent powers – Quashing of complaint under Domestic Violence Act – Circumstances- Held, settlement between parties if going to result in harmony and may improve their future relationship, is a relevant consideration for exercise of powers under Section 482 of Code. (Para 11) Title: Neha Sharma & other vs. Ms. Rajani Devi & another. Page – 239

Code of Criminal Procedure, 1973 –Sections 216 & 217 – POCSO Act, 2012 – Sections 8 & 12 – Alteration of charges – Material on record prima facie making out a case of sexual assault rather than of sexual harassment – Order directing framing of charges for offence under Section 8 of Act, not unwarranted. (Para 12). Title: Ashwani Kumar alias Anku vs. State of H.P. Page – 76

Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts, Act 2015 (Act)- Section 16- Schedule affecting amendments in Code of Civil Procedure, 1908 (Code) - Held, provisions of the Code as amended vide aforesaid Act are applicable only when suit is being adjudicated under the provisions of the said Act and not otherwise – M/s SC & Contracts. (Paras 9 & 10) Title: Shri Raj Kishore Gupta and another vs. Shri Suresh Kumar and another. Page – 231

Constitution of India, 1950 - Article 226 – CCS (CCA) Rules, 1965 – Rule 14 – Penalty of removal – Court's interference in Writ jurisdiction – Scope – Held, in disciplinary proceedings, the High Court can not act as appellate court nor it can re-appreciate evidence adduced before the Inquiring Authority unless the conclusion arrived at on the face of it, is wholly arbitrary and capricious. (Para 8) Title: Gulshan Kumar vs. State of Himachal Pradesh and another (D.B.) Page – 676

Constitution of India, 1950 – Article 226 – **Himachal Pradesh Liqour Licence Rules, 1986 –** Rule 35 – A(22) - **Excise Policy for the year 2014 -15** – Condition No. 4.3 stipulating imposition of additional fee and penalty on retailers in case of their failure to sell quantum of liquor for which they were granted licence to vend - Challenge thereto – Held, leving of additional fee and penalty commenced from the year 2009 with introduction of Rule 35-A and from year 2013-14 when condition was incorporated in Annual Policy Announcement which continued till 2016-17 – Petitions filed only in 2015 whereas Petitioners chose to apply for renewal of their lincence year after year – They can not raise challenge to such condition. (Para 99) Title: M/s Mohan Meakin Ltd. Vs. State of H.P. and others. Page - 771

Constitution of India, 1950 - Article 226 – Misuse of Public office – Issuance of wrong income certificate of 'nursery teacher training' by Society for Child Relief and Women Welfare enabling private respondent to obtain employment on that basis – Held, public offices are not meant for abuse – Certificate issued by public functionaries on inquiry was found false – Selection of private respondent effected on basis of such documents, set aside - Departmental / Criminal proceedings ordered to be initiated against erring officials. (Para 3, 6 to 8) Title: Kaushalya Devi vs. The State of Himachal Pradesh and others. Page – 482

Constitution of India, 1950 – Article 14 – Equality before law – Institution/department not promoting petitioner on ground of his misconduct – Petition against –Held - Service record of petitioner not showing any money recoverable from him – No inquiry initiated against petitioner qua misconduct on his part – Officers junior to petitioner promoted by department/ institution – Petitioner can not be denied promotion – Petition allowed. (Para 4). Title: Ramesh Chand vs. The Chairman/Manager M/s The Kangra District Wholesale Co-operative Consumer and Marketing Federation Ltd. Page – 325

Constitution of India, 1950 – Article 215 – **Contempt of Courts Act, 1971** – Sections 2(b) & 12 - Civil contempt – Petitioner alleging contempt of court on ground of non-payment of interest on emoluments – Held, court had merely directed respondent to examine the grievances of petitioner - No mandamus as such was issued by the court regarding grant of interest etc. – No case of disobedience of court direction is made out – Petition dismissed. (Paras 5 & 6). Title: Sh. Suresh Kumar and others vs. Dr. Arun Sharma and others. Page No. 389

Constitution of India, 1950 – Article 226 – Appointment as Anganwari helper – Setting aside of by Appellate Authority on ground of appointment obtained by furnishing wrong income certificate – Challenge thereto – Held, inquiry report of Tehsildar reveals that income certificate of petitioner was incorrect – She had concealed income of her family – As per actual income, she did not fall in the income criteria – Her appointment was rightly cancelled by Appellate Authority – Petition dismissed. (Paras 3 to 5) Title: Smt. Jayotsna Saklani vs. State of Himachal Pradesh through Secretary (Social Justice and Empowerment) to the State of H.P. & others. Page – 282

Constitution of India, 1950 - Article 226 – Central Government Health Scheme (CGHS) - Scheme made applicable only to retirees residing in areas covered by CGHS that too on exercise of option by them - Extension to pensioners residing in non-CGHS areas - Held, in view of judgment in Shankar Lal Sharma's case, retired employees residing in non-CGHS areas are also entitled for medical benefits available to retirees residing in areas covered by CGHS - Therefore, petitioner is also entitled for benefits of the Scheme notwithstanding that he had opted for fixed medical allowance at time of his superannuation - He could not have opted for CGHS at that time as he was residing in non-CGHS area and opportunity to exercise such option was not available to him – Respondents directed to reimburse medical bills of petitioner towards his indoor patient treatment. (Para 5). Title: Subhash Chand vs. UOI and others. Page – 561

Constitution of India, 1950 – Article 226 – Challenge to selection/ appointment as Anganwari helper – Locus standi – Held, petitioner challenging appointment of private respondent as Anganwari helper – Petitioner herself did not participate in the selection process – She has no locus standi to challenge selection/ appointment of private respondent particularly when no dispute is raised as to advertisement inviting applications or her separation from joint family or income certificate of private respondent – Petition can not be treated as a public interest litigation. (Para 3) Title: Satya Devi vs. State of H.P. & others. **(D.B)** Page – 45

Constitution of India, 1950 – Article 226 – Judicial Courts (Regulation & Maintenance of Canteen) Rules, 1984 (Rules) – Rule 23(2) – Cancellation of canteen licence by District and Sessions Judge on basis of report of Canteen Committee – Challenge thereto – Held, licence of petitioner had already expired – Various reports of Inspection Committee indicating that canteen was being run in breach of terms and conditions of licence - Shortcomings were not removed by her despite show cause notices issued to her in that regard – Surprise inspection by District Judge alongwith Additional District & Session Judge and Senior Civil Judge again showing that canteen was being run in most unhygienic manner and in breach of conditions of licence – Respondents were justified in revoking licence and ordering her to hand over its vacant possession. (Paras 2 & 3) Title: Madhu Bala vs. District & Sessions Shimla & others. **(D.B.)** Page – 51

Constitution of India, 1950 – Article 226 – Non-selection for LPG dealership – Challenge thereto - Writ jurisdiction – Held, normally in commercial matters, High Court should not exercise its extraordinary jurisdiction conferred by Art. 226 of the Constitution - Advertisement requiring applicant(s) /intended dealer(s) to be owing land of specified area in that locality – Petitioner admittedly not owing any land there – Her ineligibility for dealership can not be said to be wrong – Petition dismissed. (Paras 5, 11 to 14) Title: Suman Bala vs. Hindustan Petroleum Corporation Limited and another. Page – 319

Constitution of India, 1950 – Article 226 – Regularization as Creche Teacher/ Bal Sevika - Entitlement – Held, petitioner was appointed as crèche teacher on fixed honorarium under Rajiv Gandhi National Crèche Scheme, Ministry of Women and Child Development of Union Government – She can not claim parity with Bal Sevikas appointed under state sponsored schemes – She can not be considered for promotion / recruitment as Balwadi teacher as per R & P Rules for said posts. (Paras 7 to 10). Title: Prem Lata Sanehi vs. Union of India & other. Page – 251

Constitution of India, 1950 - Article 226 – Supervisory jurisdiction – Nature and scope – Held, in exercise of its powers under Article 227 of Constitution, High Court is not to sit as an appellate court over the orders of lower courts – It will interfere only if orders either shock the judicial conscience of court or are so perverse that in case same are permitted to remain on record, it would result in great injustice to either party. (Para 7) Title: Mahesh Kumar vs. H.P. State Civil Supplies Corporation and others. Page – 338

Constitution of India, 1950 – Article 226 – Transfer of employee on basis of D.O Note of elected representative - Validity – Held, an elected representative has no right to claim that a particular employee be transferred to a particular station – Such choice is left with Administrative Head(s) i.e, with Executive and not with Legislators - Administrative Head has to apply his mind and take decision regarding transfer of an employee uninfluenced by the recommendation of a political executive. (Para 4) Title: Dalip Singh vs. State of H.P. & others.(D.B) Page – 523

Constitution of India, 1950 – Article 226 – Transfer on D.O. Note of an elected representative – Challenge thereto – Held, any proposal of transfer of an employee from any elected representative cannot be straightway implemented - The Administrative Head is required to examine the proposal impartially and has to take an independent decision on the merits of same in accordance with law and as per transfer policy.(Para 2).Title: Keshav Ram vs. State of H.P. & Others. **(D.B.)** Page – 340

Constitution of India, 1950 - Article 226 – Transfer to non-tribal area – Non-implementation of order for want of reliever – Held – State directed to provide reliever against the petitioner at place of his posting in tribal area within stipulated period failing which he shall be at liberty to join at new place of posting without waiting for the reliever. (Para 4) Title: Suresh Kumar vs. The State of Himachal Pradesh through its Secretary (IPH) & others. Page - 494

Constitution of India, 1950 – Article 226 – User of Town Hall, Shimla – Public interest litigation – Held, Municipal Corporation may locate offices of Mayor and Deputy - Mayor in the Town Hall – Municipal Corporation in consultation with Government should come up with innovative ideas to put Town Hall to best use from point view of preserving the heritage and to derive income from such activities, which will showcase the beauty of hill station and culture and traditional arts of the people of the State – It may be put to use the area for housing high-end cafe with reading facilities, information centre and boutique of traditional crafts attracting tourists with an entry fee that will provide a handsome revenue to Corporation . (Paras 22 & 23). Title: Court on its own motion vs. State of H.P. and others. **(D.B.)** Page - 83

Constitution of India, 1950 - Article 226 – Writ Jurisdiction – Alternative remedy – Existence of – Effect – Existence of alternative remedy, doest not create an absolute legal bar on exercise of writ jurisdiction by High Court – Decision whether to exercise or not to exercise such writ jurisdiction is to be taken by High Court on examination of facts and circumstances of a particular case (Para 12) Title: Kishori Lal Sharma and others vs. State of H.P. and others Page - 757

Constitution of India, 1950 – Article 226 – Writ Jurisdiction – Order for the recovery of transport allowance by the department from employees – Challenge thereto – Held, petitioners had not applied for grant of transport allowance – It was granted by the department concerned of its own in terms with prevailing Office Memorandum – Petitioners were entitled for same under said Office Memorandum – They belong to class III & class IV service – Order for recovery of transport allowance can not be made on ground that they were on deputation with other institutions at the relevant point of time, when pay etc., was being paid to them by the parent department. (Paras 10 & 11) Title: Rajeev Kumar vs. Union of India & others. Page – 18

Constitution of India, 1950 – Article 226 – Declaration / Up-gradation of State Roads as National Highways – Public interest litigation – Held, Union Government has not taken any final decision as to which are the State Roads to be declared as National Highways as the guidelines for said declaration of State Roads as National Highways not finalized – Internal ministerial consultations required for finalization of such guidelines – Matter closed. (Para 3 to 6). Title: Court on its own motion vs. Union of India & others. **(D.B.)** Page – 88

Constitution of India, 1950 – Articles 14 & 226 – Equality before law – Parity in pay – Writ jurisdiction – Held, parity in salary can be claimed by a worker either individually or collectively only upon espoused parity being proven to be completely working on all parameters – Mere similarity of designation or nomenclature of posts is not sufficient. (Para 3). Title: Ashwani Kumar & others vs. State of H.P. & others Page – 36

Constitution of India, 1950 – Articles 14 & 16 – Government notification dated 22.6.2019 – Clause 7.2.4 - Selection of Senior Resident – Selection criteria – Challenge thereto – Notification dated 22.06.2019 providing selection of Senior Resident on basis of marks obtained in MBBS and PG course together with marks for publication – Petitioner contending criteria as being arbitrary and unreasonable on ground that selection should be made on basis of Rules as prevalent on date of advertisement dated 27.2.2019 – Held, there is no vested right of promotion but only a right to be considered for promotion in accordance with Rules which prevail on the date on which consideration for promotion takes place – There is no rule of universal application that vacancies must be filled on basis of law which existed on date when they arose – Petitioner has no right to claim that selection should be made on basis of old criteria of 2012 since it was applicable on date of advertisement dated 27.02.2019– Petition dismissed (Paras 18 & 19) Title: Dr. Sidharth Sood vs. State of H.P. and others. Page – 359

Constitution of India, 1950 – Articles 14 & 226 – Equality before law – Regularization from back date – Entitlement – Respondents declining regularization of petitioner from back date by rejecting medical certificate produced by him showing his bonafide absence from work, on ground of its late production and having been issued by a private medical practitioner – Writ against – Held, respondents could not have discriminated against petitioner by rejecting his medical certificate issued by a private practitioner and denying regularization from back date when similarly placed employees “PS’ & “JR” were also regularized in similar circumstances . (Para 7) Title: Komal Chand vs. State of H.P & others. (D.B.) Page – 549

Constitution of India, 1950 – Articles 14 & 226 – Principles of natural justice – Applicability - Held, principles of natural justice envisage that no person should be condemned unheard – No order can be passed by any authority be it quasi-judicial or otherwise at the back of a person if said order is to have civil consequences qua the said party – Order passed by Director, Women and Child Development on representation of a person adversely affecting the service of petitioner behind her back, is arbitrary. (Para 12 & 13). Title: Rama Sharma vs. State of H.P. through its Secretary Department of Social Justice and Empowerment, Shimla-2 & others. Page – 485

Constitution of India, 1950 – Articles 14 & 226 – Seniority in absorbing department – Whether service rendered in parent department on equivalent post is to be considered? – Held, on facts, offer of deputation/ absorption was not under any R & P Rules, as Rules were not in existence – It was only in exercise of executive powers of the State that posts were filled on deputation basis – Therefore, State was within its bounds to impose conditions it deemed fit in deputing and absorbing the staff and such staff had the right to accept or reject the conditions so imposed by the State – As per conditions, seniority of absorbed staff was to rank from the date of absorption – Previous service rendered in parent cadre was not to be considered toward seniority – Petitioner accepted said conditions and accepted absorption – He can not claim seniority over officials absorbed earlier simply on basis of his previous service rendered in the parent department. (Para 3) Title: State Election vs. Ram Kumar Negi.**(D.B.)** Page – 764

Constitution of India, 1950 - Dispute regarding interse seniority – Rejection of petitioner's representation by the department –Filing of repeated representations – Effect – Held, repeated representations do not revive the cause of action. (Para 3). Title: State Election vs. Ram Kumar Negi.**(D.B.)** Page – 764

Constitution of India, 1950 - Penalty of removal – Whether disproportionate? - Interference by Writ court – Held, doctrine of proportionality is a well recognized concept of judicial review – One of the tests to be applied while dealing with question of punishment would be, would any reasonable employer have imposed such a punishment in like circumstances ? (Para 12). Title: Gulshan Kumar vs. State of Himachal Pradesh and another (D.B.) Page - 676

Constitution of India, 1950- Article 226 - Excise Policy for the year 2014 -15 – Condition No. 10.28 (A) (8) and 10.29 stipulating imposition of additional fee and penalty on manufacturers/distillers/bottlers etc., in case of their failure to manufacture/ sell quantum of liquor for which they were granted wholesale licence to vend - Challenge thereto – Petitioner's contending policy to be arbitrary whereas State submitted that what is sought to be imposed and realized is not a tax but a fee for breach of conditions licecne – Held, if something is payable by way of tax or duty, then liability to pay would not depend upon performance or non-performance of assessee – But, if something is payable only in terms of contract, then contractual obligation so imposed can be tested on parameters of performance failure or breach – Manufacturers/ distillers/bottlers etc. on account of statutory prescriptions can not sell their product in open market – They can not be asked to pay the additional fee etc. for sale less than minimum guaranted quota. (Paras 54, 56 , 58 & 151) Title: M/s Mohan Meakin Ltd. Vs. State of H.P. and others. Page – 771

Constitution of India, 1950 –Article 226 – Transfer of employee on basis of D.O Note of an elected representative – Effect – Held, any proposal of an elected representative regarding transfer of an employee can not be straightway implemented – It has to be examined by Head of Department and he has to take an independent decision on the same uninfluenced by the proposal in accordance with law and transfer policy. (Para 3). Title: Sh. Ramjan Mohmmad vs. State of H.P. and Others. **(D.B.)** Page – 380

Constitution of Indian, 1950 – Article 226 – Transfer on D.O Note of Minister – Validity – Held, the question whether an employee has to be transferred and posted out, is to be decided by the administration – Administrative Head has to apply his mind and take decision regarding transfer of employee independently and uninfluenced by recommendation if any, of the political executive – If any recommendation is received from political executive, the Administrative Department must examine the matter before ordering transfer(s) - Issuing transfer orders on

recommendation of Minister without first examining about the justification of such transfer by the Administrative Head, is not legally sustainable. (Paras 7 & 8) Title: Surinder Kumar vs. State of H.P. & others. Page - 5

Contempt of Courts Act, 1971 – Section 2(a) & (b) - Contempt – What is ?- Held, contempt is such conduct that defies the authority or dignity of a court or legislature – It is punishable in case it interferes with administration of justice. (Para 41) Title: Jaram Singh and others vs. Sh. Anil Kumar Khachi and another. Page – 636

Contempt of Courts Act, 1971 – Sections 12 & 15 - Contempt - Purging of contemnor - Tendering of apology – Effect – Held, apology can not be allowed to be used as a weapon of defence – Attempt to justify wrongful act by contemnor would nullify apology offered by him. (Para 52). Title: Jaram Singh and others vs. Sh. Anil Kumar Khachi and another. Page – 636

Contract of Insurance – Dishonour of premium cheque – Effect – Held, insurance policy was valid on the date of accident – It was cancelled subsequently on ground of dishonour of premium cheque – Insurance company can not avoid its liability. (Para 17) Title: United India Insurance Co. Ltd. Vs. Smt. Kumta Devi & Ors. Page – 353

Co-sharers – Joint land – Exclusive hissedari possession of a co-sharer - Nature of - Held, exclusive possession of a co-sharer over joint land does not empower him to appropriate it exclusively to the exclusion of other co-sharers. (Para 9) Title: Neerat Ram & another vs. Ram Nath & another. Page – 410

'D'

Drugs and Cosmetics Act, 1940 – Sections 18 read with 27(d) - **Drugs and Cosmetics Rules, 1945 (Rules)** - Rule 124 (c), Schedule F (11) - **Medical Devices Rules, 2017** – 'Rolled Bandages'- 'Surgical Dressings' not conforming to the prescribed standards – Cognizance – Quashing of complaint – Held, rolled bandages were not of standards as prescribed under the Rules when samples were actually drawn – But before filing complaint, Medical Devices Rules came into existence, which exempted 'Rolled Bandages' from applicability of said Rules of 2017 and excluded them from definition of 'Surgical Dressings' – Offence if any was of technical nature as bandages were not found conforming to standards i.e, length, width etc – Omission if any, was not injurious to the health of public – Medical Devices Rules were curative or declaratory in nature and will have retrospective operation – Continuation of proceedings would amount to abuse of process of law – Petition allowed - Complaint quashed. (Para 22, 26, 29 to 31). Title: M/s Kings Surgicals Memoodpur Mafi and others vs. State of Himachal Pradesh. Page – 586

'E'

Employees Compensation Act, 1923 – Section 22 - Motor accident – Death case – Defence of invalid/ fake driving licence – Relevancy – Commissioner allowing claim application of dependents of driver and fastening liability on insurance company – Appeal against by insurer on ground that driving licence of deceased driver was fake and it has no liability – Held, insurance company can absolve itself only if it is proved that driving licence of driver was fake and the owner of vehicle had its knowledge yet he permitted the driver to drive it. (Para 16 & 17). Title: ICICI Lombard General Insurance Company Limited vs. Smt. Bhawani & another. Page – 598

Employees Compensation Act, 1923 – Section 4-A(3) (a) & (b) – Imposition of penalty – Whether insurer is bound to pay penalty imposed upon insured ? Held - penalty is not a part and parcel of the legal liability of the employer - It is imposed upon him under contingencies contemplated by Section 4-A (3)(a) and (b) of the Act on account of his default in paying due compensation to his employee - Insurer is under contractual obligation to indemnify the employer for his legal liability only- Since penalty is not part of legal obligation of employer, the insurer is not liable to pay it. (Para 13) Title: Oriental Insurance Company Ltd. Vs. Smt. Neena Devi & others. Page - 233

'F'

Factory Act, 1948 – Section 106, Proviso – **Code of Criminal Procedure,1973** – Section 473 – Time limitation in taking congnizance – Held, period of six months as provided in the Proviso to Section 106 of the Act for filing complaint is attracted only when either there is no response of compliance to the written orders of the Inspector or despite response of compliance, he (Inspector) noticed discrepancies / violation as mentioned in written order after fresh inspection, to be still continuing – Only in that eventuality, it can be said that there is violation of written order of the Labour Inspector. (Para 8 & 10) Title: Saugata Gupta & another vs. State of Himachal Pradesh through its Labour Inspector. Page – 552

Family Settlement - Effect – Held, family settlement duly acted upon, operates as a complete estoppel as between parties to it. (Para 15). Title: Rattan Chand (deceased) through his LRs & Anr. Vs. Rishi Kesh & Anr. Page – 341

Family Settlement - Effect- Held, family settlement between members of family should generally be given sanctity and party should be bound by the same. (Para 13). Title: Rattan Chand (deceased) through his LRs & Anr. Vs. Rishi Kesh & Anr. Page – 341

'H'

Himachal Pradesh Excise Act, 2011(Act) – Sections 27, 36 & 38 - Scope of – Held, Act makes a distinction between excise duty and countervailing duty on one hand and consideration payable for grant of licence – However, State may in addition to or instead of excise duty or countervailing duty may accept sum in consideration of a lease of any right under Section 27 (Para 45). Title: M/s Mohan Meakin Ltd. Vs. State of H.P. and others. Page - 771

Himachal Pradesh Excise Act, 2011(Act) – Section 28(1) – Nature & Scope – Held, Section 28 (1) of Act contains a delegation of power to the Finacial Commissioner to grant a licence, permit or pass on payment of such fees as he may direct. (Para 48). Title: M/s Mohan Meakin Ltd. Vs. State of H.P. and others. Page - 771

Himachal Pradesh Panchayati Raj Act , 1994 – Section 135 (2) – Order passed by SDO (C) – Order appellable – Aggrieved party filing representation against the order before Appellate Authority instead of a formal appeal – Effect – Held, right to appeal is a statutory right – Wherever right to file appeal is conferred upon a party, it has to avail said right strictly inconsonance with statutory provisions – Mere representation filed against an order passed by quasi - judicial authority, may be before the Authority which has the power to hear appeal against the said order, does not confer any power upon said Authority to adjudicate upon representation as if it were an appeal - For deciding an appeal, there has to be properly constituted appeal before the Authority. (Para 9 to 11) Title: Bal Krishan vs. State of Himachal Pradesh and others. Page – 626

Himachal Pradesh Land Revenue Act, 1954 – Sections 16 & 17 - Review jurisdiction – Nature of – Held, right to review is a stationary right and court of law or quasi – judicial authority has no right to review its order unless the statute confers upon it the power of review. (Para 17). Title: Joginder Dutt vs. The State of Himachal Pradesh through its Secretary (Revenue) & others. Page – 284

Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 – Section 4 (3), Proviso - Cancellation of lease qua common land granted by Gram Panchayat – Procedure –Held, Collector is required to give opportunity of being heard to the lessee before passing order of cancellation of lease – Order cancelling grant without affording opportunity of being heard as contemplated under Section 4 (3) of Act is illegal. (Para 10). Title: State of H.P & others vs. Bhagwan Dass & others. Page – 459

Himachal Pradesh Judicial Officers (Pay, Allowances & Conditions of Service) Act, 2003 – Notification dated 29.8.2008 – Item No 16 (vii)- Domestic Help Allowance – Condition of minimum qualifying service – Constitutional validity & applicability vis-a-vis family pensioners of

deceased judicial officer – Held, though condition of minimum five years of qualifying service for grant of Domestic Help Allowance to retired judicial officer is constitutionally valid yet analogy of mandatory completion of 5 years service by him/her can not be extended to an incumbent who dies in harness before completion of five years of service – Retirement from service before five years is a voluntary act of an employee - Death within five years of service is not a voluntary act unless it is a case of suicide- Doctrine of election is not attracted in a case of death. (Paras 23 & 24). Title: Ms. Santosh Negi vs. State of H.P. and others. Page – 277

Himachal Pradesh Land Revenue Act, 1954 – Sections 14, 17 & 18 – Attestation of mutation – Held, the question whether Will was validly executed or not and whether testator had the power to bequeath, lies in domain of civil court – Revenue authority has no jurisdiction to decide such issues. (Para 18) Title: Joginder Dutt vs. The State of Himachal Pradesh through its Secretary (Revenue) & others. Page – 284

Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 – Sections 4 (1) & 9 - Eviction from public premises – Sub- divisional Collector found the petitioner having constructed house on government land and ordered his eviction – Order upheld by Divisional Commissioner – Petition against – Held, Appellate Authority (Divisional Commissioner) disposed of number of appeals including appeal of petitioner vide common decision / order dated 16/5/2014 – No discussion in the body of order as what was the factual matrix of each case being decided by it and on what ground order passed by the Collector in case of each appellant , was being upheld – Appellate Authority was hearing appeals(s) and it was incumbent upon it to have adjudicated each appeal independently or discussed facts and grounds of appeal of each case independently - Petition allowed – Order set aside - Matter remanded. (Paras 7 & 8) Title: Shyam Singh vs. State of H.P. and others. Page – 74

Himachal Pradesh Tenancy & Land Reforms Act, 1972 (Act) - Section 104 (3) – Vestment of proprietary rights – Date of - Held, tenant would not acquire proprietary rights qua tenancy land during pendency of resumption proceedings before the revenue authorities. (Paras 13 & 14) Title: Shri Karam Chand and another vs. Shri Prakash Chand and Others. Page – 264

Himachal Pradesh Tenancy & Land Reforms Act, 1972 (Act) – Section 45 – Succession to tenancy – Held, Act being a special statute, succession to tenancy would govern by it and not by general principles of Hindu Succession Act. (Para 11).Title: Shri Karam Chand and another vs. Shri Prakash Chand and Others. Page – 264

Himachal Pradesh Tenancy and Land Reforms Act, 1972 - Section 114 – Mutation conferring proprietary rights – Review of - Held, A.C-II grade has no jurisdiction to review order passed by the Land Reforms Officer. (Para 11). Title: Paras Ram through his LRs vs. Kishore Chand and others. Page – 454

Himachal Pradesh Tenancy and Land Reforms Act, 1972 - Section 2 (8)- 'Landless person', who is ? - Held, to fall within definition of expression 'landless person' one should satisfy that (i) he does not hold any land for agricultural purposes, whether as owner or as tenant; (ii) he earns his livelihood principally by manual labour on land; (iii) he intends to take the profession of agriculture; and (iv) he is capable of cultivating land personally. (Para 8) Title: Preeti vs. State of H.P. and others. **(D.B.)** Page - 105

Himachal Pradesh Tenancy and Land Reforms Act, 1972 – Section 2(7) – Expression 'Land' – Meaning of – Held, - 'Land' as defined in the Act does not include built up structure being used for non-agricultural purpose but includes structures meant for agricultural purposes or purposes subservient thereto (Para 11) Title: Preeti vs. State of H.P. and others. **(D.B.)** Page - 105

Himachal Pradesh Urban Rent Control Act, 1987 - Section 14 – Eviction on ground of arrears of rent – Deposit of 'amount due' with Rent Controller itself, when not bad ? – Rent Controller dismissing application of tenant seeking to deposit 'amount due' with him on ground that tenant ought to have approached landlord first for payment and only on his refusal, it can be deposited with him (Rent Controller) – Petition against – Held, Rent Controller in his eviction order has directed payment of 'amount due' to landlord or deposit it in the court within 30 days of said order – There was no direction in the order that tenant could have had deposited rent in the court only if landlord had refused to accept the same – Tenant was merely complying the order of Rent Controller – Dismissal of his application was wrong – Tenant can not be made to suffer

because the eviction order was not inconsonance with law (Paras 11 to 15) Title: Sh. Vivek Kumar Sharma vs. Sh. Achal Jandev. Page – 55

Himachal Pradesh Urban Rent Control Act, 1987 - Section 14(3)(a)(i) – Eviction suit on ground of bonafide requirement - Withdrawal of earlier eviction suit filed on same ground but without leave of Rent Controller - Effect – Held, in earlier rent petition, amendment was sought by the landlady but petition was dismissed as withdrawn without seeking leave of Rent Controller – Second petition contains same phraseology and content as were incorporated in amendment application – Both petitions thus being on same ground – Dismissal of earlier petition would estop landlady to file second eviction petition against the tenant. (Para 6). Title: Shri P.C. Marpa vs. Smt. Rewat Kumari. Page – 740

Himachal Pradesh Urban Rent Control Act, 1987 – Code of Civil Procedure, 1908 – Determination of use and occupations charges – Rent Controller fixing use and occupation charges on basis of assessment done by Hon'ble High Court in another case – Challenge thereto – Held, both premises situated in same building-No evidence that premises with respect of which fixation was done by High Court was bigger in size – Fixation done by Rent controller with respect to demised premises not wrong – Petition dismissed. (Para 2). Title: Sh. Ajeet Singh (since deceased) through his legal representative Sh. Lakhvinder Singh vs. Smt. Usha Rani & Ors. Page – 703

Himachal Pradesh Urban Rent Control Act, 1987 – Order XXII Rule 3 – Death of petitioner landlord during pendency of eviction proceedings – Substitution of legal representatives vis a vis claim raised in main petition - Mode of disposal of application - Held, claim of 'bonafide requirement' is to be decided in main petition and not in application filed under Order XXII Rule 3 of Code for bringing on record his legal representatives. (Para 4) Title: M/s Rikhi Ram Amar Nath vs. Shri Vikas Sood and another. Page - 608

Himachal Pradesh Urban Rent Control Act, 1987 – Section 14 (3) – Eviction suit from rented open land on ground of 'bonafide requirement' – Proof- Held, rented land was being used by the tenants for running their coal company – Said coal business is no more undertaken by them – Petitioners are in business and want to expand their commercial activities - Plea that they want to stack building material on that land and sell it to customers from there, is bonafide as land is connected with road – Landlord alone has the capacity to discern the adequacy and suitability of premises/ land for running business – Tenant can not dictate terms to the landlord in that regard – Petition allowed – Eviction ordered. (Paras 4 & 5) Title: Sushma Rani & other vs. M/s Durga coal Company. Page – 316

Himachal Pradesh Urban Rent Control Act, 1987 – Section 14 (3) – Eviction suit on ground of 'bonafide requirement' – Death of landlord during pendency of proceedings – Effect – Held, even if landlord dies during pendency of eviction proceedings , 'bonafide need' can not be said to have lapsed. (Para 4) Title: M/s Rikhi Ram Amar Nath vs. Shri Vikas Sood and another. Page – 608

Himachal Pradesh Urban Rent Control Act, 1987 (Act) – Section 14 – **Code of Civil Procedure 1908**, **(Code)** – Order VII Rule 11(d) – Rejection of eviction petition for want of cause of action – Whether permissible? Held, Act does not vest any jurisdiction with Rent Controller to reject eviction petition on grounds mentioned in Order VII Rule 11 of Code – In absence of these provisions specifically having been made applicable to proceedings under the Act, these can not be invoked for seeking rejection of eviction petition. (Para 3). Title: Dev Raj Duggal vs. Harish Kumar. Page – 288

Himachal Pradesh Village Common Lands Vesting And Utilization Act, 1974 - Section 3 –- **The Punjab Village Common Lands (Regulation) Act, 1961** - Section – 4 - Vestment of common land in State – Validity –Held, land continuously recorded in possession of Panchayat/ State – Plaintiff not found in cultivatory possession of any part of village common land - Subsequent stray entries showing plaintiff to be in possession of land, palpably wrong – Plaintiff can not be declared to have become owner of any such land - RSA dismissed. (Paras 7 & 8) Title: Bhagat Singh vs. State of H.P. Page – 38

Himachal Pradesh Cooperative Socities Act, 1968 - Sections 35-A & 37 – Scope and applicability - Held, provisions of Section 35-A of Act can be invoked where a cooperative society constituted in accordance with provisions of Act, rules and byelaws does not exist – These provisions can not be invoked where there exists a Managing Committee but same has been superseded by the Registrar in exercise of powers under Section 37 of Act. (Para 22) Title: Kishori Lal Sharma and others vs. State of H.P. and others Page - 757

Hindu Marriage Act, 1955 (Act) – Section 24 – Maintenance pendente-lite – Right under Act vis-a-vis other statutes – Held, right of wife for maintenance under Section 24 of Act is independent of her right to maintenance under other provisions of law – But while determining amount of maintenance under this provision, court must take into consideration the amount which has been awarded to her under other provisions of law. (Para 8) Title: Ms. Yashu Priya vs. Vinay Guleria. Page – 193

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Indian Contract Act, 1872 - Sections 73 & 74 – Damages – Grant of-- Contract regarding extraction of resin – Plaintiff Corporation filing suit for recovery/ damages on ground of less extraction of resin by defendant – Lower courts denying plaintiff's claim – RSA- Held, agreement on basis of which suit was filed, is not proved on record by examining scribe or witness(es) thereto – Since very existence of contract inter -se parties is not proved, plaintiff not entitled for any amount towards shortfall in extraction of resin – RSA dismissed (Para 11 & 12). Title: The Himachal Pradesh State Forest Corporation Limited vs. Kuldeep Singh. Page – 615

Indian Easements Act, 1882 – Section 13 – Right of way by necessity - Alternative path – Relevancy – Held, when alternative path can not be used as a way and is practically inaccessible for the purpose for which easement is claimed by the dominant owner then plea of existence of alternative path can not be taken to defeat easement of necessity through servient tenement. (Para 9) Title: Sh. Gulzari Lal vs. Sh. Prem Chand and others. Page – 261

Indian Evidence Act, 1872 - Section 68 – Will in favour of Advocate appointing him as the sole trustee of property — Suspicious circumstances – Proof - Held, testarix had already filed application before District Judge for withdrawal/ cancellation of vakalatnama executed by her in favour of said Advocate and she further requested court to see that he did not encroach or prejudice her rights – She had executed General Power of Attorney in favour of her step son and even authorized him therein to dispose or sell her property – Manner of signing of Will totally at variance with usual manner of signing documents by the testatrix – Presence of her signatures at two places on last page with a gap in between is similar to what is a routine while drafting a short affidavit, verification or bond – First two pages of will bearing signatures of attesting witnesses but not of testatrix - Neither attesting witness 'HR' nor propounder of Will stating as who typed Will – Will surrounded by suspicious circumstances and was the result of cheating- Decree(s) setting aside Will upheld. (Paras 16, 17 & 23). Title: Sukhversha & others vs. Bawa Jung Bahadur. Page - 382

Indian Evidence Act, 1872 – Section 114 – Presumption as to marriage - Circumstances under which it can be drawn – Held, long continuous cohabitation between man and woman will raise presumption of valid marriage in such circumstances - Mathematical precision and proof of marriage is not required. (Paras 11 & 12) Title: Roop Ram vs. Tara Devi and others. Page – 9

Indian Evidence Act, 1872 – Section 27 – Recovery of weapon - Evidentiary value – Held, recovery of weapon of offence at instance of accused not being on his disclosure statement, is not relevant. (Para 6). Title: State of H.P. vs. Satish Kumar. Page – 314

Indian Evidence Act, 1872 – Section 3 – Appreciation of oral evidence – Claim based on bequeath – Held, claim with respect to land based on bequeath must also be supported by revenue record. (Para 11 to 13) Title: Kishani Devi & others vs. Birbal Singh & others. Page – 470

Indian Evidence Act, 1872 – Section 3 – Appreciation of evidence – Testimony of victim of sexual abuse – Held, conviction can be based on sole testimony of prosecutrix unless there are compelling reasons for seeking corroboration. (Para 39). Title: Pankaj vs. State of Himachal Pradesh. Page – 119

Indian Evidence Act, 1872 - Section 3 – Circumstantial evidence – Appreciation of – Held, circumstances relied upon by prosecution must be of conclusive nature and must also be

consistent with hypothesis of quilt of accused. (Para 15) Title: Devi Ram vs. State of H.P. **(D.B.)** Page – 20

Indian Evidence Act, 1872 – Section 3 – Interested witness – Appreciation of evidence – Held, mere interestedness of any witness to occurrence would not perse mean that he/she is a witness not worth credence. (Para 2) Title: State of H.P. vs. Vinod Kumar. Page – 417

Indian Evidence Act, 1872 – Section 35 – Correction of date of birth recorded in matriculation certificate - Entries in public record(s) vis a vis school record(s) – Held, death and birth register maintained by statutory authorities raises a presumption of correctness – It would prevail over entries made in a school register particularly in absence of any proof that school entries were recorded at the instance of guardian of person concerned. (Para 4). Title: Shakuntla Devi vs. State of H. P. and another Page – 724

Indian Evidence Act, 1872 – Section 65 – Proof of sale deed by secondary evidence – Leave of court – Held, where original documents are not produced at any point of time nor any factual foundation is laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence - Secondary evidence relating to contents of a document is inadmissible if non-production of original is not accounted for. (Para 13). Title: Gagan Singh & anoter vs. Hem Raj & others. Page – 516

Indian Evidence Act, 1872 – Section 66 – Notice to opposite party to produce document – Non-issuance of - Effect – Held, filing of application to lead secondary evidence itself is a notice to opposite party to produce document if it is in its possession.(Para 18) Title: Gagan Singh & another vs. Hem Raj & others. Page – 516

Indian Evidence Act, 1872 – Section 68 – Will - Dispute between brother and sister regarding Will executed by their father ' DC' – Plaintiff (sister) disputing Will as forged and fabricated one – Lower courts dismissing her claim and holding Will in favour of brother (defendant) as valid – RSA – Held , there is distinction between a Will which is forged and fabricated one and Will which is alleged to be procured by coercion or misrepresentation – Case of plaintiff is that the Will is forged and fabricated – Plaintiff not saying anything about forgery or fabrication in her statement – Will duly proved by defendant by examining scribe and an attesting witness – Testator was residing with defendant (son) till his death – It was the last valid Will of testator – RSA dismissed. (Para 10 to 12). Title: Smt. Shakuntla Devi vs Shri Amar Singh and another. Page - 394

Indian Evidence Act, 1872 – Section 68 – Will – Proof of – Held, where circumstances surrounding execution of Will raise a doubt as to whether the testator was acting on his own free will , the initial onus is on propounder to remove all such doubts. (Para 14). Title: Harbans Singh and others vs. Wattan Singh and others. Page – 110

Indian Evidence Act, 1872 – Section 68 – Will – Proof of - Suspicious circumstances – Held, mere execution of subsequent Will, written four months of execution of first Will and without mentioning in subsequent will about the execution of previous Will, is not a suspicious circumstance. (Para 12). Title: Sh. Jagdish Chand vs. Sh. Jai Kishan. Page – 583

Indian Evidence Act, 1872 - Section 68 – Will – Suspicious circumstance(s) – Proof – Held, plaintiff relying upon Will executed by 'M' in his favour – 'M' had a wife named 'Mathi' – Recitals in Will that testator 'M' had no wife, evidently false – No reason given in Will by testator for disinheriting his wife Mathi – Testator never lived with plaintiff and the latter never looked after the former – Testator remained sick in the last days of life and died 12-13 days after execution of alleged Will – Execution of Will surrounded with suspicious circumstances. (Paras 21 to 25) Title: Roop Ram vs. Tara Devi and others. Page - 9

Indian Evidence Act, 1872 – Section 68 – Will- Suspicious circumstances – Held, mere non – joining of persons residing in the proximity of testator as marginal witnesses to Will executed by him, by itself is not a suspicious circumstance. (Para 14) Title: Himat Singh vs. Kashmir Singh and others. Page – 466

Indian Evidence Act, 1872 – Section 8 – Motive – Evidentiary value – Held, where accused had a motive to cause death, an eye witness account of occurrence may not be required. (Para17) Title: Devi Ram vs. State of H.P. **(D.B)** Page – 20

Indian Evidence Act, 1872 – Sections 3 & 45 – Expert evidence vis a vis ocular evidence- Appreciation of – Held, account of an eye witness if credible, will prevail upon expert medical evidence as to the cause of injuries on victim. (Para 13). Title: State of Himachal Pradesh vs. Purshottam Dass. Page – 274

Indian Evidence Act, 1872 –Section 68 – Will – Proof of – Essential requirements – Held, propounder must prove that (i) Will was signed by the testator (ii) at relevant time, testator was in sound disposing state of mind and (iii) testator had understood the nature and effect of dispositions and had put his signature on document of his own free volition and will. (Para 16) Title: Harbans Singh and others vs. Wattan Singh and others. Page – 110

Indian Evidence Act, 1872 –Section 68 – Will - Suspicious circumstances – What are ? Held, suspicious circumstances surrounding execution of Will may be as (i) signature of testator shaky and doubtful or not appear to be his usual signature (ii) condition of testator's mind may be feeble (iii) disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion or absence of adequate provisions for natural heirs without any reason (iv) propounder taking prominent part in execution of Will (v) testator used to sign blank papers. (Para 18) Title: Harbans Singh and others vs. Wattan Singh and others. Page – 110

Indian Forest Act, 1927 – Sections 52 & 52-A (As amended vide H P Amendment Act, 1991) - Release of vehicle – Authorised Officer dismissing release application on ground of accused/ owner being an habitual offender – Revision against - Petition dismissed by Additional Sessions Judge – Petition against – Held, Sections 52 and 52-A need to be interpreted harmoniously – Under Section 52 of Act, seizure of forest produce must be proved to have been effected from the confiscated vehicle – No forest produce was seized from vehicle of petitioner - Key ingredient of recovery of forest produce from his vehicle missing in the case – So there was no justification for ordering confiscation of his vehicle by the Authorised Officer – Petition allowed. (Para 7). Title: Rakesh Kumar vs. State of H.P. & another. Page – 681

Indian Penal Code – Section 376 D - Gang rape – Proof - Prosecutrix turning hostile and not identifying culprits during trial – Effect – Held, notwithstanding victim not identifying accused during trial yet mixed DNA retrieved from her vaginal swab clearly indicating that accused 'SS' and "RK' had sexual intercourse with her – But opening of door by her and absence of injuries indicating struggle by her and non-tearing of clothes worn by her at relevant time bely forcible sexual intercourse by accused with her. (Paras 53 , 56 & 67) Title: Pankaj vs. State of Himachal Pradesh. Page – 119

Indian Penal Code, 1860 - Sections 420, 468 & 471 – Code of Criminal Procedure, 1973 – Section 239 – Accused allegedly prepared matriculation certificate of co-accused 'RS' on basis of which he obtained public service – Accused seeking discharge – Trial court dismissing prayer and ordering framing of charges – Petition against – Held, case against accused based on incriminatory statement of principal accused 'RS' and identification by him of premises where accused was running computer centre – Computers used by accused for preparing alleged certificates(s) not taken into possession – Best evidence showing complicity of the accused not on record and no prime facia case is made out against him – Petition allowed – Accused discharged. (Para 2 & 3). Title: Shashi Kumar vs. State of H.P. Page – 744

Indian Penal Code, 1860 – Section 325 – Grievous hurt – Proof – Trial court convicting accused for causing grievous hurt – First appellate court allowing appeal and setting aside conviction of accused – Appeal against – Held, material on record is inherently contradictory – In FIR 'Khukhari' is mentioned as weapon of offence but witnesses saying that the injuries were caused with a knife (Chhuri) – MLC indicating use of blunt weapon as the injury was lacerated one than incised – Medical evidence contradicts the version of victim and eyewitnesses - Acquittal upheld . (Para 5). Title: State of H.P. vs. Satish Kumar. Page – 314

Indian Penal Code, 1860 – Section 504 – Intentional insult – Proof – Held, mere statement of complainant that accused misbehaved with him without revealing the actual words/ abuses hurled by him does not constitute offence under Section 504 of code. (Para 9). Title: State of H.P. vs. Yoginder Pal Page - 507

Indian Penal Code, 1860 - Sections 279 , 338 & 304-A – Rash and negligent driving – Identity of driver – Proof – Accused denying of his being the driver of offending vehicle at relevant time –

Prosecution alleging that accused fled away from spot immediately after accident – Held, vehicle rolled down some 90 meters downhill - Two bodies were recovered from accidental vehicle whereas three other had received injuries - Driver side of vehicle was badly damaged and its door was unopenable – Witnesses had immediately reached the spot on hearing sound of falling vehicle – No injury found on person of accused – Highly improbable that accused could have gone unhurt in said accident – Identity of accused as a driver of offending vehicle doubtful - Appeal dismissed. (Paras 2 & 21 to 25). Title: State of Himachal Pradesh vs. Kalyan Chand. Page – 371

Indian Penal Code, 1860 – Sections 279, 304 A & 338 – Rash and negligent driving – Proof – Appeal against acquittal of trial court – Held, on facts, 'SR' an eye witness to occurrence of accident not supporting case during trial - Offending vehicle found not being driven on the wrong side of road as claimed by injured- Site plan contradicting injured witness as to manner of accident – Skid marks not present on the road – Case of rash driving not proved on record- Acquittal upheld – Appeal dismissed. (Paras 9 to 11) Title: State of Himachal Pradesh vs. Sainj Ram. Page – 276

Indian Penal Code, 1860 – Sections 409, 420 & 120 B – Criminal misappropriation etc – Discharge – Held, material on record shows that accused not unloaded cement bags meant for "State of H.P. supply" illegally at the site – Said cement bags were not validly disbursed to them – No parity is there between petitioners and co-accused who were discharged by Court - Order of Sessions Judge setting aside order of discharge and directing accused to face trial for offences punishable under Sections 409, 420 of Code is maintained – Petition dismissed. (Para 2 to 5). Title: Jyoti Prakash and another vs. State of H.P. & another. Page – 733

Indian Penal Code, 1860 –Sections 279 & 337 – Rash and negligent driving – Proof – Appeal against acquittal recorded by first appellate court after setting aside judgment of conviction – Held, offending truck had already ascended the hilly road and was at the plateau - Truck was loaded one and the witnesses stating before the court that it was in slow speed – Truck was visible to the driver of Santro car – It was incumbent on the driver of Santro car to stop his vehicle so as to avoid collision and enable the truck driver to take a pass from any moving or stationary vehicle occurring at site of occurrence – Evidence also contradictory as to manner of accident – No ground to interfere with judgment of first appellate court. (Paras 12 & 13) Title: State of Himachal Pradesh vs. Raju. Page - 463

Indian Penal Code, 1908 – Sections 307, 323, 325 & 341 – Wrongful restraint, attempt to murder, grievous hurt etc – Appeal against conviction recorded by Sessions Judge – Proof – Held, on facts (i) victim 'B' had suffered fracture of frontal bone on both sides as well as fracture of left temporal bone (ii) injuries were dangerous to life (iii) statement of victim finds full corroboration from other witnesses (iv) injuries not possible by fall (v) plea that victim was in an inebriated condition and had a fall falsified from his MLC (vi) weapon of offence connecting accused with crime – Evidence proves commission of aforesaid offences by accused – No perversity or misappreciation of evidence by trial court – Appeal dismissed. (Para 9 to 13).Title: Dev Raj alias Devo vs. State of H.P. Page – 731

Indian Registration Act, 1908 (Act) – Section 17 – **Indian Stamp Act, 1899** - Section- 3- Family settlement – Whether requires registration? - Held, family settlement deed does not require either to be registered under Act or stamped under provisions of Indian stamp Act. (Para 12) Title: Rattan Chand (deceased) through his LRs & Anr. Vs. Rishi Kesh & Anr. Page – 341

Indian Registration Act, 1908 – Section 17 (1-A) – **Transfer of Property Act, 1882 (TPA)** – Section 53–A - Agreement to sell – Requirement of registration- Held, agreement to sell immoveable property does not create any interest in the land and thus it is not compulsorily registrable – it is only when party seeks to invoke Section 53 – A of TPA, that question of registration of such agreement comes into picture (Paras 11 & 12) Title: Suresh Kumar and another vs. Laxmi Devi. Page – 211

Industrial Disputes Act, 1947 - Section 25-F - Termination of service – Reinstatement – Held, appointment limited by time does not confer any right to the post – On expiry of time limit, appointment ceases automatically – Person holding such post can not have a right to continue

on such post – Petitioner was appointed purely on contract basis – After expiry of contractual period, he has no right in such post – Petition dismissed. (Paras 2, 4 & 8) Title: Vikram Singh vs. The Managing Director, H.P. Tourism Development Corporation and another. Page – 365

Industrial Disputes Act, 1947 – Section 10 – Reference – Delay in raising dispute – Effect – Held, though there is no limitation prescribed within which an industrial dispute can be raised yet the stale claims can be rejected – Onus is upon workman to demonstrate that by filing communications / representations with employer, he had kept the cause subsisting – And despite delay, he can raise industrial dispute. (Para 12) Title: Sh. Jitender Singh vs. The State of Himachal Pradesh and another Page – 671

Industrial Disputes Act, 1947 – Section 25 F - Illegal termination – Back wages - Grant of – Held, whether a workman on his reinstatement is entitled for back wages, is to be decided on basis of evidence which has been adduced by parties on record – Reasons are to be given in the award as to why back wages are being denied or given – Further, it is incumbent on employer to demonstrate that during the period services of workman remained illegally terminated , he was gainfully employed – And if employer fails to prove the same, workman can be given back wages. (Para 9). Title: Sh. Naseeb Chand vs. The Manager, Component & Equipment Ltd. and another. Page – 663

Industrial Disputes Act, 1947 - Section Reference 10 – Delay - Held, Industrial Tribunal gets its jurisdiction only on reference made by the Appropriate Govt – Therefore, it can not invalidate referencne on ground of delay – If State contends that claim of workmen is stale, then it must challenge reference by way of Writ on ground of non-existence of an industrial dispute. (Para 4) Title: The Executive Engineer, Baijnath Division, HPPWD, Baijnath, District Kangra vs. Shri Amar Singh. Page – 556

Industrial Disputes Act, 1947 - Section 25-F – Engagement of worker through a contractor – Disengagement of services – Effect – Held, workman was engaged by a contractor and not by the Corporation as such – It was contractor who put him with Corporation – There was no relationship of employer – employee between petitioner and Corporation and no industrial dispute exited between them – Petitioner can not be granted any relief qua the Corporation. (Paras 10 & 11) Title: Rakesh Sharma vs. Indian Oil Corporation and another. Page – 69

Industrial Disputes Act, 1947 – Section 10 – Reference - Jurisdiction of Tribunal – Held, Tribunal is bound to confine its inquiry to questions specifically referred to it by way of reference – It has no jurisdiction to make inquiry on questions which are not referred to it. (Para 4) Title: The Executive Engineer, Baijnath Division, HPPWD, Baijnath, District Kangra vs. Shri Amar Singh. Page – 556

Industrial Disputes Act, 1947 – Sections 2 (k), 12(4) & (5) – Industrial dispute – Existence of – Role of Appropriate Government – Held, under Section 12(5) of Act, Appropriate Government has limited role to the extent of ascertaining whether there exists an industrial dispute inter-se parties ? – It can not touch or adjudicate the merits of such a dispute – Adjudication of merits of dispute can be done only by Authority having adjudicatory powers under the Act. (Paras 9 & 10). Title: Sh. Gurdev Kumar vs. State of H.P. and others. Page – 172

Interpretation of Statutes – 'Punctuation' mark in a clause – Effect – Held, punctuation marks do not control the meaning of statutory provision if it is otherwise obvious. (Para 18) Title: Kishori Lal Sharma and others vs. State of H.P. and others Page - 757

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Joint land – Suit for possession of land by co-sharer, who is out of its possession, whether maintainable?– Held, suit for possession by co-sharer in fact, is a suit for partition – Preliminary decree of partition as passed in appeal by District Judge, can not be interfered with. (Para 14). Title: Smt. Meeran Devi and another vs. Shri Daya Ram and others. Page – 473

Juvenile Justice Act, 2000 – Section 15(1) (g) – Dispositional orders – Detention in Special Home – Held, if juvenile in conflict with law has attained majority during pendency of inquiry/ appeal / revision, then he can not be detained in Special Home even if, he is found having committed the offence. (Para 3) Title: Anil Kumar @ Ballu vs. State of Himachal Pradesh. Page – 246

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Land Acquisition Act, 1894 – Sections 18 & 23 – Acquisition of houses etc. for public purpose – Market value – Determination – Held, Collector had assessed the valuation of houses on basis of report of HP, PWD – HP, PWD had estimated the value by applying H.P. S.R of 1999 - However, acquisition of houses was made in 2005 – There was hike in wages and cost of construction material in between 1999 -2005 – Therefore, reference court was justified in granting 40% increase on valuation done by HP,PWD- Appeal dismissed. (Para 3) Title: Collector Land Acquisition HP. PWD & another vs. Prem Chand. Page – 334

Letters Patent Appeal – Held, order framing issues on application having been filed under Order VII Rule 11 of Code of Civil Procedure, is interim in nature – Letters Patent appeal against it is not maintainable. (Para 4).Title: Kimtu Devi vs. State of Himachal Pradesh & Ors.(D.B.) Page - 526

Limitation Act, 1963 - Articles 64 & 65 – Adverse possession – Held, onus is on party pleading adverse possession to prove that its possession over suit land is open , peaceful and hostile for more than 12 years as against true owner. (Para 11) Title: Shasikant and another vs. Krishana@Kharishan Singh. Page - 578

Limitation Act, 1963 – Articles 64 & 65 – Adverse possession – Joint land – Exclusive possession of co-sharer – Effect – Held, without clear proof of ouster of other co-sharers not in actual possession of land, a co-sharer in its exclusive possession can not be held to have become owner by way of adverse possession. (Para 14) Title: Smt. Meeran Devi and another vs. Shri Daya Ram and others. Page – 473

Limitation Act, 1963 – Section 5 – **Guidelines for engagement of Anganwari workers/ helpers, 2007** – Clause 12 – Delay in filing appeal before Appellate Authority (Divisional Commissioner) – Whether can be condoned? – Appellate Authority dismissing appeal against order of Additional District Magistrate setting aside appointment of petitioner as Anganwari helper on ground of its being time barred – Petition against – Held, Section 5 of Act is applicable only to proceedings pending in courts alone and not before quasi-judicial authorities like the Appellate Authority – In the guidelines/ scheme there is no provision for condonation of delay – Petitioner can not invoke Section 5 of Act for seeking condonation of delay. (Para 3). Title: Laxmi Devi vs. State of H.P. and Others. **(D.B.)** Page – 378

Limitation Act, 1963 – Section 5 – Applicability before quasi-Judicial authority – Held, provisions of Section 5 of Act are not applicable in proceedings before quasi-judicial authority unless same are specifically made applicable by relevant rules/notification /scheme/ guidelines etc. (Para 7) Title: Smt. Krishna Kumari vs. State of H.P. & others.**(D.B.)** Page – 502

Limitation Act, 1963 – Section 5 – Condonation of delay – Sufficient cause – Proof – Appellant seeking condonation of delay caused in filing appeal on ground that her counsel did not inform her about decree of trial court and also that she remained under depression – Appellate court dismissing application on ground of non-examination of counsel as well as medical officer to prove prescription slips – Petition against – Held, when statement of applicant qua supply of delayed information to her by counsel qua decree of trial court and of her remaining under medical treatment is unimpeachable, appellate court should not have insisted on examination of counsel/medical officer - Petition allowed. (Para 2). Title: Rajni Sharma & another vs. Housing & Urban Development Corporation Ltd. & others. Page – 40

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Mental Healhcare Act, 2017(Act) – Section 2(c) – 'Authority' – Jurisdiction & functions – Held, 'Authority' as defined in Section 2(c) of the Act has no jurisdiction to adjudicate a lis between

two contending parties. (Para 18) Title: Sh. Kishori Lal vs. Sh. Vijay Kumar Sood and another. Page – 71

Mental Healthcare Act , 2017 – Sections 2 (c) & 116 – Bar of jurisdiction of civil court - Scope - Held, civil court can not interfere in the discharge of functions as stipulated in Chapter XI & XII of any 'Authority 'as defined in section 2 (c) Act. (Para 18). Title: Sh. Kishori Lal vs. Sh. Vijay Kumar Sood and another. Page – 71

Mental Healthcare Act, 2017 (Act) – Sections 3(5) & 116 –Suit against person alleged to be mentally infirm – Whether not maintainable ? - Held, Section 116 of Act does not bar filing of suit before the civil court by or against person alleged to be of unsound mind. (Para 18) Title: Sh. Kishori Lal vs. Sh. Vijay Kumar Sood and another. Page – 71

Motor Vehicles Act, 1988 - Sections 39 & 43 – Temporary registration of vehicle – Effect – Vehicle met with an accident after expiry of temporary registration but before regular registration – Damages suit – Held, it is mandatory for an owner of vehicle to ply it after expiry of temporary registration, only after getting it parmanently registered with RLA concerned – After expiry of temporary registration, vehicle was not legally useable on high way – Insurer not liable to compensate the insured for the damage (Para 3) Title: Jai Mehta vs. Divisional Manager National Insurance Co. Page – 704

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Death case – Funeral expenses – Held, only a sum of Rs. 15000/ - can be awarded towards funeral expenses. (Para 8). Title: Bharti AXA General Insurance Company Limited vs. Smt. Sushila and others. Page – 601

Motor Vehicles Act, 1988 - Section 166 – Motor accident - Bodily injuries disabling claimant to complete his B-Tech in time – Compensation - Held, in sequel to disability inflicted upon the claimant, he was precluded to prosecute his B-Tech for a year – Compensation of Rs. 1,50,000/- assessed towards prolongation of duration of his course. (Para 4). Title: Abhishek Bhandari vs. Manoj Kumar & others. Page – 445

Motor Vehicles Act, 1988 - Sections 149 & 166 – Motor accident – Defence of driving of vehicle by an unauthorized person – Proof –Vehicle met with an accident when son of registered owner had handed over it to an auto mechanic for rectification of defect – Auto mechanic receiving bodily injuries in accident leading to filing of claim application by him - Insurer contending that claimant was not authorised by registered owner to drive it – And it can not be directed to indemnify the award – Held, no FIR / report was filled either by the registered owner or his son regarding theft of vehicle by auto-mechanic – Effective control over vehicle was with son of registered owner and he had an implied authority to keep the vehicle in the roadworthy condition – He was authorised to deploy claimant as auto- mechanic in vehicle concerned – Insurer can not deny its liability. (Para 3) Title: Manager Bajaj Allianz General Insurance Company Ltd. vs. Vinod Kumar & another. Page – 409

Motor Vehicles Act, 1988 - Section 149 (2) (a)(i)(c) – Motor accident – Absence of route permit as a defence – Availability - Held, accident occurring in an Area / Zone situated in close proximity of road with respect to which a valid route permit was there –This minimal deviation from route permit even for private propose would not attract provisions of Section 149(2) (a)(i)(c) of the Act. (Para 3 & 4) Title: United India Insurance Co. Ltd. vs. Nisha Rani & others. Page – 752

Motor Vehicles Act, 1988 - Section 163 A – Motor accident – No fault liability – Defence of negligence on part of deceased – Maintainability – Held, in proceedings contemplated under Section 163 A of the Act, question of negligence either on part of deceased or the on part of driver of offending vehicle becomes redundant – On proof of occurrence of motor accident, the Tribunal has to assess compensation as per Schedule appended with the Act. (Para 2 & 3). Title: Sarita Devi & others vs. The Oriental Insurance Co. Ltd. & others. Page - 415

Motor Vehicles Act, 1988 - Section 166 – Motor accident - Rash and negligent driving – Requirement of proof – Held, in proceedings instituted under Section 166 of Act, claimant must prove that accident in question had occurred because of rash and negligent driving on part of driver of offending vehicle – Absence of such proof will disentitle him to claim compensation from the owner /insured of offending vehicle. (Para 5) Title: Shri Devinder Singh vs. Shri Raj Kumar & others Page - 514

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Death case – Additions towards 'future prospects' – Held, deceased was engaged in a private job/ work – Additions towards his 'future prospects' are to be 40 % on his established income in view of Pranay Sethi's case AIR 2017 SC. 5157. (Para 8).Title: Bharti AXA General Insurance Company Limited vs. Smt. Sushila and others. Page – 601

Motor Vehicles Act, 1988 – Section 10 - Driving licence –Validity of – Held, holder of LMV licence can drive all light motor vehicles including light transport vehicle. (Para 13). Title: Rajender Kumar vs. Shyam Lal and Anr. Page – 531

Motor Vehicles Act, 1988 – Section 147(2) – Liability of insurer in case of 'Act only' policy – Held, deceased was a gratuitous passenger in the vehicle – He was not a third party qua insurer – Policy obtained by insured was 'Act only' policy – Insurer can not be directed to indemnify the award in such cases – Nor it can be asked to pay first and recover the paid amount from from the insured. (Paras 2 & 3). Title: Rahul Sood vs. Smt. Bimla and others. Page – 299

Motor Vehicles Act, 1988 – Section 149(2) (a)(ii) - Motor accident – Claim application – Fake driving licence – Liability of insurer – Held, insurer can not absolve itself from liability to indemnify award simply on ground that driving licence of driver of offending vehicle was fake - The question which is relevant is whether the insured was aware of the fact that driving licence of driver was fake before employing him as a driver ? (Para 6). Title: Hari Ram vs. Jamuna Devi & others. Page – 440

Motor Vehicles Act, 1988 - Section 149(2)(a)(i)(c) – Motor accident – Claim application – Absence of route permit as a defence – Availability – Held, mere plying of offending vehicle at a place beyond the domain of route permit assigned, will not entitle insurer to claim immunity from its liability to indemnify the award provided the vehicle was not being plied for an unlawful purpose or purpose falling out side the category for which vehicle was registered. (Para 3).Title: United India Insurance Co. Ltd. vs. Nagin Kumar & others. Page – 749

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Bodily injuries – Enhancement of compensation – Entitlement – Claimant filling appeal against award of tribunal and claiming enhancement of compensation under heads ' Loss of income during medical treatment' and 'future prospects' – Held, disability if any, was temporary in nature and amenable to recuperation – Disability not interdicting the workman to perform callings of his avocation – Claimant being public servant was paid salary during his medical treatment – Petitioner is not entitled for enhancement in compensation on said grounds (Para 2 & 3). Title: Pwan Kumar vs. Liberty Videocon General Insurance Ltd. & others. Page – 414

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application – Compensation qua 'future prospects' – Grant of - Held, claimants are entitled for requisite hikes or accretions towards 'future prospects' vis a vis per mensem income of deceased as per the ratio of National Insurance Company Ltd vs. Pranay Sethi & others 2017 of ACJ 2700 (Para 7) Title: Oriental Insurance Co. Ltd. Vs. Kunta Devi & others. Page – 292

Motor Vehicles Act, 1988 - Section 166 – Motor accident – Death case – Compensation under heads 'Future prospects', 'Funeral expenses' etc. Deceased was self employed – As such, additions of 40% on account of 'future prospects' could have been made on his proved income- Further only sum of Rs. 15,000/- towards 'funeral expenses' can be awarded – No sum can be granted under head 'loss of love and affection' – Appeal partly allowed – Award modified. (Para 14). Title: United India Insurance Company Limited vs. Rakesh Bala & Others. Page – 542

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Personal injuries- Compensation – Enhancement – Entitlement – Petitioner, a milk vendor suffering 10% permanent disability in a road side accident – Claiming enhancement in compensation as awarded by Tribunal – Held, medical evidence showing that permanent disability has not rendered the claimant incapable to perform his avocation as milk vendor or from leading an ordinary life – No evidence of loss of future income on account of such disability – Appeal devoid of merits and is dismissed. (Para 3). Title: Shubham vs. Amar Dass & others. Page – 310

Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 20 – Recovery of 'charas' – Non-joining of independent persons in search proceedings – Effect – Held, mere non-joining of witnesses in search proceedings per-se is not a ground to disbelieve prosecution case – The relevant consideration is whether independent persons were actually available at that place and time. (Para 17). Title: Prem Chand vs. State of H.P. **(D.B.)** Page – 215

Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 20 – Recovery of 'charas' – Proof of - Appeal against conviction – Held, parcels containing bulk as well as sample contraband containing signatures of accused and independent witnesses – FSL report confirming analyzed sample as of 'charas' – Version of official witnesses consistent and corroborating prosecution case – Case property duly identified during trial in the court – Minimal discrepancies in deposition of witnesses - Non-supporting of prosecution case by the independent witnesses inconsequential – No ground to interfere with judgment of conviction – Appeal dismissed. (Paras 8,10 & 12) Title: Parshotam vs. State of H.P. Page – 295

Narcotic Drugs Psychotropic Substances Act, 1985 – Sections 35 & 54 – Presumption – Applicability – Held, presumption as envisaged in Sections 35 & 54 of Act can be drawn against accused only on proof of his being in exclusive possession of a rucksack containing 'charas'. (Para 30). Title: Prem Chand vs. State of H.P. **(D.B.)** Page – 215

Negotiable Instruments Act, 1881 - Section 138 – Dishonour of cheque – Complaint – Proof – Held, accused admitting cheque having been signed by her – Also admitting that she had borrowed the sum as a vehicle loan from complainant and that was to be repaid in monthly installments – Accused not leading any evidence to rebut presumption of consideration attached with cheque – Plea of accused that blank cheque was misued by complainant, is not substantiated – She was rightly convicted of offence under Section 138 of the Act – Petition dismissed. (Para 8 to 13). Title: Smt. Babli Chauhan vs. M/S Mahindra and Mahindra Finance Services Limited. Page – 566

Negotiable Instruments Act, 1881 - Section 143 -A – Interim compensation by the Trial Court - Applicability – Held – Section 143-A of Act would be attracted only in those complaints where offence was committed after the amendment of Act i.e, w.e.f 1st September, 2018.(Para 9) Title: Sh. Shyam Lal vs. Sh. Diwan Chand and another. Page – 390

Negotiable Instruments Act, 1881 – Sections 138 & 139 – Dishonour of cheque – Complaint – Held, accused not denying his signatures or scribings made in words and figures as borne in the cheque – Complainant is mentioned as the payee in it – There is presumption that cheque was issued in complainant's favour for consideration. (Para 5) Title: Gopal Sharma vs. Sh. Anurag Sood and another. Page – 451

Negotiable Instruments Act, 1881 – Section 139 – Presumption of consideration – Held, holder of a negotiable instrument shall presumed to be holding it towards discharge of legally enforceable debt or other legal liability subsisting between him and its drawer. (Para 2) Title: Parvesh Soni vs. State of H.P. and another. Page – 268

Negotiable Instruments Act, 1881 - Section 148 – Interim compensation by Appellate Court – Applicability – Held, provision of Section 148 will apply to all criminal appeals filed on or after 1st September, 2018 even if complaints before trial court(s) were filed prior to 1st September, 2018. (Para 11) Title: Sh. Shyam Lal vs. Sh. Diwan Chand and another. Page – 390

Negotiable Instruments Act, 1881 - Sections 138 & 139 – Dishonour of cheque – Complaint – Held, signatures on cheque not disputed by accused – Issuance of said cheque in favour of complainant also stands admitted by her – There will be presumption that cheque was used by her for discharge of debt or any other liability. (Para 8 & 12). Title: Geeta Devi vs. Surinder Singh and another. Page – 571

Negotiable Instruments Act , 1881 – Sections 53 & 138 – Dishonour of cheque – Death of payee before the filing of complaint – Effect – Held, person deriving title from the payee of cheque is entitled to file complaint under section 138 of Act against its drawer (Para 5). Title: Smt. Kiran Thakur vs. Krishan Lal. Page - 452

Negotiable Instruments Act 1881 – Sections 138 & 139 – Dishonour of cheque – Complaint – Presumption of consideration – Held, once signatures on cheque are admitted by drawer, a presumption shall arise that it was issued in payee's favour for consideration and towards

discharge of debt or any other liability – Onus shifts to accused to prove the contrary. (Para 9 & 10) Title: Naresh Verma vs. Narender Chauhan. Page – 659

Negotiable Instruments Act, 1881 - Section 139 – Dishonour of cheque - Presumption of consideration – Effect – Held, holder of cheque shall be presumed to hold the cheque in discharge of valid or an enforceable contract or other legal liability- But the presumption is rebuttable (Para 3). Title: Ram Chand vs. Suresh Kumar. Page – 742

Negotiable Instruments Act, 1881 - Section 147 – Compromise at revision stage – Permissibility – Accused seeking leave to compound offence at revisional stage - Leave granted in favour of petitioner inconsonance with guidelines laid in Damodar S. Prabhu vs. Saged Aabalal H (2010) SCC 663. (Para 6 & 7) Title: Satish Kumar Thakur vs, Surmukh Singh. Page – 712

Negotiable Instruments Act, 1881- Section 145(2)- Whether accused is required to give reasons in his application seeking leave to summon and cross-examine complainant and his witness? Trial Court dismissing application of accused having been filed for summoning and cross-examining complainant on ground that he has not mentioned in it that amount was not due from him- Petition against- Held, Section 145(2) of Act has two parts- First part deals with suo motu power of court to summon and examine witness whose evidence has already been recorded on affidavit- Whereas second part casts a duty on court to summon such person for examination if application is filed in this regard either by the complainant or the accused- Party is not required to give reasons in his application for summoning such a person for purpose of examination. (Paras 15 to 17) Title: Anu Sharma vs. Punjab National Bank. Page - 201

Negotiable Instruments Act, 1881- Sections 118 & 139 – Dishonour of cheque – Presumptions of consideration – Effect – Whether additionally, complainant is required to prove source of money having been lent by him to accused? Held, in view of statutory presumptions as contained in Sections 118 & 139 complainant is not required to prove source of money lent to accused in proceedings under Section 139 of Act - Onus is upon accused to rebut the presumption that cheque was not drawn for consideration – Complainant's case can not be disbelieved for want of evidence regarding source of funds for advancing loan to accused. (Para 7). Title: Nathu Ram vs. Atma Ram. Page – 203

Negotiable Instruments Act, 1881- Sections 118 & 139 – Dishonour of cheque – Presumptions of consideration – Effect – Whether additionally complainant is required to prove source of money having been lent by him to accused ? Held, in view of statutory presumptions as contained in Sections 118 & 139 complainant is not required to prove source of money lent to accused in proceedings under Section 139 of Act - Onus is upon accused to rebut the presumption that cheque was not drawn for consideration – Complainant's case can not be disbelieved for want of evidence regarding source of funds for advancing loan to accused. (Para 8).Title: Nathu Ram vs. Devinder Singh. Page – 207

'P'

Partition Suit – Principle of Owelty – Applicability – Held, in appropriate cases, court by applying principle of owelty, may grant monetary compensation to a co-sharer in lieu of his share in the undivided property. (Para 17). Title: Smt. Meeran Devi and another vs. Shri Daya Ram and others. Page – 473

Prevention of Corruption Act, 1988 - Sections 7 & 13(2) – Illegal gratification – Proof of – Held, mere holding of currency notes by accused perse is not a proof of fact that he had voluntarily accepted the same as illegal gratification. (Para 11).Title: Shyam Chand vs. State of H.P. Page – 746

Protection of Children from Sexual Offences Act, 2012 - Section 4 – **Indian Penal Code, 1860** – Section 376 – Penetrative sexual assault on minor – Proof – Appeal against conviction by accused – Accused arguing wrong appreciation of evidence on part of Special Judge – Held, allegations against accused are being that he forcibly took prosecutrix to his house and raped her there – Statement of prosecutrix not believable as visit of accused to her house would have been noticed by her brother and grandmother - And sexual assault of accused would have brought attraction of his parents also when he was staying with them in one room Kachha structure - Land dispute between father of prosecutrix and accused already existing between

them – Statement of prosecutrix unnatural – Appeal allowed – Conviction set aside. (Para 8 to 10). Title: Dharam Singh @ Dharmu vs. State of H.P. Page – 406

Punjab Excise Act, 1914 (as applicable to State of H P) – Section 61(1) (a) – Recovery of Country/ IMF Liquor beyond permissible limits without licence –Appeal against acquittal of trial court recorded on ground that complete chain commencing from recovery of liquor till sending of samples to laboratory for analysis, not established – Held, recovery memos coupled with road certificate and Expert's analysis reports clearly show that nips drawn from the recovered bottles were sent to the test laboratory – The substance examined was found to be liquor meant for human consumption – Seizure memos bear signatures of independent witnesses 'SL' and 'PC' – Mere non-supporting of case by them during trial inconsequential – Material on record proves recovery of cartons of liquor from premises of accused – Appeal allowed –Acquittal set aside. (Paras 9 to 13). Title: State of H.P. vs. Roop Lal. Page – 311

Punjab Village Common Lands (Regulation) Act, 1961 - Section 4 (3)(ii) – Vestment of land in Gram Panchyat/ State – Exclusion of certain lands from vestment –Held, Shamlat land in cultivating possession of a person for a period of more than 12 years without payment of rent or by payment of charges not exceeding the land revenue and cesses payable thereon , is not liable to be vested in Panchayat – Predecessor in interest of plaintiff recorded in continuous possession of land since 1915 till 1954-55 on payment of land revenue – Entries not rebutted by defendants – Land was not liable to be vested in Gram Panchayat / State of H.P. – RSA allowed – Decrees of lower courts set aside – Suit deceased. (Para 3 to 6). Title: Nand Lal vs. State of H.P. and others. Page – 734

'Q'

Quasi-Judicial Authorities – Need of judicial discipline – Held, quasi–judicial authorities are to abide by principle of judicial discipline – Time stipulated by superior authority in its order for the adjudication of matter must be adhered to by quasi – judicial authority. (Para 3). Title: Baldev Singh vs. H.P. State Transport Appellate Tribunal & others. Page - 281

'R'

Revenue Entries- Evidentiary value – Held, revenue entries are only for fiscal purposes and can not be relied upon to determine question of title. (Para 17) Title: Rattan Chand (deceased) through his LRs & Anr. Vs. Rishi Kesh & Anr. Page – 341

'S'

Specific Relief Act, 1963 - Section 19 – 'Bonafide purchaser' – Onus of proof – Held, protection of being a 'bonafide purchaser' in good faith for value without notice of original contract is in the nature of exception to general rule and thus onus of proof of good faith is on purchaser, who pleads that he is an innocent purchaser. (Para 14) Title: Vinod Kumar and another vs. Chain Singh and others Page – 665

Specific Relief Act, 1963 – Section 10 – Specific performance of agreement to sell land, when can be denied ? – Held, document not mentioning khasra number or other particulars of land intended to be sold to plaintiff – Suit land mentioned in plaint is not shown to be relatable to land described in agreement – Plaintiff not entitled for specific performance of agreement in question. (Paras 15 & 20) Title: Bishamber Lal, son of Sh. Hari Saran, now deceased through his legal representatives Rajinder Kumar and others vs. Sh. Amar Sain, son of Sh. Liaq Ram (since deceased) through his legal representatives Smt. Kesharmani and others. Page – 323

Specific Relief Act, 1963 – Section 31 – Cancellation of an instrument - Plaintiff seeking cancellation of sale deed on ground that it was result of fraud and misrepresentation – Held, pleaded case of plaintiff being that the defendant got a sale deed executed from him instead of a mortgage deed – In deposition on oath saying that when he came to know that defendant was getting a sale deed executed instead of mortgage, he refused and went away – No evidence that signatures on sale deed are not his signatures – Sale deed not shown to be the result of fraud or misrepresentation – RSA dismissed. (Para 13).Title: Ashok Kumar vs. Nazir Begum and others. Page - 397

Specific Relief Act, 1963 – Section 38 – Decree of permanent prohibitory injunction – Grant of - Held, plaintiffs claiming settled possession over suit land through sale deed(s)- Sale deed(s) not proved in evidence by them – Plaintiffs possession can not be inferred simply on basis of mutations(s) attested in their favour – Plaintiffs since not proved to be in settled possession, are not entitled for permanent prohibitory injunction. (Para 4 to 6). Title: Vakil Singh (through LRs) & others vs. Bir Singh & others. Page – 755

Specific Relief Act, 1963 – Section 38 – Permanent prohibitory injunction - Grant of – Held, plaintiff in settled possession of land, is entitled for a decree of permanent prohibitory injunction against defendant against his unauthorized interference (Para 14) Title: Suresh Kumar and another vs. Laxmi Devi. Page - 211

Specific Relief Act, 1963 – Section 38 – Permanent prohibitory injunction - Grant of - Plaintiff alleging interference in his possession over suit land from defendants – Held, when settled possession of plaintiff over disputed land is not probablised on basis of order of Naib Tehsildar (Settlement) as well as report of Local commissioner, he is not entitled for a decree of permanent prohibitory injunction against defendants. (Paras 9 & 10). Title: Ram Pal and others vs. Naresh Kumar and Others. Page – 269

Specific Relief Act, 1963 – Section 39 – Mandatory injunction – Grant of - Plaintiff alleging that defendants have made encroachment by extending projections of their structure over his structure and they also having blocked air and light of his house regarding which he had acquired easementary right by way of prescription – Lower courts dismissing plaintiff's claim – RSA – Held, suit land was 'Abadi' with both parties raising their constructions within their share and within possessions they were holding – Land of plaintiff is situated upwardly vis-a-vis land of defendants – No photographs of spot placed on record for showing that defendants having blocked space falling between houses of parties or they having made overhanging projections over plaintiff's slab – Lower courts were justified in dismissing plaintiff's claim – RSA dismissed. (Para 9 to 11).Title: Dhani Ram vs. Kuldeep Singh & others. Page – 402

Specific Relief Act, 1963 – Sections 10 & 19 – Agreement to sell – Specific performance thereof – RSA against concurrent findings decreeing plaintiff's suit for specific performance of agreement to sell land after setting aside sale of same land in favour of co-defendants – Held, agreement to sell specifically admitted by defendants – Agreement to sell prior in time vis-a-vis sale deed of co-defendants - Plaintiff was ready and willing to perform his part of agreement – Co-defendants not proved to be bonafide purchasers for consideration without notice of agreement to sell – Plaintiff rightly held to be entitled for decree of specific performance. (Para 11 to 14) Title: Vinod Kumar and another vs. Chain Singh and others. Page – 665

Specific Relief Act, 1963 - Sections 34 & 38 – Suit for declaration & injunction – Plaintiff challenging recovery effected from his salary towards house rent and his liability to pay penal rent towards official accommodation - Suit dismissed by trial court – Appeal of plaintiff also dismissed by first appellate court – RSA - Held, plaintiff was not the employee of Satluj Jal Vidut Nigam Limited (SJVNL) – Residential accommodation was given to him in SJVNL, township because he was posted as Incharge of Police Post there – After transfer from there, he had no right to retain said accommodation – His possession thereof was un-authorised and defendants were entitled to recover arrears of rent/ penal rent from him through his employer (Para 10 & 11) Title: Chita Ram vs. The Chief Managing Director, Satluj Jal Vidyut Nigam, Himfed Building, Shimla and others Page - 695

Specific Relief Act, 1963- Section 10 - Specific performance of agreement to sell- Escalation of prices of land- Consequences- Held, parties entering in to an agreement to sell land- Advance payment of Rs.8.00 lakh as part of consideration also paid- Plaintiff ready and willing to perform her part of the agreement and to pay balance sale price- Plea of defendant that agreement was the result of undue influence or fraud not proved on record- Plaintiff entitled for specific performance of agreement to sell-Defendant not entitled for payment of interest on balance sale

price on account of escalation of prices because it was she who was delaying execution of sale deed on one pretext or another. (Para 26, 27 & 33). Title: Dharamjeet Kaur vs. Smt. Jagiro. Page – 163

'T'

Tort Law – Battery – Suit for damages – Acquittal of defendant by criminal court in a case arising out of same incident - Effect on suit – Held, findings returned by criminal court acquitting accused (defendant) in a case arising out of same incident has no bearing as far as the adjudication of dispute raised in civil suit is concerned – In criminal case, benefit of doubt has to be given to accused and it is not so in a civil suit. (Para 24). Title: Rameshwar Kumar vs. Kanta Devi & another. Page – 479

Tort Law – Joint tort- feasors – Suit for damages – Whether all joint -torfeasors need to be joined in a suit?- Held, where liability is joint and several, the person aggrieved has the choice of suing either of joint -tortfeasors or both or all of them (Para 9) Title: Smt. Jogindra vs. Ram Lal (since deceased) through his LRs. Page – 348

Tort Law – Joint-tort - feasors - Who are and extent of their liability? – Held, two or more persons become joint-tortfeasors by either committing a tort in concert or by the principle of vicarious liability – Joint -tortfeasors are jointly and severally liable for whole of the damages. (Para 9) Title: Smt. Jogindra vs. Ram Lal (since deceased) through his LRs. Page - 348

Tort Law – Malicious prosecution – Damages – Grant of – Plaintiff claiming damages for malicious prosecution on ground that defendant No. 2 made trespass in his house and caused him arrested in a false case – Held, defendant No. 2 during course of investigation went to premises of plaintiff to seize timber with respect to which offence under Forest laws was suspected to have been committed by him – Section 165 of Cr. P.C. specifically empowered him to visit a place for recovering any thing necessary for purposes of investigation – He was not required to obtain search warrant from Judicial Magistrate – Timber was actually found stacked in his house – Description of timber given in permit was different from specifications of timber actually found in plaintiff's house – No evidence that such exercise was done by the defendant No. 2 with malice - Search of house of plaintiff was not illegal – Plaintiff not maliciously prosecuted and not entitled for damages – RSA allowed – Suit dismissed. (Paras 4 to 8) Title: Ramesh Pathania vs. Surat Singh & another. Page - 303

Tort Law – Negligence – Damages – Assessment – Held, principles laid down in Sarla Verma & others Vs. Delhi Transport Corporation and another (2009) 6 SCC 121 can be applied in determining quantum of damages in other cases involving tort of negligence. (Para 28) Title: National Hydroelectric Power Corporation Limited, Chamera Project & another vs. Rukmani Devi & another. Page - 132

Tort Law - Negligence – Washing away of a girl alongwith gushing water of tunnel, whose gates were negligently opened by the Dam staff – Damages – Defendants denying negligence on their part and pleading that deceased sneaked into Dam area despite her stopping by the Security Guard – She was a trespasser in Dam area and highly negligent in conducting herself – Held, on facts, place near the tunnel outlet from where girl was washed away was neither fenced nor any 'Dangerous zone' warning was displayed – Public could visit that area easily – No siren was blown before releasing water from the Dam into tunnel – Deceased was standing near bridge which was an open space – Fencing of area was done after this incident as per orders of Deputy Commissioner – Defendants were highly negligent in releasing water from the Dam –This negligence resulted in death of daughter of plaintiff and she is entitled for damages. (Paras 18 to 27).Title: National Hydroelectric Power Corporation Limited, Chamera Project & another vs. Rukmani Devi & another. Page - 132

Transfer of Property Act ,1882 – Section 58 (d) - Usufructory mortgage –'Ghasni land' – Held, grass grown over 'Ghasni' can be harvested by the mortgagee which is capable of being

sold etc – Mortgagee can reap gains and profits from its sale – As such, usufructory mortgage can be created with respect to land recorded as 'Ghasni'. (Para 17). Title: Dalip Kumar and others vs. Des Raj & others. Page – 446

Transfer of Property Act, 1882 – Section 62 – Limitation Act, 1963 – Article 61 – Usufructory mortgage – Redemption thereof – Limitation and commencement – Held, right to recover possession of mortgaged land by the usufructory mortgagor commences from date when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment by the mortgagor – This right does not extinguish merely with lapse of 30 years from the mortgage. (Para 15) Title: Dalip Kumar and others vs. Des Raj & others. Page – 446

'W'

Workmen Compensation Act, 1923 – Sections 3 & 4 - Murder of driver during course of employment - Whether legal representatives entitled for compensation under the Act ? – Held, workman was engaged in the vehicle as a driver – He was present at spot where his murder was committed – His presence there was only because of his employment – His murder took place during the course of employment and his legal representatives are entitled for compensation under the Act. (Para 14) Title: United India Insurance Co. Ltd. Vs. Smt. Kumta Devi & Ors. Page – 353

Workmens' Compensation Act, 1923 - Section 22 – Employer – employee relationship – Proof – Absence of appointment letter/salary slip etc- Effect – Held, normally owners of taxies do not issue appointment letter(s) or salary slip(s) to person(s) engaged by them as drivers- Fact that claimant is known as driver of owner in the bazar area is sufficient proof of employer – employee relationship between them particularly when owner had not filed any complaint for unauthorised use of his vehicle against the driver (Para 11 & 12) Title: Rajender Kumar vs. Shyam Lal and Anr. Page – 531

Workmens' Compensation Act, 1923 - Section 21 – Territorial jurisdiction – Held, Section 21 of Act does not debar filing of claim petition by dependents of deceased at a place where they ordinarily reside or where employer has his registered office. (Para 4) Title: Oriental Insurance Co. Ltd. vs. Parkash Singh & others. Page – 510

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Mohan Lal ...Petitioner.
Versus
State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 1348 of 2019
Judgment reserved on : 23.8.2019
Date of Decision : August 30 , 2019

Code of Criminal Procedure, 1973 – Section 439 – Regular bail – Grant of - Appreciation of material - Principles summarized – Held, at time of grant of bail detailed analysis of evidence is not required – Only the evidence is to be seen just like a skeleton without flesh – However, prima facie examination of material may be necessary to find out credibility and probability of statements of witnesses. (Para 6).

For the petitioner : Mr. Prashant Chaudhary, Advocate, for the petitioner.
For the respondent : Mr. Ashwani Sharma & Mr. Nand Lal Thakur, Additional Advocates General and Mr. Kuldeep Chand, Deputy Advocate General for the respondent/State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

The petitioner, who is under arrest, on being arraigned as an accused in FIR Number 17 of 2019, registered under Section 376 of Indian Penal Code, 1860, dated 09.04.2019, in the file of Women Police Station, Mandi, District Mandi, HP, disclosing non-bailable offence, has come up before this Court under section 439 CrPC, seeking regular bail.

2. The status report(s) filed. I have seen the status report(s) as well as the police file to the extent it was necessary for deciding the present petition, and the police file stands returned to the police official. I have heard Sh. Prashant Chaudhary, learned counsel for the petitioner and Sh. Nand Lal, learned Additional Advocate General for the respondent/State.

FACTS:

3. The gist of the First Information Report and the investigation is as follows:

(a). One Smt. Prabhi Devi, aged 71 years, resident of village Nayol, who was accompanied with her son Sh. Gian Chand and the victim visited the Women Police Station, Mandi on 9th April, 2019. She informed that her husband had died around eight years ago and she is a home maker. She has a son named Gian Chand and a daughter (victim – aged 27 years). She further informed the police that her daughter is a specially abled child with mental retardation because of which she is deaf and dumb, and as a result of her mental illness she could not study.

(b) On 7.04.2019, her son had gone away from home to attend a condolence meeting. She alongwith her daughter had gone to the house of her God-brother Sh. Nagnu in his village Binol, P.O. Gharan to take lunch (dhaam). During day time, around 3 O'clock her daughter, by signal, informed her that she needs to urinate. On this she signalled her to go to the toilet constructed adjacent to the house and she herself sat in the corridor near the water tap. Near the water tap, one Smt. Summi and her daughter-in-law Smt. Shanta were washing utensils and she started talking to them and her daughter went inside the toilet. After some time her daughter started crying. On this she ran towards the toilet and tried to

open the door, which was bolted from inside. The door was not very strong and when she pulled it then the entire door came out. Inside the toilet she noticed that Mohan Singh, petitioner herein, who was resident of the village Binol, had opened the salwaar of her daughter and he had also opened his pyjama. He had laid down the victim on the floor and was himself lying on her. On this she pulled Mohan Singh and thereafter pushed him away. She raised voice and all this was seen by Summi and her daughter-in-law Shanta. She further stated that due to this the clothes of her daughter had become stained and she had washed them.

(c) She further stated that on 7.04.2019 she could not come to lodge the report with the police because she was alone in the house. On the arrival of her son she visited the Police Station alongwith her son and daughter on 9.04.2019 to report that Mohan Singh had committed a wrong act with her daughter and it is not possible for her daughter to reveal as to what has actually happened with her and she demanded justice. Consequently, the police registered the aforesaid FIR and started the investigation.

(d) The police got conducted the medical examination of the victim from the Zonal Hospital Mandi. On the same day, the accused was arrested and his medical examination was also conducted from the same hospital. The Investigating Officer could not decipher anything from the victim. Subsequently the statements under Section 164 CrPC of the victim and her mother Smt. Prabhi Devi were got recorded. The vaginal swabs, which were preserved by the Doctor, were sent for RFSL and the report of the RFSL has been received.

4. The petitioner had come up with the present bail petition which is not supported by any affidavit. It is contended that there are inimical relations of the bail petitioner with the family members of the complainant and due to such discourse, a false case has been registered.

5. The police has filed the status report and also filed supplementary status report dated 8.8.2019, as per which the Investigating Officer conducted further investigation and did not find any inimical relations between the parties. The status report also stated that in the year 2016, the son of the petitioner had contested the election of Pradhan of Gram Panchayat Maini and he had won that election and in the very same election the brother of the victim had also filed his nomination papers but he had withdrawn his name and did not contest the elections.

6. At the time of grant of bail a detailed analysis of evidence is not required. Only the evidence is to be seen just like a skeleton without flesh. However, to decide a bail petition for serious offence like the present one, prima facie the credibility and probability of the statements is to be analyzed.

7. **REASONING**:

(a) As far as the allegation of the bail petitioner regarding animosity is concerned, there is no documentary evidence to corroborate the same. The bail petition is not even supported by an affidavit and the further investigation conducted by the police has belied the same. Therefore, regarding animosity, at this stage, there is nothing on the record to arrive at any conclusion.

(b) Even as per the allegations of the complainant Smt. Prabhi Devi, there was a dhaam which was organized at that place. Dhaam is a common feast given by families to the entire village in which even people who are close to them are also invited from other places. Generally there is a gathering of lot of people because of the dhaam. The dhaam was organized during day time and broad day light. If the allegations, in its entirety are seen, it makes up a situation as if the petitioner was waiting for a prey. He would not know that the victim would feel urination

and come to that toilet. There was no loss of time between her cries and her mother breaking open the door. If the accused was such a pervert, then till the age of 56 years, of which he is, he might have some previous criminal history. The status report filed by the prosecution does not reveal any previous criminal history of the petitioner.

(c). The incident took place in the house of the God-brother of the mother of the victim, who was resident of the same village where the accused was residing. After all, the victim and her mother were the guests of the God-brother of the mother of the victim. In such a situation, the delay in reporting the matter is one of the factors for consideration in bail.

(d) The complainant (Prabhi Devi), specifically stated that she was waiting for her daughter near the toilet and was talking to one lady Summi and her daughter-in-law Shanta, who were washing utensils. This means that there was commotion nearby and accused was aware of the presence of the people. When the door was forcibly opened then this fact would also have been noticed by Summi and Shanta and the incident would have spread to the entire village like a wild fire. In such a situation, the non reporting of the incident to the police till 9.4.2019, would at least entitle the petitioner for the relief of bail.

(e) As per the spot map, which is on page 20 of the police file, there is a common WC and Wash Room, which is marked as points A & B. The total width of the WC is two feet. The width of the wash room is four feet and so the entire width of the toilet is six feet. Within that, a two feet width Indian seat is laid. As per the complainant, the victim was made to lie down in the toilet which was before this WC and at this place she was laid. The width of the wash room is four feet and length is not mentioned by the Investigating Officer. For a person to lie down on this floor and for accused to lie over her, the length of this wash room would be at least six feet. In the absence of any explanation, for the purpose of grant of bail, it at least raises some doubt about the fact that the victim was laid on the floor of the wash room.

(f) The medico-legal certificate of the victim is dated 9.04.2019 at 4.50 p.m., which would take it to fifty hours after the alleged assault. The examining Doctor did not find any sign of injury over any part of her body. The Doctor did not find any injury on external genitals as well as on the anus. The Doctor did not immediately give opinion about sexual assault and reserved it till the report of the chemical analysis and the report of psychiatrist were received. The RFSL report did not find any blood and semen in the swabs obtained from the victim by the Doctor. According to the Doctor, the possibility of sexual assault could not be ruled out.

(g) According to the complainant, when she had pushed the door the entire structure had come out. I have also seen the photographs in the police file which contains the photograph of the broken door. The entire wooden plank is shown to have been torn off from between. It cannot be said that it was a weak door and the age of the mother of victim being 71 years, who claimed to have pulled this door, is another factor which makes out a case for bail.

(h) As per the status report the investigation is complete and the report under Section 173 CrPC already stands filed in the Court on 24.7.2019.

(i) The petitioner is in judicial custody since 9.4.2019.

(j) In the status report, there is no mention of previous criminal history of the bail petitioner.

(k) The petitioner is a permanent resident of address mentioned in the memo of parties. Therefore, his presence can always be secured to face trial.

(l) I am satisfied that no purpose will be served if the bail petitioner remains in the judicial custody.

(m) I am of the considered view that, *prima facie*, petitioner has made out a case for grant of bail.

8. The learned counsel for the petitioner submitted that because of the medical evidence it is not a case under Section 376 IPC and even if everything is admitted it will be a case of attempt to rape. He submitted that simply because the charge-sheet has been filed under Section 376 IPC or even if charges are framed thereunder it would not take away the character of the offence from attempt to rape to that of rape. He has specifically placed reliance on the decision rendered by this Court in Cr.MP(M) No. 1288 of 2014, titled as *Raj Kumar vs. State of Himachal Pradesh alongwith other connected petition,* decided on 6th February, 2015.

9. The cumulative effect of the above discussion, makes out a case for bail. In the result, the present petition is allowed. The petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing personal bond in the sum of Rs.10,000/- (rupees ten thousand) with one surety in the like amount to the satisfaction of the Sessions Judge/Addl. Sessions Judge, Mandi, District Mandi, H.P.

10. This Court is granting the bail subject to the conditions mentioned in this order. The petitioner undertakes to comply with all directions given in this order and the furnishing of bail bonds by the petitioner is acceptance of all such conditions:

(a) The petitioner shall neither influence nor try to control the investigating officer in any manner whatsoever.

(b) The petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or tamper with the evidence.

(c) The petitioner undertakes not to contact the complainant and witnesses to threaten or browbeat them or to use any pressure tactics.

(d) As per the status report the distance between the villages of the bail petitioner and the victim is eight kilometers. Therefore, a direction is issued that the petitioner shall not enter the village of the victim within a radius of seven kilometers from the house of the victim, under any circumstance whatsoever till the completion of the trial. The respondent-State shall send a copy of this order to the Pradhan of the concerned Panchayat and in case he notices the accused to be present within the vicinity of seven kilometer from the house of the victim, then he shall inform the S.H.O. of the concerned Police Station, who in turn shall take appropriate recourse to law. This condition is being laid so that no trauma is caused to the victim, at least till the time of recording of the statement of the victim in Court. Such a condition is neither arbitrary nor unreasonable and the only purpose is that the victim is unable to come face to face with the accused and also has been imposed with a view that the accused is unable to influence the victim.

(e) In *Kunal Kumar Tiwari* vs. *State of Bihar*, 2017 AIR (SC) 5416, the Hon'ble Supreme Court had referred to Sub Clause (c) of Section 437(3) of the Code of Criminal Procedure and stated that conditions of bail cannot be arbitrary, fanciful and cannot extend beyond the ends of provisions. The Supreme Court held that the phrase "interest of justice" as used under Sub Clause (c) of Section 437(3) means "good administration of justice", or "advancing the trial process" and inclusion of broader meaning should be shunned because of purposive interpretation.

(f) In case, the petitioner is arraigned as an accused of the commission of any offence, prescribing the sentence of imprisonment of ten years or more, then within thirty days of knowledge of such FIR, the petitioner shall intimate the SHO of the present police station, with all the details of the present FIR as well as the new FIR. It shall be open for the State to apply to this Court, for cancellation of this bail, if it deems fit and proper.

(g) The petitioner undertakes to attend the trial.

11. It is clarified that the present bail order is only with respect to the above mentioned FIR. It shall not be construed to be a blanket order of bail in all other cases, if any, registered against the petitioner.

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

13. Simply because the petitioner has been granted bail, the learned trial Court shall pursue the case expeditiously as per its calendar.

14. Petition stands allowed in the aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MRS. JUSTICE JYOTSNA REWAL DUA, J.

Surinder Kumar .....Petitioner

Versus

State of H.P and others .....Respondents

CWP No. 1919 of 2019

Decided on: 29.08.2019

Constitution of Indian, 1950 – Article 226 – Transfer on D.O Note of Minister – Validity – Held, the question whether an employee has to be transferred and posted out, is to be decided by the administration – Administrative Head has to apply his mind and take decision regarding transfer of employee independently and uninfluenced by recommendation if any, of the political executive – If any recommendation is received from political executive, the Administrative Department must examine the matter before ordering transfer(s) - Issuing transfer orders on recommendation of Minister without first examining about the justification of such transfer by the Administrative Head, is not legally sustainable. (Paras 7 & 8)

Cases referred:

Sanjay Kumar vs. State of Himachal Pradesh and others, 2013(3) Shim.L.C 1373

Amir Chand vs. State of Himachal Pradesh, 2013(2) Him.L.R (DB) 648

Ashok Kumar Attri vs. Himachal Pradesh Power Corporation Limited, 2013 (3) Shim.LC 1594

For the petitioner: Ms. Sheetal Vyas, Advocate.

For the respondents: Mr. Ashok Sharma, A.G with Mr. Vikas Rathore, Addl. A.G with Mr. J.S. Guleria, Dy. A.G. for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (Oral)

As reported by the Registry, notice to respondent No. 3 has not been issued for want of steps.

2. In the given facts and circumstances when the transfer of the petitioner vide order under challenge has been ordered on the basis of D.O. note which as per the law laid down by this court is not legally permissible, the writ petition can be disposed of effectively and judiciously in the absence of the said respondent.

3. The petitioner, a Post Graduate Teacher/Lecturer (Chemistry), presently posted as such at Government Senior Secondary School, Arloo, District Una has

approached this Court by filing the present writ petition for quashing the order dated 11.07.2019, Annexure P-1, whereby he has been transferred from the said school to Government Senior Secondary School, Jowar, District Una (H.P.) vice Sunil Kumar, respondent No.3 herein.

4. On 20.08.2019, following order came to be passed in this writ petition:-

> "Notice. Mr. Vikas Rathore, learned Additional Advocate General appears and accepts service of notice on behalf of respondents No. 1 and 2. Notice through speed post to respondent No.3 on filing process fee during the course of the day for 28.08.2019 through Principal, Government Senior Secondary School, Jowar, District Una, H.P. The appearing respondents to file short affidavit in reply and also produce the record leading to issuance of impugned order of transfer, Annexure P-1. In the meanwhile, the petitioner be not relieved from his present place of posting, if still working there."

5. Yesterday i.e. 28.8.2019, the returnable date, affidavit in reply as directed though was not filed, however, the record leading to the transfer of petitioner produced. The record being not complete as one of its page found missing, therefore, while passing the order to retain the record by learned Deputy Advocate General, respondent No.2 was directed to remain present in person to assist the Court. The order passed yesterday on 28.08.2019 reads as follows:-

> "Affidavit in reply has not been filed. Learned Deputy Advocate General has produced the record which, prima-facie, reveal that the transfer of the petitioner has been ordered on the D.O. note of Rural Development and Panchayati Raj Minister. In the name of the record only a photostat page of the list of the teachers sought to be transferred prepared by the office of Minister, Rural Development is available in the file in which the name of petitioner figures at serial No.8. The next page in-continuation is missing may be to withheld something from this Court. Let learned Deputy Advocate General to retain this record. List tomorrow on 29.08.2019. We direct respondent No.2 to remain present in person to assist the Court."

6. Consequently, the 2nd respondent, Director, Higher Education, Himachal Pradesh is present in person. He has produced the record, which is now complete. It is seen that the Rural Development and Panchayati Raj Minister to the Government of Himachal Pradesh submitted two D.O notes bearing U.O. No.PS/RDM(Tfr)2019-10249 dated 24.06.2019 and U.O No.PS/RDM/(Tfr)/2019-10384 dated 25.06.2019 to the Education Minister, Himachal Pradesh for transfer of Teachers named therein from one place to other. The same were forwarded to the Director, Higher Education, the 2nd respondent after obtaining the approval of Education Minister for needful. The office of respondent No.2 has accordingly ordered the transfer of the petitioner one of the teachers sought to be transferred vide U.O. Note referred to hereinabove from Government Senior Secondary School, Arloo, District Una to Government Senior Secondary School, Jowar, District Una without TTA/joining time vice respondent No.3, who was transferred with TTA/joining time vide order under challenge in this writ petition. The order of transfer of petitioner without TTA/joining time gives an impression that it is he who has requested for his tansfer from Government Senior Secondray School, Arloo, whereas, it is not so, as according to learned counsel, the petitioner never made any such request.

7. Whether the order of transfer of the petitioner in view of the law laid down by this Court in ***Sanjay Kumar*** vs. ***Sate of Himachal Pradesh and others, 2013(3) Shim.L.C 1373*** and ***Amir Chand vs. State of Himachal Pradesh, 2013(2) Him.L.R (DB) 648*** is legally sustainable or not is a question which has engaged our attention in this case. The answer thereto in the given facts and circumstances, however, would be in negative for the reason that as per the legal principles settled in the judgments supra, an elected representative has no right to claim that a particular employee is transferred to a particular station. Such choice has been left to be exercised by the Administrative

Head(s) i.e. the executive and not by the legislators. Whether an employee has to be transferred and posted out, as per the ratio of the law laid down in these judgments has to be decided by the administration. This Court has also expected from the Administrative Head(s) to apply their mind and take a decision to issue order of transfer of the employees independently and uninfluenced by the recommendations, if any, made by the political executive i.e. merely on asking by MLA or Minister. Not only this but in the event of any recommendation is received from the political executive, the Administrative Department can always make a back reference stating therein as to why the recommendations so made cannot be accepted. In ***Amir Chand's*** judgment cited supra, it has further been held that whenever transfer of an employee is not ordered by the departments but on the recommendations of Minister or MLA, in that event also, before the order of transfer is issued, views of Administrative Department should be obtained. Only thereafter the transfer can be ordered, if approved by the Administrative Head(s). The law so laid down is reproduced as under:-

> [81] In addition to the directions issued in the individual writ petitions, we are of the considered view that certain general directions are required to be issued. We have collated the various directions issued by us in different cases which have not been complied till today. After taking into consideration the entire scenario, we issue the following directions:
>
> > 1. The State must amend its transfer policy and categorize all the stations in the State under different categories. At present, there are only two categories, i.e. tribal/hard areas and other areas. We have increasingly found that people who are sent to the hard/tribal areas find it very difficult to come back because whenever a person is posted there, he first manages to get orders staying his transfer by approaching the political bosses and sometimes even from the Courts. Why should the poor people of such areas suffer on this count. We are, therefore, of the view that the Government should categorize all the stations in the State in at least four or five categories, i.e. A, B, C, D and E also, if the State so requires. The most easy stations, i.e. urban areas like Shimla, Dharamshala, Mandi etc. may fall in category A and the lowest category will be of the most difficult stations in the remote corners of the State such as Pangi, Dodra Kawar, Kaza etc. At the same time, the home town or area adjoining to home town of the employee, regardless of its category, otherwise can be treated as category A or at least in a category higher than its actual category in which the employee would normally fall. For example, if an employee belongs to Ghumarwin, which is categorized in category B, then if the employee is serving in and around Ghumarwin, he will be deemed to be in Category A.
> >
> > 2. After the stations have been categorized, a database must be maintained of all the employees in different departments as to in which category of station(s) a particular employee has served throughout his career. An effort should be made to ensure that every employee serves in every category of stations. Supposing the State decides to have four categories, i.e. A, B, C, D, then an employee should be posted from category A to any of the other three categories, but should not be again transferred to category A station. If after category A he is transferred to category D station, then his next posting must be in category B or C. In case such a policy is followed, there will be no scope for adjusting the favourites and all employees will be treated equally and there will be no heart burning between the employees.

> 3. We make it clear that in certain hard cases, keeping in view the problems of a particular employee, an exception can be made but whenever such exception is made, a reasoned order must be passed why policy is not being followed.
>
> 4. Coming to the issue of political patronage. On the basis of the judgments cited hereinabove, there can be no manner of doubt that the elected representative do have a right to complain about the working of an official, but once such a complaint is made, then it must be sent to the head of the administrative department, who should verify the complaint and if the complaint is found to be true, then alone can the employee be transferred.
>
> 5. We are, however, of the view that the elected representative cannot have a right to claim that a particular employee should be posted at a particular station. This choice has to be made by the administrative head, i.e. the Executive and not by the legislators. Where an employee is to be posted must be decided by the administration. It is for the officers to shows their independence by ensuring that they do not order transfers merely on the asking of an MLA or Minister. They can always send back a proposal showing why the same cannot be accepted.
>
> 6. We, therefore, direct that whenever any transfer is ordered not by the departments, but on the recommendations of a Minister or MLA, then before ordering the transfer, views of the administrative department must be ascertained. Only after ascertaining the views of the administrative department, the transfer may be ordered if approved by the administrative departments.
>
> 7. No transfer should be ordered at the behest of party workers or others who have no connection either with the legislature or the executive. These persons have no right to recommend that an employee should be posted at a particular place. In case they want to complain about the functioning of the employee then the complaint must be made to the Minister In charge and/or the Head of the Department. Only after the complaint is verified should action be taken. We, however, reiterate that no transfer should be made at the behest of party workers."

8. In the case in hand, as noticed supra, no doubt, on the recommendations of the Rural Development and Panchayati Raj Minister, the Education Minister, Himachal Pradesh has approved the transfers of various Post Graduate Teachers including the petitioner and the matter was forwarded to the 2nd respondent. Nothing is there in the record produced before us that in the office of 2nd respondent, the matter was examined to ascertain the justification of the transfer of the petitioner approved by the political Executive. Again nothing is there on record to show that the office of respondent No. 2 has examined the matter and the said respondent recorded its satisfaction qua the desirability of the transfers including that of the petitioner approved by the political Executive are in the interest of administration or larger public interest. Therefore, obviously, the respondent No. 2 has issued the order of transfer merely o the D.O. note of the Rural Development and Panchayati Raj Minister which is not legally permissible as the law laid down by this Court deprecate such practice of transfer of an employee.

9. True it is that the petitioner was transferred and posted at the present place of his posting on 24.08.2017. As per note of the Superintendent (Transfer Cell) of the office of 2nd respondent available in record, previously, he remained posted at Government Senior Secondary School Loharli (HMR) w.e.f. 19.07.2013 to 14.07.2015 and in Government Senior Secondary School, Jowar (Una) w.e.f. 15.07.2015 to 23.08.2017. Now, he has again been transferred to Government Senior Secondary School, Jowar

(Una) vide order under challenge. What is the distance between Government Senior Secondary School, Jowar and Government Senior Secondary School, Arloo (Una), nothing has come on record. The Administration Heard i.e. respondent No. 2 may transfer the petitioner, however, strictly in accordance with law and in the interest of Administration and on the basis of D.O. note and at the behest of political executive.

10. The competent authority i.e. the 2nd respondent on receipt of approval for transfer of the petitioner should have examined the same independently and uninfluenced by the recommendation, if any, of the elected representative and issued the order of transfer thereafter. The issuance of order of transfer of the petitioner by the 2nd respondent, therefore, is not in the interest of administration or public interest and rather colourable exercise of power. Being so, the impugned order, in all fairness and in the ends of justice, is not legally sustainable. The same, as such, deserves to be quashed and set aside. A Co-ordinate Bench of this Court in A***shok Kumar Attri vs. Himachal Pradesh Power Corporation Limited, 2013 (3) Shim.LC 1594***, in similar set of facts and circumstances has held as under:-

> "6. Taking overall view of the matter, therefore, we not only quash and set aside the office order, dated 31st August, 2013, but also direct respondent No.1 to reconsider the issue of posting of petitioner and respondent No.3 afresh, taking into account all aspects of the matter and that decision should be taken in accordance with the extant transfer policy and not under dictation or influence of the D.O. letters received form the office of the Chief Minister, which has no value and if that is taken into account, it would be nothing short of extraneous consideration by the Appropriate Authority of respondent No.1."

11. In view of the legal principles settled in the judgment supra, we are in agreement with the submissions made by Ms. Sheetal Vyas, learned counsel representing the petitioner that order of transfer, Annexure P-1 is not legally sustainable.

12. For all the reasons hereinabove, this petition succeeds and the same is accordingly allowed. Consequently, the order under challenge in this writ petition, Annexure P-1 is quashed and set aside. We, however, leave it open to the respondent-State to consider the transfer of the petitioner from the present place of posting to any other station strictly in the light of the law discussed hereinabove and our observations in this judgment. Pending application(s), if any, shall also stand disposed of.

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

Roop Ram .....Appellant/Plaintiff.

Versus

Tara Devi and others .....Respondents/Defendants.

RSA No.132 of 2004.

Date of decision:28th August, 2019.

Indian Evidence Act, 1872 - Section 68 – Will – Suspicious circumstance(s) – Proof – Held, plaintiff relying upon Will executed by 'M' in his favour – 'M' had a wife named 'Mathi' – Recitals in Will that testator 'M' had no wife, evidently false – No reason given in Will by testator for disinheriting his wife Mathi – Testator never lived with plaintiff and the latter never looked after the former – Testator remained sick in the last days of life and died 12-13 days after execution of alleged Will – Execution of Will surrounded with suspicious circumstances. (Paras 21 to 25)

Indian Evidence Act, 1872 – Section 114 – Presumption as to marriage - Circumstances under which it can be drawn – Held, long continuous cohabitation between man and woman will raise presumption of valid marriage in such circumstances - Mathematical precision and proof of marriage is not required. (Paras 11 & 12)

Cases referred:

Bharpur Singh and others vs. Shamsher Singh (2009) 3 SCC 687
Dhannulal and others vs. Ganeshram and another (2015) 12 SCC 301
Kishan Chand and another vs. Smt. Basanti Devi and others, 1996(2) S.L.J. 872
Joga Singh (Major) and another vs. Samma Kaur and others, 1996 (2) SLJ 1481
Kalayan Singh vs. Smt. Chhoti and others, AIR 1990 Supreme Court Cases 396
Milkhi Ram and others vs. Smt. Surmoo Devi 1993 (1) Sim. L.C. 118

For the Appellant : Mr. Ramakant Sharma, Senior Advocate with Mr. Dinesh Kumar, Advocate.

For the Respondents : Mr. Bhupender Gupta, Senior Advocate with Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

Aggrieved by the judgment and decree passed by the learned first appellate Court whereby he reversed the judgment and decree passed by the learned trial Court, the plaintiff has filed the instant regular second appeal.

2. The parties shall be referred to as the 'plaintiff' and the 'defendants'.

3. Brief facts giving rise to filing of the present appeal are that one Kanshia, a resident of village Hiun Jajah, Tehsil Rajgarh, District Sirmaur,H.P. co-owned a parcel of land comprised in Khata/Khatauni No. 14/51, Khasra Nos. 335/206 and 337/211, measuring 5 bighas 17 biswas and Khata Khatauni No. 6min/32/31, Khasra No. 209, measuring 1 bigha 9 biswas, situated in mauza Hiun Jajah, Tehsil Rajgarh, District Sirmaur and bequeathed his share therein along with other property in favour of his sister's son Megha, who was living with him at Hiun Jajah. It was averred that in the same village, Megha had his self acquired property comprised in Khata Khatauni No. 1min/4, Khasra No.354/212, measuring 3 bighas 17 biswas. Besides this, he has some landed property in village Sahroj which was about 7-8 kilometres away from village Hiun Jajah. Megha willed away his entire property movable and immovable in favour of his youngest brother Roop Ram, the plaintiff, vide Will dated January 11, 1983, Ex. PW5/A. He died on January 25, 1983 and the ownership of his property in village Sahroj was mutated in favour of the plaintiff vide mutation No. 85 dated December 21, 1983, Ex.PW1/A. However, ownership of the property bequeathed by Kanshia in favour of Megha was not mutated in favour of the plaintiff and the same had been mutated in favour of Janki, who claimed to be the wife of Kanshia on the latter's demise in July 1982. The plaintiff challenged the mutation which was ultimately cancelled and a mutation in respect of Kanshia's property bequeathed in favour of Megha came to be sanctioned in favour of Mathi, even though, she was in no way related to Megha. It was further averred that on the basis of this mutation, Mathi sold part of the suit land comprised in Khasra No. 354/212, measuring 3 bighas 17 biswas in favour of Shyam Dutt, predecessor-in-interest of defendants No. 2 to 6 vide sale deed dated July 8, 1990, Ex.DW1/B and gifted the remaining suit land comprised in Khasra Nos. 335/206, 337/211 and 209, measuring 7 bighas 6 biswas in favour of Shyam Dutt's brother Hem Raj (defendant No.1) vide gift deed dated November 23, 1992. The plaintiff, therefore, had filed the suit for declaration that he is owner and in possession of the suit land and that the sale deed dated July 8, 1990 and the gift deed dated November 23, 1992, executed by Mathi, are illegal, null and void, fraudulent and not binding on him and further the mutations effected on the basis of deeds were also be declared null and void. Lastly, it was prayed that the defendants be restrained from alienating or encumbering the suit land.

4. The defendants contested the suit filed by the plaintiff by filing written statement. It was denied that Megha had willed away his property movable and immovable in favour of the plaintiff. According to the defendants, the bequest in favour of the plaintiff was the result of fraud and misrepresentation as there was no occasion for Megha to bequeath his property in favour of the plaintiff, who lived in a different village Sahroj and never looked after him. It was averred that Megha in fact lived with his wife Mathi at village Hiun Jajah till his death and there was no reason for him to disinherit her wife by bequeathing his property in favour of the plaintiff. As per defendants, the Will dated 11th January, 1983 allegedly executed in favour of the plaintiff was shrouded in suspicious circumstances. As far as the plaintiff's claim as to mutation of ownership of Megha's property at village Sahroj on the basis of the Will in his favour is concerned, it was averred that the same was passed behind the back of the interested parties and without proper inquiry by the Assistant Collector 1st Grade. It was further averred that on the demise of her husband, Mathi had become absolute owner of the suit land and the deeds of gift and sale executed by her were valid. It was also averred that the mutation attested in favour of the plaintiff in respect of property at village Sahroj was wrong. The defendants also raised contentions regarding maintainability of the suit, mis joinder of different cause of action, non-joinder of necessary parties, estoppel and valuation of the suit.

5. From the pleadings of the parties, the learned trial Court on 22.04.1997 framed the following issues:

> "1. Whether the suit land was self acquired property of Megha? OPP.
>
> 2. Whether the deceased Megha executed a valid will in favour of the plaintiff? OPP.
>
> 3. Whether the Gift Deed No. 172 dt. 28-11-92 executed by defendant No.1 in favour of the plaintiff is null and void, as alleged? OPP.
>
> 4. Whether the Gift Deed No. 119 executed by late Mathi on 8-7-90 is null and void? OPP.
>
> 5. Whether the plaintiff is entitled for the relief of injunction? OPP.
>
> 6. Whether the suit of the plaintiff is not maintainable? OPD.
>
> 7. Whether the suit of the plaintiff is not maintainable for misjoinder or cause of action? OPD.
>
> 8. Whether the plaintiff is estopped by his acts, conduct to file the present suit? OPD.
>
> 9. Whether the suit of the plaintiff is not properly valued, if so, what is the correct valuation? OPD.
>
> 10. Relief."

6. Aggrieved by the judgment and decree passed by the learned trial Court, the defendants filed an appeal before the learned first appellate Court, who allowed the same vide judgment and decree dated 25.11.2002, constraining the plaintiff to file the instant appeal.

7. On 01.04.2004, this appeal came to be admitted on the following substantial question of law:

> "Whether the learned first Appellate Court has misapplied the law pertaining to the existence of suspicious circumstance surrounding the execution of the Will?"

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

8. How the Will is required to be proved and what would constitute suspicious circumstance has been elaborately considered by the Hon'ble Supreme Court in ***Bharpur Singh and others*** *vs.* ***Shamsher Singh (2009) 3 SCC 687*** wherein it was observed as under:

> *"14. The legal principles in regard to proof of a will are no longer res integra. A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator.*
>
> *15. This Court in H. Venkatachala Iyengar vs. B.N. Thimmajamma [AIR 1959 SC 443] opined that the fact that the propounder took interest in execution of the Will is one of the factors which should be taken into consideration for determination of due execution of the Will. It was also held that: (AIR p. 451, para 19)*
>
> > *one of the important features which distinguishes Will from other documents is that the Will speaks from the date of death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator.*
>
> *16. In H. Venkatachala case[1], It was also held that the propounder of will must prove:*
>
> > *(i) that the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and*
> >
> > *(ii) when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, and*
> >
> > *(iii) If a Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.*
>
> *It was moreover held:(H. Venkatachala case[1], AIR p. 452, para 20*
>
> > *"20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the*

testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

17. This Court in Niranjan Umeshchandra Joshi vs. Mrudula Jyoti Rao & ors. (2006) 13 SCC 433 :(2006) 14 SCALE 186, held: (SCC pp. 447-48, paras 33-34)

"33. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [See Madhukar D. Shende v. Tarabai Shedage (2002) 2 SCC 85 and Sridevi and Ors. v. Jayaraja Shetty and Ors. (2005) 8 SCC 784]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.

34. There are several circumstances which would have been held to be described (sic) by this Court as suspicious circumstances:

(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

(ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

[See H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors. AIR 1959 SC 443 and Management Committee T.K. Ghosh's Academy v. T.C. Palit and Ors. AIR 1974 SC 1495]"

18. Respondent was a mortgagee of the lands belonging to the testatrix. He is also said to be the tenant in respect of some of the properties of the testatrix. It has not been shown that she was an educated lady. She had put her left thumb impression. In the aforementioned situation, the question, which should have been posed, was as to whether she could have an independent advice in the matter. For the purpose of proof of will, it would be necessary to consider what was the fact situation prevailing in the year 1962. Even assuming the subsequent event, viz., the appellants had not been looking after their mother as has been inferred from the fact that they received the news of her death only six days after her death took place, is true, the same, in our opinion, would be of not much significance.

19.The provisions of Section 90 of the Indian Evidence Act keeping in view the nature of proof required for proving a Will have no application. A Will must be proved in terms of the provisions of Section 63(c) of the Indian

Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Indian Evidence Act providing for exceptions in relation thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as Section 68 of the Indian Evidence Act postulates that execution must be proved by at least one of the attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence. {See B. Venkatamuni vs. C.J. Ayodhya Ram Singh & ors. [(2006) 13 SCC 449, SCC p. 458, para 19]}

20. This Court in Anil Kak vs. Kumari Sharada Raje & ors. [(2008) 7 SCC 695] opined that court is required to adopt a rational approach and is furthermore required to satisfy its conscience as existence of suspicious circumstances play an important role, holding: (SCC p. 714, paras 52-55)

"52. Whereas execution of any other document can be proved by proving the writings of the document or the contents of it as also the execution thereof, in the event there exists suspicious circumstances the party seeking to obtain probate and/ or letters of administration with a copy of the Will annexed must also adduce evidence to the satisfaction of the court before it can be accepted as genuine.

53. As an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order.

54. It may be true that deprivation of a due share by (sic to) the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a Will.

55. Unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation."

21. Unfortunately, the first appellate court as also the High court did not advert to these aspects of the matter.

22. We may notice that in Jaswant Kaur vs. Amrit Kaur & ors. [(1977) 1 SCC 369] this Court pointed out that when the Will is allegedly shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and defendant. An adversarial proceeding in such cases becomes a matter of Court's conscience and propounder of the Will has to remove all suspicious circumstances to satisfy that Will was duly executed by testator wherefor cogent and convincing explanation of suspicious circumstances shrouding the making of Will must be offered."

9. What would be suspicious circumstance was thereafter set out in para-23 of the judgment which reads as follows:

"23. *Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:*

i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.

ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.

iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.

iv. The dispositions may not appear to be the result of the testator's free will and mind.

v. The propounder takes a prominent part in the execution of the Will.

vi. The testator used to sign blank papers.

vii. The Will did not see the light of the day for long.

viii. Incorrect recitals of essential facts."

10. It was further clarified that the circumstances narrated hereinabove are not exhaustive and were subject to offer of reasonable explanation, existence thereof, which were required to be considered before coming to the conclusion on the genuineness of the Will. It was also clarified that even though the Will may be registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with.

11. It would be noticed that even though the learned trial Court held that Mathi was not wife of Megha, however, said finding was reversed by the learned first appellate Court and rightly so because the learned trial Court in coming to such conclusion had insisted upon mathematical precision and proof of marriage. It has specifically come on record that Megha and Mathi lived as husband and wife for more than 25 years and, therefore, a strong presumption of wedlock arises in their favour.

12. The law on this issue is well settled and I may only refer to a fairly recent judgment of the Hon'ble Supreme Court in ***Dhannulal and others*** *vs.* ***Ganeshram and another (2015) 12 SCC 301*** wherein it was observed as under:

"*11. We are unable to accept the submissions made by Mr. Naveen Prakash, learned counsel appearing for the plaintiff-appellant. Indisputably, the first wife of Chhatrapati died in the very early age and immediately thereafter the original defendant No.1 Phoolbasa Bai started living with Chhatrapati as his second wife. Out of the wedlock of Phoolbasa Bai and Chhatrapati, one son was born, whose name was Mannu Lal. The said son of Chhatrapati and Phoolbasa Bai died unmarried. It is also not in dispute that the original owner Shiv Ram had only one son namely, Chhatrapati and one daughter Sumitrabai. Phoolbasa Bai died during the pendency of the suit in the year 1992. The relationship of Chhatrapati and Phoolbasa Bai has not been denied. It has also not been denied that they had been living together as husband and wife in a joint family.*

12. In the fact of the case there is strong presumption in favour of the validity of a marriage and the legitimacy of its child for the reason that the relationship of Chhatrapati and Phoolbasa Bai are recognized by all persons concerned.

13. In Andrahennedige Dinohamy vs. W.L. Balahamy, (1928) 27 LW 678:AIR 1927 PC 185, it was held that where a man and woman are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. The Court observed as follows: (LW pp. 681-82)

> *"The parties lived together for twenty years in the same house, and eight children were born to them. The husband during his life recognized, by affectionate provisions, his wife, and children, The evidence' of the Registrar of the District shows that for a long course of years the parties were recognized as married citizens, and even the family functions and ceremonies, such as, in particular, the reception of the relations and other guests in the family house by Don Andris and Balahamy as host and hostess--all such functions were conducted on the footing alone that they were man and wife. No evidence whatsoever is afforded of repudiation of this relation by husband or wife or anybody."*

14. In the case of Gokal Chand vs. Parvin Kumari, AIR 1952 SC 231, this Court observed that continuous co-habitation of woman as husband and wife and their treatment as such for a number of years may raise the

presumption of marriage, but the presumption which may be drawn from long co-habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.

15. It is well settled that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a long time. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on a party, who seeks to deprive the relationship of legal origin. In the instant case, instead of adducing unimpeachable evidence by the plaintiff, a plea was taken that the defendant has failed to prove the fact that Phoolbasa Bai was the legally married wife of Chhatrapati. The High Court, therefore, came to a correct conclusion by recording a finding that Phoolbasa Bai was the legally married wife of Chhatrapati."

13. Apart from the above, Keshwa Ram, who claimed to be the priest of Megha and others, while appearing as DW-3 also testified that Mathi was Mehga's wife and was living at Kanshia's house for 30-40 years and that Mathi lived with Mehga.

14. In addition thereto, defendants have examined another witness Jati Ram, who is a resident of adjoining village contiguous to village Hiun Jajah and while appearing as DW-5, he testified that Megha lived in the house of Kanshia for 25-30 years and Mathi had lived there as Megha's wife. He further stated that "*we all villagers considered Mathi to be the wife of Megha…we were children when Mathi had been married. I do not recollect the marriage. I saw Mathi and Megha having lived together for 25-30 years. Mathi died in village Hiun in 1996-97*".

15. Besides above, the other documentary evidence brought on record by way of abstract of 'Pariwar Register', wherein Mathi is shown Megha's wife, lends credence to the defendants' claim that Mathi was Megha's wife.

16. Even on the electoral roll pertaining to the Tehsil in which village Hiun Jajah is situated, Mitha Devi is shown to be the wife of Megha vide entires at serial Nos. 280 and 281.

17. It needs to be noted that the learned trial Court had rejected the entry in the 'Pariwar Register' Ex. DW6/C on the ground that there was discrepancy of age difference of Megha and Mathi. In the 'Pariwar Register' Ex. DW6/C, the age difference of the two was 15 years, whereas, in the electoral roll Ex. DW4/A, it was three years. Besides this, Megha's wife was shown to be Mitha Devi and not Mathi.

18. But, then the learned first appellate Court has rightly reversed the finding of the learned trial Court by concluding that it appeared to be oblivious of the fact that the information recorded by the officials engaged in the preparation of the data as to the voters, their names and age, which are reflected in the electoral roll, are not always absolutely correct. The age mentioned by certain illiterate village rustics to the officials is based on guesswork and is hardly correct.

19. The learned first appellate Court is absolutely right in observing that whether it was wife Mathi or Mitha or there was a age difference between the two, the fact remains that Megha was not a bachelor and had a wife, who was none-else than Mathi, who lived with him for over 25 years till he breathed his last and it was for this reason that the mutation in respect of Kanshia's landed property bequeathed in favour of Megha came to be sanctioned in favour of Mathi after mutation in favour of Janki was rejected.

20. Yet, surprisingly, the Will dated January 11, 1983, Ex.PW5/A propounded by the plaintiff contains recital that Megha, the testator, was having no wife. Evidently, this recital is false and casts a serious shadow of doubt on the veracity, correctness and authenticity of the Will. The Will is shrouded by suspicious circumstances and, therefore, cannot be held to be genuine and reliance has correctly been placed by the learned first appellate Court on the following judgments:

(i) Kishan Chand and another *vs.* ***Smt. Basanti Devi and others, 1996(2) S.L.J. 872.***

(ii)Joga Singh (Major) and another *vs.* ***Samma Kaur and others, 1996 (2) SLJ 1481.***

(iii) Kalayan Singh *vs.* ***Smt. Chhoti and others, AIR 1990 Supreme Court Cases 396.***

(iv) Milkhi Ram and others *vs.* ***Smt. Surmoo Devi 1993 (1) Sim. L.C. 118.***

21. In the instant case, the wife of the testator, Mathi, has been totally disinherited of the property and left to fend for herself without there being any reason which makes the Will highly suspicious.

22. In addition to the above, there are some other factors which also render the Will Ex.PW5/A to be highly suspicious. The plaintiff's claim of having looked after Megha is not borne out from the records as it has specifically come on record that Megha lived in village Hiun Jajah which is 7-8 kilometres away from village Sahroj where the plaintiff lived.

23. In addition thereto, there is no evidence worth-name to prove that the plaintiff used to render services to Megha or looked after him. On the contrary, the Will Ex. PW3/A executed by Kanshia in favour of Megha clearly mentions that Megha was serving and looking after Kanshia. In such circumstances, it is difficult to believe that the plaintiff was looking after Megha by going to his village, which as observed above, was 7-8 kilometres away.

24. That apart, there is discrepancy as to the point of time when the Will Ex. PW5/A was allegedly executed. The plaintiff while appearing as PW-1 in his cross examination maintained that the Will in his favour was executed 10-15 years after the death of Kanshia. Admittedly, Kanshia died in July, 1982, as is evident from certificate Ex.DW6/B. Secondly, computing 10-15 years from this year, the Will Ex. PW5/A was allegedly executed somewhere in the year 1992-93. However, the Will in question is stated to be executed on January 11, 1983, which casts a serious doubt on the plaintiff's claim.

25. It would also be noticed that as per the statement of PW-1, Megha remained sick in the last days of his life and admittedly died 12-13 days after the execution of the Will. Sukh Ram, who claims to have scribed the Will, testified in his cross examination that Megha was suffering from a breathing disease at that time and that day he also took rest. If Megha was sick during last days of his life and was unwell even on the date when the alleged Will was executed, then where was the occasion for him to go to different village Sarsu which was at a distance of 7-8 kilometres away to get the Will scribed and could have conveniently made the same in his own village.

26. Lastly, it would be noticed that defendant Hem Ram has clearly maintained that he had never seen Megha's sign and that he (Megha) used to append thumb impression. This claim of Hem Ram has not even been disputed during his cross examination by the plaintiff. Even when confronted with cross-examination, the plaintiff clearly claimed that he did not produce any document containing Megha's signatures, except the so-called Will. This additionally casts a serious doubt regarding the execution of the Will.

27. The substantial question of law is accordingly answered against the appellant.

28. Consequently, there is no merit in this appeal and accordingly the same is dismissed, leaving the parties to bear their own costs. Pending application,if any, also stands disposed of.

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

Rajeev Kumar …Petitioner.

Versus

Union of India & others ..Respondents.

CWP No. 839 of 2015 a/w
CWP Nos. 840, 841, 844 and 847 of 2015

Date of Decision: August 27, 2019

Constitution of India, 1950 – Article 226 – Writ Jurisdiction – Order for the recovery of transport allowance by the department from employees – Challenge thereto – Held, petitioners had not applied for grant of transport allowance – It was granted by the department concerned of its own in terms with prevailing Office Memorandum – Petitioners were entitled for same under said Office Memorandum – They belong to class III & class IV service – Order for recovery of transport allowance can not be made on ground that they were on deputation with other institutions at the relevant point of time, when pay etc., was being paid to them by the parent department. (Paras 10 & 11) Title: Rajeev Kumar vs. Union of India & others. Page -

Cases referred:

State of Punjab and others vs. Rafiq Masih (White Washer) and others, (2015) 4 SCC 334
High Court of Punjab and Haryana and others vs. Jagdev Singh, (2016) 14 SCC 267

For the Petitioners: Mr. Hoshiar Kaushal, Advocate in all petitions.

For the Respondents: Mr. Lokinder Paul Thakur, Senior Panel Counsel, for respondents No.1 to 4 in all the petitions.

Mr. Neeraj Gupta, Senior Advocate with Mr.Ajeet Singh Jaswal, Advocate, for respondent No.5 in all the petitions.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (Oral)

Petitioners have preferred these petitions for quashing and setting aside impugned order dated 05.01.2015 (Annexure P-2), whereby office of respondent No.2 has directed recovery of Transport Allowance paid to the petitioners during their deployment with respondent No.5-NTPC Unit Dadri.

2. It is undisputed fact that petitioners herein are Class-C employees, who are working as Constables in Central Industrial Security Force (in short 'CISF') and were deputed in Security of NTPC Dadri during the years 2008 to 2013 and there was an arrangement between CISF and NTPC, whereby security personnels were to be provided by the CISF to NTPC and initially their pay was to be disbursed by the CISF but was to be reimbursed to CISF by respondent No.5-NTPC later on.

3. It is also an admitted fact that vide Office Memorandum dated 29.08.2008, category of the petitioners was allowed monthly Transport Allowance, but subject to the condition that Allowance was not admissible to those employees, who were provided with facility of Government transport and further that Office Memorandum dated 03.10.1997, whereby Transport Allowance was disallowed to the employees having been provided with official accommodation within one kilometer of office or within a campus housing the place of work and residence, was withdrawn. Meaning thereby that Transport Allowance was admissible irrespective of distance of official accommodation but inadmissible to those employees who were provided Government Transport.

4. During their posting with respondent No.5-NTPC, Transport Allowance was paid to the petitioners and others by their employer CISF and claim for its reimbursement was submitted to NTPC. However, NTPC did not reimburse the said Transport Allowance to CISF, on the ground that NTPC had provided transport facility to

the security personnels deputed with it whereupon matter was again taken up by CISF authorities vide communication dated 03.06.2010 (Annexure-02) with NTPC, wherein, on the basis of recommendation of 6th Pay Commission, it was canvassed that Central Government has sanctioned payment of Transport Allowance to its employees even if the distance from the residence to the office is '0' kilometer and further that no proper/dedicated vehicles are being provided by NTPC for transporting the CISF Duty Personnels. The fact remains that despite correspondences between NTPC and CISF, the amount was not reimbursed by NTPC, whereupon Office of Commandant of CISF had directed to recover the Transport Allowance from petitioners which was paid to them.

5. Learned counsel for the petitioners relying upon the decision of Hon'ble Apex Court in ***State of Punjab and others vs. Rafiq Masih (White Washer) and others, (2015) 4 SCC 334***, has canvassed that present case is squarely covered by the ratio of law laid down by the Apex Court in this case and, therefore, even without adjudicating right of the petitioners, with respect to the entitlement of the Transport Allowance during the relevant period involved in the present petitions, and liability of respondents to pay the same, impugned recovery order/notice dated 05.01.2015 (Annexure P-2) is liable to be quashed.

6. Prayer of the petitioners to quash recovery order, has been refuted by the respondents by filing separate replies. However in view of restricted arguments for quashing impugned recovery notice on the basis of ratio of law laid down by the Apex Court in *Rafiq Masih's case*, there is no necessity to discuss merits of other pleas raised and refuted by parties with respect to entitlement, liability to pay, payment and recovery of Transport Allowance.

7. Referring the judgment passed by the Apex Court in ***High Court of Punjab and Haryana and others vs. Jagdev Singh, (2016) 14 SCC 267,*** learned Senior Panel Counsel appearing for respondents No.1 to 4 has contended that petitioners are not entitled for benefit of ratio of law laid down by the Apex Court in *Rafiq Masih's* case.

8. Admittedly it is not a case here, where, for getting Transport Allowance, petitioners had submitted any papers or had applied for grant of the same, but the same was disbursed to them by the concerned authorities in pursuance to the Office Memorandum dated 29.08.2008 and other similar memorandum issued time to time and further it was also the view of the CISF authorities that the said Allowance was admissible to the petitioners and therefore, it was paid by CISF to petitioners for which they had not taken any overt act on their part nor any material has been placed on record to establish that petitioners had ever given any undertaking to refund the Transport Allowance paid to them.

9. So far as Jagdev Singh's case, relied upon by learned counsel for CISF, is concerned, in that case the Officer to whom payment was made was clearly put on notice in the first instance that any payment, found to have been made in excess, was required to be refunded and the said officer had also furnished an undertaking while opting for revised pay scale that he would refund the excess payment received by him, which is not a case in present petitions. It is also noticeable that in *Jagdev Singh's case,* the Apex Court has referred judgment passed in *Rafiq Masih's case* and has distinguished it but not overruled it. In given facts of present cases *Jagdev Singh's case* is of no help to the respondents.

10. In Rafiq Masih's case supra, the Apex Court has summarized the following few situations wherein recovery by the employer would be impermissible in law, where payments have mistakenly been made by the employer in excess of their entitlement for which the employees were not having any role:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases, where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

11. Cases of the petitioners are covered in situation (i) referred above in preceding para.

12. In view of the above discussion, without going into the issue as to whether transport facility was being provided by respondent No.5-NTPC to CISF duty personnels or not, and as to whether petitioners were entitled for the Transport Allowance paid to them, or not, and without adjudicating claims and counter claims *inter se* CISF and NTPC, present petitions are allowed in view of the ratio of law laid down in Rafiq Masih's case and respondents/concerned authorities are restrained from recovering the Transport Allowance paid to the petitioners and the impugned order dated 05.01.2015 (Annexure P-2 in CWP Nos. 839, 841, 844 and 847 of 2015 and Annexure P-3 in CWP No.840 of 2015), is quashed and set aside.

Pending application(s), if any, also stand disposed of in aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MRS. JUSTICE JYOTSNA REWAL DUA, J.

Devi Ram .....Appellant

Versus

State of H.P. .....Respondent

Cr. Appeal No. 296 of 2017
Reserved on: 01.07.2019
Decided on: 02.09.2019

Indian Evidence Act, 1872 - Section 3 – Circumstantial evidence – Appreciation of – Held, circumstances relied upon by prosecution must be of conclusive nature and must also be consistent with hypothesis of quilt of accused. (Para 15) Title: Devi Ram vs. State of H.P. Page – 22

Indian Evidence Act, 1872 – Section 8 – Motive – Evidentiary value – Held, where accused had a motive to cause death, an eye witness account of occurrence may not be required. (Para17) Title: Devi Ram vs. State of H.P. Page - 22

Cases referred:

Jagriti Devi vs. State of Himachal Pradesh, AIR 2009 SC 2869

Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550

State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (5) (HP) 213

Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 Supreme Court 1622

Kanhaiya Lal vs. State of Rajasthan, (2014) 4 SCC 715

For the appellant: Mr. Lalit K. Sharma, Advocate.

For the respondent: Mr. Narinder Guleria, Addl. A.G and Mr. J.S. Guleria, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge

The appellant (hereinafter referred to as the 'accused') herein is a convict. He has been convicted by learned Additional Sessions Judge-I, Mandi, District Mandi, H.P. for the commission of offence punishable under Sections 302 and 201 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and to pay fine of `10,000/- for the commission of offence punishable under Section 302 IPC and for a period of one year and to pay fine of `5,000/- for the commission of offence punishable under Section 201 IPC vide judgment dated 30.11.2016 passed in Sessions Trial No. 23/2013, under challenge in the present appeal.

2. PW-5 Maghu Ram is the father of the accused, whereas, complainant Narainu (PW-1) his brother. On 29.04.2013, there was marriage of daughter of one Dhani Ram (grand daughter of PW-11 Bhagat Ram) at village Khushla. Accused accompanied by his wife Manjeet Kaur and the complainant accompanied by his wife had gone to participate in the marriage. As per statement Ext.PW-1/A of PW-1 recorded under Section 154 Cr.P.C, the accused and deceased had their food and left the house of Dhani Ram around 6.45 p.m. The complainant left the house of said Dhani Ram at about 8.30 p.m. On the way, he heard criers of his brother, the accused who was asking '***Niche Aao***, ***Niche Aao***'(come down). Accordingly he went to '*nallah*' and found his brother lying there on stone. On asking as to how he came there, the accused replied that he had slipped and fallen down. On inquiry as to where is his wife (deceased), he replied that she had gone to house of her parents. On asking this question repeatedly on 10-12 occasions, replied that she had gone to her parent's house. The complainant (PW-1) then raised alarm from the '*nallah*' itself. On this, his father Maghu and nephew Dev Raj arrived there. In their presence also, the accused was asked about his wife, his reply again was that she had gone to the house of her parents. They lifted the accused from that place and brought to the path, there Hukam Chand, Gulab Chand, Tara Chand and Leeladhar met them. Hukam Chand (PW-2) inquired from the accused strictly as to where was his wife. On this, he told that she had gone to her house. The complainant retorted at him and told that she is not in the house. This allegedly raised suspicion in their mind that the accused may have killed her, therefore, PW-1 accompanied by Tara Chand and Leeladhar went inside the jungle and after searching the deceased for about 30-45 minutes, they could trace her out, who was lying in an injured condition in the jungle. There were grievous injuries on her head and forehead and she was lying in unconscious condition. They picked up her body and brought to the road. The deceased and the accused both were taken by them thereafter to civil hospital at Sundernagar for treatment. In the hospital, the deceased was declared dead by the doctor on duty. Since the accused has told lie about his wife and he was under fear as well perturbed, therefore, the complainant has suspected that it is he who had killed her.

3. The statement Ext.PW-1/A of complainant was recorded by Inspector Binny Minhas (PW-14), who on receipt of information Ext.PW-8/A had rushed to Civil Hospital, Sundernagar where the deceased was brought along with the accused. PW-1 Narainu and others were also present there. PW-14 made endorsement Ext.PW-14/A on the statement Ext.PW-1/A and it was sent to Police Station BSL Colony, Sundernagar through Constable Lal Singh. On the basis thereof, FIR Ext.PW-12/A was registered in the police station.

4. On receipt of file from the police station inquiry from the accused as to how he received injuries on his person and how the death of his wife occurred, he told that they had fallen into gorge through 'Dhank' (hill slope). When PW-14 Inspected the dead body, he allegedly found she having sustained the injuries on her head and forehead caused with sharp edged weapon. She allegedly had not sustained any other injuries on her body nor her clothes were soiled. He clicked the photographs Ext.PP-1 to Ext.PP-3 of

the dead body and recorded the statements of Hukam Chand (PW-2) Ext.PS-1 and Dev Raj Ext.PS-2 under Section 161 Cr.P.C. It is thereafter he prepared the inquest papers. The post-mortem was conducted by the Medical Officer, Civil Hospital, Sundernagar. The post-mortem report Ext.PW-6/B was collected and the accused arrested. The spot inspection was conducted on the identification thereof by PW-1 Narainu and the spot map Ext.PW-14/D prepared. Blood stained soil and leaves (in the shape of powder) were lifted from the spot and taken into possession vide seizure memo Ext.PW-1/C from the spot itself. Blood stained leaves of '*Baan*' tree were also lifted and taken into possession vide seizure memo Ext.PW-1/D in the presence of Narainu (PW-1) and Dev Raj. One gents wrist watch and broken pen lying on the spot were also taken into possession. Inside the pen, a paper allegedly containing writing "Dev love Ashu" was found written. The statement of Narainu and supplementary statement of Dev Raj Ext.PS-3 and Ext.PS-4 were also recorded. On the disclosure statement Ext.PW-7/A allegedly made by the accused on 2nd May, 2013 while in custody, the weapon of offence axe, Ext. P-8 was recovered and taken into possession vide memo Ext.PW-3/A in presence of Jitender Kumar and Durga Dass. The sketch of axe Ext.PW-14/G was prepared. The accused allegedly has identified the place as per the identification memo Ext.PW-3/C and a cellphone black in colour LAVA, KKT 345 make lying inside the dry leaves of '*Baan*' having one sim of idea, whereas, other of Reliance belonging to the deceased was taken in possession vide memo Ext.PW-3/B. The rucksack of accused he was carrying when went to attend the marriage with the deceased was also taken in possession vide memo Ext.PW-3/B. PW-5 Maghu Ram allegedly handed over one jean and shirt of the accused which were worn by him on the day of occurrence. The same were also taken in possession vide memo Ext.PW-3/E. The spot map of the place of recovery of axe, Ext.PW-14/H was also prepared. The statement of Maghu Ram (PW-5) Ext.PS-5 was recorded as per his version. The statements made by Jitender Kumar and Durga Dass, HC Chaman Lal and HC Inder Dev were also recorded as per their version.

5. On 9.5.2013, PW-14 recorded the statements of Bhagat Ram, Chet Ram and Gulab Chand as per their version. On 3.6.2013, he recorded the statements of Leeladhar and Tara Chand. On 14.7.2013, the report Ext. P-X was received from the Forensic Science Laboratory and on 16.7.2013, the weapon of offence axe was produced before Dr. Vivek Modgil and his opinion on the post-mortem Ext.PW-6/B was obtained. The reports Ext.P-Y and Ext.P-Z were also received from the Forensic Science Laboratory. The photographs Ext.PP-4 and Ext.PP-5 were taken at the time of recovery of the weapon of offence, whereas, the photograph Ext.PP-6 is taken at the time of recovery of the cellphone. On completion of investigation, PW-14 has prepared the challan and filed the same in the Court.

6. Learned trial Court on consideration of the final report filed by the investigating agency and also the documents annexed therewith has found a *prima-facie* case for the commission of the offence punishable under Section 302 and 201 IPC made out against the accused. Therefore, charge against him was accordingly framed. He, however, pleaded not guilty to the charge and claimed trial. The prosecution, in turn, has examined 14 witnesses in all and placed reliance on the documentary evidence referred to hereinabove.

7. The material prosecution witnesses are Narainu (PW-1), the complainant, Hukam Chand (PW-2), a witness of the spot, Chet Ram (PW-4) and Maghu Ram (PW-5). They have been associated and examined by the prosecution to prove its case to the extent that the accused and deceased went to the house of Dhani Ram for attending the marriage of his daughter there. According to PW-1, they left the house of Dhani Ram at about 7.00 p.m, whereas, he came back therefrom at about 8.45 p.m. On way back, he heard cries of his brother, the accused. He went to the '*nallah*' and found the accused lying on a stone. On inquiry, the accused told that he had fallen from the path. When inquired from him about his wife, the accused told that she had gone to her parent's house. He has also supported the prosecution case so as to he called his father Maghu Ram (PW-5) and nephew Dev Raj and they all lifted the accused from the place where he

was lying and brought him to the road. Thereafter, Hukam Chand, Tara Chand, Leeladhar also came there. Hukam Chand (PW-2) has not supported the prosecution case and turned hostile. Chet Ram (PW-4) has been associated to support the prosecution case that the accused not only slapped his wife, the deceased but also dragged her in the courtyard of Dhani Ram, when they had gone to attend the marriage. Maghu Ram (PW-5), the father of the accused has also not supported the prosecution case so as to it is the accused who killed his wife. Bhagat Ram (PW-11), is the grand-father of bride Nitu Devi. According to him, the accused and his wife also attended the marriage of his grand-daughter and returned to their home at about 5.30-6.00 p.m.

8. The remaining prosecution witnesses are formal as Durga Dass (PW-3) is a witness to seizure memos Ext.PW-3/A and Ext.PW-3/B, whereby axe Ext.P-8 and Pithu Ext.P-10 were taken in possession by the police. The cellphone Ext.P-12 was also stated to be taken in possession in his presence vide recovery memo Ext.PW-3/D, whereas jean pant Ext.P-14 and shirt Ext.P-15 vide recovery memo Ext.PW-3/E. PW-6 is Dr. Vivek Modgil of Civil Hospital, Sundernagar. He conducted the post-mortem of the dead body and submitted report Ext.PW-6/B. PW-7 HC Chaman Lal posted in police station BSL Colony, Sundernagar at the relevant time has witnessed the disclosure statement Ext.PW-7/A, whereby axe Ext.P-8 was got recovered by the accused. He also discharged the duties of MHC and the parcel containing axe Ext.P-8 was deposited with him. He made the entries in the malkhana register. PW-8 HC Nand Lal had entered rapat Ext.PW-8/A in the daily dairy on receipt of information from the hospital. PW-9 Constable Chet Ram had taken the case property vide RC Ext.PW-9/A and deposited the same in R.F.S.L. Mandi. PW-10 Dharam Chand is Patwari concerned who on demand had supplied the copy of jamabandi Ext.PW-10/A and tatima Ext.PW-10/B to the police. PW-12 ASI Trilok Chand had made endorsement Ext.PW-12/B on the back side of statement Ext.PW-1/A. He also recorded the statement of Dharam Chand and obtained the copy of jamabandi Ext.PW-10/A and Aks tatima Ext.PW-10/B from this witness. PW-13 remained posted as MHC Police Station, BSL Colony, Sundernagar. He has stated about the deposit of case property before him and sending the same to Forensic Science Laboratory for examination. PW-14 is the Investigating Officer. He tells us the manner in which the investigation was conducted by him in this case.

9. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C has denied the entire prosecution case either for want of knowledge or being incorrect. According to him, he has been implicated in a false case as his wife deceased Manjeet Kaur died due to fall from the hill. He, however, not opted for producing any evidence in his defence.

10. Learned trial Judge on appreciation of the oral as well as documentary evidence available on record has convicted and sentenced the accused vide judgment under challenge as pointed out at the very out set.

11. The legality and validity of the impugned judgment has been questioned on the grounds *inter-alia* that the evidence available on record has not been appreciated in its right perspective and rather learned trial Court has based its findings on conjectures, surmises and hypothesis. The present, according to appellant-convict is a case where no iota of evidence is there to connect him with the commission of offence. Therefore, the conclusion drawn by learned trial Judge that he has committed the offence punishable under Section 302 and 201 IPC are not trustworthy. The material prosecution witnesses have made inconsistent statements and contradicted each other. The contradictions and improvements in their version goes to the very root of the case. The findings that PWs 1, 2, 4 and 5 have supported the prosecution case are stated to be contrary to the record. PW-1, the complainant while in the witness box has denied any statement Ext.PW-1/A he made to the police, therefore, the very genesis of the occurrence and also registration of FIR Ext.PW-12/A on the basis thereof, looses its significance. It has come in the prosecution evidence itself that the accused was not only under fear but also perturbed because they both fallen into gorge. The prosecution evidence also reveals

that they both were living happily. The motive that the accused had relations with another lady Ashu is not at all proved as the prosecution has failed to produce any evidence in this regard. Even the I.O as per his version in cross-examination has not opted for associating said Ashu in the investigation of the case. In the absence of eye witness count to the occurrence, the prosecution has placed reliance on the circumstantial evidence which is not worthy of credence on account of missing links nor sufficient to arrive at a conclusion that it is the accused alone who had killed his wife, the deceased. The impugned judgment, as such, has been sought to be quashed and set aside.

12. Dr. Lalit K. Sharma, learned counsel representing the appellant-convict while drawing our attention to the evidence available on record has vehemently argued that the impugned judgment is not legally sustainable because the prosecution has failed to prove its case against the accused beyond all reasonable doubt. The prosecution story that the accused has killed his wife, the deceased on account of his extra marital relations is not at all proved. On the other hand, the plea of the accused he raised in his defence that his wife slipped away from the path leading through hill top and fallen into gorge and died thereby, according to Mr. Sharma finds support even from the prosecution evidence itself. When the statement Ext.PW-1/A is not proved to be made by the complainant PW-1, therefore, the very genesis of the occurrence is stated to be doubtful. The prosecution witnesses have clarified while in the witness box that on seeing the accused under fear and also perturbed, they suspected that it is he who may have killed his wife. The alleged recovery of axe Ext.P-8 is also of no help to the prosecution case. According to Mr. Sharma, the medical evidence is also not suggestive of that fatal injury has been caused on the forehead of deceased with axe Ext.P-8 alone as the doctor has not ruled-out the possibility of such injury likely to be caused by way of fall through a 'Dhank' on stone.

13. On the other hand, Mr. Narinder Guleria, learned Additional Advocate General has pointed out from the testimony of PW-4 Chet Ram that the accused slapped the deceased in the house of Dhani Ram and also dragged her there in the courtyard. According to him, this alone is sufficient to believe that it is he who had murdered her. Also that, his contradictory answers to the query of PW-1 Narainu and PW-2 Hukam Chand and whereabouts of his wife that "she had gone to the house of her parents" and "she had gone to her house" irrespective of she was lying unconscious in the '*nallah*' lead to the only conclusion that it is he alone who had killed her and by making contradictory statements qua her whereabouts, tried to conceal this fact from the persons including the complainant present there. It is also pointed out that the extra marital relations of the accused with another lady Ashu stand established, therefore, he, according to learned Additional Advocate General, had the motive to kill his wife, the deceased.

14. We have carefully analyzed the rival submissions and also the evidence available on record.

15. The present is a case where no eye witness count of the occurrence has come on record as the commission of alleged offence has not been witnessed by anyone. The present, therefore, is a case hinges upon the circumstantial evidence. In a case of this nature, the facts and circumstances of the case should be conclusive in nature and consistent only with the hypothesis of the guilt of the accused and not explainable on any other hypothesis except that the accused is guilty. Therefore, an onerous duty is casted on this Court to find out the truth by separating grain from the chaff. In other words, it has to be determined that the facts of the case and the evidence available on record constitute the commission of an offence punishable under Section 302 IPC against the accused or not. However, before coming to answer this poser, it is desirable to take note of the legal provisions constituting an offence punishable under Section 302 IPC. A reference in this regard can be made to the provisions contained under Section 300 IPC. As per the Section ibid, culpable homicide is murder firstly if the offender is found to have acted with an intention to cause death or secondly with an intention of causing such bodily injury knowing fully well that the same is likely to cause death of someone or

thirdly intention of causing bodily injury to any person and such injury intended to be inflicted is sufficient in the ordinary course of nature to cause death or if it is known to such person that the act done is imminently so dangerous that the same in all probability shall cause death or such bodily injury as is likely to cause death.

16. Culpable homicide has been defined under Section 299 IPC. Whoever causes death by way of an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death can be said to have committed the offence of culpable homicide. Culpable homicide is murder if the act by which death is caused is done with the intention of causing death. Expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degree. We are drawing support in this regard from the judgment of Apex Court in **Jagriti Devi vs. State of Himachal Pradesh, AIR 2009 SC 2869.**

17. The ingredients of culpable homicide amounting to murder, therefore, are: (i) causing death intentionally and (ii) causing bodily injury which is likely to cause death. In case the accused had motive to cause death of deceased, the eye witness count of the occurrence may not be required, however, where the motive is missing, the prosecution is required to prove its case with the help of the testimony of eye witnesses.

18. The present being a case of circumstantial evidence, the Court seized of the matter has to appreciate such evidence with all care and circumspection and rely upon only if establishes the guilt of the accused alone and rule out all possibilities leading to the presumption of innocence of the accused. The law is no more res integra as support can be drawn from the judgment of a Division Bench of this Court in ***Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550.*** The relevant extract of this judgment reads as follows:

> **[21]** It is well settled that in a case, which hinges on circumstantial evidence, circumstances on record must establish the guilt of the accused alone and rule out the probabilities leading to presumption of his innocence. The law is no more res integra, because the Hon'ble Apex Court in Hanumant Govind Nargundkar Vs. State of M.P, 1952 AIR(SC) 343 has laid down the following principles:
>
> > "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."
>
> **[22]** The five golden principles, discussed and laid down, again by the Hon'ble Apex Court in Sharad Birdhichand Sarda Vs. State of Maharashtra, 1984 4 SCC 116, are as follows:
>
> (i) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,
>
> (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (iii) the circumstances should be of a conclusive nature and tendency,
>
> (iv) they should exclude every possible hypothesis except the one to be proved, and
>
> (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused."

19. Similar is the ratio of the judgment rendered again by this Bench in ***State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (5) (HP) 213.*** The relevant text of this judgment also reads as follows:

> **"[10]** As noticed supra, there is no eye-witness of the occurrence and as such, the present case hinges upon the circumstantial evidence. In such like cases, as per the settled proposition of law, the chain of circumstances appearing on record should be complete in all respects so as to lead to the only conclusion that it is accused alone who has committed the offence. The conditions necessary in order to enable the court to record the findings of conviction against an offender on the basis of circumstantial evidence have been detailed in a judgment of this Court in Devinder Singh V. State of H.P, 1990 1 Shim LC 82 which reads as under:-
>
> "1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> 2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilt.
>
> 3. The circumstances should be of a conclusive nature and tendency.
>
> 4. They should exclude every possible hypothesis except the one to be proved AND
>
> 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
>
> **[11]** It has also been held by the Hon'ble Apex Court in Akhilesh Halam V. State of Bihar, 1995 Supp3 SCC 357 that the prosecution is not only required to prove each and every circumstance as relied upon against the accused, but also that the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The relevant portion of this judgment is reproduced here-as-under:-
>
> ".....It may be stated that the standard of proof required to convict a person on circumstantial evidence is now settled by a serious of pronouncements of this Court. According to the standard enunciated by this court the circumstances relied upon by the prosecution in support of the case must not only be fully established but the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for as conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt of an accused is to be inferred, should be conclusive nature and consistent only with the hypothesis of the guilt of the accused and the same should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together lead to the only irresistible conclusion that the accused is the perpetrator of the crime....."

20. This Court has again held in ***State of Himachal Pradesh Vs. Sunil Kumar, Cr. Appeal No. 326 of 2011 decided on 15.6.2017*** as under:

> *"13. It is more than settled that in case of circumstantial evidence, the circumstances from which inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and there be a complete chain of evidence consistent only that the hypothesis of guilt of the accused and totally inconsistent with his innocence and in such a case if the evidence relied upon is capable of two inferences then one which is in favour of the accused must be accepted. It is clearly settled that when a case rests on circumstantial evidence such evidence must satisfy three tests:*

.The circumstance from which an inference of guilt is sought to be drawn must cogently and firmly established.

.Those circumstances should be of a definite tendency un-erringly pointing out towards the guilt of the accused.

. The circumstances taken cumulatively, should form a complete chain so that to come to the conclusion that the crime was committed by the accused.

14. Equally well settled is the proposition that where the entire prosecution case hinges on circumstantial evidence the Court should adopt cautious approach for basing the conviction on circumstantial evidence and unless the prosecution evidence point irresistible to the guilt of the accused, it would not be sound and safe to base the conviction of accused person.

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

other hypothesis and should be consistent that only the guilt of the accused (See: Lakhbir Singh vs. State of Punjab, 1994 Suppl. (1) SCC 173)."

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

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

… … … … … …

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

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

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

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

22. The Apex Court again in ***Kanhaiya Lal*** vs. ***State of Rajasthan, (2014) 4 SCC 715*** has held as to how and under what circumstances the commission of an offence can be inferred on the basis of circumstantial evidence and last seen theory. This judgment reads as follows:-

"8. The prosecution case is that the appellant-accused Kanhaiya Lal committed the murder of Kala by strangulation and threw the body in the well. Nobody witnessed the occurrence and the case rests on circumstantial evidence. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and

> circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.
>
> 12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant."

23. Now, if adverting to the prosecution case, admittedly, the deceased was legally wedded wife of the accused. It is established from the prosecution evidence that on 29.4.2013, the accused and deceased had gone to attend the marriage of the daughter of one Dhani Ram, grand-daughter of PW-11 Bhagat Ram at village Khushla. They had their meal in the marriage and as per statement under Section 154 Cr.P.C Ext.PW-1/A, returned to their house at 6.45 p.m, whereas, as per version of complainant PW-1 at about 7.00 p.m. and that of PW-11 Bhagat Ram at about 5.30-6.00 p.m. Irrespective of the contradiction qua timing of their return, the fact remains that they returned to their house together because the accused has also not disputed this aspect of the matter, as is apparent from the trend of cross-examination of the prosecution witnesses conducted by learned defence counsel. The complainant had also gone to attend the marriage and he came back after the accused and deceased left the house of Dhani Ram. As per his version, on the way to the house, he heard cries of his brother, the accused who was asking '***Niche Aao, Niche Aao***' (come down). On recognizing that his brother, the accused is crying, he went down and noticed the accused lying on a stone in the nallah. His wife, as per prosecution case itself, was also lying in an unconscious condition at a distance of 10 feet from the place where the accused was lying in an injured condition on the stone.

24. The further case of the prosecution that on inquiry by PW-5 from the accused that where was his wife and the reply that she had gone to her parent's house and thereafter that she had gone to her house and the accused allegedly was not frightened but perturbed also, therefore, suspected to have killed his wife does not find support from the prosecution case. PW-5 has supported the prosecution case only up to the stage of he found the accused lying in an injured condition on a stone in the gorge and on inquiry about his wife, he told that she had gone to her parent's house and also that he called his father Maghu Ram (PW-5) and nephew Dev Raj to the spot. No doubt, he has also supported the prosecution case that sometime the accused was telling that his wife had gone to her parent's house and sometime that she had gone to her house, however, denied that it is due to such conduct of the accused, they apprehended he having killed his wife. He had denied any such statement made to the police. The prosecution has not opted for cross-examining him qua this part of its case. Therefore, its case that in view of the contradictory statements made by the accused, PW-1 believed that he had killed his wife stand falsified. Though, he admitted the statement Ext.PW-1/A having been made by him before the police and also identified his signature thereon, however, when cross-examined stated that he had reported to the police that his brother and his wife had fallen down the hill. It has also come in his cross-examination that the accused was living with his wife, the deceased happily. The forest where the accused and deceased had fallen is stated to be at a walkable distance of 20 minutes. He also admits that the accused was under fear and also disturbed and lying in a semi conscious condition in the nallah. The deceased was also lying in unconscious condition there. He admits that the accused remained disturbed for 3-4 days after the incident. He admits that the path in the forest at that place crosses through a '*Dhank*' (mountain) and the accused and deceased were lying at a distance of 200 meters below the path. He also admits that the accused did not speak with anyone. He had not suspected that it is the accused who had killed his wife nor made any such statement to the police.

25. Therefore, as per evidence having come on record by way of the testimony of complainant, PW-1 the prosecution case that on contradictory statement qua whereabouts of the deceased the accused made he and other persons present there suspected that it is he who had killed her, is not at all proved and rather as per his testimony both the accused and deceased fell into gorge from the path situated in the hill side. About the so called motive that the accused had relations with another lady Ashu and that it is for this reason he had killed his wife is also not proved at all. On the other hand, as per his version the accused and deceased were living happily. He has not even been cross-examined also on behalf of the prosecution as he has partly resiled from his statement Ext.PW-1/A qua material aspects while in the witness box, as pointed out hereinabove.

26. The another material prosecution witness is PW-2 Hukam Chand. He has not supported the prosecution case at all and rather turned hostile. He was declared hostile and cross-examined by learned Public Prosecutor. He tells us that on being told by Narainu, PW-1 that his brother, the accused had fallen into gorge and is lying in an injured condition there, he went to the spot. When inquired from the accused as to how he had fallen, no reply was given by him. Though as per this witness when asked the whereabouts of his wife, the deceased sometime had been telling that she had gone to her parent's house and sometime to her house, however, it is denied that on account of such conduct of the accused, they suspected that it is he who had killed her. The suggestion that he was not in a position to explain the injuries the accused sustained and that the accused was also lying in semi conscious condition have been admitted being correct. His further statement that it was a love marriage and that the accused and deceased both were living happily belies the case of the prosecution for the reason that if it is so, the accused had no occasion to kill his wife, particularly, when the so called motive to kill her is not proved at all. Therefore, PW-2 has also not supported the prosecution case at all. No doubt that part of the statement of a hostile witness which supports the prosecution case has to be relied upon and cannot be ignored. Therefore, if it is believed that the deceased and accused were lying in an injured condition on the spot and the deceased ultimately declared dead when taken to hospital, does not implicate the accused for the commission of her murder because nothing has come in his statement that he killed her by inflicting blow with axe Ext.P-8. On the other hand, when the accused himself was lying in an injured and unconscious condition on the spot with injuries on his person, how he could have killed the deceased, his own wife with whom as per the prosecution case itself he was living happily.

27. Another material prosecution witness PW-4 Chet Ram though claims that he cooked food in the house of Dhani Ram and even had been serving the guests came there to participate in the marriage and that he noticed the accused having slapped his wife 2-3 times in the courtyard of said Dhani Ram and dragged her there. His testimony in cross-examination that he is also the resident of same village to which the accused belongs, however, not in speaking terms with him, leads to the only conclusion that his alleged statement qua slapping and dragging the deceased by the accused is not correct and rather made for some ulterior motive may be on account of enmity between him and the accused as there can't be any other and further reason of their non-speaking terms, irrespective of belongs to same village. It is unbelievable that this witness had any occasion to see the accused slapping his wife at a distance of 150 feet in the courtyard, that too, when he having cooked the food and even serving the same to the guests also. He, therefore, had no occasion to see any such activity going on there. Above all, as per his statement in cross-examination in the marriage about 200 persons were present, therefore, it is not known as to why anyone else has not noticed the accused having slapped his wife and also dragged her and why effort to associate any other person(s) to support this part of the prosecution case has not been made. When this witness admits that ladies were having food separately, whereas, the gents separately and that the wife of PW-1 Narainu was also with the deceased, it is she who would have thrown some light qua this aspect of the matter. However, it is not known as to why she has not been

examined. Interestingly enough, his statement was not recorded by the police as he stated while in the witness box. If it is so, his statement while in the witness box cannot be relied upon and has to be ignored because he was not associated during the investigation of the case by the police.

28. PW-5 Maghu Ram is the father of the accused. He has also not supported the prosecution case and was declared hostile. It has come in his cross-examination conducted on behalf of the prosecution that he went to the place where the accused and deceased were lying on hearing noise. When reached there, he noticed that the accused and deceased both had fallen through a '*Dhank*' into gorge. On inquiry from the accused as to where his wife was, he told that she had gone to her parent's house. The accused and deceased, according to him, both had gone to attend the marriage of daughter of Dhani Ram. Though he admits the relations between the accused and another lady Ashu and that accused used to beat his wife, the deceased. He has also admitted that this was the cause of killing the deceased by the accused. However, when further cross-examined by learned defence counsel, it is stated that his memory is weak. Also that, he is illiterate. The marriage of the accused and deceased was love marriage. As per his further version, his statement was not recorded by the police. Both the accused and deceased were lying on the spot in unconscious condition. Both were taken to civil hospital, Sundernagar for treatment. The deceased was declared as brought dead in the hospital by the doctor on duty, whereas, the accused gained consciousness after two days. He has also admitted that path at that place is narrow and is through forest. If one does not walk cautiously, may fall down into gorge. Therefore, PW-5 has also not supported the prosecution case at all. His statement in cross-examination conducted on behalf of the prosecution that the accused had relations with another lady Ashu and it is for this reason he has killed his wife, the deceased cannot be believed to be true, particularly when it has further come in his cross-examination conducted by learned defence counsel that he is illiterate and his memory is weak. According to him, his statement was not recorded by the police. However, the prosecution has not associated said Ashu during the course of investigation of the case nor cited her as a witness. Had it been so, the defence would have an opportunity to cross-examine her. Therefore a passing reference in the statement of this witness and also in the prosecution case is not sufficient to arrive at a conclusion that illicit relations of the accused with said Ashu was the cause of killing the deceased by him.

29. The another circumstance which the prosecution has pressed in service against the accused is the recovery of alleged weapon of offence, axe Ext. P-8, consequent upon the so called disclosure statement Ext.PW-7/A he allegedly made in the presence of HC Chaman Lal (PW-7) and HC Inder Dev of Police Station, BSL Colony, Sundernagar. There is, however, no grain of truth in this part of the prosecution case because from the testimony of HC Chaman Lal (PW-7) who was posted in police station, BSL colony, Sundernagar itself, it cannot be believed by any stretch of imagination that the accused has made the disclosure statement Ext.PW-7/A. As a matter of fact, the disclosure statement and recovery effected on the basis thereof otherwise is also a weak type of evidence. The statement under Section 27 of the Act leading to discovery of facts exclusively in the knowledge of maker thereof and if such facts ultimately discovered in consequence of the statement so made, some guarantee should be there that information given by the accused was true and it is only in that situation such evidence can be relied upon to fasten liability on the accused. In the case in hand, PW-7 no doubt has stated while in the witness box that the disclosure statement Ext.PW-7/A was made by the accused in his presence while in custody in the police station. The prosecution, however, has failed to explain as to what necessitated to record the statement only in the presence of official witnesses i.e. two Head Constables posted in the same police station. On the other hand, BSL colony, Sundernagar is a thickly populated area which falls under the Municipal Committee, Sundernagar and it cannot be believed by any stretch of imagination that no other person from the locality or from the area which falls within the jurisdiction of this police station came there in connection with some work or otherwise.

PW-7 when cross-examined has expressed his inability to tell as to how many persons visited the police station on that day. He has not denied that no-one from the general public came to the police station on that day. Meaning thereby that the I.o. has intentionally and deliberately fabricated the disclosure statement Ext.PW-7/A which was not made by the accused. In order to show that the same has been made by the accused two official witnesses have been associated, again intentionally and deliberately to ensure that the prosecution case which to his own knowledge was false supportedby them during the course of trial. The testimony of HC Chaman Lal (PW-7), therefore, can't be believed to be a genuine and acceptable evidence qua this aspect of the matter.

30. Above all, axe like Ext. P-8 is generally available in every house, particularly in rural areas. When the prosecution witnesses themselves have stated that the accused was lying in an injured and semi unconscious condition, whereas, the deceased at a distance of 10 feet therefrom in an unconscious condition, which as per the findings recorded hereinabove by way of fall into gorge through 'Dhank' from the path, the accused had no occasion to have assaulted the deceased with the axe Ext.P-8. Otherwise also, as per the prosecution case itself, the accused and deceased were on there way to home from the marriage. The house was away from the spot where both were lying in the nallah in injured condition. It is not understandable as to when and how the axe was brought by him which was in the house. The prosecution case, as a matter of fact, qua this aspect of the matter is palpably false. There is no question of using axe by the accused to kill the deceased as it is for this reason, no blood was detected thereon, as is apparent from the perusal of the report of seriologist Ext.P-X. Though it has come in the disclosure statement Ext.PW-7/A that the axe was washed by the accused with water after the commission of offence, however, when the prosecution story is silent. On the other hand, as per the prosecution case itself, he was taken to hospital along with the deceased from the spot itself. When he washed the axe and kept the same in the roof of slateposh house, no plausible explanation is forthcoming qua this aspect also. It is also doubtful that the injury on the forehead of the deceased was caused with axe Ext.P-8 alone. No doubt, in the opinion of Dr. Vivek Modgil (PW-6), the two injuries marked as star on the person of deceased could have been caused by a sharp edged weapon, whereas, the remaining with blunt trauma. In his cross-examination, the suggestion that such injuries can also be caused by way of fall on a sharp edged stone though was denied at the first instance being wrong, however, in the same breath clarified that the injury on the skull which as a matter of fact was fatal could have also been caused by way of fall on stone from height. Therefore, the opinion of doctor is also not conclusive that fatal injuries on the person of deceased could have not been caused otherwise and only with the axe Ext.P-8. The I.O. with a view to book the accused by hook and crook in a false case had fabricated the evidence which approach is not at all appreciated. The accused, a member of weaker section of the society, hence a poor man has been implicated falsely in this case to the reasons best known to the I.O, PW-14.

31. When the disclosure statement Ext.PW-7/A is not proved as discussed in para supra, the discovery of axe Ext.P-8 vide memo Ext.PW-3/A is also not proved. No doubt, Ext.PW-3/A has been witnessed by Durga Dass (PW-3) and one Jitender Kumar. Jitender Kumar has not been examined. As regards, Durga Dass (PW-3), he has only stated that the accused got recovered one axe at village Khushla where he was brought by the police. What to speak of recovery of axe Ext.P-8 from the roof of a room of house, this witness has not even deposed that the same was recovered from the house of the accused and rather as per his statement recorded hereinabove, the recovery was effected in village Khushla. Above all, it has come in his cross-examination that he did not go inside the house of the accused. He admits that spot is a secluded place and the path is narrow. The nallah is deep from the path. His testimony, therefore, supports the defence version that they fell down through 'Dhank' from path. Even if the recovery of cellphone and watch etc., is on the spot the same is hardly of any help to the prosecution case because the accused and deceased had fallen from 'Dhank' into gorge and lifted in injured condition therefrom. The cellphone, watch and chappal etc. may have been recovered

therefrom, but such recovery does not connect the accused with the commission of offence.

32. As regards the recovery of jean pant and shirt of the accused, he allegedly worn at the time when brought in injured condition from the nallah to the road, according to PW-5 Maghu, the father of the accused, the same were handed over by him to the police in the police station on asking by them. Therefore, though PW-3 has stated about the same produced by PW-5 on the spot, however, the evidence to the contrary having come on record by way of testimony of PW-5 belies the statement of PW-3. Above all, even if jean pant and shirt of the accused soiled with blood etc. were taken in possession, again is of no consequence for the reason that after having fallen down through 'Dhank', he may have received injuries on his person and the blood oozed out as well as the same soiled. The recovery of pant and shirt of the accused is, therefore, also of no help to the prosecution case.

33. The remaining prosecution witnesses HC Nand Lal and Constable Chet Ram PW-8 and PW-9 respectively are formal because PW-8 has entered rapat rojnamcha Ext.PW-8/A on receipt of information qua a woman brought to the hospital and has been declared dead, whereas, PW-9 has taken the case property to the Forensic Science Laboratory on being handed over by Inder Dev (PW-13), MHC police station. PW-10 Dharam Chand is the Patwari concerned who has issued the jamabandi Ext.PW-10/A and tatima Ext.PW-10/B to the police. PW-12 ASI Trilok Chand has made an endorsement Ext.PW-12/B on the back side of statement Ext.PW-1/A. He has also recorded the FIR Ext.PW-13/A. During the investigation of the case, he has recorded the statement of Dharam Chand (PW-10) and collected the copy of jamabandi Ext.PW-10/A and tatima Ext.PW-10/B. Inder Dev (PW-13) was posted as MHC in police station, BSL colony Sundernagar at the relevant time. He has deposed about the case property handed over to him from time to time and the entries thereof made by him in the malkhana register. He has also deposed about the case property having been sent to Forensic Science Laboratory and the report(s) received therefrom. PW-14 Inspector Binny Minhas, the then SI/SHO police station, BSL, colony Sunderngar is the Investigating Officer. He has deposed about the manner in which he conducted the investigation. When cross-examined it is, however, stated by this witness that statement of lady namely, Ashu was not recorded by him. Also that, he has not collected any evidence regarding the relations of the accused with said Ashu. It is denied that the accused also received injuries on his person. Though the suggestion that the accused had multiple fracture in his leg, he expressed his inability to answer this question, however, in the same breath admitted that the accused was limping. Meaning thereby that the accused had also received injuries on his person but the I.O. has avoided to answer the suggestions so put to him by learned defence counsel deliberately to the reasons best known to him. He admits that the distance between spot and the house of the accused was about 1-½ kilometer. Such distance, according to him was covered by the residential houses of the people. Being so, how the accused could have killed the decesed in view of 'Abadi' nearby. His version that there was no path at the place where the deceased was lying is absolutely baseless for the reason that the spot as per the prosecution evidence itself is inside the jungle and the path was on hill side from where she had fallen. Therefore, the version of the I.O. in his cross-examination conducted by learned defence counsel leaves no manner of doubt that the investigation was not conducted in a fair manner and rather with a view to implicate the accused by hook or crook in this case falsely.

34. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C has denied the entire prosecution case either being wrong or for want of knowledge and rightly so because, in our opinion, he has not murdered his wife and rather she died by way of fall through '*Dhank*' into gorge from the path while on the way back to her house in the company of accused after attending the marriage in the house of Dhani Ram. The plea, the accused raised in his defence that his wife Manjeet Kaur had died due to fall from the hill finds support from the prosecution evidence itself, which has come on record by way of the testimony of PW-1, the complainant, Hukam Chand (PW-2)

and Maghu Ram (PW-5), the father of the accused has also substantiated the same while in the witness box.

35. In view of the discussion hereinabove, the material prosecution witnesses i.e. the complainant PW-1 Narainu, PW-2 Hukam Chand and PW-5 Maghu Ram have not supported the prosecution case and rather their testimony substantiates the plea that the accused and deceased slipped from the path on hill top and fallen into gorge through '*Dhank*' and received injuries on their person. The alleged case of prosecution that the accused immediately before the commission of offence slapped and also dragged the deceased in the courtyard of the house of Dhani Ram in the presence of PW-4 Chet Ram for the reason hereinabove also inspires no confidence. The recovery of axe Ext.P-8 and other articles consequent upon the alleged disclosure statement made by the accused is not at all established as the testimony of sole official witness PW-7 HC Chaman Lal associated to prove this part of the prosecution case lends no assurance thereto. Therefore, when the accused and deceased as per prosecution itself were leading happy married life, there was no occasion to the former to have killed the latter in the manner as claimed by the prosecution. The alleged prosecution story that the accused had love affairs with another lady Ashu is not at all proved on record. Even as per the testimony of the I.O. PW-14, he neither associated said Ashu nor was she interrogated during the investigation of the case. The alleged recovery of paper slip having written "Dev love Ashu" from inside the pen recovered from the spot is also not worthy of credence for the reason that in which portion of pen, the paper slip was kept inside it, remained unexplained. On the other hand, in our considered opinion, in the pen, there is no space for keeping any paper slip.

36. The present in view of above is, therefore, a case where learned trial Court has not appreciated the evidence available on record in its right perspective and to the contrary recorded the findings of conviction against the accused on the basis of conjecture and surmises. Such an approach has certainly resulted into miscarriage of justice to the accused because he has not only been convicted on the basis of highly inadmissible evidence but also sentenced to undergo imprisonment for life. The impugned judgment, as such, is neither legally nor factually sustainable. It is, therefore, not possible to sustain the impugned judgment and sentence.

37. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the conviction and sentence imposed on the appellant-convict Devi Ram are set aside and he is acquitted of the charge framed against him under Section 302 and 201 IPC, by giving him benefit of doubt. He is directed to be released from the custody forthwith unless required otherwise. The Registry to prepare the release warrants accordingly.

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

Anil Kumar ....Petitioner.

Vs.

Shri Tara Dutt Sharma .....Respondents.

CMPMO No.: 119 of 2019
Date of Decision: 19.08.2019

Code of Civil Procedure, 1908 – Order VI Rule 17 – Amendment of pleadings – Delay – Held, application for execution of decree of permanent prohibitory injunction was filed by decree holder on 12.11.2010 – JD filed his reply on 28.2.2012 – Issues were settled and after evidence of decree holder qua disobedience of decree, judgment debtor took nine opportunities for adducing his evidence- Thereafter, JD seeking amendment in reply filed by him – Not his case that amendment was necessitated by developments occurring subsequent to filing of execution application or that it could not have been

effected earlier despite due diligence – Application not bonafide – Executing court was justified in dismissing said application – Petition dismissed. (Paras 9 & 10)

For the petitioner: Mr. Y.P. Sood, Advocate.

For the respondents: Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner/Judgment Debtor has challenged order, dated 05.03.2019, passed by the Court of learned Senior Civil Judge, Shimla in CMA No. 174-6 of 2018 in Execution Petition No. 55/10 of 10/13, vide which, an application filed by the petitioner under Order VI, Rule 17 of the Code of Civil Procedure for amendment in the reply filed to application filed by the Decree Holder under Order XXI, Rule 32 of the Code of Civil Procedure, has been dismissed.

2. Brief facts necessary for the adjudication of present petition are that the respondent herein filed a suit against the petitioner, i.e. Suit No. 213/1 of 97/93 for permanent prohibitory injunction, which was decreed in favour of the respondent vide judgment and decree, dated 27.09.1999, whereby the petitioner herein was restrained from interfering in any manner in the ownership and possession of land comprised in Khata/Khatauni No. 6/6 min, Khasra No. 22, measuring 707 square feet of the plaintiff, situated in Mauja Kufri, Koti Kufri Bazaar, Pargana Dharthi, Tehsil and District Shimla.

3. An application was filed under Order XXI, Rule 32 read with Section 151 of the Code of Civil Procedure by the Decree Holder before the learned Executing Court with the following prayers:

> *"(i) The respondent/JD may be ordered to be detained in civil prison and his property be also attached till he comply with the decree passed by this learned Court.*
>
> *(ii) That the respondent/J.D. be directed to remove all construction, projection extended on the set backs of the applicant upon Khasra No. 392, remove drainage pipes and obstruction upon Kh. No. 397, the common passage leading to the house of the applicant and restore the site to its original condition at the time of passing of the decree by appointing local commissioner under whose supervision the decree passed by this Court be complied with.*
>
> *(iii) Any other relief which this learned Court deems fit may also be granted in favour of the applicant in the interest of law and justice."*

This application was filed in November, 2010. Reply to the said application was filed by the petitioner, who denied the allegations made in the application.

4. The contention of the Decree Holder in the application filed before the learned Executing Court was that the Judgment Debtor had deliberately and willfully disobeyed the decree passed against him by encroaching upon the portion of set backs left by the Decree Holder by constructing a residential room on the common passage in Khasra No. 397, which was on the back side of shops standing on Khasra Nos. 395, 394 & 393 and that respondent had raised construction behind Khasra No. 393 and closed the passage leading towards Khasra No. 392 of the Decree Holder. As already mentioned above, the same was denied by the Judgment Debtor by way of his reply, which was filed in the month of February, 2012.

5. Thereafter, an application was filed by the Judgment Debtor under Order VI, Rule 17 read with Section 151 of the Code of Civil Procedure before the learned Executing Court praying for permission to amend the reply filed by him to the application filed under Order XXI, Rule 32 of the Code of Civil Procedure by the Decree Holder. It was mentioned in the application that the Judgment Debtor intended to amend para-4 of its

reply by incorporating therein the fact that the decree stood passed on the basis of old revenue record, but Execution was preferred on the basis of new record, i.e., post settlement revenue record and as these facts came to the knowledge of the Judgment Debtor only while preparing the case for leading evidence, therefore, the amendment was being sought as it was necessary and essential for proper adjudication of the controversy.

6. This application stands rejected by the learned Court below by way of impugned order. Learned Executing Court while dismissing the application held that Judgment Debtor had suffered a decree of permanent prohibitory injunction on 27.09.1999. Decree Holder filed a petition under Order XXI, Rule 32 of the Code of Civil Procedure on 12.11.2010, alleging that Judgment Debtor has disobeyed the decree by encroaching upon the land of the Decree Holder. Reply to the petition stood filed by the Judgment Debtor on 28.02.2012, denying the allegations of the Decree Holder. Issues stood framed on 20.03.2012 and Decree Holder concluded his evidence on 12th July, 2017. Since 11th August, 2017, the case was being listed for recording J.D's evidence and it was the 9th opportunity on 13.09.2018, when JD moved the application under Order VI, Rule 17 of the Code of Civil Procedure, seeking amendment of the reply filed on 28.02.2012. Learned Court after discussing the respective stand of the parties, held that the very fact that application stood filed after availing nine opportunities to lead evidence revealed smacks of *malafides* on the part of the Judgment Debtor and that it could not be demonstrated that application could not have been filed earlier by the Judgment Debtor despite due diligence. Learned Court also held that the proposed amendment, if allowed, would change the nature of the case and result into a *de novo* trial. On these basis, learned Executing Court dismissed the application filed by the Judgment Debtor by holding that the proposed amendment was not necessary and essential for proper adjudication of the matter in hand.

7. Feeling aggrieved, the Judgment Debtor has filed the present petition.

8. I have heard learned counsel for the parties and have also gone through the impugned order as well as the other documents appended with the petition.

9. As has been observed by the learned Executing Court in the impugned order, it is not in dispute that the decree was passed in favour of the Decree Holder and against the Judgment Debtor of permanent prohibitory injunction on 27.09.1999. It is also not in dispute that the petition under Order XXI, Rule 32 of the Code of Civil Procedure was filed as far back as on 12.11.2010 and the Judgment Debtor filed his reply to the said application on 28.02.2012. Application seeking amendment in the reply so filed, was filed in September, 2018. There is no cogent explanation given in the application as to why the application praying for amendment of the reply could not be filed earlier. It is not the case of the petitioner that proposed amendments were subsequent developments and, therefore, the same could not be incorporated at the time when the reply was filed earlier or by moving an appropriate application for amendment of the reply within some reasonable time after filing of the reply. This clearly demonstrates that the petitioner has not been able to demonstrate that proposed amendments could not be incorporated earlier in the reply despite due diligence.

10. There is yet another relevant point and the same is filing of the application seeking amendment of the reply after availing nine opportunities to lead evidence. First of all, this Court fails to understand as to why learned Executing Court gave nine opportunities to the petitioner to lead his evidence. Be that as it may, it is but evident from the record that as the petitioner had failed to lead his evidence before the learned Executing Court despite having availed nine opportunities, filing of the application under Order VI, Rule 17 of the Code of Civil Procedure at a belated stage was nothing but an afterthought and the application was filed just to gain some more time. It is reiterated that whether or not the proposed amendments, be it in the suit or written statement, application or reply, as the matter may be, are necessary for the adjudication of the *lis* or not, is an issue which the Court has to take into consideration after it comes to the conclusion that the proposed amendments could not be earlier incorporated in the

pleadings by the party concerned despite due diligence. In the present case, the petitioner has not been able to pass the said test, as it is writ large on the face of the record that the application was filed at a belated stage, i.e., after six years of the reply been filed, amendment in which was sought and that too after availing nine opportunities to lead evidence.

11. In this view of the matter, as this Court finds no perversity with the order, dated 05.03.2019, passed by the learned Court below which has dismissed the application filed under Order VI, Rule 17 read with Section 151 of the Code of Civil Procedure, this petition being devoid of any merit, is dismissed. Miscellaneous applications, if any, also stands disposed.

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

Ashwani Kumar & others ....Petitioners.

Versus

State of H.P. & others ....Respondents.

CWP No. 5515 of 2012
Reserved on 20.8.219
Date of decision: 30.8.2019

Constitution of India, 1950 – Articles 14 & 226 – Equality before law – Parity in pay – Writ jurisdiction – Held, parity in salary can be claimed by a worker either individually or collectively only upon espoused parity being proven to be completely working on all parameters – Mere similarity of designation or nomenclature of posts is not sufficient. (Para 3).

For the petitioners: Mr. Sanjeev Kumar, Advocate.

For the respondents: Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel Dy. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The petitioners, are, rendering service, as, Accountants-cum-Clerks in Kasturba Gandhi Balika Vidyalayas, (for short, as, KGBVs), in, different districts, of, State of Himachal Pradesh. It is averred, on, affidavit that certain revised guidelines, stand issued, by the authority concerned, for, hence implementing, the, Kasturba Gandhi Balika Vidyalayas Scheme, and, therethrough, a, decision has been taken, by the respondent concerned, to merge the afore scheme, with the Sarva Shiksha Abhiyan (SSA) programme w.e.f. 1.4.2007, (a) and, thereafter it is further averred, that, the salary drawn by the similarly situate Accountants/Clerks, appointed under SSA Scheme, be directed to be the salary,also disbursable to the petitioners, as they, perform work similar, as, performed by the Accountants-cum-Clerks appointed under the SSA Scheme.

2. Tritely, the petitioners, are, claiming parity, of, pay, with, similar situate Accountants-cum-Clerks, appointed under the SSA Scheme. The afore conundrum appertaining, to, the parity of pay, inter-se, similar situate employees, is, to be resolved, (a), in consonance with paragraph-29, of the verdict, rendered, by the Hon'ble Apex Court, in case titled, Oshiar Prasad & others vs. Employers in Relation to Management of Sudamdih Coal Washery, of, M/s Bharat Coking Coal Ltd. Dhanbad, Jharkhand, reported in 2015 (4) SCC. The relevant paragraph-29 whereof, is, extracted hereinafter:-

> "it can safely be noted that merely because the workers in both the references were working in one project by itself was not enough to give them any right to claim parity with the claim of others. So long as the parity was not proved on all the relevant issues arising in the case, no

worker whether individually or collectively was entitled to claim the relief only on the basis of similarity in the status qua the employer."

3. A perusal of the herein above extracted relevant paragraph, (a) visibly underscors, qua, the requisite parity being claimable, only upon the espoused parity being proven, to be completely working, on, all parameters/ issues, arising in the lis, at hand, (b) and, it being unclaimable, either individually or collectively, only, on the fulcrum of similarity, in the status, qua, the employer/ employment, (c) and, bearing in mind, the, afore trite expostulations of law, borne in the apposite herein above extracted paragraph, of, the verdict, rendered, by the Apex Court, (d) thereupon the mere factum of similarity of designation, of the petitioners herein, vis-a-vis, designation of employees, appointed, under, the SSA Scheme, would not work, vis-a-vis, the petitioners, unless, all the afore apt expostulated connectivity(ies), (e) appertaining to all, relevant parameters or issues, as, arise in the instant lis, are, also proven, to be holding visible similarities, with, all those employees, hence holding, a, similar thereto designation, and, who, are, appointed under the SSA Scheme.

4. For determining whether the afore requisite echoings hence appertaining, vis-a-vis, all, the, afore issues, and, parameters, and, also qua therethrough(s) hence, also, parity existing, inter-se the petitioners, and, the employees appointed, under, the SSA Scheme, (a) and, obviously when the afore requisite determinants, are, borne in the terms, and, conditions of the appointment, of, employees, under, the afore scheme(s), (b) and, in the quantum of volume of work, performed by the petitioners, and, by the other purportedly similarly situate, with them, employees, as, appointed under the SSA Scheme, (c) and rather with averments, standing borne, in the reply made, on, affidavit, and, as furnished by the contesting respondents, and, their hence making, visible displays, qua, the petitioners, being engaged, under, guidelines, borne in a specific policy, formulated, by the Government of India, (d) and, all the admissible remunerations being also governed hence therethrough, and, with also averments being borne, qua all the petitioners, through, a, contract executed inter-se them, with, the department concerned, hence accepting all the terms and conditions, embodied, in the requisite policy, inclusive, of, admissible remunerations, vis-a-vis, them, (e) rather, thereupon, theirs being estopped to espouse, qua, theirs being entitled, to, a higher quantum of salary, vis-a-vis, the, relevant contractually agreed salary, by them, (f) also, the predominant factum espoused in the afore affidavit(s), sworn by the authorized officers, of, the respondents, is, qua, the, petitioners managing the accounts, only, of, a particular hostel, hence carrying, a, numerical strength of 15 girls, (g) whereas, Accountants-cum-Clerks, appointed under the SSA Scheme, being, enjoined to render service, in, the entire district(s) concerned, and, also theirs' managing accounts, of, blocks also, (h) and, with all the afore averments, made, on affidavit, sworn, are, not strived, to, be contested, by the petitioners, through, any rejoinder, furnished thereto, by them/, and, when hence they acquire vericity, (i) and, when all the afore echoings, carry unfoldment qua apparent contradistinctivity(ies), vis-a-vis, the nature(s) of engagement, inter-se, the, petitioners, and, the purportedly similar situate, employees, rather emerging, (ii) and, conspicuously, with the petitioners through executing a contract, hence accepting the remunerations, disbursable to them, as, borne in the requisite governing policy, (iii) and, also when there is gross contradistinctivity, vis-a-vis, the volume of work, performed by the petitioners, and, the Accountants-cum-Clerks, employed, under the SSA Scheme, (iv) thereupon all the afore visible contradistinctivity(ies), inter-se, the, apt employment(s) under SSA Scheme, and, the petitioners herein, rather fails, to bring, to, the fullest satiation, hence, the, expostulation(s) of law, borne in the apposite herein, apt, above extracted paragraph, borne, in, the verdict, rendered by the Apex Court, (v) thereupon within the ambit of the afore expostulations of law, the petitioners, are, not entitled to parity of pay, vis-a-vis, the Accountants-cum-Clerks, as, appointed, under, the SSA Scheme.

5. In view of the above observation(s), there is no merit in the instant writ petition, and, it is dismissed accordingly. All pending applications, also stand disposed of.

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

Bhagat Singh .....Appellants

Versus

State of H.P. .....Respondent.

RSA No. 339 of 2007
Reserved on: 22.8.2019
Date of Decision: 30.8.2019

Himachal Pradesh Village Common Lands Vesting And Utilization Act, 1974 - Section 3 – **The Punjab Village Common Lands (Regulation) Act, 1961** - Section – 4 - Vestment of common land in State – Validity –Held, land continuously recorded in possession of Panchayat/ State – Plaintiff not found in cultivatory possession of any part of village common land - Subsequent stray entries showing plaintiff to be in possession of land, palpably wrong – Plaintiff can not be declared to have become owner of any such land -RSA dismissed. (Paras 7& 8)

For the appellant: Mr. R. K. Gautam, Sr. Advocate with Ms. Megha Kapur Gautam, Advocate.

For the respondent: Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel Dy. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal, stands, directed by the aggrieved plaintiff, against, the concurrent verdicts of dismissal, pronounced, respectively, by the learned trial Judge, upon, Civil Suit No. 117/91, and, upon Civil Appeal No. 300/2K RBT 169/04/2000, by the learned First Appellate Court, wherethroughs, his espoused decree for rendition of relief, of, permanent injunction, and, for possession, vis-a-vis, suit khasra numbers, and, against the defendant, stood declined.

2. Briefly stated the facts of the case are that the one Gulab Singh son of Sh. Sucheta resident of village Jatoli alias haroly, Tehsil and District Una was the land owner in the village with a share in shamlat land of the village according to Shajra nasab. The said Sh. Gulab Singh sold 53 kanals 17 marlas land along with share in shamlat land to late Sh. Rai Bahadur Jodha Mal vide registered sale deed dated 26.6.1934 for a consideration of Rs. 3,000/- and a mutation to this effect was sanctioned on 14.2.1935 vide mutation No. 1112. Due to this sale Rai Bahadur Jodha Mal became owner of Shamlat land measuring 108 kanals 8 marlas along with proprietary land measuring 53 kanals17 marlas and came in exclusive possession of the same. He continued in exclusive hissedari possession of shamlat land measuring 119kanals 2 marlas till his death and after his death his successors namely Sh. Joginder Lal and Sh. Jatinder Lal etc. inducted the plaintiff as non-occupancy tenant over 68 kanals of shamlat land i.e. suit land on payment of yearly rent of Rs. 10/- and since then he is continuing in possession of the suit land as tenant. He has planted mango and other fruit bearing trees and has built his abadi over the suit land. He has spent about Rs. 35,000/- in improving and reclaiming the suit land and now the same is irrigate done. An orchard is also thereon it. It is further alleged that the suit land never vested into Panchayat or the State Government but a wrong entry was incorporated in the revenue record by the revenue official showing 47 share of the suit land in the ownership of Gram Panchayat/State Government by way of vestment which was corrected by the order of Assistant Collector-I Grade through Fard Badar dated 27.8.1969. The plaintiff has been claiming in possession of the suit land under the owners and the defendant has no right, title or interest in it but the Collector, Una at the instance of some interested and influential

person made an entry in favour of the owners vide his order dated 30.4.91. This order of Collector is beyond jurisdiction and he has no authority to change the entry incorporated in the series of jamabandis. The said order is still subjudice before the Divisional Commissioner Kangra at Dharmshala. On the basis of that order dated 30.4.1991 the defendant is now threatening to dispossess the plaintiff from the suit land. Hence the plaintiff filed a suit for issuance of permanent injunction restraining the defendant to interfere with the possession of the plaintiff over the suit land in any manner.

3. The defendant contested the suit on the grounds that the suit land was vested earlier with the Panchayat in the year 1955 and a mutation to this effect was sanctioned in favour of the panchayat vide mutation No. 2057 dated 7.2.1955 and the possession of the same remained with the panchayat and thereafter in the year 1976 it vested in State of H.P. and a mutation to this effect was sanctioned on 13.2.1976 vide mutation No. 2959. So the plaintiff has no right, title or interest with the suit land and the order of Collector dated 30.4.1991 is correct, legal and in accordance with law, and, it is denied by the defendant that the plaintiff has done plantaiton in the suit land or he improved the same. Rather it is alleged that since the suit land had already been vested in the panchayat, there was no occasion to induct the plaintiff as tenant on the suit land and the entry regarding this has been procured by the plaintiff wrongly. After coming into force of H.P. Village Common Lands Vesting and UtilisationAct,1974, the suit land has vested in theState Government of H.p. free from all encumbrances and more over its nature is 'Kharaitar" and 'Khad' and the same is not in possession of the plaintiff and besides this the defendant raised legal objections regarding maintainability, non-joinder, cause of action and non-compliance of the provisions of Section 80 CPC and prayed for the dismissal of the suit.

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

1. Whether the plaintiff is entitled for the relief of permanent injunction as alleged? OPP
2. Whether the plaintiff has no cause of action and the suit is not maintainable? OPD
3. Whether the suit is bad for non-joinder of necessary parties? OPD
4. Whether this Court has no jurisdiction to try the suit? OPD
5. Whether the suit is bad for want of notice under Section 80 CPC? OPD
6. Relief.

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

6. Obviously, through the instant Regular Second Appeal, cast, before this Court, by the plaintiff, he seeks reversal of the concurrent pronouncements, made, against him, by both the learned Courts below.

7. This Court, on 6.8.2007, had, admitted the appeal, instituted by the plaintiff/appellant against the judgment and decree, rendered, by the learned first Appellate Court, upon substantial questions of law No. 1 and 4, occurring at page No.4, of the paper book, for, hence its making, an adjudication thereon:-

1. Whether the Shamlat land can vest in the Panchayat under the Punjab Act if the owner is in possession of the land before 26th January, 1950?
2. Whether the courts below are legally duty bound to decide all the material facts and application in the case if not decided what is its effect.

Substantial questions of Law No.1 & 4:

7. The veracity, or efficacy of the entries,, occurring in khasra girdawari, and, subsequently carried in, the, jamabandi appertaining, to the year 1973-74, and, vis-a-vis, the suit khasra numbers, reflections, in, jamabandi whereof, are made, on, anvil of rapat-roznamcha, made by the halqua patwari, on 20.4.1972, is, rather denuded, for, the reasons, (a) the suit khasra numbers, under, unchallenged mutations, respectively recorded, on 20.1.1955, and, on 7.2.1955, and, wherethroughs, after the vestment, of, the suit khasra numbers, in the State of Himachal Pradesh, it being vested in the Panchayat concerned, and, possession thereof, being, also delivered, vis-a-vis, the Panchayat concerned, (b) conspicuously rather in contemporaneity, vis-a-vis, makings, of, all the afore mutations, no apposite entries, in, the column, of, possession, in the relevant jamabandi, hence being cast (c) thereupon, the occurrence of, a, stray entry, in the khasra girdawari, hence in the jamabandi, prepared subsequent, to, making, of, the afore orders, is, inferred, to, stand cast through, sheer concoction(s), and, manipulation(s), (d) importantly with khasra girdawari, appertaining to the suit khasra numbers, and, rojnamcha borne, in,ext. PW-5/A, being respectively drawn subsequently, and, earlier, vis-a-vis, theirs respective makings, (e) and, when the base, for the change in possession(s), vis-a-vis, suit khasra numbers, is, the khasra girdawari, (f) thereupon the rapat rozmancha, drawn and prepared prior, to the preparation, of the girdawari, by the halqua patwari, is, imbued, with, a, deep suspicion, (g) as aptly concluded, in an order recorded, in, Ext. DW-2/C, by the Divisional Commissioner, while affirming the order rendered by the Deputy Commissioner-cum-Collector concerned, (h) also wherethrough, the afore manner of change, in the entry of possession, vis-a-vis, the suit khasra numbers, were, conjointly deprecated, (i) thereupon though dehors, the pendency of proceedings, appertaining to the requisite lis, hence before the Financial Commissioner concerned, rather the effect of the afore unchallenged mutations, recorded, on 21.1.1955, and, on 7.2.1955, (h) is, qua when reiteratedly, in contemporaneity, vis-a-vis, recording of the afore mutations, no entry of possession, standing borne, in the relevant revenue record, hence reflecting the plaintiff, to be in possession of the suit khasra numbers, (i) thereupon, the, much belated therefrom, occurrence, of, a stray entry in the jamabandi appertaining, to, the year 1973-74, and, vis-a-vis, the suit khasra numbers, and, when the afore change, for, the afore reasons rather sparks suspicion, thereupon the afore change, is, discountenanced, and, does not rather render legally frail, the afore unchallenged mutations, recorded, vis-a-vis, the suit khasra numbers.

8. The above discussion, unfolds, qua the conclusion(s), as arrived by the learned Courts below, being based, upon a proper and mature appreciation, of, evidence on record. Accordingly, the substantial questions, of law are answered in favour of the defendant/respondent, and, against the plaintiff/ appellant herein.

9. In view of the above discussion, the instant appeal, is, dismissed, and, the judgment and decree impugned, before this Court, is, affirmed and maintained. Consequently, the plaintiff's suit is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Rajni Sharma & another ....Petitioners

Versus

Housing & Urban Development Corporation Ltd. & others .Respondents.

CMPMO No. 144 of 2015
Reserved on : 26.8.2019
Date of decision 30.8.2019

Limitation Act, 1963 – Section 5 – Condonation of delay – Sufficient cause – Proof – Appellant seeking condonation of delay caused in filing appeal on ground that her counsel did not inform her about decree of trial court and also that she remained under depression – Appellate court dismissing application on ground of non-examination of counsel as well as medical officer to prove prescription slips – Petition against – Held, when statement of applicant qua supply of delayed information to her by counsel qua decree of trial court and of her remaining under medical treatment is unimpeachable, appellate court should not have insisted on examination of counsel/medical officer- Petition allowed. (Para 2).

For the petitioner: Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

For the respondents: Mr. Sanjay Dalmia,Advocate, for respondent No.1.
Mr. Deepak negi, Advocate, vice counsel for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant petition, is, directed against the impugned order of dismissal, made, upon, the aggrieved defendants' application, cast, under the provisions, of, Section 5, of, the Limitation Act, by the learned First Appellate Court. Through the afore application, the applicant, had, strived for condonation of delay, in challenging the verdict, hence decreeing the plaintiffs' suit, against, the defendants.

2. This Court would proceed to interfere, with, the impugned verdict, only upon, qua the learned court below, not meteing, an appropriate deference, to the explications, purveyed by the applicant, for, hence hers being precluded, to, within time, challenge, the verdict, pronounced by the learned Civil Judge, upon, Civil Suit RBT No.10-S/6 of 2014/11, (a) the learned court below had rendered, a, disaffirmative order, upon, the requisite application, and, the afore order, was, rested upon, (b) want of the counsel, engaged by the applicant, not stepping into the witness box, for proving the averments, cast, in the application, vis-a-vis, the applicant, remaining uninformed, by the afore counsel, (b) and, the medical slip, borne in Ext. AW-1/A, disclosing therein the medical reasons, besetting, the, applicant, for hers, hence being precluded, to, earlier institute the appeal, against, the impugned verdict, before the learned First Appellate Court, being not amenable, for meteing, of any credence thereto, given theirs, being not proven, by the Doctor concerned, who, issued them. However, for the reasons, to be assigned hereinafter, the, afore reason(s) warrant theirs' being dis-countenanced, (a) the applicant, while stepping into witness box, rendering a testification, vis-a-vis, her counsel, not within time, making any intimation to her, vis-a-vis, the fate, of, the afore civil suit, (b) hers throughout the period, since, the pronouncement, made, against her, by the learned Civil Judge, remaining unwell, and, hers in proof of her ailment, tendering prescription slips, respectively borne in Ext. PW-1/A, in Ext. PW-1/B, in Ext. PW-1/C, and, in Ext. PW-1/D, hence into evidence, (c) hers' disclosing qua hers remaining under treatment for depression, and, an intimation, vis-a-vis, the fate of the afore civil suit, being meted, to her, only after 8 to 9 months, since the, apt, decision being recorded, upon, the afore civil suit, (d) and, though the afore testification, embodied in her, examination-in-chief, was strived, to, be shattered, through hers' being subjected to, the, ordeal, of, cross-examination, by the learned counsel for the defendants, and, wherein(s), suggestion(s) appertaining qua the counsel, engaged by the applicant, making within time, an intimation to her, vis-a-vis, the decision, being recorded, upon, the afore civil suit concerned, by the learned trial Judge concerned, rather stood purveyed, (e) and, yet, with hers denying the afore suggestion(s), (f) and, also hers' denying suggestions, put to her, qua hers deposing falsely, vis-a-vis, hers' being beset with depression. In aftermath, the effect(s) of all the afore suggestions, meted to her, and, hers' meting disaffirmative answers thereto, is, qua hence the learned court below being, enjoined, to, conclude qua

her testimony, in her examination-in-chief, being not adequately shattered, (f) and, also hence when there was no necessity, for the learned court below, to insist, qua hers ensuring, the, stepping into the witness box, of, her duly engaged counsel, yet, the learned court below, has, unnecessarily insisted, upon, the applicant, qua the latter ensuring, the, stepping into witness box, of, her duly engaged counsel, (i) despite, reiteratedly, the learned counsel, for the non-applicant, making, a, minimal effect, to, scatter the vigor(s), of, her requisite testification, appertaining, to hers, remaining unintimated, by her duly engaged counsel, vis-a-vis, the fate of the civil suit concerned, (ii) hence it was insagacious, for, the learned trial Judge, to, not mete any credence thereto, (iii) and, also when she had in her examination-in-chief, testified qua hers being gripped, for a long time with depression, and, when, in, proof thereof, she tendered, Ext. AW-1/A, to, Ext. AW-1/D, into evidence besides when the afore exhibits, are, not suggested nor stand proven, to, be ingrained with any vice, of, any fabrication, (v) thereupon hence the afore exhibits acquired truth, hence it was insagacious, for, the learned trial Judge, to, yet proceed to insist, for, ensuring, of, proofs thereof, through hers, ensuring, the, stepping into, the, witness box, of, the doctor concerned.

3. For the forgoing reasons, there is merit in the instant petition, and, it is allowed. The impugned order is set aside. The parties are directed to appear before the learned First Appellate Court, on, 20.9.2019. Records be sent back forthwith. All pending applications, if any, also stand disposed of.

4. Any observation made herein above, shall not, be taken as an expression of opinion on the merits of the case, and, the learned first appellate Court, shall decide the matter uninfluenced, by any observation made hereinabove.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Pranav Verma ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent

Cr.MP(M) No.1534/2019
Reserved on : 23rd August,2019
Date of Decision: 30th August, 2019

Code of Criminal Procedure, 1973 – Section 439 – Regular bail- Grant of in a case registered for rape / aggravated penetrative sexual assault on victim, a minor – Held, victim had continuous sexual relationship with accused – Investigation is complete – No recovery is to be made from accused - He is a permanent resident of place disclosed in application and his presence can be ensured – No bar under POCSO, Act in granting bail to accused – Petition allowed. (Para 4).

Case referred:

Kunal Kumar Tiwari vs. State of Bihar, 2017 AIR (SC) 5416

For the Petitioner: Mr. Peeyush Verma, Advocate.

For the Respondent: Mr. Ashwani K. Sharma & Mr. Nand Lal Thakur, Additional Advocate Generals and Mr. Kuldeep Chand, Deputy Advocate General, for the State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

The petitioner, who is under arrest, on being arraigned as an accused in FIR number 139/2018 dated 25.11.2018, registered under Sections 376 of Indian the

Penal Code, 1860 and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act'), in the file of Police Station, (East) Chhota Shimla, District Shimla, H.P., disclosing non-bailable offences, has come up before this Court under Section 439 of the Code of Criminal Procedure, seeking regular bail.

2. The status report stands filed. I have seen the status report(s) as well as the police file to the extent it was necessary for deciding the present petition, and the same stands returned to the police official.

FACTS:

3. The gist of the First Information Report and the investigation is as follows:

a. That the victim, born on 15.8.2001, was admitted to Kamla Nehru Hospital, Shimla and on 24.11.2018. The hospital authorities informed Police Station (East) Shimla that the said victim had given birth to a baby and the age of the mother is 17 years. Consequently, the aforesaid FIR was registered.

b. The police reached the hospital and after obtaining the Certificate of Fitness, her statement under Section 154 of the Code of Criminal Procedure, was recorded.

c. She alleged that two years before, after Class-10, she had left the school and now she stays at home with her mother. Her parents are employees and they go to their official jobs daily. She has a younger brother, who also goes to school on regular basis.

d. She further stated that in the building, where she was residing, a boy named Pranav also lived. In the year 2017, during Deepawali, she came to know the said Pranav (petitioner) who started coming to her home and she also used to go to his house. They started meeting each other. In the month of February, 2018, he called her to his house. Nobody was present at his home and on finding her alone, said Pranav established sexual relations with her. Thereafter, on various occasions, the accused established sexual relations with her, due to which, she became pregnant. She informed Pranav about her pregnancy, but because he takes drugs, he did not pay any heed to this. He left for his sister's home. After June/July, 2018, she was not in contact with him.

e. She further stated that in the month of November, 2018, she had given birth to a baby boy.

4. I have heard Mr. Peeyush Verma, learned counsel for the petitioner and Mr. Ashwani K. Sharma, learned Additional Advocate General for the respondent/State.

REASONING:

(a) In the statement recorded under Section 154 of the Code of Criminal Procedure, the victim although did not state specifically of putting up any resistance and the fact that if she was ravished on the first occasion, then why she continued having sexual relations with the accused.

(b) Section 375(d) (sixthly), states that sexual intercourse, even with the consent of the girl, when she is under 18 years of age, amounts to rape. Similarly, Sections 4 and 6 of POCSO Act, deals with penetrative and aggravated sexual assaults. In POCSO Act, Section 2(d) states that the child means any child below the age of 18 years. Therefore, even although on the face of it, it seems to be a case of consent, but consent has to be pleaded and proved, which cannot be done so in this case, because of the age and even if it is so done, it would be statutory rape.

(c) Despite the fact that the petitioner, who is a 23 years old boy, impregnated a child of 17 years, but it does not mean that there is no power with this Court to grant bail. As per the allegations of the victim, when the petitioner called her to his home, none was present and then he established sexual intercourse with her and thereafter on numerous occasions they had coitus.

(d) There was no justification for the victim to continue to establish sexual relations with the petitioner. Undoubtedly, she was a minor, but it was only in 2013, when by amendment of the Indian Penal Code, the age of consent was increased from 16 to 18 years. Whatever is the ultimate outcome of the allegations can not be commented at this stage. There is no provision in the Indian Penal Code or POCSO Act, which creates a total bar for grant of bail.

(e) The petitioner is in judicial custody since 6.12.2018.

(f) The investigation in the case is complete and no recovery is to be effected. Therefore, no purpose would be served to continue the judicial custody.

(g) In the status report, there is no mention of previous criminal history of the bail petitioner.

(h) The petitioner is a permanent resident of address mentioned in the memo of parties. Therefore, his presence can always be secured.

(i) I am satisfied that no purpose will be served if the bail petitioner is continued in judicial custody.

(j) I am of the considered view that, *prima facie*, petitioner has made out a case for grant of bail.

5. In the result, the present petition is allowed. The petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing personal bond in the sum of Rs.10,000/- with one surety in the like amount to the satisfaction of the Sessions Judge, Shimla, District Shimla, H.P. and in case such Court is not available, then any Additional Sessions Judge of District Shimla, H.P.

6. This Court is granting the bail subject to the conditions mentioned in this order. The petitioner undertakes to comply with all the directions given in this order and the furnishing of bail bonds by the petitioner in acceptance of all such conditions:

a. The petitioner shall neither influence nor try to control the investigating officer in any manner whatsoever.

b. The petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or tamper with the evidence.

c. The petitioner undertakes not to contact the complainant and witnesses to threaten or browbeat them or to use any pressure tactics.

d. Until the statements of the victim and other non official witnesses, are recorded, the petitioner/ accused shall not stay within a distance of 10 Kilometers radius from the house of the prosecutrix and also not within the municipal limits of Shimla town, even if, such municipal limits are beyond 10 Kilometers. Respondent shall send a copy of this order to S.H.O. Police Station, (East), Shimla. However, irrespective of these conditions, the petitioner is permitted to visit his Lawyers, Courts and Hospitals. The petitioner shall inform to the SHO of above mentioned Police Station about the address where he would be residing. After the recording of the statements of the aforesaid witnesses, this condition shall automatically come to an end.

e. In case of emergency, whenever, the accused is required to visit his home, then he shall take permission of the SHO/I.O. or any superior Officer of the concerned Police Station or of Muncipal Counciler of the concerned municipal area, in whose jurisdiction, the residence of the victim, falls. But in no situation, he shall stay at this place for more than one day/24 hours at a time. This condition is being laid so that no trauma is caused to the victim, at least till the time of recording of the statement of the victim in Court. Such a condition is neither arbitrary nor unreasonable and the only purpose is that the victim is unable to come face to face with the accused and also has been imposed with a view that the accused is unable to influence the victim.

f. In case, the petitioner is arraigned as an accused of the commission of any offence, prescribing the sentence of imprisonment of ten years or more, then within thirty days of knowledge of such FIR, the petitioner shall intimate the SHO of the present police station, with all the details of the present FIR as well as the new FIR and it shall be open for the State to apply to this Court, for cancellation of this bail, if it deems fit and proper.

g. The petitioner undertakes to attend the trial

7. At this stage, it shall be appropriate to make reference to a judicial precedent wherein a Co-ordinate Bench of this Court in Cr.MP(M) No.1875 of 2015, titled as ***Sagar Tomar vs. State of Himachal Pradesh***, decided on 31.12.2015 and Cr.MP(M) No.194 of 2018, titled as ***Chaman Singh vs. State of Himachal Pradesh***, decided on 19.3.2018, had granted bails, when the victims were under 18 years of age and the offences were post 2013 amendment.

8. Reliance may also be placed on precedents of other High Courts wherein, on similar facts, bails were granted: (i) The High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, in Criminal Petition No.16790 of 2016, titled as ***Korra Praveen Vs. State of Telangana***, decided on 15.12.2016; and (ii) The High Court of Gujarat at Ahmedabad in R/Criminal Misc. Application No.23962 of 2018, titled as ***Harsul S/o Gambhirdan Banesingh Gadhavi Versus State of Gujarat***, decided on 16.1.2019.

9. In ***Kunal Kumar Tiwari* vs. *State of Bihar***, 2017 AIR (SC) 5416, the Hon'ble Supreme Court had referred to Sub Clause (c) of Section 437(3) of the Code of Criminal Procedure and stated that conditions of bail cannot be arbitrary, fanciful and cannot extend beyond the ends of provisions. The Supreme Court held that the phrase "interest of justice" as used under Sub Clause (c) of Section 437(3) means "good administration of justice", or "advancing the trial process" and inclusion of broader meaning should be shunned because of purposive interpretation.

10. It is clarified that the present bail order is only with respect to the above mentioned FIR. It shall not be construed to be a blanket order of bail in all other cases, if any, registered against the Petitioner.

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

Petition stands allowed in the aforesaid terms.

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IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Satya Devi ...Petitioner

Versus

State of H.P. & Others ...Respondents

CWP No. 1390 of 2018
Decided on: 27.08.2019

Constitution of India, 1950 – Article 226 – Challenge to selection/ appointment as Anganwari helper – Locus standi – Held, petitioner challenging appointment of private respondent as Anganwari helper – Petitioner herself did not participate in the selection process – She has no locus standi to challenge selection/ appointment of private respondent particularly when no dispute is raised as to advertisement inviting applications or her separation from joint family or income certificate of private respondent – Petition can not be treated as a public interest litigation. (Para 3)

Coram:
Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.
Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.
Whether approved for reporting?[1] Yes.

For the appellants : Mr. Dinesh Bhanot, Advocate.

For the respondents : Mr. Vikas Rathore and Mr. Narender Guleria, Additional Advocate Generals with Mr. Manoj Bagga, Asstt. Advocate General, for respondents No.1 to 3.

Ms. Kamlesh Kumari, Advocate vice Mr. H.S. Rana, Advocate, for respondent No.4.

Jyotsna Rewal Dua, J.

The writ petitioner, who has not appeared in the Interview for the post of Anganwari Helper in Anganwari Centre Pando Negia, Tehsil Nalagarh, District Solan, held pursuant to Advertisement dated 28.5.2018, seeks to quash the selection and appointment of respondent No.4-Smt. Bohri Devi, as Anganwari Helper.

2. The bare minimum **facts** required for adjudication of the present lis are:-

2(i) The interviews for the post of Anganwari Helper in Anganwari Centre, Pando Negia, Tehsil Nalagarh, District Solan, were held on 08.08.2007, under 2007 Policy. Petitioner as well as respondent No.4, participated in the selection process. Respondent No.4, was eventually selected and appointed as Anganwari Helper.

2(ii) Petitioner challenged the appointment of respondent No.4- Smt. Bohri Devi, as Anganwari Helper before the Deputy Commissioner, Solan, alleging her income to be above the prescribed limit. The appeal was dismissed on 09.06.2009 (Annexure P-1 colly).

2(iii) Further appeal preferred by the petitioner was allowed on 03.12.2009 by the Divisional Commissioner, Shimla Division, Shimla, by remanding the matter to the Deputy Commissioner, Solan.

2(iv) The Deputy Commissioner, Solan, vide order dated 19.06.2010, directed the Tehsildar, Nalagarh to re-assess the income of respondent No.4- Smt. Bohri Devi's family. In compliance to the direction, Tehsildar, Nalagarh, after issuing notices to the parties, re-assessed the family income of petitioner and respondent No.4 vide his order dated 18.02.2012. Family income of respondent No.4-Smt. Bohri Devi, was re-assessed

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[1] **Whether reports of Local Papers may be allowed to see the judgment?**

as Rs. 50,200/- (the amount included Rs.16,200/- wages of her husband Sh. Kashmiri Lal, Rs. 4000/- on account of agricultural income and Rs. 30,000/- income of her brother-in-law-Sh. Satish Kumar. Petitioner's family income was also re-assessed as Rs.23,800/-(which included her husband's income of Rs. 15000/- and Rs.8,800/- as income of her son-Sh. Kamal Chand. Tehsildar, Nalagarh, on the basis of this re-assessment, cancelled the earlier income certificates of petitioner and respondent No.4. The Deputy Commissioner, dismissed the appeal, preferred by the petitioner, vide order dated 27.12.2012, by directing the parties to approach the Competent Court.

2(v) After the cancellation of the income certificate, respondent No.3/ The Child Development Project Officer, issued Show Cause Notice to respondent No.4-Smt. Bohri Devi, for cancellation of her appointment as Anganwari Helper. This led her to file CWP No.2914/2013 in this Court. Pursuant to order passed therein, respondent No.4, continued in service. The writ petition was disposed of on 03.07.2013 (Annexure P-7), with a direction to Tehsildar Nalagarh to re-verify the income certificates of petitioner as well as respondent No.4, after giving them opportunity of hearing. In compliance to the directions, Tehsildar Nalagarh, vide order dated 03.01.2014, re-verified and confirmed that the income of family of respondent No.4, was correctly assessed as Rs. 50,200/-, during the year 2007. Resultantly, respondent No.3, cancelled the appointment of respondent No.4-Smt. Bohri Devi, on 12.10.2015 (Annexure P-10).

2(vi) Respondent No.4-Smt. Bohri Devi, filed her second Writ Petition, bearing No. CWP No.4468/2015, before this Court and continued in service on the basis of interim order. The writ petition was finally dismissed in default on 24.08.2017. As a sequel, respondent No.3 cancelled the appointment of respondent No.4 on 05.09.2017.

2(vii) During the interregnum, respondent No.4, in accordance with law, separated from the joint family. The Parivar Register of her nuclear family pursuant to such separation, has been brought on record of the present writ petition (Annexure R-4/1), wherein, the name of her brother-in-law-Sh. Satish Kumar, is not reflected as a family member. The family is also reflected as belonging to below poverty line (BPL). Accordingly new family income certificate has been issued to respondents No.4's husband on 27.09.2017 (Annexure R-4/2), depicting the income of her family to be not more than Rs.35,000/-, which is the outer eligibility limit of income, prescribed under 2016 Notification, issued by the State Government for appointment of Anganwari Helpers under ICDS, Programme.

2(viii) Appointment of respondent No.4 as Anganwari Helper, having been cancelled vide order dated 05.09.2017, fresh applications were invited for filling up the vacant post. The advertisement was issued in this regard on 28.05.2018. Two candidates including respondent No.4, applied for the post. Respondent No.4, having topped the merit list, was selected and appointed as Anganwari Helper.

2(ix) It is this fresh appointment of respondent No.4 as Anganwari Helper which has been challenged by the petitioner in the instant petition.

3(i) It is not in dispute that the petitioner himself has not participated in the fresh selection process held pursuant to the Advertisement dated 28.05.2018. Petitioner,

therefore, has no locus standi to challenge the selection and appointment of respondent No.4 as Anganwari Helper.

3(ii) Petitioner has not challenged the Advertisement dated 28.05.2018 and the selection process commenced thereunder for filling in vacant post of Anganwari Helper in Anganwari Centre, Pando Negia, Tehsil Nalagarh, District Solan.

3(iii) Petitioner has not even challenged the fresh income certificate issued in favour of respondent No.4- Smt. Bohri Devi's family entitling her to come within the eligibility criteria for the post of Anganwari Helper under 2016 Notification. Petitioner has also not challenged the separation of respondent No.4's family from her earlier joint family as evidenced in Annexure R-4/1-the copy of Parivar Registrar, wherein not only her nuclear family is stated to have separated from the joint family, but is also reflected as belonging to BPL category.

3(iv) The writ petitioner seeking to quash the selection and the appointment of respondent No.4-Smt. Bohri Devi, is not maintainable. The prayer of the petitioner for making the selection and appointment to the post of Anganwari Helper on the basis of 2007 selection process and to appoint the candidate next in the waiting list is *dehor*s of not only the legal position, but also against the factual position as events have overtaken themselves, which have not been challenged by the petitioner. Even otherwise, such kind of petition in service matters can also not be treated in form of public interest litigation. See: ***Civil Appeal No. 5444 of 2019***, titled as ***Vishal Ashok Thorat and ors***. v. ***Rajesh Shrirabapu Fate & ors. Decided on 19.07.2019*** as well as ***(2011) 5 SCC 464***, titled as ***Bholanath Mukherjee and others*** v. ***Ramakrishna Mission Vevekananda Centernary College and others***.

4. In view of the above discussion, we find no merit in the instant petition and the same is dismissed accordingly. Pending application(s),if any, also stand disposed of.

****

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Sh. Saurav Sharma. .....Petitioner.
Versus
State of Himachal Pradesh & anr. .....Respondents.

Cr.MMO No. 468 of 2019
Date of decision: August 30, 2019.

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers – Quashing of FIR in non- compoundable cases pursuant to compromise – Held, FIR involving non-compoundable cases may be quashed in view of compromise of parties provided offences(s) are not heinous or serious in nature and the wrong is basically done to victim. (Para 4).

Cases referred:

Gian Singh versus State of Punjab and another, (2012) 10 SCC 303
Narinder Singh and others V. State of Punjab and another, (2014) 6 SCC 466
Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others V. State of Gujarat and another (2017) 9 SCC 641

For the petitioner Mr. V.D. Khidtta, Advocate.
For the respondents Mr. Vikas Rathore, Addl. AG, for respondent No. 1.
Respondent No. 2 in person.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge *(Oral)*

Though status report has not been filed, however, the record of the case has been produced by Shri Vikas Sharma, Inspector/SHO Police Station, Rohru.

2. The record reveal that on completion of the investigation, the police has filed the challan in the court of learned Additional Chief Judicial Magistrate, Rohru, District Shimla against the accused-petitioner under Sections 354-D, 506, 509 and 323 IPC. The charge also stand framed against him, however, the prosecution evidence is not yet recorded and for that purpose the case is stated to be listed on 20.11.2019. The respondent No.2-complainant has now settled the dispute with the accused-petitioner amicably, hence she is no more interested to prosecute him in the pending criminal case.

3. It is seen that the offence, the accused-petitioner allegedly committed, under Sections 506 and 323 IPC is compoundable under sub Section (1) of Section 320 Cr.P.C., whereas, the offence punishable under Section 509 IPC under sub section (2) thereof. It is thus the offence allegedly committed by the accused-petitioner under Section 354-D is not compoundable. This petition has, therefore, been filed for quashing the FIR and consequential criminal proceedings on the basis of the compromise Annexure P-2 to this petition.

4. The law on the point that a FIR registered with the allegations qua commission of a non-compoundable offence can be quashed or not is no more *res integra* as it has been held by Hon'ble Apex Court in ***Gian Singh*** versus ***State of Punjab and another, (2012) 10 SCC 303*** that the High Court while exercising inherent powers vested in it under Section 482 of the Code of Criminal Procedure may quash FIR/criminal proceedings in a case where the offence allegedly committed by the accused is not heinous or serious in nature and the wrong basically done to the victim. As per this judgment, the inherent powers should be exercised only in appropriate cases having arisen out of civil, mercantile, commercial, financial, partnership or other transactions of like nature including matrimonial or the case relating to dowry etc. The compounding of offence, however, is not permissible in those cases registered with serious allegations and heinous in nature like rape, dacoity and corruption etc.

5. The Apex Court in ***Narinder Singh and others*** V. ***State of Punjab and another, (2014) 6 SCC 466*** while quashing the FIR in a case registered under Section 307 of the Indian Penal Code has held as under:

> "We have gone through the FIR as well which was recorded on the basis of statement of the complainant/victim. It gives an indication that the complainant was attacked allegedly by the accused persons because of some previous dispute between the parties, though nature of dispute etc. is not stated in detail. However, a very pertinent statement appears on record viz., 'respectable persons have been trying for a compromise up till now, which could not be finalized'. This becomes an important aspect. It appears that there have been some disputes which led to the aforesaid purported attack by the accused on the complainant. In this context when we find that the elders of the village, including Sarpanch, intervened in the matter and the parties have not only buried their hatchet but have decided to live peacefully in future, this becomes an important consideration. The evidence is yet to be led in the Court. It has not even started. In view of compromise between parties, there is a minimal chance of the witnesses coming forward in support of the prosecution case. Even though nature of injuries can still be established by producing the doctor as witness who conducted medical examination, it may become difficult to prove as to who caused these injuries. The chances of conviction, therefore, appear to be remote. It would, therefore, be unnecessary to drag these proceedings. We, taking all these factors into consideration cumulatively, are of the opinion that the compromise between the parties be accepted and the criminal proceedings arising out of FIR No.121 dated 14.7.2010 registered with Police Station LOPOKE, District Amritsar Rural be quashed. We order accordingly."

6. The Apex Court in a recent judgment titled ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others*** V. ***State of Gujarat and another (2017) 9 SCC 641*** has reiterated the broad principles need to be followed while considering the prayer for quashing the FIR and consequential criminal proceedings on the basis of compromise, which reads as follow:-

> "16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :
>
> **16.1.**Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;
>
> **16.2.** The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.
>
> **16.3.** In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;
>
> **16.4.** While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;
>
> **16.5.** The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;
>
> **16.6.** In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;
>
> **16.7.** As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;
>
> **16.8.** Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;
>
> **16.9.** In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and
>
> **16.10.** There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

7. It is, therefore, seen from the legal principles settled in the judgments cited supra that the inherent power to quash the criminal proceedings should be

exercised to secure the ends of justice or to prevent the abuse of process of law. Also that, criminal proceedings should be quashed in those cases where the possibility of conviction is remote and the continuation of the criminal proceedings would cause oppression and prejudice to the accused. There should be due regard to the nature and gravity of the offence committed. Heinous and seriousoffencesinvolving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed even if the victim or the family of the victim have settled the dispute. It has further been held in this judgment that such offences are not private in nature but have serious impact upon the society at large. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

8. Applying the ratio of the judgments (supra) in the given facts and circumstances of this case, the respondent No. 2-complainant and accused-petitioner have now settled all disputes amicably. The statements of respondent No.2-complainant and accused-petitioner have been recorded separately. In view of the compromise Annexure P-2 respondent No.2-complainant is now no more interested to prosecute the accused-petitioner nay further and rightly so because they both are living in the same locality and interested in maintaining cordial relations and to live in peace and harmony. The respondent No.2-complainant in the changed circumstances, therefore, is not going to depose against the accused-petitioner. Therefore, the chances of success of trial, if allowed to continue, are very bleak and to allow the proceedings to continue would amount to abuse of the process of law. The allegations are also that the accused-petitioner had been following the respondent-complainant while coming or going to college for the last so many days and on the day of occurrence he even mis-behaved also with her. Hence not so serious and even personal to her.

9. In view of what has said hereinabove, this petition is allowed. Consequently, FIR No. 0124/2018 Annexure P-1 and consequential criminal proceedings registered against the accused-petitioner in the court of learned Additional Chief Judicial Magistrate, Rohru,District Shimla in case No. 9-02 of 2019, titled *State of H.P.* Versus *Saurav Sharma* are quashed and set aside.

10. The petition is accordingly disposed of.

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IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Madhu Bala ...Petitioner

Versus

District & Sessions Shimla & Others ...Respondents

CWP No. 1655 of 2019
Decided on: 02.09.2019

Constitution of India, 1950 – Article 226 – Judicial Courts (Regulation & Maintenance of Canteen) Rules, 1984 (Rules) – Rule 23(2) – Cancellation of canteen licence by District and Sessions Judge on basis of report of Canteen Committee – Challenge thereto – Held, licence of petitioner had already expired – Various reports of Inspection Committee indicating that canteen was being run in breach of terms and conditions of licence - Shortcomings were not removed by her despite show cause notices issued to her in that regard – Surprise inspection by District Judge alongwith Additional District & Session Judge and Senior Civil Judge again showing that canteen was being run in most unhygienic manner and in breach of conditions of licence – Respondents were justified in revoking licence and ordering her to hand over its vacant possession. (Paras 2 & 3)

Coram:
Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.
Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.
Whether approved for reporting?[2] *Yes.*

For the petitioner : Ms. Suchitra Sen, Advocate.
For the respondents : Mr. J.L. Bhardwaj, Advocate.

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[2] **Whether reports of Local Papers may be allowed to see the judgment?**

Jyotsna Rewal Dua, J.

Challenge has been laid by the petitioner to the orders issued by the respondents, cancelling her licence to run the canteen in Judicial Courts Complex, Theog and directing her to hand over the vacant possession of the canteen.

2(i) The husband of the petitioner was running the canteen in Judicial Courts Complex, Theog, for the years ending March, 2015 to March, 2017. Licence to run the canteen thereafter was granted to the petitioner for the years ending March, 2018 and March, 2019.

2(ii) On 06.03.2019, applications were invited from the persons interested to run the aforesaid canteen for the year ending March, 2020. This notice dated 06.03.2019 (Annexure P-1) *inter-alia*, contained a stipulation:-

> *" ..... Licence for running canteen shall ordinarily be for year ending March, 2020, but Canteen Committee can enhance/reduce such period. Rate of license fee shall be Rs. 900/- per month...."*

2(iii) Pursuant to the process initiated under the notice dated 06.04.2019, the petitioner on 01.05.2019 (Annexure P-2), was granted licence to run the canteen in Judicial Courts Complex, Theog w.e.f. 01.05.2019 to 31.07.2019. The grant of licence was subject to various terms and conditions. Some of them being relevant are reproduced hereinafter for the sake of convenience:-

> *"8. That Canteen premises shall be furnished by the licnesee before starting Canteen and crockery and cutlery shall be provided by her for customers as may be prescribed by the Committee from time to time.*
>
> *9. That it shall be obligatory on the part of applicant to prepare/serve hot and cold beverages and food stuffs of good quality. The beverages ad food stuffs may be checked from time to time by the member(s) of the Committee or any responsible office authorized by the Committee or with the help of Food Inspector of area.*
>
> *10. That applicant will maintain cleanliness of premises and shall keep utensils, crockery etc. in hygienic and presentable condition."*

2(iv)(a) Condition No.13, authorized the District & Sessions Judge, Shimla in consultation with Inspection Committee, to terminate the licence to run the canteen, even before the expiry of the licence period, in case of breach of any terms and conditions contained in the grant order, on service of 24 hours notice. The condition is reproduced hereinafter:-

> *"13. That licence may be terminated at any time before expiry of period by the District and Sessions Judge, Shimla in consultation with the Committee on service of 24 hours notice on breach of any terms and conditions laid herein-above or by giving one month;s notice to the District and Sessions Judge, Shimla and in case of termination of licence before expiry of full period licence except in the ode as provided here-in-above amount of security shall be liable to be forfeited to the District and Sessions Judge, Shimla."*

2(iv)(b) The inspection of the canteen was to be carried out by the Inspection Committee, which was to submit a fortnightly inspection report with respect to cleanliness and hygienic conditions of the canteen as well as about the rates/price of the beverages and food stuffs charged by the licensee. The condition in this regard reads as under:-

> "15. *The Inspection Committee constituted vide office order No. 13404-7, dated 6th September, 2018, is directed to inspect the Canteen and submit the fortnightly report through Senior Civil Judge- cum-ACJM, Theog to the Committee with regard to cleanliness and hygienic conditions of*

Canteen and also about rates/price of beverages and food stuffs charged by licensee."

2(v)(a) In compliance to condition No.15, fortnightly inspections of the canteen were carried out by the Committee for the first fortnight of May, 2019 vide Annexure R-1/E dated 16.05.2019, second fortnight of May, 2019 vide Annexure R-1/F dated 01.06.2019, first fortnight of June, 2019 vide Annexure R-1/G dated 17.06.2019, second fortnight of June, 2019 vide Annexure R-1/H, dated 01.07.2019 and first fortnight of July, 2019 vide Annexure R-1/I, dated 18.07.2019. All these inspection reports are replete with serious short-comings on part of the petitioner in running the canteen, some of which can be noticed hereinafter:- Canteen and its kitchen were not properly cleaned; wash basin was not found clean; utensils used for serving eatable items were found to be unclean and not in presentable condition; water buckets were dirty, full of dust; cigarette stubs were scattered in the canteen; disposable glasses were being reused for serving water and tea ; used tea leaves were being used over and over again; all food items were not available during inspections; no beverage item was served; proper hygiene was not maintained for keeping food items; floor and tables were unclean; fridge was not properly cleaned; domestic gas cylinder was being used for preparing food items, preparations were also not good; dustbin was filled over the brim with garbage, emitting foul smell; the Bar members and court staff also complained to the Committee that they being not satisfied with food quality and the cleanliness of the canteen, were not availing it's facility.

2(v)(b) All the above inspection reports had been brought to the notice of the petitioner by the respondents, however, short-comings were not removed. Rather these re-surfaced in the subsequent inspection reports. The Show Cause Notice was issued to the petitioner on 14th May, 2019 (Annexure P-7) as to why her licence be not revoked in accordance with Judicial Courts (Regulations and Maintenance) Rules, 1984, for having failed to run the canteen in good condition as per stipulations contained in the grant order. This was followed by another Show Cause Notice dated 01.07.2019 (Part of Annexure P-7). Copies of inspection reports were also appended along with notices. The petitioner responded to the notice dated 01.07.2019 and controverted the allegations vide her reply dated 06.07.2019 (Annexure P-8). Where-after, a surprise inspection of the canteen was carried out by the District & Sessions Judge, Shimla-respondent No.1 along with Additional District & Sessions Judge (CBI), Shimla and Senior Civil Judge- cum-ACJM, Theog on 17.07.2019 in presence of the petitioner and found following deficiencies in the canteen:-

"1. The dishes were not cleaned with dish-cleaning agents.

2. There was no provision to provide clean drinking water. Water running from the tap is being served for drinking.

3. Food items were found stored in the refrigerator in unhygienic condition. The refrigerator was dirty and it appeared that it was not cleaned for the last many days.

4. The utensils used for cooking the food were found dirty and not properly washed.

5. Foul smell was emanating from the canteen. The floor and wash-basin were dirty and were not cleaned for the last many days.

6. Domestic cylinder was being used for cooking the food.

7. The rate list of eatable items was not displayed. When the licence holder was asked, she said that the said list was not supplied. However the contract was awarded t her for three months on the basis of lowest price quoted by her. Even she could not give

satisfactory answer as at what rates the eatable items were being sold.

8. *The eatable items were displayed without any cover.*

9. *Food quality was not found good.*

10. *Workers were not employed.*

11. *As per the Food Safety and Standard Act, 2006, the persons running the canteen are required to get their medical examination, but no such report has been submitted despite being asked by the office. She has not engaged any helper for the service to the customers.*

12. *The photographs of the canteen were also taken and placed on record."*

2(vi) Finding that licence holder was playing with the lives of people by providing unhygienic food and had failed to improve the cleanliness standard even after the short-comings repeatedly noticed by the Inspection Committee in its reports dated 16.05.2019, 01.06.2019, 17.06.2019 and 01.07.2019, were pointed out to her; despite issuance of notices to her, neither the quality of food nor the cleanliness was improved; resultantly, on 22.07.2019 (Annexure P-3), the licence granted to the petitioner to run the canteen was revoked by the respondents under Rule 23 (a) of the Judicial Courts (Regulations and Maintenance of Canteen) Rules, 1984 with further direction to the petitioner to hand over the vacant possession of the canteen before 31.07.2019. To the similar effect is the letter dated 26.07.2019 (Annexure P-4). After revoking the licence granted to the petitioner, respondents issued fresh licence to another successful bidder on 03.08.2019 (Annexure R-1/D). Aggrieved against these two communications (Annexures P-3 & P-4), the petitioner has preferred the instant writ petition.

3. We have heard Ms. Suchitra Sen, learned counsel for the petitioner, who has reiterated the submissions made in the writ petition and Mr. J.L. Bhardwaj, learned counsel for respondents and have gone through the record carefully.

3(i) The contention of the petitioner that the period allowed to her to run the canteen has to be construed till the year ending March 2020, cannot be accepted. The notice dated 06.04.2019, inviting offers for running the canteen, contained provision that the period for running the canteen can be enhanced or reduced. It is under this notice that the petitioner had herself participated. Even, the licence granted to the petitioner to run the canteen was w.e.f. 01.05.2019 to 31.07.2019. The contention that petitioner's licence was till year ending March, 2020, is not factually correct. The licence period of the petitioner had come to an end on 31.07.2019. Therefore, even otherwise there was no legal right vested in the petitioner to continue running of canteen beyond 31.07.2019. Additionally, condition No.13, imposed in her licence to run the canteen clearly stipulated that on breach of any terms and conditions prescribed in the licence, the same can be terminated even before the expiry of the period.

3(ii) Therefore, **firstly**, there is no legal right vested with the petitioner to seek continuation of her licence beyond 31.07.2019. **Secondly**, respondent No.1, had the power to terminate the licence even before the expiry of the licence period, in consultation with the Committee, on service of 24 hours notice, in case of breach of terms and conditions of the licence. The breach of terms and conditions were noticed by the Inspection Committee in their fortnightly reports, which were also brought to the notice of the petitioner. These serious short-comings in running of the canteen, were not removed by the petitioner, which fact was personally verified by District & Sessions Judge, Shimla-respondent No.1 during a surprise inspection of the canteen on 17.07.2019 along with Additional District & Sessions Judge (CBI), Shimla and Senior Civil Judge-cum-ACJM, Theog in presence of the petitioner. The respondents were, therefore, justified and within

their rights in revoking the licence granted to the petitioner for running the canteen in Judicial Courts Complex, Theog and further ordering her to hand over its vacant possession.

4. In view of the above, we do not find any infirmity with the impugned orders. The writ petition being devoid of merits is, therefore, dismissed. Pending applications (s), if any, shall also stand disposed of.

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

Sh. Vivek Kumar Sharma ....Petitioner.
Versus
Sh. Achal Jandev ....Respondent.

CMPMO No.:440 of 2018.
Decided on: 30.07.2019.

Himachal Pradesh Urban Rent Control Act, 1987 - Section 14 – Eviction on ground of arrears of rent – Deposit of 'amount due' with Rent Controller itself, when not bad ? – Rent Controller dismissing application of tenant seeking to deposit 'amount due' with him on ground that tenant ought to have approached landlord first for payment and only on his refusal, it can be deposited with him (Rent Controller) – Petition against – Held, Rent Controller in his eviction order has directed payment of 'amount due' to landlord or deposit it in the court within 30 days of said order – There was no direction in the order that tenant could have had deposited rent in the court only if landlord had refused to accept the same – Tenant was merely complying the order of Rent Controller – Dismissal of his application was wrong – Tenant can not be made to suffer because the eviction order was not inconsonance with law (Paras 11 to 15)

For the petitioner Mr. Vipen Pandit, Advocate.
For the respondent Mr. Rakesh Dhaulta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, petitioner has challenged order dated 13.09.2018, passed in CMA No. 204/6 of 2018, titled as Sh. Vivek Sharma vs. Achal Jandev, passed by learned Rent Controller-II, Solan, vide which, learned Rent Controller has rejected the request of the petitioner/ applicant/tenant to deposit the rent.

2. Brief facts necessary for adjudication of the present petition are that a rent petition, i.e. Rent Petition No. 20/2 of 2014 was filed by respondent Achal Jandev against the present petitioner under Section 14 of the H.P. Urban Rent Control Act, 1987, which was allowed by learned Rent Controller vide order dated 17.07.2018 in the following terms:-

> *"Judged in the light of my above detailed discussion the instant petition for eviction of respondent from the disputed premises on the ground of arrears of rent is allowed with costs. The respondent shall pay arrears of rent amounting to Rs. 89,382/- including statutory increase as detailed/calculated supra. The petitioners are also entitled to statutory interest of 12% on arrears of rent accruing between 1.5.2014 to 30.06.2018. The cost of present petition is assessed as Rs. 5000/- It is clarified that if the respondent pay to the petitioners/landlord or deposit into the court the aforesaid rent with interest as referred to above within a period of 30 days from today, the present petition shall be deemed to have dismissed on the ground of arrears of rent, whereas on the failure of the respondent for making the payment as referred to above, this order shall be executable in accordance with law and the respondent shall also be liable for eviction from the suit premises on account of arrears of rent. The amount paid by respondent to the petitioners during pendency of petition shall be adjusted in arrears of rent. The file after its due completion be consigned to the record room."*

3. Petitioner herein filed an application before learned Rent Controller for permission to deposit the rent on 30.08.2018. It was mentioned in the application that the Court of learned Rent Controller had allowed the rent petition partly by directing the tenant to deposit a sum of Rs.89,382/- by mentioning that amount which has been paid by the tenant during the pendency of the petition be adjusted. It was further mentioned in the application that in terms of order passed by learned Rent Controller, the tenant was liable to deposit an amount of Rs.13,500/- which was being deposited vide demand draft No. 730921, dated 31.07.2018 drawn at Corporation Bank, payable at Solan, in the Court of learned Rent Controller.

4. In the said application, respondent herein/landlord was proceeded against *ex parte* on 17.08.2018.

5. Vide impugned order, i.e. order dated 13.09.2018, this application of the tenant was dismissed by learned Rent Controller on the ground that application did not disclose whether or not tenant had first tendered the amount to the landlord and whether landlord had refused to accept the amount of arrears of rent. Relying upon the judgment of this Court in Hans Raj Khimta v. Smt. Kanwaljeet Kaur alias Sardarni Babli Latest, 2016 (1) HLJ 303 and in Pradeep Aggarwal v. Maya Poddar and Anr. (CMPMO No. 39 of 2018) learned Rent Controller held that under Section 14 of the H.P. Urban Rent Control Act, arrears of rent were to be directly paid to the landlord and could not be deposited in the Court until and unless there was sufficient evidence that landlord had refused to accept the arrears of rent. It further held that though vide order dated 17.07.2018, Court had directed the tenant to pay the arrears to the landlord or to deposit in the Court the arrears of rent, yet, tenant first had to tender the arrears to the landlord and only upon landlord's refusal to accept the amount, he could approach the Court for tendering said amount. It further held that draft tendered by the tenant was in the name of the Court, whereas same should have been in the name of the landlord. On these bases, learned Rent Controller dismissed the application filed by the tenant by holding that tenant could not be allowed to deposit the arrears of rent amount in the Court.

6. Feeling aggrieved, petitioner/tenant has filed the present petition.

7. Learned Counsel for the petitioner has argued that the impugned order passed by the learned Rent Controller in the application filed by the tenant for depositing the arrears of rent was not sustainable in the eyes of law because order passed by learned Rent Controller in the rent petition on 17.07.2018 itself was self explanatory and application to deposit rent in Court was filed by the petitioner in terms of the said order.

8. On the other hand, learned Counsel for the respondent has argued that there was no infirmity with the order passed by the learned Rent Controller dismissing the application of the tenant to deposit the amount of arrears of rent because in terms of the statutory provisions of the H.P. Urban Rent Control Act, the tenant was bound to pay the amount to the landlord and the same could have been deposited in the Court only if landlord has refused to accept the arrears of rent.

9. I have heard learned Counsel for the parties and also gone through order passed by learned Rent Controller in the eviction petition as also the impugned order.

10. The language used by learned Rent Controller while partly allowing the eviction petition in para 15 of the order dated 17.07.2018 is as under:-

> ***"It is clarified that if the respondent pay to the petitioners/landlord or deposit into the court the aforesaid rent with interest as referred to above within a period of 30 days from today,"***

11. It is amply clear from the language which was used in the order by learned Rent Controller that the tenant was either to pay the arrears of rent to the landlord or to deposit the same in the Court within a period of 30 days from the passing of the order. There was no direction contained in the order that the tenant could have had deposited or tendered the rent amount in the Court only if landlord had refused to accept the same. This important aspect of the matter has not been taken into consideration by learned Rent Controller while passing the impugned order. By filing the application for tendering the rent in the Court, the tenant was just abiding by the terms of the order passed by learned Rent Controller on 17.07.2018. In the absence of there being a direction by learned Rent Controller that the arrears of rent were to be first tendered to the landlord and on his failure to receive the same, the same were to be deposited in the Court, learned Rent Controller, could not have had dismissed the application filed for depositing the arrears of rent in the Court on the ground that arrears should have been first

tendered to the landlord and on his refusal to accept the same, the same could have been tendered in the Court. This is a hyper technical approach adopted by learned Rent Controller which is in derogation of the letter and spirit of the order passed by it while deciding the eviction petition on 17.07.2018.

12. Learned Rent Controller in order dated 17.07.2018, had given option to the tenant to pay the arrears of rent to the landlord or deposit the same in the Court. After suffering eviction in the eviction proceedings, the tenant was to abide by the directions passed by learned Rent Controller and comply with them. This is exactly what the tenant did in the present case by depositing the amount of arrears of rent in the Court by moving the application in this regard.

13. This Court is not oblivious to the fact that the language of the order passed by learned Rent Controller in para 15 of the order dated 17.07.2018 was not in consonance with the provisions of Section 14 of the H.P. Urban Rent Control Act, however, in the peculiar facts of this case, the tenant could not have been made to suffer for the mistake which was committed by the learned Rent Controller while passing order dated 17.07.2018. Incidentally, this part of the order was not assailed by the landlord, who even did not care to appear before learned Rent Controller in the proceedings originating from the application which was filed by the tenant to deposit the arrears of rent.

14. As far as the judgments relied upon by learned Rent Controller while passing impugned order, i.e. Hans Raj Khimta supra and Pradeep Aggarwal supra, are concerned, in my considered view, said judgments were not applicable in the facts of the present case. In none of the above two cases, there was any direction issued by learned Rent Controller at the time of allowing the eviction petition that the arrears of rent be paid by the tenant either to the landlord or the same be deposited in the Court. In the absence of any such direction, but obvious, the tenant was bound to first tender the arrears of rent to the landlord and in the event of landlord refusing to accept the case, the tenant could have had deposited the same in the Court by filing appropriate application.

15. In the present case, the direction passed by learned Rent Controller was either to pay the arrears of rent to the landlord or to deposit the same in the Court. In this view of the matter, the impugned order is not sustainable in the eyes of law.

16. At this stage, I shall be placing reliance upon judgment passed by Coordinate Bench of this Court dated 14.03.2019, in case Neelam Singha vs. Bawa Jung Bahadur (Civil Revision No. 201/2018), relevant portion of which reads as under:-

> *"8. It is not in dispute that the learned Appellate Authority while allowing the petition of the land lord had directed the tenant to deposit the amount. Once the term "deposit" was used, essentially it would mean that the rent would have to be deposited in the court or else it would have been mentioned that the amount is required to be directly paid to the landlord and not deposited in the Court. Once that be so, then obviously no fault on the part of the tenant can be found much less prejudice caused to the landlord for depositing the arrears of rent in the Court.*
>
> *9. The maxim "actus curiae neminem gravabit" (meaning no prejudice shall be caused to anyone due to the fault of the court) must be invoked having regard to fact situation obtaining in the present case. This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law.*
>
> *10 There is no higher principle for the guidance of the Court than the one that no act of courts should harm a litigant and it is the bounden duty of courts to see that if a person is harmed by a mistake of the court he should be restored to the position he would have occupied but for that mistake as has been held by the Hon'ble Supreme Court in Jang Bahadur vs. Brij Lal, AIR 1966 SC 1631:-*
>
> *"6…….It is no doubt true that a litigant must be vigilant and take care but where a litigant goes to Court and asks for the assistance of the Court so that his obligations under a decree might be fulfilled by him strictly, it is incumbent on the Court, if it does not leave the litigant to his own devices, to ensure that the correct information is furnished. If the Court in supplying the information makes a mistake the responsibility of the litigant, though it does not altogether cease, is at least shared by the Court. If the litigant acts on the faith of that information the Courts cannot hold him responsible for a*

mistake which it itself caused. There is no higher principle for the guidance of the Court than the one that no act of Courts should harm a litigant and it is the bounden duty of Courts to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake. This is aptly summed up in the maxim:Actus curiae neminem gravabit." 11 The basic fundamentals of the administration of justice are simple. No man should suffer because of the mistake of the court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the and maids of justice and not the mistress of the justice. Ex debite justitiae, the courts must do justice to the aggrieved. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied.

12. The Lord Cairns in Alexander Rodger v. The Comptoir D'escompte De Paris, (Law Reports Vol. III 1869-71 page 465 at page 475) observed thus:

"Now, their Lordships are of opinion,that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

13 The aforesaid observations have been repeatedly relied upon by the Hon'ble Supreme Court and reference in this regard can conveniently be made to the Five Judge Bench decision of the Hon'ble Supreme Court in A.R. Anutulay vs. R. S. Nayak and another, (1988) 2 SCC 602 para 82.

14 Once the peculiar fact as set out hereinabove comes to the notice of the court, even if there is any technicality, this Court should not feel shackled and decline to rectify that injustice or otherwise, the injustice noticed will remain forever.

15 Now in the given circumstances once there was no fault on the part of the tenant, then obviously the Court was under obligation to undo the wrong done to the parties by the act of the court, especially where total undeserved or unfair advantage has been gained by the landlord invoking the jurisdiction of the court and the same, therefore, requires to be neutralized by applying the aforesaid maxim "actus curiae neminum gravabit"."

17. In view of the findings returned herein above as also the law laid down by Hon'ble Coordinate bench of this Court in Neelam Singha's case supra, this petition is allowed and impugned order dated 13.09.2018, passed by learned Rent Controller-II, Solan, in CMA No. 204/6 of 2018, titled as Sh. Vivek Sharma, vs. Achal Jandev, is quashed and set aside with a further direction to learned Rent Controller to accept the Bank Draft which was deposited by the petitioner/tenant before it as arrears of rent.

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

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

Bishamber Singh and others ....Petitioners.

Versus

Shri Rajinder Singh ...Respondent.

Civil Revision No. 13 of 2019
Decided on: 06.08.2019.

Code of Civil Procedure, 1908 – Section 47 – Objections to execution – Maintainability – Held, decree of possession of land in favour of decree holder has attained finality –

Decree not shown to be not executable – Mere pendency of collateral proceedings inter-se parties before quasi-judicial authority can not be used as a tool by judgment debtor to delay execution of decree. (Para 8).

For the petitioners	Mr. Vijay Bir Singh, Advocate.
For the respondent	Mr. Ajay Sharma, Sr. Advocate with Mr. Rakesh Chaudhary, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, petitioners have prayed for setting aside of order dated 31.10.2018 (Annexure P-4), passed by learned Civil Judge (Jr. Division), Indora, District Kangra, H.P. vide which learned Executing Court has dismissed the objections so filed by the present petitioners to the execution petition.

2. It appears from the record that respondent herein filed a civil suit bearing No. 156/2007, titled as Rajinder Singh versus Bishamber Singh and other for issuance of a decree of possession of the suit land. Said suit was decreed in favour of the plaintiff on 28.03.2011. The appeal filed against the judgment and decree passed by the learned Trial Court was dismissed by the learned First Appellate Court on 30.04.2013 and the second appeal preferred against the judgment and decree so passed by learned Appellate Court, was dismissed by this Court on 01.03.2017.

3. As despite the judgment and decree passed by the learned Trial Court in favour of the plaintiff/decree holder having attained finality, the same was not being obeyed by the judgement debtors, i.e. present petitioners, an execution petition was filed by the decree holder before the Executing Court.

4. In the said execution petition, objections were filed by the present petitioners, which stand dismissed by way of the impugned order. While dismissing the objection filed by the present petitioners, learned Executing Court has held that as per record the judgment and decree dated 28.03.2011, passed by learned Trial Court in Civil Suit No. 156 of 2007, vide which, a decree was passed in favour of the decree holder for possession as a co-sharer qua the suit land comprised in Khasra No. 1006, measuring 0-01-16 HM, situated in mohal and mauza Bhapoo, Tehsil Indora, District Kangra, HP, had attained finality. Learned Executing Court further held that it was apparent from the record that decree holder has having a executable decree in his favour and the execution petition was also quite old. It further held that as the objections filed by the judgment debtors were not substantiated by any cogent and reliable material on record, the same were not sustainable. On these bases, learned Executing Court dismissed the objections and issued the warrant of possession.

5. Feeling aggrieved of the said order, petitioners/ judgment debtors filed the present petition.

6. I have heard learned Counsel for the parties and also gone through the impugned order as also the other documents appended with the petition.

7. When this case was listed on the previous dates, time was sought by learned Counsel for the petitioners to enable the petitioners to make an endeavour to have the matter amicably settled with the respondent. Despite sufficient opportunities having been granted in this regard, nothing fruitful has come forth till date.

8. Be that as it may, taking into consideration the arguments advanced by learned Counsel for the parties, in my considered view, there is no perversity in the impugned order. It is not in dispute that decree which has been passed in favour of present respondent has attained finality. It is a matter of record that judgment and decree passed by the Court of learned Civil Judge (Jr. Divn.), Indora, District Kangra, H.P. was

unsuccessfully assailed by the judgment debtors firstly before the learned First Appellate Court and thereafter before this Court by way of Regular Second Appeal. The findings returned by the learned Executing Court in the impugned order that there was a executable decree in favour of the decree holder, are correct findings. In my considered view, simply because some proceedings initiated by the present petitioners against the respondent under the Land Revenue Act, are pending before Divisional Commissioner, Kangra at Dharamshala, the same cannot be a ground to throttle the execution of a decree which exists in favour of the decree holder and which has attained finality. Learned Executing Court is duty bound to execute the decree passed by the Civil Court and pendency of any collateral proceedings between the parties before the quasi judicial authority(s), cannot be used as a tool by the judgment debtors to delay the execution of the decree.

In view of findings returned above, as there is no merit in the present petition, the same is accordingly dismissed. Interim order stands vacated. Miscellaneous application(s), if any, also stand disposed of accordingly.

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

Ranbir Singh ....Petitioner.

Versus

Shri Ram Transport Finance Company Limited through its authorized representative/
constituted attorney Sh. Vachiter Singh and another ...Respondents.

Civil Revision No. 155 of 2018
Decided on: 07.08.2019.

Arbitration and Conciliation Act, 1996- Sections 2(e) & 36 - Arbitral award- Execution of- Whether Civil Judge has jurisdiction to entertain execution petition? Held, Court of District Judge is the principal Civil Court of original jurisdiction in a District - Only this court can entertain an application seeking execution of an arbitral award- Court of Civil Judge has no jurisdiction to entertain such execution application. (Paras 5 & 6)

For the petitioner : Mr. Neeraj Kumar Sharma, Advocate.

For the respondents : Mr. Ashwani Kaundal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, petitioner/judgment debtor has laid challenge to order dated 02.04.2018 passed by the Court of learned Senior Civil Judge, Nahan, in Execution Petition No. 3/10 of 2016, which was filed by the present respondent No. 1/decree holder under Section 36 read with Section 2(E) of the Arbitration and Conciliation Act, 1996 in the matter of enforcement of arbitral award dated 28.06.2014 passed against the present petitioner in Arbitration Claim No. ARB/BLG/1088/2012.

2. The challenge to the order so passed is made by way of this petition on the ground of jurisdiction.

3. Learned Counsel for the petitioner has argued that the impugned order is *per se* not sustainable in law as the same stands passed by the learned Executing Court without appreciating that it was having no jurisdiction either to entertain or adjudicate the execution petition as it was not the principal Civil Court or original jurisdiction of the District concerned as the said Court is the Court of learned District Judge of the District.

4. I have heard learned Counsel for the parties and gone through the impugned order as well as other documents appended with the petition.

5. In fact, the issue is no more res-integra as Hon'ble Co-ordinate Bench of this Court in CR No. 1 of 2019, titled as Himachal Pradesh Forest Development Corporation Limited versus Shri Prem Singh and other connected matters, decided on 03.01.2019, by placing reliance upon the judgment of Hon'ble Supreme Court in (2015) 1 SCC 32, titled as State of West Bengal and Others versus Associated Contractors, has held that principal Civil Court of original jurisdiction in a District means the Court of learned District Judge and even the Court of learned Additional District Judge cannot entertain the execution petition under the Arbitration and Conciliation Act, 1996, as the same is beyond the mandate of the provisions of the Arbitration and Conciliation Act.

6. Accordingly, this petition is allowed as prayed for. Impugned order dated 02.04.2018, passed by the Court of learned Senior Civil Judge, Sirmaur at Nahan, is quashed and set aside on the ground that the Court of learned Senior Civil Judge, Sirmaur at Nahan, was having no jurisdiction either to entertain or to adjudicate the execution petition which stood so filed by respondent No. 1. In the interest of justice, it is further ordered that the execution petition, in which the impugned order was passed by the Court on 02.04.2018 shall be recalled by the Court of learned District Judge, Sirmaur at Nahan, and the same shall be decided by the learned District Judge, in accordance with law, by adhering to the principles of natural justice.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. Parties through the respective learned Counsel are directed to appear before the Court of learned district Judge, Sirmaur at Nahan on 09.09.2019.

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

Sh. Ramesh Kumar ....Petitioner.
Versus
State of H.P. and others ....Respondents.

CMPMO No.: 305 of 2018.
Decided on: 08.08.2019.

Code of Civil Procedure, 1908 - Section 151- Additional evidence - Closure of – Tribunal closing additional evidence on ground of petitioner not having taken steps for summoning additional evidence despite grant of last opportunity in that regard- Petition against- Held, at relevant time petitioner was busy in performing last rites of his close relative- Tribunal did not consider this fact and closed petitioner's additional evidence- Petitioner a rustic villager- One last opportunity granted to him to adduce additional evidence. (Paras 9 & 10)

For the petitioner : M/s R.S. Chandel and Sumit Himalvi, Advocates.
For the respondents for the : Mr. Dinesh Thakur, Additional Advocate General respondents-State.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

As per report of the Registry, steps have not been taken for the service of respondent No. 3. Learned Counsel for the petitioner submits that as the said respondent is neither a necessary nor a proper party, on his request, name of said respondent be deleted from the array of respondents. Ordered accordingly. Name of respondent No. 3 is ordered to be deleted from the array of respondents, subject to all just exceptions.

2. By way of this petition filed under Article 227 of the Constitution of India, petitioner has challenged order dated 30.07.2018, passed by learned Labour Court-cum-Industrial Tribunal, Shimla, in Reference petition No. 46/2016, titled as Ramesh Kumar versus State of H.P., vide which, permission granted to the petitioner by the learned Labour Court vide order dated 11.07.2018 to lead additional evidence stands closed on the ground that the petitioner had failed to avail the opportunity granted in terms of order 11.07.2018, as he had not taken any steps for summoning of the witnesses for the said date. Vide said order, learned Labour Court has also dismissed an application, which was filed by the petitioner on the said date itself with the prayer for grant of permission to place on record notification dated 9th June, 2018, issued by the Secretary, Irrigation and Public Health to the Government of Himachal Pradesh.

3. Learned Counsel for the petitioner has submitted that the reason as to why no witness could be summoned for 30.07.2018 in terms of order dated 11.07.2018 was that a close relative of the petitioner expired in the month of July, 2018 after passing of order dated 11.07.2018 and as the petitioner was busy alongwith his family members in performing religious last rites post the death of his relative, steps could not be taken. He has further submitted that though this submission was made before the learned Labour Court, yet, learned Labour Court closed the additional evidence of the petitioner vide impugned order. With regard to the rejection of the application filed by the petitioner for placing on record notification dated 9th June, 2018, issued by the Secretary, Irrigation and Public Health to the Government of Himachal Pradesh, learned Counsel has submitted that said document was necessary for adjudication of the lis as it conferred upon the petitioner the right of regularization in case reference was answered in his favour.

4. Learned Additional Advocate General while defending the order passed by the learned Labour Court has argued that there is no infirmity with the order dated 30.07.2018, because when learned Labour Court vide order dated 11.07.2018 had made it amply clear that only one opportunity shall be granted to the petitioner to lead additional evidence, no infirmity can be attributed to order dated 30.07.2018, on which date, right of the petitioner to lead additional evidence was closed. He further argued that it is a matter of record that the opportunity so granted to the petitioner vide order dated 11.07.2018 to lead additional evidence was not availed by him. He further submitted that similarly there was no infirmity with the order impugned whereby it rejected the application filed by the petitioner because *per se* regularization is not the domain of the learned Labour Court and further even otherwise, the application which was filed by the petitioner was not maintainable as the same was not supported by the affidavit of the petitioner.

5. I have heard learned Counsel for the parties and gone though the impugned order as well as other orders and documents appended with the petition.

6. It is a matter of record that when an application filed by the petitioner to lead additional evidence was allowed by the learned Labour Court on 11.07.2018, it was clearly stipulated in the said order by the learned Labour Court that only one opportunity will be granted to the petitioner to lead additional evidence. Despite this, neither the petitioner took any steps for summoning of the witnesses nor any witness was produced by him on 30.07.2018, therefore, there is no infirmity in the said order of closing the right of the petitioner to lead additional evidence.

7. Similarly, the reasons assigned by learned Labour Court for rejecting the application vide which prayer was made by the petitioner to place on record notification dated 9th June, 2018, also cannot be faulted with because this Court also fails to understand as to of what assistance the placing of the said notification would have had been to the petitioner as it is not in dispute that he had served the department for less than two years whereas he intended to place on record the notification which was dealing with induction of Water Guards, Pump Operators and Fitters etc. *inter alia* on the strength of service rendered by them on contract basis/regularization/daily wages itself.

8. Besides this, there is force in the contention of learned Additional Advocate General that said application, otherwise also, could not have been considered by the learned Labour Court for adjudication because the same was not supported by any affidavit of the petitioner. By no stretch of imagination, the application could be termed to be a formal application. Petitioner intended to place on record notification dated 9th June, 2018, supra and on the strength of the same, he wanted learned Labour Court to confer certain benefits upon him. That being the case, learned Labour Court could have accepted

the application only when the same was supported by the affidavit of the petitioner and an application which was not supported by the affidavit of the petitioner should have been outrightly rejected.

9. At this stage, learned Counsel for the petitioner submits that though it is a matter of record that vide order dated 11.07.2018, only one opportunity was granted to the petitioner to lead additional evidence, which could not be availed by him for the reasons he has already submitted, he prays that this Court may grant one more opportunity to the petitioner to lead additional evidence in terms of order dated 11.07.2018 as the same will not only further the cause of justice but will also assist the learned Labour Court in the adjudication of the reference petition in an effective manner.

10. In my considered view, said prayer so made by learned Counsel for the petitioner can be accepted in the facts of this case. It is a matter of record that only one opportunity to lead additional evidence was granted to the petitioner by the learned Labour Court vide order dated 11.07.2018 and it appears that on account of his acts of omission, he failed to avail the same. This Court however cannot lost sight of the fact that petitioner is a rustic villager, who has raised an industrial dispute feeling aggrieved by his alleged illegal termination by the respondents as daily waged Water Guard.

11. Accordingly, this petition is disposed of by partially modifying order passed by learned Labour Court dated 30.07.2018 with the observation that said Court shall grant one more opportunity to the petitioner to lead additional evidence in terms of order dated 11.07.2018 and if despite grant of said opportunity, petitioner fails to produce any additional evidence, then no further opportunity in this regard shall be granted and order dated 30.07.2018 shall become operative in all force. Parties through their respective learned Counsel are directed to appear before the learned Labour Court on 27.08.2019, on which date, one opportunity shall be granted to the petitioner to lead additional evidence in terms of order dated 11.07.2018 and Court assistance shall also be provided to him for summoning the witness(s).

With these observations, the petition stands disposed of. Miscellaneous application(s), if any, also stand disposed of.

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

Jai Chand ....Appellant.
Versus
Darshan Singh and others ...Respondents.

RSA No.: 140 of 2019
Decided on: 19.08.2019.

Code of Civil Procedure, 1908 – Order XXII Rules 1 & 2 – Judgment /order against a dead person – Effect – Held, judgment or order passed in favour or against a dead person is a nullity. (Para 3)

Case referred:
Gurnam Singh (Dead) Through Legal Representatives and others versus Gurbachan Kaur (Dead) by Legal Representatives, (2017) 13 Supreme Court Cases 414

For the appellant : Mr. R.K. Gautam, Sr. Advocate with Ms. Megha Kapoor Gautam, Advocate.
For the respondents : Mr. Vijender Katoch, Advocate for respondents No. 1, 2 and 4 to 12.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

When this appeal was taken up for consideration, learned Senior Counsel appearing for the appellant informs the Court that one of the respondents in appeal, i.e. respondent No. 3, namely, Onkar Singh, in fact died during the pendency of the Civil Suit, in which, Onkar Singh was the plaintiff and no steps were taken to bring on record his legal representatives on record. He further submits that the judgment and decree was

passed by the learned Trial Court in the face of record being defective and thereafter, in appeal also, this defect was not cured and judgment and decree stood passed by the learned Appellate Court, though in favour of a dead person, as the factum of death of said party was neither brought to the notice of learned Trial Court nor the learned Appellate Court. Therefore, he submits that the judgments and decrees passed by both the Courts below are a nullity and are liable to be set aside and the matter needs to be remanded back to the learned Trial Court which may proceed with the same, in accordance with law.

2. Learned Counsel representing the respondents submits that it is a matter of record that Onkar Singh had died during the pendency of the civil suit, however, he submits that the judgments and decrees passed by learned Courts below not being against the interest of the deceased person were sustainable in law.

3. Having heard learned Counsel for the parties, in my considered view, the contention of learned Counsel for the represented respondents has no legal force in view of the law laid down by Hon'ble Supreme Court in **Gurnam Singh (Dead) Through Legal Representatives and others versus Gurbachan Kaur (Dead) by Legal Representatives**, (2017) 13 Supreme Court Cases 414, in which Hon'ble Supreme Court has unambiguously held that judgment/order passed in favour of against a dead person is a nullity. In the said judgment, Hon'ble Supreme Court has held as under:-

> *"16) It is not in dispute that the appellant and the two respondents expired during the pendency of the second appeal. It is also not in dispute that no steps were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved to file an application under Order 22 Rules 3 and 4 of the Code of Civil Procedure,1908 (for short, 'the Code') for bringing their names on record in place of the dead persons to enable them to continue the lis.*
>
> *17) The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated".*
>
> *18) Order 22 Rule 3(2) which applies in the case of the death of plaintiff/appellant and Order 22 Rule 4(3) which applies in the case of defendant/respondent provides the consequences for not filing the application for substitution of legal representatives by the parties concerned within the time prescribed. These provisions read as under:-*
>
> *18.1 Order 22 Rule 3(2)*
>
> *"3.(2) Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."*
>
> *18.2 Order 22 Rule 4(3)*
>
> *"4, (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."*
>
> *19) In the case at hand, both the aforementioned provisions came in operation because the appellant and the two respondents expired during the pendency of second appeal and no application was filed to bring their legal representatives on record. As held above, the legal effect of the non-compliance of Rules 3(2) and 4(3) of Order 22, therefore, came into operation resulting in dismissal of second appeal as abated on the expiry of 90 days from 10.05.1994, i.e., on 10.08.1994. The High Court, therefore, ceased to have jurisdiction to decide the second appeal which stood already dismissed on 10.08.1994. Indeed, there was no pending appeal on and after 10.08.1994.*
>
> *20) In our considered view, the appeal could be revived for hearing only when firstly, the proposed legal representatives of the deceased persons had filed an application for substitution of their names and secondly, they had applied for setting aside of the abatement under Order 22 Rule 9 of the*

Code and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the substitution application under Order 22 Rules 3 and 4 of the Code beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed.

22) It is a fundamental principle of law laid down by this Court in Kiran Singh's case (supra) that a decree passed by the Court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree holder. The reason is that the defect of this nature affects the very authority of the Court in passing such decree and goes to the root of the case. This principle, in our considered opinion, squarely applies to this case because it is a settled principle of law that the decree passed by a Court for or against a dead person is a "nullity" (See-N. Jayaram Reddy & Anr. Vs. Revenue Divisional Officer & Land Acquisition Officer, Kurnool, (1979) 3 SCC 578, Ashok Transport Agency vs. Awadhesh Kumar & Anr., (1998) 5 SCC 567 and Amba Bai & Ors. Vs. Gopal & Ors., (2001) 5 SCC 570)."

4. In my considered view, what has been held by Hon'ble Supreme Court in above case referred to supra shall *mutatis mutandi* also apply to the proceedings in a Civil Suit.

5. In view of above, this appeal is allowed and judgments and decrees passed by both the learned Court below, i.e. judgment and decree dated 04.05.2016, passed by learned Civil Judge (Jr. Divn.) Indora, District Kangra, in Civil Suit No. 207/2012 and judgment and decree dated 06.12.2018, passed by learned Additional District Judge-I, Kangra at Dharamshala, Circuit Court at Nurpur, District Kangra, H.P. in Civil Appeal No. 7-1/xiii/2016, are ordered to be set aside, though not on merit. Case is remanded back to the learned Trial Court with the direction to proceed in the matter in accordance with law.

6. At this stage, learned Counsel for the respondents submits that the respondents may be granted the liberty to move an appropriate application before the learned Trial Court to bring on record the legal representatives of deceased respondent No. 3 herein. The only observation, which this Court can make is that in case any such application is filed before the learned Trial Court by the plaintiffs therein, then appropriate orders be passed thereupon after hearing the other party in accordance with law.

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

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

Sh. Karam Chand and others ....Petitioners.

Versus

Sh. Bishan Singh and others ...Respondents.

CMPMO No.:26 of 2019
Reserved on: 06.08.2019
Decided on: 20.08.2019.

Code of Civil Procedure, 1908 - Section 151, Order XXI Rules 10, 11 and 32 – Decree of permanent prohibitory injunction – Decree holder dispossessed forcibly by judgment debtor in disobedience of decree – Whether executing court can direct delivery of possession of said land to decree holder? – Held, after passing of decree, judgment debtor had not business to disobey it –Since dispossession of decree holder was in disobedience of decree, executing court was within its jurisdiction to direct delivery of possession of land to decree holder. He can not be asked to file a suit for possession with regard to suit property. (Paras 17 & 18).

For the petitioners Mr. Y.P.S. Dhaulta, Advocate.

For the respondents | Mr. Ramakant Sharma, Sr. Advocate with Dinesh Bhatia, Advocate for respondents No. 1 and 2. Respondents No. 3 to 10 are *ex parte*.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition filed under Article 227 of the Constitution of India, petitioner has prayed for the following relief:-

> *"It is therefore, most respectfully prayed that this petition may kindly be allowed and the impugned orders dated 22.11.2018 and 05.12.2018 contained in Annexure P-2 & P-3 passed by the Ld. Civil Judge Court No. 2, Nalagarh, District Solan H.P may kindly be quashed and set aside and the petition may kindly be allowed and the appropriate directions be issued to the Ld. Trial Court accordingly, in the interest of justice for which the petitioners shall every pray."*

2. Brief facts necessary for the adjudication of the present petition are that respondent No. 1 and predecessor-in-interest of respondent No. 2 filed a suit for grant of a decree for permanent prohibitory injunction restraining the defendants therein from interfering in any manner, changing the nature, raising construction and creating any passage in and over the suit land comprised in Khasra Nos. 372 and 373, Khewat No. 137, Khatauni No. 227 and 228, area measuring 0-18 biswas in village Majra, H.B. No. 97, Pargana Plassi, Tehsil Nalagarh, District Solan, H.P. (hereinafter referred to as the 'suit land'). Petitioners herein as also the proforma defendants were the defendants in the said suit.

3. This suit, i.e. Civil Suit No. 202/1 of 09/2008, titled as Sh. Bishan Singh and another versus Sh. Karam Chand and others, was decreed by the Court of learned Civil Judge (Jr. Division), Nalagarh, District Solan, HP, in the following manner:-

> *"This suit coming on this day before me (Hitender Kumar) Civil Judge (Jr. Div.) Nalagarh for final disposal in the presence of Sh. B.S. Ranu, Advocate for the Plaintiffs and Sh. H.C. Thakur, Advocate for Defendants/counter claimants. It is ordered that suit filed by the plaintiff is decreed and defendants are restrained from interfering in any manner, changing the nature, raising construction and creating any passage in and over the suit land comprised in khsra No. 372 and 373, khewat No. 137, khatauni No. 227 and 228 area measuring 0-18 biswas, situated in village Majra, H.B. No. 97, Pargana Plassi, Tehsil Nalagarh, District Solan, H.P. The counter claim filed by the defendant is dismissed. However, in the peculiar facts and circumstances of the case, parties are left with to bear their own cost(s)."*

4. It is evident from the decree passed by the learned Trial Court that a Counter Claim filed by the defendants was dismissed by the said Court. It is not in dispute that the judgment and decree so passed by the learned Trial Court was unsuccessfully challenged by the defendants before the learned Appellate Court and thereafter, said judgment and decree so passed by learned Trial Court, has attained finality.

5. An application was filed by the decree holders under Order 21, Rules 10, 11 and 32 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as the 'Code') before the learned Executing Court for the execution of the above referred judgment and decree in September, 2015. It was mentioned in the application that judgment debtors, impleaded as respondents No. 1 to 7 in said execution petition, had forcibly dispossessed the decree holders on 13.4.2014 from the land in dispute measuring 0-03 biswas, situated upon khasra No. 372 and had raised a kachha room thereupon after passing of the decree, execution of which was sought.

6. In the objections filed to the execution petition, contesting judgment debtors, which includes the present petitioners, took the stand that the decree holders were not entitled for the execution of the decree as the suit land measuring three biswas was under the possession of judgment debtors and decree holders, not being conversant with their land, had not taken any demarcation from the competent authority and in fact,

the decree was obtained by the decree holders by concealing material facts from learned Civil Court.

7. Vide order dated 22.11.2018 (Annexure P-2), learned Executing Court directed the judgment debtors to deliver the possession of the suit land to the decree holders, which was followed by order dated 05.12.2018 (Annexure P-3), which reads as under:-

> *"Heard.*
>
> *Possession as per last order not handed over. Relevant provision of execution is as under-*
>
> *32. Decree for specific performance for restitution of conjugal rights, or for an injunction:-*
>
> *(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.*
>
> *Opportunity for obeying the decree has already been granted. JDs have willfully failed to obey the decree. As such this Court forced to enforce the decree by attachment of the property of the JDs. Let property of JDs be attached on or before 19.01.2019. List of immovable property be filed within 5 days."*

8. Feeling aggrieved, petitioners have filed the present petition assailing Annexures P-2 and P-3.

9. Learned Counsel for the petitioners has argued that the orders impugned are not sustainable in the eyes of law because learned Executing Court has erred in not appreciating that the decree passed in favour of decree holders was only to the effect that the defendants stood restrained from interfering in any manner, changing the nature, raising construction and creating any passage in and over the suit land and there was no decree in favour of decree holders entitling them to seek possession of the suit land from the judgment debtors.

10. On the other hand, learned Senior Counsel appearing for the contesting respondents/decree holders has argued that as the possession of the suit land was forcibly taken over by the judgment debtors after passing of the decree by the learned Civil Court whereby defendants were restrained from interfering in any manner, changing the nature, raising construction and creating any passage in and over the suit land, there was no infirmity with the orders passed by the learned Executing Court as the decree holders were entitled to have the decree executed even by way of issuance of a direction to the judgment debtors to hand over the possession of the suit land to the decree holders if it stood established on record that possession of the suit land was forcibly taken over by the judgment debtors after the passing of the decree of injunction.

11. In rebuttal to the said contention of the learned Senior Counsel, learned Counsel for the petitioner has argued that the decree holders could not have been given the relief of possession of land by the learned Executing Court and the course open for the decree holders was to file a suit for possession.

12. I have heard learned Counsel for the parties and also gone through impugned orders as also other documents appended with the petition.

13. It is not in dispute that vide judgment and decree dated 31.07.2010, suit for permanent prohibitory injunction qua the suit land filed by the plaintiffs was decreed and counter claim for permanent prohibitory injunction filed by the defendants was dismissed by learned Trial Court. It is also not in dispute that the judgment and decree so passed by the learned Civil Court has attained finality. It has not been disputed during the course of the arguments before this Court that the possession of the suit land was taken over by the judgment debtors including the petitioners after the passing of the decree somewhere in the year 2014.

14. In these circumstances, the moot issue which this Court has to decide is whether in a case where a decree of injunction has been passed against the defendants

restraining them from *inter alia* interfering in any manner with the suit land, whether a decree holder in the execution of the said judgment and decree can be granted the relief of possession of the suit land if it stands proved that the suit land was forcibly taken into possession by the judgment debtors after passing of the said decree?

15. In order to answer this question, the Court has to holistically perceive the events which led to the filing of the execution petition. In a suit filed by the decree holder against the judgment debtors, a decree was passed by the learned Court whereby defendants were restrained from interfering in any manner in changing the nature, raising construction and creating any passage in and over the suit land comprised in Khasra Nos. 372 and 373, Khewat No. 137, Khatauni Nos. 227 and 228, area measuring 0-18 biswas, situated in village Majra, H.B. No. 97, Pargana Plassi, Tehsil Nalagarh, District Solan, H.P. Suit was decreed as the plaintiffs succeeded in proving before the learned Court that they were owners in possession of the suit land and the defendants, without any right, title or claim over the same, were causing illegal interference upon the suit land. Once the Court of competent jurisdiction passed the said decree in favour of the decree holders and said judgment and decree attained finality, defendants/judgment debtors were bound to obey the same. However, the judgment debtors disobeyed the judgment and decree so passed in favour of the decree holders by dispossessing decree holders from the suit land after passing of the said decree. This led to the filing of the execution petition.

16. In my considered view, the contention of learned Court for the petitioners that learned Executing Court could not have had directed the petitioners/judgment debtors to deliver the possession of the suit land and that the decree holders should have been called upon by the learned Executing Court to file a suit for possession, is not sustainable in the eyes of law. Once the decree holders were successful in obtaining a decree for permanent prohibitory injunction against the defendants, the defendants/judgment debtors had no business to disobey the said judgment and decree. After the judgment debtors had the occasion to obey the judgment and decree, yet they disobeyed the same, then the decree holders had the right to approach the Executing Court for the execution of the said judgment and decree. In the course of the execution of the judgment and decree, learned Executing Court was within its jurisdiction to issue the direction to the judgment debtors to deliver the possession of the suit property, which judgment debtors had forcibly taken into possession after passing of decree against them by disobeying the same.

17. In such like situation, where the judgment debtors disobey the decree of permanent prohibitory injunction passed against them by gaining illegal possession of the suit property, decree holders cannot be asked to file a fresh suit for possession by the Executing Court. This would be too harsh a call and would not only defeat the ends of justice but also set a wrong precedent wherein a judgment debtor can openly flout and disobey the decree passed against him and yet the Executing Court would not be in a position to execute the judgment and decree passed by it.

18. Of course, if the judgment debtor encroaches upon some other portion of the property of the decree holder which was not the subject matter of the suit, then the things would be different and in that situation, the decree holder would have to file a suit for possession but with regard to suit property, qua which, there is a decree in favour of the decree holders and against the judgment debtors for permanent prohibitory injunction, the decree holders need not file a fresh suit for possession if the decree holders are dispossessed by the judgment debtors after the passing of the judgment and decree and the possession can be ordered to be delivered to the decree holders by the judgment debtor by the Executing Court in the course of execution of said decree. This, in my considered view, would be a prudent interpretation of the provisions of Order 21, Rule 32 of the Civil Procedure Code in general and Sub Rule (5) of Rule 32, including the Explanation appended thereto in particular.

19. In similar circumstances, High Court of Punjab and Haryana in Kapoor Singh v. Om Prakash, AIR 2009 Punjab and Haryana 188, has held that the Executing Court has the jurisdiction to pass an order on the application under Order 21, Rule 32 (5) of the Civil Procedure Code to restore the possession of the land in dispute to the decree holder in case decree of permanent injunction is filed by the judgment debtor. It has been held further that the decree holder is not required to file another suit as he has already obtained a decree in his favour by spending much time and expenses and law lies in favour of the interpretation which would prevent multiplicity of the proceedings rather than the one which will generate it.

20. In Kailash Chand Milttal versus Tirathh Parkash Mittal and others, (2011) 1, Punjab Law Reporter 399, High Court of Punjab and Haryana has reiterated that in the event of taking possession in violation of the decree of permanent prohibitory injunction, in case the decree holder is called upon to file a fresh suit, then it would amount to giving a licence to the judgment debtor to violate the judgment and decree and the same would be against the public policy and would be harsh to the decree holder.

21. In view of discussion held herein above as also the case law referred to supra, as this Court does not finds any infirmity with the orders passed by the learned Executing Court whereby it has ordered the judgment debtors to deliver the possession of the suit land to the decree holders and thereafter has ordered attachment of the property of the judgment debtors in view of the non-compliance of the said direction, this petition, being devoid of any merit, is accordingly dismissed, so also pending miscellaneous application(s), if any.

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

Rakesh Sharma ....Petitioner.
Versus
Indian Oil Corporation and another ....Respondents.

CWP No.: 8497 of 2013
Decided on: 21.08.2019.

Industrial Disputes Act, 1947 - Section 25-F – Engagement of worker through a contractor – Disengagement of services – Effect – Held, workman was engaged by a contractor and not by the Corporation as such – It was contractor who put him with Corporation – There was no relationship of employer – employee between petitioner and Corporation and no industrial dispute exited between them – Petitioner can not be granted any relief qua the Corporation. (Paras 10 & 11)

For the petitioner Mr. M.L. Sharma, Advocate.

For the respondents Mr. Rahul Mahajan, Advocate for respondent No. 1.
None for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, petitioner has challenged the award passed by the Court of learned Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court-II, Chandigarh, dated 31.01.2013, vide which, the following Reference was made to it by the appropriate government:-

> *"Whether the action of the management of Indian Oil Corporation in ordering disengagement/termination of services of Sh. Rakesh Sharma, engaged through contractor and who has completed 240 days of service is just and legal? If not what relief the workman is entitled to and from which date?"*

2. The Reference so made to it by the appropriate government was answered by learned Presiding Officer, Central Government Industrial Tribunal-Labour Court-II, Chandigarh, as under:-

> *"Management has filed certain papers Exhibit M1 to M12 and it was argued by the learned counsel for the management that the name of the workman does not figure in these papers hence it is established that he was not an employee of the management. But I do not agree with the argument of the learned counsel. A negative evidence does not prove any fact. I need not to go into the plea of the management that the workman was the contractor's employee because the workman himself has failed in proving any relationship between him and the management. There is no evidence to show that the workman was the employee of the management. Hence, there is no question of terminating the services by the management. The workman is not entitled to any relief. The reference is accordingly answered against*

the workman. Let two copies of the award be sent to the Central government for further necessary action."

3. Brief facts necessary for adjudication of this case are that an industrial dispute was raised by the present petitioner feeling aggrieved by the factum of his being terminated by the Employer purportedly in violation of the provisions of Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as the 'Act'). Pursuant to the Industrial dispute having been raised by the workman, appropriate government made the afore cited Reference for adjudication to learned Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court-II, Chandigarh.

4. By way of the impugned award, learned Presiding Officer has answered the Reference by holding that the workman was not entitled for any relief as there was no evidence on record to demonstrate that the workman was not the employee of the management/present respondent.

5. A perusal of the claim statement filed by the workman filed before the learned Court below reveals that it was mentioned therein that he was employed as Electrical Helper on 23.03.1996 and he continued to work as such till 04.08.2000, when his services were terminated by the management by assigning no reason in violation of the provisions of Section 25-F of the Industrial Disputes Act. The prayer of the workman was to declare the said act of the management of terminating his services w.e.f. 04.08.2000 to be act illegal act being violative of the statutory provisions of the Industrial disputes Act with a direction to the management to reinstate him in service with continuity of service and back wages.

6. Written statement on record filed by present respondent No. 1 before the learned Court below demonstrates it was mentioned therein that there did not exist any relationship of employer and employee or master and servant between the said respondent and the workman as the workman was not engaged by the respondent-Corporation but he was employed by M/s U.K. Electricals Limited, with whom, respondent was having an agreement with regard to supply of manpower. Vide impugned award, learned Court below has upheld the said preliminary objection of the respondent by holding that when a person asserts that he is the employee of a management and the said fact is denied by the management, then the onus is upon the workman to prove that there is a relationship of employer and employee between the parties and it is not for the management to prove that workman was its employee. Learned Court further held that as there was no evidence to show that the workman was the employee of the management, hence, there was no question of his services being terminated by the management. On these bases, learned Court held that workman was not entitled for any relief as prayed for.

7. Feeling aggrieved, the petitioner-workman filed this petition.

8. I have heard learned Counsel for the parties and gone through the impugned order as also the record of the case.

9. The moot issue which this Court is to adjudicate is whether the findings of fact returned by learned Court below that the workman had failed to prove that there existed any relationship of employee and employer between him and the management is a perverse finding so returned by the learned Court below or said finding is duly borne out from the record of the case?

10. A perusal of the record demonstrates that there is not even an iota of evidence on record placed by the workman to demonstrate that there was a relationship of employee and employer between him and respondent No. 1. Except the bald assertion of the workman that he was an employee/workman of the respondent-Corporation, there is no material on record to substantiate this fact. Reliance placed on the log books and EST Identity Card, in my considered view, is of no relevance because it is not in dispute that the workman was in fact working in the Oil Depot of the respondent-Corporation, however, the fact remains that he was not working in his capacity as a workman engaged by the respondent-Corporation, but was working as a workman, who was engaged by M/s U.K. Electrical Limited.

11. Learned Counsel for the petitioner has argued that even if it is assumed that the petitioner was engaged by M/s U.K. Electricals Limited, yet there will be a deemed fiction that he was a workman engaged by the Indian Oil Corporation because as the Contractor was not registered under Section 12 of the Contract Labour (Regulation and Abolition) Act, 1970 as the Contractor was not registered for engaging contract labour

for electrical works. In my considered view there is no force in the said contention of learned Counsel for the petitioner because this was not the case set up by the petitioner either in the Industrial dispute so raised by him or in the Claim as it stood filed before the learned Labour Court. The case of the petitioner was throughout that he was a workman engaged by the respondent-Corporation. As he failed to establish relationship of master and servant between him and the respondent-Corporation, it cannot be said that the learned Court below has erred in not granting relief in his favour. Accordingly, this petition, being devoid of any merit, is dismissed. Pending miscellaneous application(s), if any, also stand dismissed. However, it is clarified that adjudication done in this petition shall not come in the way of the petitioner to invoke his rights against the contractor, in accordance with law.

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

Sh. Kishori Lal ....Petitioner.

Versus

Sh. Vijay Kumar Sood and another ...Respondents.

CMPMO No.: 215 of 2019.
Decided on: 02.09.2019.

Mental Healthcare Act, 2017 (Act) – Sections 3(5) & 116 –Suit against person alleged to be mentally infirm – Whether not maintainable ? - Held, Section 116 of Act does not bar filing of suit before the civil court by or against person alleged to be of unsound mind. (Para 18)

Mental Healhcare Act, 2017(Act) – Section 2(c) – 'Authority' – Jurisdiction & functions – Held, 'Authority' as defined in Section 2(c) of the Act has no jurisdiction to adjudicate a lis between two contending parties. (Para 18)

Code of Civil Procedure, 1908 - Order XXXII Rule 3 – Suit against person alleged to be mentally infirm - Court's role – Held, court has authority to appoint a guardian where it is satisfied that defendant is a person of unsound mind or incapable of protecting his interest by reason of mental infirmity. (Para 18).

Mental Healthcare Act , 2017 – Sections 2 (c) & 116 – Bar of jurisdiction of civil court - Scope - Held, civil court can not interfere in the discharge of functions as stipulated in Chapter XI & XII of any 'Authority 'as defined in section 2 (c) Act. (Para 18).

For the petitioner : Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

For the respondents : Mr. Ajay Kumar, Sr. Advocate with Ms. Rohini Karol, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, petitioner has challenged order dated 08.05.2019 passed by the Court of learned District Judge, Shimla, vide which an application filed by the present petitioner under Order 7, Rule 11(d) of the Code of Civil Procedure for rejection of plaint, has been dismissed.

2. Brief facts necessary for the adjudication of the present petition are that respondents/plaintiffs have filed a suit for possession against the petitioner/defendant with respect to the portion of a shop, measuring about 5x7 feet, in shop No. 93, The Mall Shimla, built upon land comprised in Khasra No. 627, Bazaar Ward, Bada Shimla, as also for recovery of use and occupation charges. A decree for recovery of `1.00 Lac alongwith pendilite and future interest has also been prayed for.

3. Petitioner filed an application under Order 7, Rule 11(d) of the Code of Civil Procedure for rejection of plaint being barred by law *inter alia* on the ground that petitioner was mentally infirm and was undergoing treatment in the Department of Psychiatry, IGMC, Shimla, yet, plaintiffs sued him in his independent capacity, without instituting the suit through next friend of the petitioner/defendant. According to the petitioner, even the service in the suit was not properly effected upon him. Same was

effected on some family member of the petitioner. Appearance was put through attorney of defendant by filing memo of appearance and thereafter, power of attorney was also filed through one Power of Attorney holder of the petitioner. Even before the filing of the suit, a notice was issued by the plaintiff on false and flimsy grounds to the petitioner which was replied by the attorney of the petitioner and the fact of mental infirmity of the petitioner was brought to the notice of the plaintiffs, yet, plaintiffs chose to file a suit against a mentally infirm person, which was barred in law. On these grounds, petitioner prayed that plaint be rejected under Order 7, Rule 11(d) of the Code of Civil Procedure.

4. Plaintiffs contested the said application. They mentioned in the reply that they had filed an eviction petition against one Gopal Dass Verma before learned Rent Controller(1), Shimla. Gopal Dass surrendered his tenancy rights. Therefore, the status of the defendant became that of an unauthorized occupant and in the said petition, Kishori Lal, i.e. present petitioner, had himself signed reply as also the affidavit in support of the same. In the Civil Suit he had been repeatedly seeking adjournments to file written statement after service and after the statutory period of 90 days to file written statement was over, application under Order 7, Rule 11(d) of the Code was filed by him. It was further mentioned in the reply that the averments made in the application were self contradictory, because in law, a mentally infirm person could not execute a General Power of Attorney. It was denied that defendant was mentally infirm and as per the plaintiffs, the filing of the application was abuse of process of law. According to them, at the most, an application could have been filed under Order 32, Rule 15 of the Civil Procedure Code, for appointing a guardian but the plaint could not be rejected.

5. Vide impugned order, learned Court below has dismissed the application by holding that plaintiffs were not having any knowledge at the time of filing of the suit that the defendant was not able to defend the suit due to his mental incapacity and after coming to know of his mental incapacity, plaintiffs had already moved an application under Order 32, Rule 15 of the Code, which was pending adjudication and for which purpose, report of the Doctor had already been called to judge the mental status of the defendant, hence, there was no merit in the application.

6. Mr. G.C. Gupta, learned Senior Counsel appearing for the petitioner has argued that the impugned order is not sustainable in the eyes of law as learned Trial Court while dismissing the application filed by the petitioner under Order 7, Rule 11(d) of the Code erred in not appreciating that the suit filed by the plaintiffs against the defendant, who was mentally infirm, was not maintainable in law, in view of the provisions of the Mental Healthcare Act, 2017 and as this extremely important aspect of the matter had been completely ignored by the learned Court below, the order was liable to be set aside and the application filed by the defendant was liable to be allowed. He has further argued that learned Trial Court had also completely erred in not appreciating the provisions of Order 32, Rules 1 and 2 of the Code of Civil Procedure, which also barred the filing of the suit.

7. On the other hand, Mr. Ajay Kumar, learned Senior Counsel appearing for the respondents has argued that the learned Trial Court rightly rejected the application by passing a reasoned and speaking order, in which all aspects of the matter have been discussed in detail. He has further argued that the contention of the petitioner that the suit was barred by the provisions of the Mental Healthcare Act, 2017, is mis-conceived because the suit is not barred under the provisions of the said Act.

8. I have heard learned Senior Counsel appearing for the parties and also gone through the impugned order as well as record of the case.

9. Order 7, Rule 11(d) of the Code of Civil Procedure *inter alia* provides that a plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law.

10. A perusal of the record demonstrates that the suit filed by the plaintiffs was for possession of the suit land and recovery of `1.00 Lac alongwith pendenlite and future interest and also for future use and occupation charges *inter alia* on the ground that possession over the same of the defendant was illegal. As per the plaintiffs, they were owners in possession of the suit property which earlier was under the tenancy of Shri Gopal Dass Verma and before him, of his predecessor-in-interest, who had sublet a portion thereof to the father of the defendant. Gopal Dass had surrendered his tenancy in the entire western portion of shop No. 93, The Mall Shimla, whereby he also handed over the possession of remaining portion of the tenanted premises in his possession to the plaintiffs and thereafter, the tenancy rights with respect to the western portion of the

shop in question, including the suit property which was sublet, came to an end after the same was surrendered by Gopal Dass Verma, which led to withdrawal of the eviction petition filed against Gopal Dass and as defendant still continued to be in possession over the suit property, his possession whereof was illegal and for possession thereof, the suit was filed.

11. It is well settled law that while deciding an application under Order 7, Rule 11(d) of the Code, the Court is not to travel beyond the contents of the plaint to ascertain as to whether the plaint entails rejection or not. *Prima facie*, from the perusal of the contents of the plaint, it cannot be said that the plaint deserves rejection as the suit appears from the statement in the plaint to be barred by any law.

12. Be that as it may, this Court will now address the issue raised by learned Senior Counsel appearing for the plaintiffs that as the defendant was mentally unsound, therefore, the suit as filed, was not maintainable in view of the provisions of the Mental Healthcare Act, 2017, as also Order 32, Rules 1 and 2 of the Code.

13. I will first deal with the provisions of Order 32 of the Civil Procedure Code. Order 32 of the Civil Procedure Code deals with suit by or against a minor or a person of unsound mind. Order 32, Rule 1 provides that every suit by a minor shall be instituted in his name by a person, who in such suit, shall be called the next friend of the minor. Order 32, Rule 2 of the Code provides that where a suit is instituted on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented and notice of such application shall be given to such persons, and the Court, after hearing his objections, if any, may make such order in the matter as it thinks fit.

14. A bare perusal of Rules 1 and 2 of Order 32 of the Code demonstrates that they deal with a situation where a suit is filed by a minor. Rule 15 of Order 32 of the Code provides that Rules 1 to 14, except Rule 2-A shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.

15. This means that the provisions of Order 32, which relate to a minor have to be read *ipso facto* also in the case of a person who is found to be of unsound mind or is incapable, by reason of any mental infirmity, of protecting his interest when suing or being sued.

16. A plain reading of Rules 1 and 2 of Order 32 of the Code demonstrates that these two rules have got nothing to do as far as the present lis is concerned because here it is not a case where the plaint has been filed by a person of unsound mind or by a person who by a reason of mental infirmity, is not in a position to protect his interest. In this case, objection is that suit has been filed against a person who is mentally infirm. This factual situation is not covered either under Rule 1 or Rule 2 of Order 32 of the Code.

17. His second contention that the plaint was hit by the provisions of Order 7, Rule 11(d) of the Code on the ground that the suit was barred by the provisions of the Mental Healthcare Act, 2017, is also, in my considered view, without any merit. Learned Senior Counsel has relied upon the provisions of Section 3 (5) and Section 116 of the said Act to contend that the suit was not maintainable before learned Civil Court. Chapter II of the Mental Healthcare Act, 2017 deals with mental illness and capacity to make mental healthcare and treatment decisions.

18. Sub Section 5 of Section 3 of the Act, 2017 provides that determination of a person's mental illness shall alone not imply or be taken to mean that the person is of unsound mind unless he has been declared as such by a competent Court. Similarly, Section 116 of the 2017, Act simply states that no Civil Court has jurisdiction to entertain a suit or proceeding, in respect of any matter which the Authority or the Board is empowered by or under this Act to determine, and no injunction shall be granted by any Court or other authority, in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act. The functions of the Authority which is so defined under Section 2(c) of the Act, are provided for in Chapter X, XI and XII of the Act and a perusal of the said Chapters demonstrates that the same do not envisage conferment of any power upon the Authority under Section 2(c) of the Act, 2017, to adjudicate a lis, as has been filed by the respondents herein against the petitioner. Nor, this is a case wherein

the plaintiffs have filed a suit against the petitioner with regard to any of the functions which the Authority has defined under Section 2(c) of the 2017, Act, is to perform under the said Act, therefore, the plea of the learned Senior Counsel appearing for the petitioner that the suit was barred under the provisions of the Mental Healthcare Act, 2017, is also completely ill founded. On the other hand, this is a case which is squarely covered by the provisions of Order 32, Rule 3 of the Code wherein the Court has the authority to appoint a guardian where the Court is satisfied that the defendant is a person of unsound mind or is incapable of by reason of mental infirmity of protecting his interest.

19. Therefore, the application filed under Order 7, Rule 11(d) of the Civil procedure Code by the present petitioner for rejection of the plaint was totally mis-conceived and rejection of the same by the learned Trial Court by way of impugned order, which is both a well reasoned and also speaking order, cannot be said to be bad in law. This Court is purposely restraining from making any observation over the mental soundness of the petitioner in issue because there is a dispute with regard to the same between the parties and even otherwise, it is for the learned Trial Court to take a call on the said issue, in accordance with law and the provisions of the Civil Procedure Code.

With these observations, this petition is dismissed by holding that the impugned order, i.e. order dated 08.05.2019, passed by learned District Judge, Shimla, in C.M.A. No. 184-S/6 of 2019, is a well reasoned and speaking order. Pending miscellaneous application(s), if any, also stand disposed of.

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

Shyam Singh ....Petitioner.
Versus
State of H.P. and others ...Respondents.

CWP No.: 4903 of 2014
Decided on: 04.09.2019

Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 –Sections 4 (1) & 9 - Eviction from public premises – Sub - divisional Collector found the petitioner having constructed house on government land and ordered his eviction – Order upheld by Divisional Commissioner – Petition against – Held, Appellate Authority (Divisional Commissioner) disposed of number of appeals including appeal of petitioner vide common decision / order dated 16/5/2014 – No discussion in the body of order as what was the factual matrix of each case being decided by it and on what ground order passed by the Collector in case of each appellant, was being upheld – Appellate Authority was hearing appeals(s) and it was incumbent upon it to have adjudicated each appeal independently or discussed facts and grounds of appeal of each case independently - Petition allowed – Order set aside- Matter remanded. (Paras 7 & 8)

For the petitioner Mr. H.S. Rangra, Advocate.
For the respondents Mr. Dinesh Thakur, Additional Advocate General with M/s Amit Kumar Dhumal and Divya Sood, Deputy Advocate Generals and Sunny Datwalia, Assistant Advocate General for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this writ petition, petitioner has challenged order dated 30.04.2012 (Annexure P-5), passed by the Court of Collector, Sub Division Joginder Nagar, District Mandi, HP, in case No. 26, titled as Assistant Engineer H.P.P.W.D. Sub Division No. II, Joginder Nagar versus Sh. Shyam Singh, decided on 30.04.2012, under the provisions of H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971, vide which, said authority has held that petitioner is in unauthorized occupation of public premises, subject matter of the said proceedings and has ordered the petitioner to vacate the same within a period of 30 days, as also order dated 06.05.2014 (Annexure P-8), vide which, appeal filed by the petitioner against the order passed by the Collector, Sub Division, Joginder Nagar, was dismissed by the learned Appellate Authority, i.e. Divisional Commissioner, Mandi Division.

2. Brief facts necessary for adjudication of the present petition are that proceedings were initiated against the petitioner under Section 4(1) of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (hereinafter referred to as the 'Act') to the effect that petitioner had encroached upon the government land comprised in khasra No. 1046/14, measuring 8-8 Sq. yards at RD No. 0/120 to 0/195 in Muhal Joginder Nagar/396 in Tehsil Joginder Nagar on Joginder Nagar-Sarkaghat-Ghumarwin road by constructing a house. Petitioner responded to the proceedings so initiated under the Act by taking the stand that he has not encroached upon the government land and, in fact, had constructed the house on his own land.

3. On the basis of demarcation, which was conducted, petitioner was found to have had encroached upon the government land and accordingly vide Annexure P-5, Collector Sub Division Joginder Nagar ordered the eviction of the petitioner from the public premises.

4. Appeal preferred by the petitioner against said order under Section 9 of the Act was dismissed by the learned Appellate Authority vide order dated 06.05.2014 (Annexure P-8).

5. Mr. H.S. Rangra, learned Counsel for the petitioner, has argued that the order in appeal passed by learned Divisional Commissioner, Mandi, is not sustainable in the eyes of law as the appellate authority passed a common order in number of appeals listed before it without appreciating the individual facts of each case and by ignoring the legal position that as it was hearing a first appeal, it was incumbent upon the learned appellate authority to have had gone into the facts of each individual case and then returned the findings on the basis of the grounds which were urged by the appellant before it.

6. I have heard learned Counsel for the petitioner as also learned Additional Advocate General and gone through the impugned orders.

7. A perusal of the order passed in appeal by learned Appellate Authority demonstrates that number of appeals stood disposed of by the Appellate Authority vide common decision dated 06.05.2014, including the appeal filed by the present petitioner. However, there is no discussion in the body of the order as to what was the factual matrix of each case being decided by it and on what ground, the order passed by learned Collector in the case of each appellant including the petitioner was being upheld by the appellate authority. A perusal of the order demonstrates that the appellate authority has taken a note in general of the dispute involved in the appeals. Nothing can be made out from the body of the order as to facts of which particular case were being referred to or were taken into consideration while deciding the appeal. The way in which the appeals were decided by the learned Appellate Authority defies all logic.

8. As the appellate authority was technically hearing a first appeal against the order of eviction passed against the appellants, including the present petitioner, it was incumbent upon the appellate authority to have had adjudicated upon each appeal independently or discussed facts and grounds of appeal of each case independently. The appellate authority ought to have taken into consideration the grounds raised in the appeal by the present petitioner and returned its findings on the same vis-a-vis the order under challenge as also the pleadings on record. This Court deprecates the manner in which the appeals were decided by learned Appellate Authority as the process of adjudication does not contains any semblance of fair adjudication. The process adopted by learned appellate authority defies basic principles of law that justice should not only be done but also seen to have been done.

9. Accordingly, this petition is allowed and the order dated 06.05.2014 (Annexure P-8), passed by learned Divisional Commissioner, Mandi Division, in the case of present petitioner, i.e. Appeal No. 213 of 2012, titled as Shyam Singh, son of Shri Lehanu Ram versus A.E. HPPWD Sub Division No. 2 J/Nagar, is set aside and the appeal is remanded back to the learned Divisional Commissioner with the direction to decide the same afresh after hearing the parties concerned, in accordance with law.

It is clarified that this Court has not made any observation on the merit of the case and the appeal shall be decided by the learned Divisional Commissioner on the basis of material before it. Pending miscellaneous application(s), if any, also stand disposed of.

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

Ashwani Kumar alias Anku ...Petitioner.

Versus

State of H.P. ...Respondent.

Cr. Revision No. 335 of 2019
Date of Decision: September 5, 2019

Code of Criminal Procedure, 1973 – Section 216 – Alteration of charges – Circumstances , when it can be ordered – Held, charges framed by court must be in accordance with material placed before it or evidence brought on record subsequently – Charges can be altered even if evidence has not been let in –If the court has not framed charges despite material on record, it can always alter or amend charges at any time before pronouncement of judgment. (Para 6).

Code of Criminal Procedure, 1973 – Section 217 – Alteration of charges – Procedure thereafter – Held, after alteration or amendment of charges by court, prosecutor and the accused have a right to recall or re- summon any witness previously examined for further examination qua altered /amended charge – Lower court may refuse to recall or re-summon any witness if request is vexatious or it is made to delay or defeat ends of justice. (para 9).

Code of Criminal Procedure, 1973 – Section 216- Power to alter charge(s) – Nature & scope – Held, the prosecution, de-facto complainant or the accused have no right to seek addition or alteration of charges – Such power is vested exclusively in the court – There is no fault on the part of court if defect in charges is rectified on basis of application of either of party. (Para 10)

Code of Criminal Procedure, 1973 –Sections 216 & 217 – POCSO Act, 2012 – Sections 8 & 12 – Alteration of charges – Material on record prima facie making out a case of sexual assault rather than of sexual harassment – Order directing framing of charges for offence under Section 8 of Act, not unwarranted. (Para 12).

Cases referred:

P. Kartikalakshmi vs. Sri Ganesh and another, (2017) 3 SCC 347

Anant Prakash Sinha alias Anant Sinha vs. State of Haryana and another, (2016) 6 SCC 105

For the Petitioner: Mr. Surinder Saklani, Advocate.

For the Respondent: Mr.Desh Raj Thakur, Additional Advocate General, with Mr.Narender Singh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (Oral)

This petition has been preferred against the amendment of charge by the learned Special Judge, Kangra at Dharamshala, vide order dated 08.07.2019, in Case S.C. No.10-K/VII/15, titled as *State vs. Ashwani Kumar @ Anku*, in case FIR No. 134 of 2014, dated 12.12.2014, registered under Sections 363 and 366-A of the Indian Penal Code (in short 'IPC') read with Sections 12 and 18 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act'), whereby charge under Section 363 IPC and Section 8 of POCSO Act has been put to the petitioner-accused instead of charge under Section 363 of IPC and Section 12 of the POCSO Act.

2. Brief controversy in the present case is that in criminal trial under Section 363 IPC and Section 12 of POCSO Act pending against petitioner before learned Special Judge, at the stage of arguments, learned Public Prosecutor had filed an application under Section 216 of the Code of Criminal Procedure (in short 'Cr.P.C.') for amendment of charge from Section 11 to Section 8 of the POCSO Act of 2012, by referring statements of PW.2-victim and witness PW.3 Yukesh Kumar. Notice of the said application was given to the petitioner, who had opposed the application by filing a detailed reply, referring deposition of the prosecution witnesses examined during course of trial.

3. It is contended by the petitioner that impugned order has been passed on the basis of application filed by learned Public Prosecutor, which was not maintainable and also that even if the substance referred in the application is taken into consideration, no case for alteration of the charge is made out as learned Public Prosecutor had picked up selective portion of the deposition of prosecution witnesses in support of his prayer made for amending the charge against petitioner and he has referred deposition of witnesses made in examination-in-chief only, whereas, in case, statements of those witnesses, made in cross-examination, are considered, no case is made out for alteration of charge. It is further stated that Court can alter charge on its own, but the parties have no vested right seeking alteration or addition or modification of the charge.

4. Learned counsel for petitioner has relied upon pronouncement of the Apex Court in ***P. Kartikalakshmi vs. Sri Ganesh and another, (2017) 3 SCC 347***, wherein it has been held that power vested in the Court under Section 216 Cr.P.C., is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right and it may be, that if there was an omission in framing of charge and if it comes to the knowledge of the Court, trying the offence, power is always vested in the Court, as provided under Section 216 Cr.P.C., to either alter or to add the charge and that such power is available with the Court at any time before judgment is pronounced. Further that no party, neither *de facto* complainant nor accused or prosecution, for that matter, has any vested right to seek any addition or alteration of charge, because it is not provided under Section 216 Cr.P.C. and if such a course, to be adopted by parties, is allowed, then it will be well-nigh impossible for criminal Court to conclude its proceedings and concept of speedy trial will get jeopardized. It is further held that an application by any of the party is not maintainable before trial Court and therefore, it was not incumbent upon the trial Court to pass an order under Section 216 Cr.P.C.

5. Learned Additional Advocate General has contested this petition on the ground that Court was having the power to alter the charge, by exercising powers under Section 216 Cr.P.C., at any stage before pronouncement of judgment and even if it is considered that application filed by learned Public Prosecutor was not maintainable, then also, mere filing of the application will not render the order passed by trial Court illegal as the Court is vested with power to alter the charge under Section 216 Cr.P.C. and he has submitted that by way of alteration of charge petitioner is not going to be suffered any prejudice in any manner, keeping in view the procedure prescribed under Sections 216 and 217 Cr.P.C., which empowers the Court either to direct new trial or adjourn trial for such period as may be necessary and recall or re-summon and examine the witnesses with reference to such alteration or addition and also to call any further witness whom the Court may think to be material.

6. The Apex Court in ***Anant Prakash Sinha alias Anant Sinha vs. State of Haryana and another, (2016) 6 SCC 105***, after considering its previous pronouncements, has reiterated that Court can change or alter charge, if there is defect or something is left out and the test for it is thatit must be founded on the material available on record, and it can be on the basis of the complaint or the FIR or accompanying documents or material brought on record during the course of trial, and it can also be done at any time before pronouncement of the judgment. It is further observed that if Court has not framed charge despite material on record, it has the jurisdiction and authority to add a charge or to alter the charge and the charge so framed by the Magistrate should be in accordance with material placed before him or evidence brought on record subsequently and further that by exercising powers under Section 216 Cr.P.C., charges already framed can be altered even if evidence has not been let in.

7. Undoubtedly, as held by the Apex Court, it is obligatory on the part of the Court to ensure that no prejudice is caused to accused during trial and he is allowed to have a fair trial.

8. To safeguard the interest of not only accused but also of prosecution, complete mechanism has been provided under Sections 216 and 217 Cr.P.C., after alteration or addition of charge wherein under Section 216(4) it is provided that if, in the opinion of Court, alteration or addition to a charge is such that proceedings immediately with the trial, is likely to prejudice the accused or the Prosecutor, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

9. Section 217 Cr.P.C., in case of alteration or addition of charge by the Court after the commencement of the trial, mandates to allow the Prosecutor and the accused to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the Prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice and by using word 'shall allow', it is mandated by the legislation to allow the request of accused or prosecution to recall or re-summon, and examine such witness except for reasons provided in the section itself. Further not only this, in Clause (b) of Section 127 Cr.P.C. the Court has also been granted discretion to call any further witness, who is considered to be material by the Court after alteration or addition of charge.

10. No doubt, as explained by the Apex Court in *P. Kartikalakshmi's* case, power under Section 216 Cr.P.C., to alter or add to any charge by the Court, at any time before judgment is pronounced, does not create any vested right in favour of the prosecution, complainant or accused to seek any addition or alteration of charge as the said power is exclusively confined with the Court and Court can *suo motu* alter or add any charge on the basis of material before it, if it comes to the knowledge of the Court that a necessity has arisen for alteration or addition of charge and Section 216 Cr.P.C. is enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. However, in *Anant Prakash Sinha's* case, it is also observed that defect in framing of charge can be removed by the Court on its own, but in such a situation, there is no fault on the part of the Court in entertaining an application which, in a way, can be considered an application bringing to the notice of the Court about the defect in framing of the charge. It is clear from conjunctive reading of the pronouncements of the Apex Court that though parties do not have any vested right for alteration or addition of charge, but at the same time, the application filed by either party can be entertained by the Court as an instrument bringing defect in the charge to its notice. Therefore, learned Special Judge has not committed any illegality or irregularity by entertaining application filed by learned Public Prosecutor.

11. Originally, petitioner was charged by learned Special Judge under Section 363 IPC and Section 12 of the POCSO Act. Section 12 of the POCSO Act provides punishment for sexual harassment, defined under Section 11, with imprisonment of either description for a term which may extend to three years with fine. Whereas, Section 8 of POCSO Act provides for punishment for sexual assault, defined under Section 7, with imprisonment of either description for a term which shall not be less than three years, but which may extend to five years with fine. For the punishment provided under Section 8 of POCSO Act, it is graver offence than the offence punishable under Section 12 of POCSO Act. Therefore, an accused charged under Section 12 of POCSO Act only cannot be punished for commission of offence under Section 8 of POCSO Act. Therefore, when an application was filed before learned Special Judge, on the basis of material on record stating that a case not of sexual harassment, but of sexual assault is made out, it was necessary for learned Special Judge to consider the material on record and to alter or add the charge, but definitely subject to his own satisfaction on the basis of the FIR, accompanying documents and material brought on record during the course of trial before him and not on mere asking of the applicant. The alteration or addition is not to beswayedby the application of either party, but for the material on record, which came or is brought to the notice of the Court.

12. In the present case, in the application filed by learned Public Prosecutor, deposition of PW.2 and PW.3 in their examination-in-chief has been referred for amendment of the charge. However, learned Special Judge has not altered the charge on the basis of submissions of the applicant referring portion of the statements quoted by learned Public Prosecutor, but he has amended the charge by referring the material placed before him alongwith challan as he has clearly referred in the impugned order that after going through the charge-sheet, it had appeared to the Court that there was specific allegations against the accused that he had tried to remove prosecutrix from out lawful custody and taken her about 400 meters away from her house towards the Railway Station and therefore, physical contact of the accused with prosecutrix is shown in the case, which will come within the definition of sexual assault under Section 7 of POCSO Act and further that it has been stated in the original charge-sheet that taking of the prosecutrix to the fields was sexual assault and not the sexual harassment and, as such, he has found that there are specific allegations in this regard against the accused in the charge-sheet and thereafter considering that offence under Section 7 of POCSO Act punishable under Section 8 is a serious offence in comparison to the commission of offence under Section 11 of POCSO Act punishable under Section 12 of POCSO Act, he has ordered amendment of the charge under Section 363 IPC and Section 8 of POCSO Act.

13. At the time of framing of charge, Court has to consider *prima facie* evidence available on record about commission of offence for which accused is to be charged and not to evaluate the merits of evidence with regard to its sufficiency to convict the accused. Appreciation of evidence on merit is to be done by the Court on conclusion of trial and framing of charge on the basis of allegations in the challan and material accompanying it does not mean that there is sufficient evidence to convict the accused for the said offence as at the time of framing of charge availability of material sufficient for commencing the trial, is to be seen. The same principle will be applicable for altering or addition of charge under Section 216 Cr.P.C.

14. There is difference in 'sufficient material for commencing the trial' and 'evidence sufficient to convict an accused'. Former is to be considered at the stage of framing of charge and latter is to be evaluated on conclusion of trial. Framing of charge or amendment of charge under a particular Section does not mean that accused is definitely to be convicted for commission of the said offence, but it commences the trial or retrial for charge or amended charge whereafer on the basis of evidence on record accused may be convicted either for charged offence or for lesser offence or may be acquitted.

15. Therefore, I find no material for interference in impugned order doubting its correctness, legality or propriety.

16. It is informed that in the trial, case has been listed tomorrow i.e. 06.09.2019 for examination of witnesses after amendment of the charge, which indicates that trial Court has adopted the mechanism available under Sections 216 and 217 Cr.P.C. for safeguarding the interest of accused to avoid any prejudice to him on account of amendment of charge and during re-examination of the witnesses, petitioner-accused shall also have opportunity to cross-examine those witnesses and in case any witness is not recalled or re-summoned by the Court, he has a right to pray for recalling or re-summon and examine any witness, who may have been examined with reference to the amendment of the charge, and in view of provisions of Section 217 Cr.P.C., Court has no option except to recall or re-summon the said witnesses expect for the reasons provided under Section 217(a) of Cr.P.C.

17. In view above discussion, present petition is dismissed being devoid of merit, so also pending application(s), if any.

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

Suman Kumar and others ….Appellants.

Versus
Rattan Lal ...Respondent.

RSA No.: 410 of 2019.
Decided on: 05.09.2019.

Code of Civil Procedure,1908 – Order XXVI Rule 9 – Appointment of Commissioner for local investigation – Power of court – Held, for issuance of a commission under Order XXVI Rule 9 of Code, the court is not subservient to any application to be filed by either of parties before it – It is judicial conscience of court which has to be satisfied as to whether appointment of commissioner is necessary for purpose of elucidating the matter in issue pending between the parties - If same is necessary then court can order such commission and for said purpose, no application by either of parties is required. (Para 15).

For the appellants : Mr. Paresh Sharma, Advocate.
For the respondent : Mr. P.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this appeal, appellants have challenged the judgment and decree passed by the Court of learned Civil Judge (Jr. Divn.), Court No. 2, Ghumarwin, District Bilaspur, H.P. in Civil Suit No. 160/1 of 2006/14, vide which a civil suit filed by the present respondent for permanent prohibitory injunction as also for mandatory injunction stood decreed and the judgment and decree dated 29.07.2017, passed by learned Appellate Court in Civil Appeal No. 17-13 of 2017, whereby the appeal filed by the present appellants against the judgment and decree passed by learned Trial Court was dismissed.

2. Brief facts necessary for the adjudication of the present appeal are that a suit for permanent prohibitory injunction and in the alternative for possession, was filed by the present respondent/plaintiff against the appellants/ defendants on the ground that plaintiff, alongwith other co-sharers, was recorded as co-owners in joint possession of the suit land comprised in Khata/Khatoni No. 270/349, Khasra number 328, measuring 0-18 bigha and Khata/Khatoni number 301/353, Khasra number 327, measuring 0-02 bigha, situated in Village Bhapral, Pargna Ajmerpur, Sub Tehsil Bharari, Tehsil Ghumarwin, District Bilaspur, H.P. (hereinafter referred to as the 'suit land'). According to the plaintiff, defendants who were strangers to the suit land had started raising construction, initially in their own land which was contiguous to the land of the plaintiff, however, thereafter defendants dismantled the beed which was the boundary between the land of the plaintiff and defendants and opened one door towards the courtyard of the plaintiff and also encroached upon the land of the plaintiff by raising construction upon the same. On these pleadings, the suit was filed praying for a decree of permanent prohibitory/ mandatory injunction and in the alternative for possession.

3. Defendants contested the case of the plaintiff and took the stand that neither they had encroached over the suit land nor they had demolished any beed on the spot nor casued any interference over the suit land which belonged to the plaintiff.

4. On the basis of pleadings of the parties, learned trial Court framed the following Issues:-

1. *Whether the plaintiff is entitled for decree of permanent prohibitory injunction, as prayed for?... OPP.*
2. *Whether the plaintiff is entitled for decree of mandatory injunction, as alleged? ...OPP*
3. *Whether the plaintiff is entitled for decree of possession, as alleged? ..OPP*
4. *Whether the present suit is not maintainable in the present form, as alleged? ..OPD*
5. *Whether the plaintiff has no locus standi to file the present, as alleged? ..OPD*
6. *Whether the plaintiff has no cause of action to file the present, as alleged? ..OPD*

7. *Whether the plaintiff is estopped to file the present suit by his own acts, conduct and deed, as alleged?*
8. *Whether the present suit is bad for non-joinder and mis-joinder of necessary parties, as alleged? ..OPD*
9. *Whether the plaintiff is estopped to file the suit by the doctrine of acquiescence delay and latches, as alleged? ..OPD*
10. *Whether the present suit is not properly valued for the purpose of Court fee and jurisdiction, as alleged? OPD*
11. *Relief.*

5. The Issues so framed were answered as under on the basis of the evidence which was led by the respective parties in support of their respective contentions:-

Issue No. 1	*:*	*Yes.*
Issue No. 2	*:*	*Yes.*
Issue No. 3	*:*	*Yes.*
Issue No. 4	*:*	*No.*
Issue No. 5	*:*	*No.*
Issue No. 6	*:*	*No.*
Issue No. 7	*:*	*No.*
Issue No. 8	*:*	*No.*
Issue No. 9	*:*	*No.*
Issue No. 10	*:*	*No.*
Relief	*:*	*Suit of the plaintiff is decreed as per operative part of judgment.*

6. Learned Trial Court decreed the suit in the following terms:-

> *"This suit coming on this 12th day of April, 2017 for final disposal before me Upasna Sharma, Civil Judge (Junior Division), Court No. 2, Ghumarwin, Distt. Bilaspur, H.P. in the presence of Sh. S.K. Sharma, Adv. Ld. Counsel for the plaintiff, Sh. B.S. Dhiman, Adv Ld. Counsel for the defendants. It is ordered that the suit of the plaintiff is decreed to the effect that defendants are restrained by way of permanent prohibitory injunction from causing interference over the suit land qua the land in khasra No. 328 land measuring 0-18 bighas and Khata/ Khatoni No. 270/349, khasra No. 328 measuring 0-18 bighas and khata/khatoni No. 301/353 khasra No. 327, measuring 0-02 bigha situated in Village Bhapral, Pargna Ajmerpur, Sub Tehsil Bharari, Tehsil Ghumarwin, Distt. Bilaspur, H.P. and defendants are further directed to hand over the vacant possession of khasra No. 327/1 measuring 0-1 biswa shown in tatima dated 16.10.2016 which has been prepared as per the report conducted by local commissioner on said date to the plaintiff within one month from the date of order. No order as to cost is being made."*

7. It was held by learned Trial Court that to demonstrate that defendants were interfering over the suit land, plaintiff entered the witness box and deposed to said effect. Learned Trial Court further held that there was on record demarcation report of the Local Commissioner which proved that Suman Kumar etc. i.e. the appellants herein, had carried out construction over khasra No. 327/1, which belonged to the plaintiff, which clearly demonstrated that interference was caused over the suit land by the defendants and hence, the plaintiff was entitled to a decree of permanent prohibitory injunction and also for a decree of mandatory injunction as encroachment stood established upon the suit land by the defendants.

8. Feeling aggrieved, defendants filed an appeal before the learned Appellate Court.

9. Learned Appellate Court while upholding the findings returned by learned Trial Court, dismissed the appeal. Like learned Trial Court, learned Appellate Court also returned the findings that it was an admitted case even of the defendants that they have no right over the suit land, however, their stand was that the construction was carried out by them over their own land and there was no encroachment by them over the land of the plaintiff. Learned Appellate Court further held that in order to ascertain the veracity of the

rival claims of the parties, learned Trial Court had appointed a Local Commissioner to demarcate the suit land so as to elucidate the position on the spot and report dated 16.10.2016 of the Local Commissioner, i.e. Tehsildar Ghumarwin, depicted that the land of the plaintiff stood encroached to the extent of 0-1 biswa by the defendants. It further held that suit stood decreed by learned Trial Court on the basis of said report of the Local Commissioner. Learned Appellate Court took into consideration the grounds raised before it with regard to the appointment of Local Commissioner by the trial Court and held that the appellants could not be permitted to raise any objection with regard to appointment of Local Commissioner by learned Trial Court because it was borne out from the record that when the earlier demarcation report of the land in dispute was rejected by the learned trial Court and a fresh Commission for demarcation of the land was issued by the learned Trial Court vide order dated 11.05.2016, said order was passed in the presence of learned Counsel for the parties, including the defendants and the appointment of the Commissioner was not objected to on behalf of the defendants who also associated themselves in the process of demarcation which was subsequently carried out on 16.10.2016, i.e. almost 5 months after the order of demarcation was passed by the learned Trial Court. On these bases, learned Appellate Court held that, that being the case, the defendants could not be allowed to object to the fresh demarcation report simply because the same was not in their favour. Learned Appellate Court also held that said plea of the appellants merited rejection, more so, because no illegality was found in the process of demarcation that was followed by the Local Commissioner. Learned Appellate Court also took into consideration the fact that the objections which were filed against the demarcation report by the parties were also dealt with and dismissed by learned Trial Court vide separate order on 12.04.2019. Learned Appellate Court also relied upon the judgment of this Court in Kishori Lal vs. Pingla Devi, 1999(1) SLC 221, wherein it has been held by this Court that report of the Local Commissioner and the evidence recorded by him, shall be evidence in the suit, as also mandated by Order 26, Rule 10 of the Code. On these bases, learned Appellate Court concurred with the findings returned by learned Trial Court and dismissed the appeal.

10. Feeling aggrieved, the appellants have approached this Court by way of regular second appeal.

11. I have heard learned Counsel for the parties and gone through the judgments and decrees passed by learned Courts below.

12. There are concurrent findings returned in favour of the plaintiff and against the defendants by both the learned Courts below that the suit land was being interfered with by the defendants and they had also encroached upon the same. These concurrent findings are pure and simple findings of fact.

13. Learned Counsel for the appellants has argued before this Court that because the appointment of Local Commissioner by the learned Trial Court vide order dated 11.05.2016 was a unilateral act on the part of the learned Trial Court and as it was not passed on any application filed in this regard for appointment of the Local Commissioner by either of the parties, the same renders the judgments and decrees passed by learned Trial Court as also learned Appellate Court as *non est* because said act of learned Trial Court amounts to creating evidence in favour of the plaintiff.

14. In my considered view, there is no force in the said contention of learned Counsel for the appellants. Order 26, Rule 9 of the Code of Civil Procedure *inter alia* envisages that in any suit, in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

15. A reading of Rule 9 of Order 26 of the Code clearly demonstrates that for issuance of a commission under the provisions of Order 26, Rule 9 of the Code, the Court is not subservient to any application to be filed by either of the parties before the Court. It is the judicial conscious of the Court which has to be satisfied as to whether the appointment of a Commission is necessary for the purpose of elucidating the matter in issue pending between the parties or not. If the Court is of the view that same is necessary for the purpose mentioned in Rule 9 of Order 26 of the Code, then Court can order such Commission and for the said purpose, no application by either of the parties is required.

16. The issue as to whether appointment of Commission will result in creating evidence in favour of a party has to be primarily decided by the Court of law, when either

party approaches it for appointment of Commission. On the basis of basic principle of law that he who alleges has to prove, the Court has to cautiously take a decision with regard to the prayer for appointment of Commission keeping in view the fact whether allowing of such application will result in creating of evidence in favour of a party or it will assist in elucidating the matter between the parties.

17. I again reiterate that as far as factual matrix involved in the present appeal is concerned, there are concurrent findings returned in favour of the plaintiff and against the defendants that the defendants have interfered with the suit land and further also encroached upon the suit land.

18 During the course of arguments, learned Counsel for the appellants could not demonstrate that these concurrent findings of fact recorded in favour of the plaintiff and against the defendants were perverse and not borne out from the record of the case. As per him, the infirmity in the judgments and decrees passed by learned Courts below was that the same were passed upon the report of the Local Commissioner, which commission was directed by the learned Trial Court *suo motu*. I have already dealt with the said issue raised by learned Counsel for the appellants in detail in above part of the judgment. As, in my considered view, there is no substantial question of law involved in the present appeal nor there is any perversity in the findings returned in the judgments and decrees passed by learned Courts below, present appeal being devoid of merit is dismissed. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Court on its own motion ...Petitioner

Versus

State of H.P. and others ...Respondents

CWPIL No. 19 of 2016
Decided on: 06.09.2019

Constitution of India, 1950 – Article 226 – User of Town Hall, Shimla – Public interest litigation – Held, Municipal Corporation may locate offices of Mayor and Deputy-- Mayor in the Town Hall – Municipal Corporation in consultation with Government should come up with innovative ideas to put Town Hall to best use from point view of preserving the heritage and to derive income from such activities, which will showcase the beauty of hill station and culture and traditional arts of the people of the State – It may be put to use the area for housing high- end cafe with reading facilities, information centre and boutique of traditional crafts attracting tourists with an entry fee that will provide a handsome revenue to Corporation . (Paras 22 & 23).

For the petitioner: Ms. Seema K. Guleria, Advocate, as Amicus Curiae.

For the respondents: Mr. Ashok Sharma, Advocate General, with M/s. J.K. Verma, Adarsh K. Sharma, Ritta Goswami, Ashwani K. Sharma and Nand Lal Thakur, Additional Advocates General, for respondents No. 1 to 4.

Mr. Ankush Dass Sood, Senior Advocate, with Mr. Naresh K. Gupta, Advocate, for respondents No. 5 and 6.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.*(Oral)*

Aggrieved by the haphazard parking of vehicles on both sides of the road on the motorable ambulance road from Sanjauli Bazar up to Tibetan Colony (Dhingu Dhar), a group of residents of Dhingu Dhar road, Sanjauli came up with a writ petition in CWP No. 1675 of 2016. The reliefs sought in the said writ petition, as it was originally filed, were as follows:

"(i) That the respondents may kindly be directed by way of writ of mandamus to immediately take steps to prevent haphazard parking on the both sides of the road and remove and take action against the wrongdoers, who park their vehicles on both sides of the road thus causing obstruction and inconvenience in free flow of traffic on the Motorable ambulance road from Sanjauli Bazar till Tibetan Colony (Dhingu Dhar), Shimla.

(ii) That the respondents may kindly be directed to immediately clear and relaying the Motorable ambulance road from Sanjauli Bazar till Tibetan Colony (Dhingu Dhar), Shimla.

(iii) That the respondents may kindly be directed to adopt a proper procedure for laying down pipes, telecommunications wires, etc. so that no inconvenience is caused to the public at large.

(iv) Any other appropriate writ, order or direction which this Hon'ble Court may deems fit, just and proper in the facts and circumstances of the present case may kindly also be issued/passed, in the interest of justice and fair play."

2. Since the petitioners who came up with CWP No. 1675 of 2016 were residents of the said locality, the writ petition filed by them was for the redressal of the grievances of the said locality and was not in the nature of a public interest litigation.

3. On 29.06.2016, this Court ordered notice in the said writ petition and also passed an order directing the respondents not to allow illegal parking on the road which was the subject matter of the litigation.

4. But when the said writ petition came up for hearing on the next date, namely 24.08.2016, a sudden twist took place and this Court directed the writ petition to be treated as a Public Interest Litigation. The order passed on 24.08.2016 reads as follows:

"Keeping in view the fact that the grievance projected through the instant petition involves larger public interest, we deem it proper to treat the instant petition as public interest litigation. Ordered accordingly. The Registry is directed to diarize the writ petition as such. Ms. Seema K. Guleria, Advocate, is appointed as Amicus Curiae to assist the Court.

Respondents No. 1 to 4 have already filed the reply. They are also directed to file status report within two weeks about the steps having been taken for managing the movement/parking of vehicles in and around Indira Gandhi Medical College and Hospital, Shimla.

Reply/status report by respondents No. 5 to 8 be filed within two weeks."

5. Pursuant to the aforesaid order, the writ petition was re-numbered as the present CWPIL No. 19 of 2016.

6. Even after conversion of the ordinary writ petition into a public interest litigation, the issue sought to be addressed by the Court remained the same, as could be seen from the order passed on 15.09.2016. Primarily, the order passed on 15.09.2016 focused on the restriction of the entry of vehicles in two areas, namely Sanjauli and Kasumpati. But slowly over the next couple of hearings, the scope of the public interest litigation got enlarged to the larger question of pedestrian and vehicular traffic at different places in the city. As a consequence, more parties including the Himachal Road Transport Corporation came to be impleaded as respondents in the writ petition.

7. On 23.03.2017, when the public interest litigation came up for further orders, the Municipal Commissioner, Shimla, through a status report, placed on record, the details of road side car parking provided by the Municipal Corporation in and around Shimla. At that time, the learned counsel who was appointed by this Court as Amicus Curiae (incidentally, the counsel for the petitioner in CWP No. 1675 of 2016 was the one who was appointed as the Amicus Curiae after the personal interest litigation was converted into a public interest litigation) brought to the notice of the Court that the

Municipal Corporation was spending huge amounts of money under ADB/World Bank Projects, for the upliftment and beautification of Shimla. Therefore, the attention of the Court got diverted to a Parking Complex under construction. Therefore, the Project Proponent of the Parking Complex got impleaded as one of the respondents to the public interest litigation.

8. Then the case took a turn on 13.12.2017, when the Court noticed certain communications exchanged between the Asian Development Bank and the Department of Tourism and Civil Aviation. In some of those communications, it was found that a building known as Town Hall, located on the Mall Road and belonging to the Municipal Corporation was proposed to be renovated and that plans for the same had been approved from the Municipal Corporation as well as the Heritage Committee. It is relevant to note that Town Hall used as the office of the Municipal Corporation, was originally designed as "New Library and Offices" by a Scottish Architect by name Mr. James Ransome. It appears that the original building, designed as a library was constructed in 1908, but after a few decades, the offices of the Municipal Corporation came to be located in the said building. Treating the said building as "priceless architectural marvel", the Asian Development Bank funded the restoration of the building.

9. Therefore, this Court passed an order on 13.12.2017 suggesting that a decision must be taken with regard to the proper use of the building after its restoration. The relevant portion of the order passed by this Court on 13.12.2017 may be usefully extracted as follows:

> *"6. It is a matter of record that for the last two years, work of preservation and restoration of the building is in progress. More than ₹ 8.00 crore stand invested by the ADB for such purpose.*
>
> *7. Article 51-A (Part-IVA) of the Constitution of India mandates that it shall be the duty of every citizen of India to value and preserve the rich heritage of our composite culture.*
>
> *8. In fact, with respect to another building in the town, i.e. Vice Regal Lodge, having great historical importance and significance, apart from being an architectural wonder, when an attempt was made to convert the same into a hotel, Hon'ble the Apex Court intervened and directed the said property to be protected and preserved, so that cultural and historical heritage of India and beauty and grandeur of the monuments is preserved. Further, in the very same report [Rajeev Mankotia v. Secretary to the President of India & others, (1997) 10 SCC 441], the Court observed that "Similar places of interest, though of recent origin, need to be preserved and maintained as manifestation of our cultural heritage or historical evidence. Similar efforts should also be made by the Government of India, in particular the Tourism Department, to attract foreign tourist and to give them good account of our past and glory of the people of India as message to other countries and territories".*
>
> *9. The need to protect and preserve such buildings stands reiterated by the Apex Court also in K. Guruprasad Rao v. State of Karnataka & others, (2013) 8 SCC 418.*
>
> *10. Undoubtedly, the building, which is commonly known as the "Town Hall", undoubtedly, is an important and significant landmark of the town. Intrinsically, it is part of its heritage.*
>
> *11. It is in this backdrop, we are of the considered view that a decision must be taken with regard to proper use of the building after its restoration. Perhaps it can be used for housing a Library and other public conveniences, rather than leaving it at the mercy of the "Babus", for nailing the restored wooden panels and work of art, only for the purposes of hanging the annual calendars or pasting the same all over the walls."*

10. A direction was also issued by this Court on 13.12.2017 to the Chief Secretary to the Government to file his personal affidavit on the next date of hearing with regard to the proposed usage of the Town Hall building.

11. Thus, what started off as an ordinary litigation relating to haphazard parking, slowly got sidetracked into an issue relating to management of traffic in Shimla and later assumed the role of a public interest litigation with the proposed use of the Town Hall, becoming the focus of the litigation.

12. Pursuant to the directions issued by this Court on 13.12.2017, affidavits were filed on behalf of the respondents. Thereafter, the learned Advocate General appearing for the State, made a statement before this Court on the next date of hearing, namely 11.01.2018 that the possession of the Town Hall building will not be handed over to the Municipal Corporation without the leave of the Court. The Court was also informed by the Director (Tourism) that for the improvement of the Shimla Town, more than ₹ 650 Crores stood sanctioned as Grant by the Asian Development Bank.

13. On 13.11.2018, this Court directed the learned Advocate General and the learned counsel for the Municipal Corporation to submit a conceptual plan of the Town Hall building alongwith details of the area of each room. The respondents were also directed to place on record the proposal as to how the State Government, in consultation with the Municipal Corporation intended to utilize the said premises. Pursuant to the said order, the Commissioner of the Municipal Corporation filed an affidavit.

14. After perusing the same, this Court passed an order on 03.01.2019. This order reads as follows:

> *"Though the Commissioner, Municipal Corporation has filed the compliance affidavit in terms of our previous order dated 13th December, 2018, but we are not convinced with the idea that some of the senior functionaries would sit in the Town Hall Building, whereas the other officials will be housed in other adjoining areas. This is totally an impractical approach to the efficient functioning of the Corporation.*
>
> *On the other hand, it is suggested that the State Museum, which is housed in a big building with lawn and parking place, can be shifted to the Town Hall building, with a Modern Visitors Gallery to showcase the State of Himachal Pradesh in its entirety with single entry and exit to the building. For such purpose, the final decision will have to be taken by the State Government, for which, learned Advocate General assures the Court to take up the matter at the highest level."*

15. Eventually, a conceptual plan was filed by the Municipal Corporation. On the conceptual plan filed by the Municipal Corporation and on their proposals for the better utilization of the building known as "Town Hall", we heard the learned Amicus Curiae, Mr. Ashok Sharma, learned Advocate General, and Mr. Ankush Dass Sood, learned Senior Counsel appearing for the Municipal Corporation.

16. The learned Senior Counsel appearing for the Municipal Corporation pleaded that though the building is owned by the Municipal Corporation, they are not able to take possession of the building and put it to appropriate use, on account of a previous order passed by this Court recording the undertaking on the part of the learned Advocate General not to hand over possession. It is argued by the learned Senior Counsel that after having spent a huge amount of money, if the Corporation is not allowed to put up the building to optimum use, the Municipal Corporation will suffer irreparable loss and hardship.

17. We have carefully considered the submissions as well as the conceptual plan and the affidavit.

18. In the conceptual plan filed by the Commissioner of the Municipal Corporation alongwith his affidavit, it is stated

(i) that pursuant to a decision taken in a meeting held between the Additional Chief Secretary (Tourism) and Principal Secretary (Urban Development), an Expert in the field of Urban Planning, by name Professor K.T. Ravindran, was consulted.

(ii) that the said Professor K.T. Ravindran inspected the Town Hall on 27.12.2018 and made various suggestions; and

(iii) that on an earlier occasion, this Court had directed the respondents to explore the possibility of shifting the State Museum from its existing location at Chaura Maidan to Town Hall, but the same was not found feasible, as the building in which State Museum is located at present is of an area of about 3304 sq. mtrs. with parking area to the extent of 575 sq. mtrs. and open area/lawn measuring 1320 sq. mtrs., while the area of the Town Hall building is only about 1338 sq. mtrs.

19. It is further stated in the conceptual plan that a meeting was convened under the chairmanship of the Chief Minister on 06.03.2019. It was decided in the said meeting that the attic floor and ground floor should be put to such use that they attract tourists and the public. It was also decided therein that the Municipal Corporation should be able to use the middle floor.

20. After narrating the sequence of events, the conceptual plan contains a proposal, which reads as follows:

*"**4. Proposal:***

In view of the facts and circumstances of the case it is quite evident that the Town Halls across the globe are being predominantly used by the City Councils and moreover this will help in maintaining the Heritage legacy and its traditional use for over the period of more than hundred years.

The Proposal of Municipal Corporation, Shimla regarding its usage of one of the floors housing the office of Mayor, Deputy Mayor and Commissioner and other allied offices have been also endorsed by renowned expert engaged in the field of Architecture and Urban Planning. Needless to mention that the Hon'ble Chief Minister has also endorsed the proposal of Municipal Corporation, Shimla in the meeting held on 6.3.2019. Further, it is submitted that the best concept of usage of this building will be around mixed use i.e. office floor and commercial use largely in terms of the public centric activities. The final decision to run the public oriented activities like High-End Café with reading facilities, Information Centre, Children related facilities and Boutique of Traditional Crafts etc be taken forward by exploring the feasibility as also the commercial interest including viability of proposed ventures by the Municipal Corporation in consultation with the State Government. It is further emphasized that being the owner and possession holder of the property it is the exclusive right of Municipal Corporation to make the best use of it given the sanctity of the constitutional body and historical value attached to the Corporation.

Therefore, it is concluded that the property in question shall be handed over to Municipal Corporation, Shimla for making its best use, in public interest."

21. While the proposal contained in the conceptual plan is broadly acceptable, there is only one aspect which may be a matter of concern. While there can be no objection to the location of the offices of the Mayor and the Deputy Mayor in the Town Hall, the location of the offices of the Commissioner and other allied officers will certainly convert the heritage building into a full-fledged Government office. While the Mayor and the Deputy Mayor may not be required to sit throughout the day in the office, the Commissioner and his Deputies may be required to sit in the office throughout the day for six days a week. They may also have to deal with the public, who may have to seek the services of or the statutory approvals/licenses of the Municipal Corporation for various activities. While tourists who visit a place of interest may stay at the most, in a building

for not more than two to three hours, the employees of a Government office may be required to stay for about seven hours at the minimum,every day. The maintenance and the cleanliness of any Government building, especially in a country like ours, leaves much to be desired. Moreover, a huge amount of money has been invested in the renovation of the structure and hence, the Corporation should be able to get some income which will match at least the cost of maintenance and the cost of servicing the loan/investment cost.

22. Therefore, we are of the considered view that while permitting the Municipal Corporation to locate the offices of the Mayor and the Deputy Mayor in the Town Hall, the Municipal Corporation, in consultation with the Government, should come up with innovative ideas to put the Town Hall to best use (i) from the point of view of preserving the heritage, and (ii) so as to derive income from such activities which will showcase the beauty of the hill station and the culture and traditional arts of the people of the State.

23. Therefore, this public interest writ petition is disposed of with the following directions:

(i) The State Government may hand over the property in question to the Municipal Corporation;

(ii) The Municipal Corporation may be permitted to have the offices of the Mayor and the Deputy Mayor in the Town Hall. The offices of the Commissioner or his Deputies need not be located in the Town Hall.

(iii) The Municipal Corporation, in consultation with the State Government may put to use the rest of the area, for housing a high-end Café with reading facilities, Information Centre and Boutique of traditional crafts and arts, attracting tourists, with an entry fee that will provide a handsome revenue to the Corporation to service the loan.

24. While passing the aforesaid order, we have kept in mind two more aspects, namely (a) that this public interest litigation has its genesis in a private litigation about haphazard parking of vehicles in a particular area in the Shimla Town, but in the course of hearing, this Court kept on enlarging its scope; and (b) that the building in question is owned by the Municipal Corporation of Shimla and hence, beyond issuing a direction to the Corporation to protect the heritage value of the structure, this Court cannot issue directions that will infringe upon the property rights of the statutory body.Insofar as the original writ petition relating to haphazard parking of vehicles is concerned, series of interim orders have taken care of the interest of the petitioners, they shall hold good.

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Court on its own motion ...Petitioner

Versus

Union of India & others ...Respondents

CWPIL No. 268 of 2017
Reserved on: 24.07.2019
Decided on: 06.09.2019

Constitution of India, 1950 – Article 226 –Declaration / Up-gradation of State Roads as National Highways – Public interest litigation – Held, Union Government has not taken any final decision as to which are the State Roads to be declared as National Highways as the guidelines for said declaration of State Roads as National Highways not finalized – Internal ministerial consultations required for finalization of such guidelines – Matter closed. (Para 3 to 6).

For the petitioner: Mr.Ankush Dass sood, Senior Advocate with Mr.Arjun Lall, Advocate, as Amicus Curiae.

For the respondents: Mr.K.D. Shreedhar, Senior Advocate with Ms.Tanvi Chauhan, Advocate, for respondents No.1 and 11/Union of India.

Mr.Ashok Sharma, Advocate General, with Mr.J.K. Verma, Mr.Ranjan Sharma, Mr.Adarsh Sharma and Mr.Nand Lal Thakur, Additional Advocate Generals, for respondents No.2 to 4/State.

Mr.Shrawan Dogra, Senior Advocate with Mr.Bharat Thakur, Advocate, for respondents No.5 to 9.

Ms.Shreya Chauhan, Advocate, for respondent No.10.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice

This Public Interest Litigation is an off root of another Public Interest Litigation of the year 2015, bearing CWPIL No.17 of 2015. In the said Public Interest Litigation CWPIL No.17 of 2015, this Court passed an order on 24.11.2017 taking note of the fact that the Ministry of Road Transport and Highways Government of India had accorded, in principle approval, for the declaration of 61 roads in the State of Himachal Pradesh as new National Highways. This Court recorded in its order dated 24.11.2017 that considering the importance of timely construction of new National Highways, this Court deemed it proper to supervise the progress made in the construction of the Highways. Taking note of the communication of the Central Government dated 14.09.2016, this Court directed on 24.11.2017 in CWPIL No.17 of 2015 that a separate PIL should be registered.

2. Subsequently another Public Interest Litigation in CWPIL No.212 of 2017 concerning the construction of National Highways covering a total length of about 750 Kms was taken up by the Court and the Registry was directed to register three separate public interest litigations, with respect to each of the three different Highways, namely, Pinjore-Baddi-Nalagarh NH-21A, Shimla-Matour NH 88 and Pathankot-Mandi NH-20.

3. Accordingly, the above Public Interest Litigation in CWPIL No.268 of 2017 was separately registered for the purpose of addressing the issue of award of contracts for the preparation of detailed project reports. After the registration of the said PIL, several orders were passed from time to time. Some of the orders passed are extracted as follows:-

"(i) *Order passed on* ***01.12.2017***

"Mr. Anup Rattan, learned Additional Advocate General, under instructions, from Mr. B.K. Sharma, Chief Engineer, (NH), HP PWD, Shimla-1 has handed over the status report of finalization of consultants in preparation of DPRs which reads as under:-

"*Status of finalization of consultant in preparation of DPRs of "In Principle" declared National Highways in the state of Himachal Pradesh.*

Total in principle declared National Highways	*69*
Total number of roads in which the work of consultancy already awarded for preparation of feasibility study and DPR for National Highways upon approval of ministry (MORTH).	*8* *Seven already awarded and 8th case awarded to M/s Sowil India ltd. on 29.11.2017*
Total number of roads upon finalization of technical, financial and tender based estimate completed and sent to ministry (MORTH).	*24* *22 already sent and two cases sent to ministry on 29.11.2017*

Total number of roads in which tenders called and are in its evaluation stage which are likely to be finalized and to be sent to Govt. of India by 5.12.2017	*18*
Tenders invited but yet to be finalized	*9+3=12*
Road to be constructed by other agency i.e. NHIDCL 4nos *BRO 1nos* *Already constructed by HPRIDC 2nos*	*7*
Total	*69*

Mr. Anup Rattan further states that work of preparation of DPR reports stands awarded to (1) M/s EXPLORER Consultancy Services Pvt. Ltd. Plot No.3, First Floor Sector 18 Serhaul Hurugrum Haryana 122001. India; (2) M/s WAPCOS Ltd., 7th Floor "Kailash", 26 Kasturba Gandhi Marg New Delhi 110001 India; (3) M/s Sowil Ltd., D-157, Sector-7, Noida 201301 India; (4) M/s RITES Ltd., RITES Bhawan 4th Floor-HW Plot No.1 Sector 29 Gurugram Haryana 122001; and (5) M/s STUP Consultations Pvt. Ltd. 1112, Vishal Tower, Distt. Centre Tankpuri, New Delhi 110058 India. As such, we implead them as party respondents No. 5 to 9. Service upon the aforesaid respondents be effected through respondent No.4.

Insofar as 24 cases which are pending consideration with respondent No.1 are concerned, Mr. Desh Raj Thakur learned counsel states that necessary action shall positively be taken within a period of one week. We clarify that if needful is not done within the above mentioned period, then Chief Engineer, Zone-II, Ministry of Road and Transport shall personally remain present in Court.

As far as 18 roads in which tenders are called for are concerned, Mr. Anup Rattan, under instructions, states that the same are in the stage of evaluation, which is likely to be finalized and sent to the Government of India by 5th December, 2017.

We direct the State to do the needful by 5th December, 2017 positively. Mr. Desh Raj Thakur states that cases so received from the State shall positively be processed within two weeks thereafter. Mr. Anup Rattan states that cases shall be sent through a special messenger. We direct respondent No.4 to file his personal affidavit indicating the names of successful bidders.

Insofar as tenders of 12 roads are concerned, Mr. Anup Rattan informs us that as far as 9 out of 12 roads are concerned, process qua finalization of tenders also stand taken and the same shall be completed within 30 days and thereafter the cases shall be sent to respondent No.1 for approval. We direct respondent-State to positively do the needful within a period of 30 days from today. Mr. Desh Raj Thakur states that cases so received from the State shall positively be processed within two weeks thereafter.

With regard to remaining three cases, Mr. Anup Rattan informs us that the entire process shall be completed within a period of 45 days from the date of issuance of notice inviting tender and thereafter the cases shall be sent to respondent No.1 for approval. We direct the State to forthwith issue notice qua inviting tenders and complete the entire process within 45 days thereafter. Mr. Desh Raj Thakur states that cases so received from the State shall positively be processed within two weeks thereafter.

We request Mr. Ankus Dass Sood, learned Senior Counsel and Mr. Arjun K. Lall, Advocate to assist the Court as Amicus Curiae."

(ii) *Order passed on 11.12.2017.*

Compliance affidavits on behalf of respondents No.2 to 4 & are taken on record.

2. We clarify that the indulgence shown by this Court is only as a facilitator and the lis, which is definitely not adversarial in nature, is being pursued only for the timely completion of projects in question. Needless to say, parties undertaking the execution of work shall be governed by the agreements/arrangements entered into between the respondent company and the stakeholders. This Court would definitely welcome suggestions from the private respondents, as to how best the agreement can be got executed at the earliest and this we say so for the larger public interest of earlier completion of roads is involved.

3. Further, we are of the view that while preparing DPRs of the national highways, it would be open for the consultants to consider all attending factors, including geographical conditions and topographical locations. We are clear that in a hilly State, particularly where the soil strata is not consistent, perhaps roads may have to be constructed by digging tunnels through the mountains, for not only it may shorten the distance, but save the environment in terms of soil erosion and landslides. Further, the distance would be reduced considerably. Also human potential would be optimized to the fullest. Constructing roads by digging tunnels is not a concept, which is alien to the State of Himachal Pradesh. In fact, off late, it is put to use at three places i.e. Rohtang; Barog; and Swarghat. Perhaps it would also save cost of acquisition of land and reduce cost of the project.

4. Another factor which must be kept in mind is the construction of duct for common utility services such as laying of optical fiber lines/telecom cables/electricity cables, IPH and sewerage lines etc. This would not only prevent repeated digging of the roads, but perhaps generate income from the service providers, using the same.

5. Yet another factor, which must be kept in mind, would be providing of lay-ways and civic amenities for the commuters.

6. We clarify that these are all guidelines to be kept in mind for preparation of DPRs.

(iii) <u>Order passed on 4.1.2018</u>

Status report filed by Mr. Dalip Singh Chauhan, Superintending Engineer, National Highway, is pleasingly satisfactory. We place on record our appreciation for the efforts put in by the said Officer in processing the files and pursuing the matter with the authorities for preparation of DPRs. Equally, we appreciate the efforts put in by Mr. Rajesh Sharma, learned Assistant Solicitor General of India and Mr. Desh Raj Thakur, learned Central Government Standing Counsel, who have been relentlessly pursuing the matter with the appropriate authorities for grant of necessary sanction/approvals.

2. Noticeably, out of 62 roads, tenders for preparation of DPRs qua following 05 roads already stand sanctioned and the work is in progress. Relevant extract of status report is quoted herein below:-

Sr. No	*Name of Road*	*Name of consultant*	*Length (KM)*	*Date of issue of Letter of Acceptance by Chief Engineer (NH)*	*Status*
1.	*Dhaneta-Barsar-Shahtalai-*	*XPLORER Consultancy Services Pvt.*	*61*	*12.9.2017*	*Letter to commence the work*

	Berthin	*Ltd., Plot No.3, 1st Floor Sarhaul, Sector-18 Gurgaon-122001, Haryana*			*issued on 6.10.2017 and work in progress*
5	*Shimla(Dhalli)-Tattapani-Churag-Rohanda-Sundernagar*	*SOWIL LIMITED, D-157, Sector 7 Noida-201301, India*	*180.000*	*10 .10.2017*	*Letter to commence the work issued on 3.1.2018 and work in progress*
6	*Salhech-Chandol-Habbon-ajgarh-Baddu Sahib-Bagthan-Banethi*	*RITES Ltd 4th Floor, Highway Division Plot No.1, Sector-29 Gurgaon-122201*	*127.300*	*19.9.2017*	*Letter to commence the work issued on 12.12.2017 and work in progress.*
7	*Sanaura (NH)-Rajgarh-Nohradhar-Haripurdhar-Rohnahat-Jamali on NH-707*	*RITES Ltd 4th Floor, Highway Division Plot No.1, Sector-29 gurgaon-122201*	*114.000*	*19.09.2017*	*Letter to commence the work issued on 12.12.2017 and work in progress.1*
8	*Sainj (NH-705)-Deha-Chopal-Nerwa-Feduspul (NH)*	*STUP Constants Pvt. Ltd. 11/2, Vishal tower, Distt. Center Janakpuri, New Delhi 110058*	*90.000*	*14.9.2017*	*Letter to commence the work issued on 15.12.2017 and work in progress.*

3. We notice that qua following three roads the process for confirming the bank guarantees/singing of bank agreements is in progress and as we understand, the same is likely to be completed within a period of one week, hopefully within fortnight, the successful bidders shall commence the work for preparation of DPRs. Relevant extract is reproduced herein below:-

Sr. No	*Name of Road*	*Most preferred bidder/consultant*	*Length (KM)*	*Status*
1	*Shimla (Taradevi)-Kunihar-Ramsher-Nalagarh-Dharowala (HP)-Ghanauli on NH-205*	*M/s WAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi*	*102.350*	*Tender based estimates are under scrutiny in MORTH,*

		110001		*New Delhi.*
2	*Rohru-Chirgaon-Tikri-Larrot-Chanshal-Dodrakawar*		*96.000*	
3	*Chhaila on NH-705 Sainj Oachghat-Sarahan on NH-907A*		*108.000*	

4. Insofar as following 24 roads are concerned, we notice that necessary sanction from the Central Government already stands obtained and thereafter the process for negotiations/finalization of tenders/completion of formalities/ signing of agreements by the successful bidders shall be completed on or before 31st January, 2018. We expect the successful bidders to immediately commence the work with the signing of the agreements. Relevant extracted is reproduced hereinbelow:-

Sr. No	*Name of Road*	*Most preferred bidder/consultant*	*Length (KM)*	*Status*
1	*Junction with NH-154 at Dramman-Sihunta-Chowari-Jot-Chamba-Koti-Tissa-Killar*	*M/s PIDC Private Limited, B-7, Sector-64, Noida-201301, India*	*271*	*Letters have been written to Consultants on 1.1.2018 to attend the negotiations before 15.1.2018. Letter of award shall be issued after successful completion of negotiations*
2.	*Jogindernagar to Bareru to Dharmanto Kunkatarto Kotli*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*44*	
3.	*Declaration of Palampur-Dharamshala road via Nagri road as new National Highway*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*35.7*	*Letters have been written to Consultants on 1.1.2018 to attend the negotiations before 15.1.2018. Letter of award shall be issued after successful completion of negotiations*
4	*Dadour-Chailchowk-Janehli-Chhatri-Ranbag-Nagan-(including Tunnel)*	*M/s YONGMA Engineering Co. Limited, Unit 301, 302 Time Centre, Sector-54 Gurgaon, Haryana 122003*	*111*	
5.	*Manupul-Gauna-Basaral-Dhaneta-Tiper-*	*M/s WAAPCOS Limited, 5th Floor, "Kailash*	*50.5*	

	Fahal-Galore-Budhawin Chowk Nalti-Hamirpur (Junction of Hamirpur Bye-pass)	*Building", 26, Kasturba Gandhi Marg, New Delhi 110001*		
6.	*Hamirpur (Mattan Sidh) Dosarka-Lambloo Tarakwadi-Bhoranj-Jahoo*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*34*	
7.	*Nagni-Pudwa-0Panhar-Khundiyan-Jawalamukhi road*	*M/s YONGMA Engineering Co. Limited, Unit 301, 302 Time Centre, Sector-54 Gurgaon, Haryana 122003*	*34.2*	
8.	*Ranital to Masroor Lunj-32 Meel via Kuther Tripal Bhater Bassa Lunsu Dhar road km 0/0 to 53/500 including bridge over Baner khad*	*M/s YONGMA Engineering Co. Limited, Unit 301, 302 Time Centre, Sector-54 Gurgaon, Haryana 122003*	*54.2*	
9.	*Kaloha-Pragpur-Dhaliara-Dada Siba Sansarpur Terrace road*	*M/s YONGMA Engineering Co. Limited, Unit 301, 302 Time Centre, Sector-54 Gurgaon, Haryana 122003*	*60.9*	
10.	*Bhager-Panol-Berthin-Ghoridhabiri-Maharal-Bijhari-Salooni-Galore-Kangu-Lalari (Bhathqa)*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*71.2*	
11.	*Didwin Tikkar-Mahal Bhoranj-Chandruhi Tatahar (Sarkaghat)*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*28.8*	

12.	*Hamirpur-Sujanpur-Alampur-Palampur*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*60*	
13.	*Junction with NH-303 at Jawallamukhi-Dehra-Jwali-Raja-Ka-Talab-Jasure*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*09*	
14.	*Sataun (NH-707)- Renuka-Dadahu-Jamta-Dosarka (NH-907A)*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*56.000*	*Letters have been written to Consultants on 1.1.2018 to attend the negotiations before 15.1.2018. Letter of award shall be issued after successful completion of negotiations.*
15.	*Haripurdhar-Sangrah-Renuka-Trimti-Bailya-Dholakuan*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*79.000*	
16.	*Kandaghat-Sadhupul-Chail-Kufri; (17) Sunni to Luhrion left bank*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*57.000*	
17.	*Sunni to Luhrion left bank*	*M/s YONGMA Engineering Co. Limited, Unit 301, 302 Time Centre, Sector-54 Gurgaon, Haryana 122003*	*50.000*	
18.	*Haripurdhar-Kupavi-Tarahan-Sarahan-Chopal*	*M/s YONGMA Engineering Co. Limited, Unit 301, 302 Time Centre, Sector-54 Gurgaon, Haryana 122003*	*67.000*	
19.	*Kofata-Jakhana-Jong-*	*M/s YONGMA Engineering Co. Limited, Unit 301,*	*29.750*	

	Tunia-Haripur	*302 Time Centre, Sector-54 Gurgaon, Haryana 122003*		
20.	*Solan to Oachghat*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*10.000*	
21.	*Solan-Subathu-Kainchi Mor*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*23.000*	
22.	*Kunihar to Domehar to Piplughat to Dhundan to Bharirighat*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*33.000*	
23.	*Nalagarh on NH-21A Dabhotta, Tibbi, Dugri-Pated Nawagram, Androla, Uperla, Kashmirpurm Baruna, Bagheri, Khatiwala Maura on NH-21*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*35.000*	
24.	*Darla Mod (Navgaon) to Berri road*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*37.000*	

5. With respect to following 10 roads (wrongly mentioned as 11) are concerned, we understand that the Ministry of MORTH, New Delhi has already accorded sanction, but, however, formal communication has yet not been received by the State. Learned Assistant Solicitor General of India states that the matter shall be expedited and he shall personally ensure that such sanctions are handed over to Sh. J.K. Verma, learned Dy. Advocate General, within a period of one week from today. Relevant extract is reproduced hereinbelow:-

Sr. No	***Name of Road***	***Most preferred bidder/consultant***	***Length (KM)***	***Status***
1	*Sundernagar-Chai-Dohara-Tiflaghat-Palasi*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*42*	*Sanction Letters in respect of these 11 roads not yet received from MORTH, New Delhi.*
2.	*Salapad to Harnda to to Kasol to Tatapani on left bank*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*64*	
4	*Ajouli Santokhgarh Una Lower Lalsingi upto Swan Bridge*	*MARC TECHNOCRATS Pvt. Ltd. Mark House, Sector6-7 Dividing Road opposite Devi Lal Park, Bahadurgar, Haryana*	*22.2*	
5	*Bangana to Jawalaji via Shantla-Tutroo-Peer-Saluhi-Chamukha-Kaleshwar-Madhadev*	*MARC TECHNOCRATS Pvt. Ltd. Mark House, Sector6-7 Dividing Road opposite Devi Lal Park, Bahadurgar, Haryana*	*39*	
6.	*Thapna (Four lane junction)-Baghchhal (Babkhal) Marotan-Jewin-Kalot-Bharoli Kalan-Gharan Shah Talai (including Bridge at Babkhal over Satluj River)*	*M/s Technocrats Advisory 1492, 1st Floor, Street No.05 Wajir Nagar, Kotla Mubarkarpur New Delhi 110003*	*42*	
7	*Bassi (On Navgaon Beari Road) Jabbal-Rani Kotla- markand (Construction of Tunnel near Bandla Dhar) connecting Bilaspur) Balh Bhulana-Beri Darolan (Construction of bridge connecting Kiratpur-Ner Chowk) Expressway)*	*M/s Technocrats Advisory 1492, 1st Floor, Street No.05 Wajir Nagar, Kotla Mubarkarpur New Delhi 110003*	*22*	
8.	*Kanchimore-Shree Naina Devi-Bhakra*	*M/s Technocrats Advisory 1492, 1st*	*50*	

		Floor, Street No.05 Wajir Nagar, Kotla Mubarkarpur New Delhi 110003		
9.	*Nadaun-Tira Sujanpur-Sandhol-Kandapattan-Jogindernagar junction with NH-154*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*127.3*	
10	*Basoli on NH-503 to Biru-Thana Kalan-Bangana-Nadaun on NH-3*	*M/s Technocrats Advisory 1492, 1st Floor, Street No.05 Wajir Nagar, Kotla Mubarkarpur New Delhi 110003*	*65*	
11	*Bharwain-Chintpurni-Jorbar-Pucca Tiala-Sansarpur Terrace.*	*M/s Technocrats Advisory 1492, 1st Floor, Street No.05 Wajir Nagar, Kotla Mubarkarpur New Delhi 110003*	*88*	

6. Mr. Dalip Singh Chauhan, Superintending Engineer states that process of negotiation shall be expedited and endeavour shall be made to have the works awarded on or before 15.2.2018.

7. Insofar as the following 03 roads are concerned, the matter is pending consideration with the appropriate authority, i.e., MORTH, New Delhi. Learned Assistant Solicitor General of India states that process shall be completed in terms of our earlier order dated 1.12.2017. Relevant extract is reproduced hereinbelow:-

Sr. No	*Name of Road*	*Most preferred bidder/consultant*	*Length (KM)*	*Status*
1	*Shimla (Taradevi)-Kunihar-Ramsehr-Nalgarh-Dharowla(HP) – Ghanauli on NH-205*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*102.350*	*Tender based estimates are under scrutiny in MORTH, New Delhi*
2	*Rohru-Chirgaon-Tikri-Larrot-Chanshal-Dodrakawar*	*M/s WAAPCOS Limited, 5th Floor, "Kailash Building", 26, Kasturba Gandhi Marg, New Delhi 110001*	*96.000*	
3	*Chhaila on NH-705 Sainj-Oachhghat-Sarahan on NH-907A*	*Sterling Indo Tech Consultants Pvt Ltd. 601, Sunny Mart, New Aatish Market, Mansarovar*	*108.000*	

		Jaipur, Rajasthan, India.		

8. With respect to remaining 16 roads, which as per the affidavit are under technical evaluation? Mr. Chauhan further states that with the receipt of the same, all the cases shall be evaluated, processed and forwarded to MORTH, New Delhi on or before 20.2.2018, in terms of our earlier order dated 1.12.2017.

9. List on ***12.1.2018****, before which date, supplementary affidavit of the latest status be filed."*

(iv) ***Order passed on 12.01.2018.***

This is in continuation of our order, dated 4th January, 2018, pursuant to which, status report stands filed by the Superintending Engineer, National Highway Division, HPPWD, US Club, Shimla. As per the same, following is the status with regard to 62 National Highways in relation to which DPRs. are required to be prepared:

Sr. No.	*Progress*
8 Roads	*Work already stands allotted to the Consultants and is likely to be completed within a period of eight months from the date of allotment.*
24 Roads	*Negotiation is under progress and work is to be awarded on or before 31st January, 2018.*
11 Roads	*Sanction stands received from MORTH and the process for consultation/negotiation and finalization of tender is under progress and is likely to be completed on or before 15th February, 2018.*
3 Roads	*The matter is yet pending with MORTH*

Learned Assistant Solicitor General states that the case shall be processed and approved, rather affirmatively. Time schedule shall be adhered to.

Sr. No.	*Roads*	*Progress*
(i)	*16 Roads*	*Technical evaluation is complete*
(ii)	*12 Roads*	*Technical evaluation is complete.*

Cases shall be forwarded to MORTH on or before 20th February, 2018. MORTH shall deal with the same in terms of our order, dated 01.12.2017 and thereafter time schedule prescribed therein shall be adhered to.

Sr. No.	*Roads*	*Progress*
(iii)	*2 Roads*	*Technical bids are to be opened before 15th January, 2018 and shall be sent to MORTH on or before 28th February, 2018.* *Time schedule shall be adhered to.*
(iv)	*2 Roads*	*There appears to be overlapping and the matter is under examination with the road alignment technical committee. Technical bid will be opened on 13th February, 2018, whereafter*

		the time schedule already fixed shall be adhered to.

Let fresh status report shall be filed before the next date. List on ***24th January, 2018*** *before the learned Vacation Judge."*

(v) ***Order passed on 13.03.2018***.

As per information supplied by Mr. Ranjan Sharma, learned Additional Advocate General, tenders for packages No. 26 and 33 stand opened on 07.03.2018, whereas tenders for packages No. 31 and 32 stand opened on 12.03.2018. We direct that the entire process post opening of the said tenders shall be completed within a period of 15 days from today and thereafter, immediately the cases shall be sent to respondent No. 1 for approval. As already directed, Central Government shall immediately process the said files and intimate its decision to the State within a period of 15 days from the date of receipt of the said files.

As far as package No. 30 is concerned, which as per information made available by the learned Additional Advocate General is to be opened on 28.03.2018, we direct that the entire process post opening of the same shall also be completed within a period of 15 days from the date of opening of tender and thereafter, file shall be sent to the Central Government forthwith, who shall convey its decision to the State within a period of 15 days from the date of receipt of such file. On the next date of hearing, the Chief Engineer, National Highway (HPPWD), Shimla shall also apprise this Court about the status of seven roads, which are reflected in the order passed by this Court on 01.12.2017, i.e. roads which were to be constructed by other agencies i.e. four roads by NHIDCL, one road by BRO and two roads which stand constructed by HPRIDC. Compliance report be filed on or before 20th of March, 2018.

List on ***20th of March, 2018."***

(vi) ***Order passed on 17.04.2018.***

On 14.9.2016, Ministry of Road Transport and Highways, Government of India had granted in principle approval for construction of 69 roads in the State of Himachal Pradesh for which Detailed Project Reports (DPRs) were to be prepared and submitted to the Ministry of Road Transport and Highways, Government of India.

2. Noticing that no action was taken by the State, on 1.12.2017, this Court issued notices with respect to 62 roads in relation to which action was to be taken by the National Highway Authority of India/ Ministry of Road Transport and Highways, Government of India / State of Himachal Pradesh.

3. Happily, all the said authorities had taken action for preparing the DPRs. However, with regard to remaining 7 roads, we had specifically not issued any direction hoping that the Agencies involved in the preparation of the DPRs, most of them being Defence Organizations, would take appropriate action. It was only in the month of March, 2018, when we found that no adequate action was taken by the State Agencies, on 13.3.2018, this Court issued certain directions with respect to these 7 roads.

4. On 9.4.2018, we had held discussion with Mr. Abhilash, Engineer Liaison Officer, Ministry of Road and Transport, Government of India, and were assured that appropriate action for preparation of DPRs shall be taken. Regretfully, we find that no proper information is

forthcoming qua these roads and more specifically from the National Highways and Infrastructure Development Corporation Ltd. (NHIDCL).

5. Under these circumstances, we implead the National Highways and Infrastructure Development Corporation Ltd. (NHIDCL), through its Managing Director and Border Road Organization through Director General (Military Operations), as party respondents No. 10 and 11 respectively in the array of respondents. Registry to carryout necessary correction in the memo of parties.

6. Mr. Rajesh Kumar Sharma, learned Assistant Solicitor General of India, waives notice on behalf of the newly arrayed respondents.

7. We direct the Managing Director of the National Highways and Infrastructure Development Corporation Ltd. (NHIDCL), and the Director General (Military Operations) of Border Road Organization to forthwith take appropriate action for ensuring that all the formalities with respect to these 7 roads, be completed at the earliest and the papers reach the office of Ministry of Road Transport and Highways, Government of India (MORTH), latest within two weeks from today and wherever it is not possible to do so, they shall explain, by way of an affidavit the difficulties/obstacles coming in their way.

List on ***7th May, 2018"***

***(vii) <u>Order passed on</u>* <u>07.05.2018</u>**.

Status report has been filed by the Chief Engineer, National Highway, HP PWD, as also on behalf of General Manager (Project), National Highways and Infrastructure Development Corporation Ltd. (NHIDCL). A perusal of the report filed by the General Manager (Project), NHIDCL demonstrates that draft DPRs. pertaining to following roads, i.e. Hathithan (NH-21)-Manikaran-Pulga, Taklesh-Sarahan-Jeori and Chandigarh-Karoran-Tanda-Prempura-Gariran-Paploha-Bar-Shilukhurd-Jangesh-Kasauli-Dharampur (on NH-5) stand submitted with NHIDCL and after going through all codal formalities, said draft DPRs shall be forwarded to MORTH by 30th June, 2018.

Learned Senior Counsel has also apprised the Court that process for preparation of land acquisition plan already stands initiated alongwith steps to obtain necessary forest clearances, as may be required. We direct that necessary permissions under the Forest Conservation Act be granted, as also preparation of land acquisition plan be completed on or before 30th June, 2018.

Mr. Ranjan Sharma, learned Additional Advocate General apprised this Court that with regard to following roads, i.e. Ranital on NH 503-Kotla on NH 154, Ghumarwain-Jahu-Sarkaghat and Naina Devi-Swarghat, no order is required to be passed as these roads are already covered under 61 roads qua which DPRs are under preparation. This Court has been further apprised that as far as formal declaration of these roads as National Highways is concerned, the same is to be done by MORTH. Mr. Rajesh Sharma, learned Assistant Solicitor General of India submits that necessary action in this regard shall be taken within period of three weeks and necessary declarations shall be issued within the said period.

With regard to road Tandi to Sansari Nalla (with Border Roads) road, this Court has been informed that the tender has already been called for preparation of DPR by the Superintending Engineer,

National Highway Circle Shahpur, HP PWD and technical bids will be opened on 30th May, 2018.

*List on **16th May, 2018**, before this Bench, on which date all the stakeholders shall submit latest status reports pertaining to all the 69 roads, as to what is the status of these roads as of now and what are the milestones which stand fixed by the stakeholders qua their respective completion.*

This Court places on record its appreciation to the assistance rendered to the Court by the learned Amicus Curiae, as also by all the learned counsel representing the stakeholders."

(viii) ***Order passed on 21.08.2018***.

Mr. Ranjan Sharma, learned Additional Advocate General has placed on record instructions dated 21.08.2018, relevant portion of which is reproduced as under:-

"The subject cited CWPIL 268/2017 was listed before the Hon'ble High Court on 21.08.2018. Accordingly, as per the directions of Hon'ble Court,the following is hereby solemnly submitted:-

1. In context to the observations raised by MoRTH, New Delhi vide letter No. RW/NH-12014/1311/HP/2018/ Zone-II dated 09.08.2018 regarding sanction of Tender based estimates of 5 Nos. roads, the desired clarification/reply will be sent to MoRTH, New Delhi within a week time.

2. In response to 24 Nos Draft Alignment Reports, regarding which 11 Nos stands received in this office from concerned Superintending Engineer, the same will be submitted to MoRTH after scrutinizing & thereafter correcting the same by concerned field functionaries within 10 days time.

3. The remaining 13 Nos Draft Alignment Report out of 24 Nos Draft Alignment Report, would be submitted to MoRTH, New Delhi within 3 weeks time.

Therefore, in view of above submissions you are requested to apprise the Hon'ble Court about the same."

Learned Advocate General states that needful shall positively be done within the stipulated time. Let learned Amicus Curiae respond to the same by the next date of hearing.

List on 11.09.2018, as prayed for."

(ix) ***Order passed on 18.09.2018.***

We request learned Advocate General to apprise Hon'ble Chief Minister, State of Himachal Pradesh, of the pendency of the present proceedings and the various orders passed by this Court in this case from 1st of December, 2017 onwards. Let Chief Secretary to the Government of Himachal Pradesh examine the matter; take up the issue of with the appropriate authority(s) and file his personal affidavit with regard to the stand taken by the various parties before this Court.

List on 25.09.2018."

(x) *Order passed on 26.11.2018*.

The Ministry of Road, Transport and Highways, Government of India, vide its memos dated 14th September, 2016, 10th April, 2017 and vide such subsequent letters informed the Government of Himachal Pradesh that 69 State Roads passing through the State of Himachal

Pradesh or neighbouring States have been approved in principle to be declared as National Highways, though subject to the outcome of detailed project report preparation.

The instant sum motu proceedings have been initiated in public interest to find out the status/fate of those 69 approved National Highways in principle.

As per the latest instructions given by the Himachal Pradesh Public Works Department contained in its affidavit dated 24th November, 2018, out of those 69 highways, State Public Works Department is required to prepare DPRs in respect of 63 number of roads, whereas three DPRs are to be prepared by NHIDCL and one by Border Road Organization.

Be that as it may, one of the preliminary exercise to be done for preparation of DPRs is to decide the alignment of the road. We are informed that alignment exercise has been completed qua 51 roads and report has been submitted to Ministry of Road, Transport and Highways, Government of India, for approval. The said Ministry is directed to take appropriate decision and send a compliance report by the next date of hearing. The HPPWD shall meanwhile complete the alignment exercise in respect of remaining proposed National Highways and forward the same to the Central Government. A fresh status report by the State Government shall also be filed.

As informed, the NHIDCL has already prepared DPRs in respect of three roads and submitted to the Ministry concerned for approval. The decision to be taken by the Ministry in respect of highways shall include those three highways also. The Border Road Organization will also submit its report about one proposed National Highway. Let the respective status reports by all Agencies be filed by the next date of hearing.

*Post for hearing on **25th February, 2019**."*

(xi) ***Order passed on 25.02.2019.***

Ministry of Road Transport and Highways has filed a status report-cum-affidavit, which is taken on record, copy whereof has also been given to the learned Amicus Curiae.

In the light of the averments made in para 15 of the status report filed today, we direct the Ministry of Road Transport and Highways to file an additional status report alongwith map depicting all the 69 State Highways which were statedly approved in principle for up-gradation as National Highways as well as the National Highways which have been decided to be widened/four-laned alongwith the time schedule in respect of each National Highway. The affidavit shall also give details of the amount spent on consultancy work and the consultants to whom such payments have been made.

*Post the matter on **9th April, 2019.***

(xii) ***Order passed on 09.04.2019.***

On 25th February, 2019, the Ministry of Road Transport and Highways was directed to file a status report alongwith a map depicting 69 State Highways which were approved in principle for up-gradation as National Highways. It was also directed that the amount spent on consultancy work and paid to the Consultants be also disclosed.

2. The status report filed in deference thereto comprises the map showing 69 stretches of State Highways approved in principle for up-gradation as National Highways with a length of 4281 km. It is

further disclosed that 945 km National Highways in length are to be up-graded in the State of Himachal Pradesh during the "successive Annual Plans subject to inter-se priority and availability of funds". The details of the release of payments towards DPR consultancy work on State Highways have also been appended as Annexure-IV. It is further averred that the Ministry of Road Transport and Highways is "in process of framing the Revised Guidelines for declaration of State Roads as National Highways".

3. We find from Annexure-IV that an amount of over ₹ 24 crores has already been released to the Consultants for preparation of DPRs and as per the details submitted separately, a sum of ₹ 163 crores is to be spent.

4. It goes without saying that hundreds of crores of rupees have been decided to be spent even without issuing the Revised Guidelines for declaring a State Highway as National Highway.

5. Going by the non-committal stand taken on behalf of the Ministry, it is possible that whatever amount has already been spent can go in waste, for it would be as per the Revised Guidelines only as to whether or not any State Road in the State of Himachal Pradesh would be formally declared as a National Highway.

6. Such a practice evolved by the Ministry cannot be appreciated. Firstly, there should have been a final decision as to which are the State Roads to be declared as National Highways and thereafter, the amount ought to have been spent on DPRs etc.

7. The fact of the matter is that as a result of the declaration in principle regarding 69 stretches of State Highways approved in principle for up-gradation as National Highways, all such roads are lying abandoned without any maintenance causing unexplainable inconvenience to the public at large. Not only this, the existing National Highways are also not being maintained at all.

8. On a query by the Court, learned Assistant Solicitor General of India, on instructions, informs that over ₹ 25 crores have been released to the HPPWD for the maintenance of National Highways, whereas at the spot, one does not find, as reported by various learned counsel, that even a single Highway has been satisfactorily maintained and is worth motorable.'

9. We, thus, direct the Ministry of Road Transport and Highways to furnish the details of the amount, National Highway wise, released for its maintenance as well as direct the Department of PWD, Government of Himachal Pradesh, to file a status report as to when and where the said amount has been spent.

10. In the larger public interest, we also direct the Ministry of Road Transport and Highways to release the requisite funds to the National Highways Wing of HPPWD for up-keep and maintenance of the National Highways. Similarly, the Ministry is directed to take a time-bound decision re : revision of the Guidelines for declaration of State Roads as National Highways and file a further status report alongwith such Revised Guidelines. The next status report shall also disclose as to how many roads in the State of Himachal Pradesh have been decided to be formally up-graded as National Highways in terms of such Revised Guidelines. A tentative time-line on study and assessment of the DPRs for up-gradation of the State Highways shall also be separately mentioned.

11. With a view to satisfy the conscious of the Court that over ₹ 24 crores have been spent for preparation of DPRs, let one of the DPRs, on illustrative basis, submitted by M/s Lion Engineering Consultants, Bhopal, to whom a sum of about ₹ three crores has been paid, be also produced.

12. Learned Assistant Solicitor General of India, on instructions, further informs that no further payments would be released to the Consultants without first finalizing the alignment of the State Roads to be up-graded as National Highways.

13. For the purpose of submitting details regarding the amount released by the Ministry for maintenance of National Highways or the amount spent by the HPPWD for such maintenance, post the matter on ***22nd May, 2019.*** *For other issues, the case shall be taken up on* ***18th June, 2019."***

4. Pursuant to the orders passed on 09.04.2019 directing the Ministry of Road Transport and Highways to take a time bound decision for revision of the guidelines for declaration of State Roads as National Highways, an affidavit has been filed on behalf of the Ministry. As per the affidavit, inter ministerial consultations are mandatorily required to be followed. It is stated that the revised guidelines would also be applicable for the assessment of detailed project reports.

5. In a separate status report filed by the Himachal Pradesh Public Works Department, it is stated that there are 19 existing National Highways running to a length of 2592 Kms in the State of Himachal Pradesh and that due to harsh weather, the cost of maintenance and repairs has increased. A tabulation is also presented along with the report indicating the details of National Highways.

6. In view of the above status report, no further orders are necessary in this PIL. Hence, it is closed.

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

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Preeti ...Petitioner

Versus

State of H.P. and others ...Respondents

CWP No. 975 of 2019
Reserved on: 07.08.2019
Decided on: 06.09.2019

Himachal Pradesh Tenancy and Land Reforms Act, 1972 - Section 2 (8)- 'Landless person', who is ? - Held, to fall within definition of expression 'landless person' one should satisfy that (i) he does not hold any land for agricultural purposes, whether as owner or as tenant; (ii) he earns his livelihood principally by manual labour on land; (iii) he intends to take the profession of agriculture; and (iv) he is capable of cultivating land personally. (Para 8)

Himachal Pradesh Tenancy and Land Reforms Act, 1972 – Section 2(7) – Expression 'Land' – Meaning of – Held, - 'Land' as defined in the Act does not include built up structure being used for non-agricultural purpose but includes structures meant for agricultural purposes or purposes subservient thereto (Para 11)

Code of Civil Procedure, 1908 – Order XVIII Rules 2 & 3 – Production of evidence by parties – Procedure – Held, in claim application, petitioner (Insured / owner) was impleaded as respondent no.1 and insurance company as respondent no. 3 – Respondent no.1 led his evidence – Thereafter, insurer led its evidence and also filed some documents

– Respondent no.1 thus had the opportunity to impeach the veracity of witnesses of the insurance company by way of cross examination – This is all the law envisages – It is not provided in law that after the subsequent respondents have led their respective evidence, then the respondent which has earlier led his/her evidence, shall again be given opportunity to rebut whatever material has been placed on record by the subsequent respondents. (Para 6).

For the petitioner:	Mr. Ajay Sharma, Senior Advocate, with Mr. Ajay Thakur, Advocate.
For the respondents:	Mr. Ashok Sharma, Advocate General, with M/s. J.K. Verma, Adarsh K. Sharma, Ritta Goswami, Ashwani K. Sharma and Nand Lal Thakur, Additional Advocates General, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

Challenging an order passed by the Tehsildar Kandaghat holding that the petitioner is not entitled to purchase a land in view of the prohibition contained in Section 118 (2) (b) of Himachal Pradesh Tenancy and Land Reforms Act, 1972, the petitioner has come up with the above writ petition.

2. Heard Mr. Ajay Sharma, learned Senior Counsel for the petitioner and Mr. Adarsh K. Sharma, learned Additional Advocate General for respondents No. 1 and 2.

3. The petitioner herein entered into an agreement for the purchase of a residential flat in village Sirinagar, Tehsil Kandaghat and submitted an application on 09.04.2019 to the Sub-Registrar seeking permission, claiming that she is a bonafide Himachali belonging to the Scheduled Caste. She enclosed a copy of the agreement of sale dated 26.03.2019. The flat intended to be purchased allegedly consisted of three rooms, kitchen, toilet, bathroom and a balcony approximately measuring a carpet area about 72.30 square meters with a parking space for one vehicle.

4. After conducting an inquiry, the third respondent held that though the petitioner is a bonafide Himachali belonging to the Scheduled Caste, she did not qualify as a "landless person" in terms of the definition of the expression under Section 2 (8) of the Act. Therefore, by the proceedings dated 22.04.2019, the third respondent informed the petitioner that she is not entitled to purchase the property, without getting permission of the competent Authority. Aggrieved by the said order, the petitioner has come up with the above writ petition.

5. The controversy that arises in this writ petition lies in a very narrow compass. The fact that the petitioner is a bonafide Himachali and that she belongs to the Scheduled Caste are not disputed. The only ground on which the third respondent has rejected the request of the petitioner is that she does not fall within the definition of the word "landless person".

6. Section 118 (1) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 prohibits the transfer of any land by way of sale, gift, will, exchange, lease, mortgage with possession, creation of a tenancy or in any other manner, if such transfer is in favour of a person who is not an agriculturist. But sub-Section (2) of Section 118 carves out certain exceptions. One of the exceptions is to be found in Clause (b) of sub-Section (2) of Section 118. As per Clause (b) of sub-Section (2), nothing contained in sub-Section (1) of Section 118 shall be deemed to prohibit the transfer of land by any person in favour of "a landless person belonging to a Scheduled Caste or a Scheduled Tribe".

7. Since there is no dispute about the fact that the petitioner is a Scheduled Caste and since the dispute revolves only around the question whether the petitioner is landless, the definition of the expression "landless person" found in Section 2 (8) of the

Himachal Pradesh Tenancy and Land Reforms Act, 1972, assumes significance. It reads as follows:

> *"2. Definitions.*
>
> *xxx xxx xxx*
>
> *(8) "landless person" means a person who, holding no land for agricultural purposes, whether as an owner, or a tenant, earns his livelihood principally by manual labour on land and intends to take the profession of agriculture and is capable of cultivating the land personally."*

8. To fall within the definition of the expression "landless person", one should satisfy four conditions, namely: (i) he must not hold any land for agricultural purposes, whether as owner or as tenant; (ii) he must earn his livelihood principally by manual labour on land; (iii) he must intend to take the profession of agriculture; and (iv) he must be capable of cultivating the land personally.

9. Neither the impugned proceedings nor the reply filed by the respondents disclose in any manner as to whether the petitioner does not satisfy any one or more of the aforesaid conditions. The impugned proceedings simply state that the petitioner is not a landless person within the meaning of the Act. It is not even known whether any kind of inquiry was conducted by the respondents for finding out whether the petitioner fulfills any one or more of the conditions stipulated in Section 2 (8). A very bald statement expressed in the form of an opinion without any basis is not sufficient to defeat the rights of a person who claims to fall under one of the exempted categories.

10. Both in the impugned proceedings as well as in the reply, the respondents have completely omitted to take note of one important fact. While the respondents have focused attention on the definition of the expression "landless person", they have completely lost sight of the definition of the word "land" appearing in Section 2 (7), which reads as follows:

> *"2. Definitions.*
>
> *xxx xxx xxx*
>
> *(8) "land" means land which is not occupied as the site of any building in a town or village and is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture and includes –*
>
> *(a) the sites of buildings and other structures on such land,*
>
> *(b) orchards,*
>
> *(c) ghasnies,*
>
> *(d) banjar land, and*
>
> *(e) private forests."*

11. The main part of the definition of the word "land" excludes a land which is not occupied as the site of any building in a town or village. It is only the inclusive part of the definition found in Clause (a) of sub-Section (7) of Section 2 that the sites of buildings and other structures on land are included within the definition. But it is only those sites of buildings and other structures located on land occupied or let out for agricultural purposes or for purposes subservient to agriculture that are included in Clause (a) of sub-Section (7) of Section 2. This is made clear by the use of the word "such" in Clause (a) of sub-Section (7) of Section 2. At the cost of repetition, Section 2 (7) (a) is reproduced again:

> "the sites of buildings and other structures on ***such*** land."

12. As can be seen from the Preamble to the Act, the aforesaid Act is intended to unify, amend and consolidate the laws relating to tenancies of agricultural lands. One cannot lose sight of the object and purposes of the Act. What is sought to be purchased by the petitioner herein, even according to the reply filed by respondents No. 1 and 2, is only a small flat measuring approximately a carpet area of 72.30 sq. mtrs. comprising of

three rooms, a kitchen, a toilet, a bathroom and a balcony with parking space for one vehicle in a building which appears to be already in existence.

13. Even according to the reply–affidavit filed by the respondents, the petitioner's father was working as a Sweeper in a Government Polytechnic during the period 1985 to 2017. Unfortunately, instead of showing sympathy on such a person from the lower strata of society, the respondents have taken advantage of this fact to say that the petitioner is not earning her livelihood principally from agriculture, as required by Section 2 (8). But such an interpretation, as we have pointed out earlier, omits to take note of the definition of the word "land" in Section 2 (7).

14. The learned Additional Advocate General appearing for the respondents sought to raise a preliminary objection to the maintainability of the writ petition on the basis of Section 72 of the Registration Act, 1908. It is his contention that whenever the Sub-Registrar refuses to register a document under Section 71, a person aggrieved is entitled to file an Appeal under Section 72 (1) and that therefore the petitioner ought to have availed the alternative remedy of Appeal before invoking the writ jurisdiction of this Court.

15. But we do not think that the above objection can be sustained. The refusal of the third respondent to register the document of the petitioner, was not on any factual ground but on the ground of a legal impediment. In fact, though the impugned order was passed by the third respondent (the then Sub-Registrar), the reply to the above writ petition has been filed by respondents No. 1 and 2. Once a reply has been filed on behalf of the Secretary (Revenue) to the Government, the objection that an Appeal ought to have been filed to the Registrar under Section 72 (1) of the Registration Act, 1908 is nothing but an eye wash. Therefore, this contention deserves to be rejected.

16. In view of the above, we are of the considered view that the impugned order passed (i) without any basis to hold that the petitioner does not satisfy any one or more of the four conditions stipulated in Sections 2 (8); and (ii) without an application of mind to the definition of the word "land" in Section 2 (7), is vitiated.

17. Hence, the writ petition is allowed and the impugned order is set aside directing the respondents to allow the registration of the flat purchased by the petitioner.

18. Pending miscellaneous applications, if any, are also disposed of accordingly.

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

Sanjay Kumar ....Petitioner.
Versus
Sh. Baju Ram and others ...Respondents.

CMPMO No.: 262 of 2019.
Decided on: 06.09.2019.

Code of Civil Procedure, 1908- Order XVIII Rules 2 & 3 – Production of evidence – Procedure – Held, in claim application, petitioner (insured) was impleaded as respondent No.1 and Insurance Company as respondent No.3 - Respondent No.1 led his evidence – Thereafter insurer led its evidence and also filed some documents – Respondent No.1 had the opportunity to impeach veracity of witnesses of insurance company by way of cross examination – This is all the law envisages – It is not provided in law that after subsequent respondents lead their respective evidence, then respondent which has earlier led his evidence shall again be given opportunity to rebut whatever material has been placed on record by subsequent respondents. (Para 6)

For the petitioner Mr. Vishal Bindra, Advocate.
For the respondents Mr. Shyam Singh Chauhan, Advocate for respondent No. 1.
Respondent No. 2 *ex parte*.

Mr. J.S. Bagga, Advocate for respondent No. 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, petitioner has challenged order dated 08.05.2019, passed in CMA No. 202-N/6 of 2019, by learned Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. vide which an application filed by the present petitioner, who is respondent No. 1 before the learned Tribunal, under Section 151 of the Code of Civil Procedure read with Section 169(2) of the Motor Vehicles Act for allowing respondent No. 1 to appear as a witness in support of his case, has been disallowed.

2. Brief facts necessary for adjudication of the present petition are that a claim petition has been filed filed by claimant Baju Ram seeking compensation of `6,00,000/- on account of injuries received by him in an accident involving vehicle Tata Ace bearing Registration No. UK07CA-3606. Present petitioner, who is the owner of the offending vehicle, has been impleaded as respondent No. 1 in the claim petition. Driver of the vehicle has been impleaded as respondent No. 2 and Insurance Company is impleaded as respondent No. 3. After the respective parties filed their response to the claim petition and also led evidence in support of their respective versions and the matter was being taken up for final hearing, an application was filed under Section 151 of the Code of Civil Procedure read with Section 169(2) of the Motor Vehicles Act by the present petitioner in which it was mentioned that as respondent No. 3, i.e. Insurance Company, during the course of leading its evidence, had produced a driving licence Mark X and its verification report Ext. RW1/F, purportedly pertaining to the driver of the owner, the petitioner be permitted to lead evidence qua the effect of the said documents as the documents were placed on record by respondent No. 3 after the evidence of the petitioner stood closed. This application stands rejected vide impugned order by learned Tribunal by assigning the following reasons:-

> *"From the perusal of the record, it transpires that the ld counsel for the owner (respondent N. 1) vide his separate statement recorded has exhibited the driving licence of the driver Pawan Kumar as Ext. R-Z and also closed his evidence. It is a matter of record that evidence in this case has already been closed on 2-1-2019 and since then the case is listed for arguments. The owner of the vehicle (Sanjay Kumar) and driver failed to appear in the witness-box. If the driver was having another driving licence Mark-X, then the owner should have appeared in the witness-box and to state this fact that his driver was having two driving licenses. Even the owner in his reply failed to stated who was his driver and whether he has verified the driving licence of the respondent No. 2 before engaging him as a driver in his vehicle. This application has been filed simply to gain the time and misuse the process of law, therefore, the application is dismissed."*

3. Feeling aggrieved, petitioner has filed the present petition.

4. I have heard learned Counsel for the parties and gone through the impugned order as well as other documents appended with the petition.

5. In my considered view, there is no infirmity in the order which stands assailed by way of present petition. This is for the reason that in the course of adjudication of the claim petition, present petitioner was given an opportunity to lead evidence in support of stand taken by him before the learned Tribunal and he availed that opportunity. Similarly, Insurance Company was also provided said opportunity and in the course of leading evidence, it has placed on record certain documents. It is not the case of the petitioner that no opportunity was given to the petitioner to cross examine the witnesses of the Insurance Company by the learned Tribunal.

6 The contention of learned Counsel for the petitioner that because some documents were placed on record by the Insurance Company after the evidence of the petitioner stood recorded, therefore, the petitioner be allowed to again enter into the witness box, in my considered view, is totally misconceived. But natural, because the petitioner was impleaded as respondent No. 1 before learned Tribunal, he was first of all called to lead his evidence which he did. It is reiterated that when respondent No. 3 was leading its evidence, petitioner had the opportunity to impeach the veracity of the witnesses of the Insurance Company by way of cross examination. That is all the law

envisages. It is not provided in law that after subsequent respondents lead their respective evidence, then the respondent which has earlier led his/her evidence, shall again be given an opportunity to enter the witness box so as to rebut whatever material has been placed on record by the subsequent respondents. In fact, if the plea of the petitioner is allowed, then after the petitioner is given said opportunity, there is a possibility that other respondents will also put forth their claim that they should be given another opportunity to do the same. As I have already mentioned above, this is not the spirit in which the proceedings are to be held.

7. At this stage, learned Counsel for the petitioner submits that in view of the documents which have been placed on record by the Insurance Company, learned Tribunal may ignore the licence/document which the petitioner has placed on record of the driver so engaged by him. In my considered view, this plea of the petitioner is totally mis-conceived. This Court has no reason to believe the contention of learned Counsel for the petitioner. On the contrary, this Court believes that learned Tribunal in the course of adjudication of the claim petition before it will take into consideration not only the pleadings of the respective parties but also the evidence which has been placed on record by them in support of their respective version and thereafter, after appreciation of the entire material on record, the claim petition shall be decided by the learned Tribunal.

In view of above discussion, as this Court does not find any merit in the present petition, the same is dismissed.

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

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

Harbans Singh and others ..... Appellants/Defendants.

Versus

Wattan Singh and others ....Respondents/Plaintiffs .

RSA No. 620 of 2007.

Reserved on: 02.09.2019

Date of decision: 05 .09. 2019.

Code of Civil Procedure, 1908 – Order VI Rule 4 – Plea of fraud, undue influence and coercion etc. - Pleadings – Held, party pleading fraud, undue influence, coercion etc must give precise and specific particulars about them in its pleadings – Setting out a general or vague plea in pleadings is inconsequential. (Para 11)

Indian Evidence Act, 1872 – Section 68 – Will – Proof of – Held, where circumstances surrounding execution of Will raise a doubt as to whether the testator was acting on his own free will , the initial onus is on propounder to remove all such doubts. (Para 14).

Indian Evidence Act, 1872 –Section 68 – Will – Proof of – Essential requirements – Held, propounder must prove that (i) Will was signed by the testator (ii) at relevant time, testator was in sound disposing state of mind and (iii) testator had understood the nature and effect of dispositions and had put his signature on document of his own free volition and will. (Para 16)

Indian Evidence Act, 1872 –Section 68 – Will - Suspicious circumstances – What are ? Held, suspicious circumstances surrounding execution of Will may be as (i) signature of testator shaky and doubtful or not appear to be his usual signature (ii) condition of testator's mind may be feeble (iii) disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion or absence of adequate provisions for natural heirs without any reason (iv) propounder taking prominent part in execution of Will (v) testator used to sign blank papers. (Para 18)

Cases referred:

Afsar Shaikh and another vs. Soleman Bibi and others AIR 1976 Supreme Court, 163

Asharfi Devi vs. Tirlok Chand and others, AIR 1965 Punjab 140

Bharpur Singh and others vs. Shamsher Singh (2009) 3 SCC 687

C. Venkata Swamy vs. H.N. Shivanna and another (2018) 1 SCC 604

Deokali vs. Nand Kishore and others AIR 1996 SC 3242

Deokali vs. Nand Kishore (1996) 9 SCC 222

Ningawwa vs. Byrappa Shiddappa Hireknrabar and others AIR 1968 SC 956

R. Saraswathy v. P. Bhavathy Ammal and another AIR 1989 Kerala 228

Shasidhar and others vs. Ashwini Uma Mathad and another (2015) 11 SCC 269

Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib and others AIR 1967 SC 878

Suraj Lamp and Industries Private Limited vs. State of Haryana and another (2009) 7 SCC 363

Vinod Kumar vs. Gangadhar (2015) 1 SCC 391

Vishwanath Bapurao Sabale vs. Shalinibai Nagappa Sabale and others (2009) 12 SCC 101

For the Appellants — Mr. G.D. Verma, Senior Advocate, with Mr. Romesh Verma, Advocate.

For the Respondents — Mr. Bhupender Gupta, Senior Advocate, with Mr. Ajeet Pal Singh Jaswal, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The defendants are the appellants, who aggrieved by the judgment and decree dated 01.11.2007 passed by learned first Appellate Court whereby it reversed the judgment and decree dated 29.8.2000 passed by learned trial Court, have filed the instant appeal.

The parties shall be referred to as the 'plaintiffs' and the 'defendants'.

2. The facts in brief are that the land comprised in Khewat No. 83, Khatauni No. 123, Kitta 53 measuring 251 Kanals 12 Marlas, situated in Tika Lidkot, Tehsil Bangana, District Una, H.P.(hereinafter referred to as the suit land) was the ancestral property. Pohlo Ram, father of the plaintiff No.1 and defendant No.1 was in possession of this land as owner through his ancestors. The parties have a right of ownership and possession in this land since their birth because the same is Hindu coparcenary property. The plaintiffs and defendants have got ½ share each in this land. Pohlo Ram died on 14.3.1989 and the mutation No. 953 dated 7.11.1989 qua the suit land was sanctioned in favour of plaintiff No.1 and defendant No.1 in equal share. Later on, on 4.8.1990 the said mutation was wrongly and illegally reviewed and sanctioned in favour of defendants No.2 to 5 on the basis of some fraudulent, sham and fictitious Will alleged to have been executed by Pohlo Ram in their favour. Pohlo Ram had been living with the plaintiffs and was served by them and there was no occasion for him to execute any such Will. Accordingly, the mutation sanctioned in favour of defendants No.2 to 5 on the basis of alleged Will is nullity, inoperative, not binding on the right, title and interest of the plaintiffs in the suit land. Even otherwise also the alienation through a Will is illegal as the suit land is Hindu coparcenary property. The plaintiffs along with defendants have been coming in possession of the suit land, but defendants No.2 to 5 on the basis of the aforesaid sham and fictitious Will threatened to oust the plaintiffs from the joint ownership and possession of the suit land. Hence, the plaintiffs filed a suit for declaration to the effect that the suit land being Hindu coparcenary property is jointly owned and possessed by the parties and the plaintiffs are having ½ share in it and the Will claimed by the defendants alleged to have been executed by Pohlo Ram in their favour and the mutation sanctioned in their favour on 4.8.1990 on the basis of said Will, are nullity and not binding upon the plaintiffs, with a consequential relief of permanent injunction restraining the defendants to oust the plaintiffs from the joint possession of the suit land.

3. The defendants contested the suit by filing written statement wherein preliminary objections qua mis-joinder and non-joinder of necessary parties were taken. On merits, they denied that the suit land is Hindu coparcenary property. It was averred that the plaintiffs have no right, title or interest in the suit land and further alleged that in fact the suit land was self acquired property of Pohlo Ram, who was living with defendant No.1 and his family members. Defendant No.1, his wife and sons used to serve Pohlo Ram in all manners and in lieu of their services, Pohlo Ram executed a Will dated 28.3.1973 qua the suit land in their favour. In fact, Pohlo Ram was having immoveable property in two villages i.e. Mauja Thara Teeka Changar and Teeka Lidkot and vide registered Will dated 28.3.1973 he bequeathed the entire suit land which is situated in village Lidkot in favour of defendants No. 2 to 5, whereas the land situated in Teeka Changar was bequeathed in favour of plaintiff No.1 and defendant No.1 in equal share. After the death

of Pohlo Ram, the defendants are owners in possession of the suit land on the basis of aforesaid Will and the plaintiffs have no concern with the same.

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

"1. Whether the Will of March, 1973 in favour of defendants No. 2 to 5 is fraudulent, fictitious, illegal and is not binding upon the plaintiff as alleged? OPP

2. Whether the suit land is joint Hindu coparcenary property and is not subject to alienation by way of Will? OPP

3. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD

4. Relief.

5. After recording evidence and evaluating the same, the learned trial Court dismissed the suit filed by the plaintiffs on 29.8.2000, constraining him to file an appeal before the learned first Appellate Court and the same was allowed vide judgment and decree dated 01.11.2007. Aggrieved thereby, the defendants/ appellants have filed the instant appeal before this Court, which came to be admitted on 28.12.2007 on the following substantial questions of law:

1. *Whether Exhibit DW-4/A Will as executed by late Sh. Pohlo Ram stands proved on record and same is legal and valid?*

2. *Whether Will Exhibit DW-4/A stands established and proved on record in accordance with law and there is no legal infirmity in the same?*

3. *Whether there being no suspicious circumstances in the preparation of the Will Exhibit DW-4/A, therefore, the same is legal and valid?*

4. *Whether the registered Will as executed by late Sh. Pohlo Ram, more than 16 years back, prior to his death, which was got duly registered by him from the Sub Registrar, Una does not suffer from any legal infirmity and the same is genuine?*

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

7. Since all the substantial questions of law are intrinsically inter-linked and inter-connected, therefore, these were taken up together for consideration and are being disposed of by a common reasoning.

8. It is not in dispute that Pohlo Ram was the common ancestor of the parties. Plaintiff No.1 and defendant No.1 are the sons, whereas plaintiff No.2 and defendants No.2 to 5 are the grand-sons of Pohlo Ram, who died on 14.3.1989. The deceased had landed property in two Villages namely Changar and Lidkot. As per the plaintiffs, Pohlo Ram died intestate and after his death, the plaintiffs have got half share in the suit land and the other half share belongs to the defendants. Whereas, defendants No. 2 to 5 are claiming themselves to be the owners in possession of the suit land on the basis of the Will dated 28.3.1973 Ex. DW-4/A.

9. The plaintiffs have termed the Will to be fraudulent, sham, fictitious, inoperative and illegal. Meaning thereby that there is half hearted admission that even though there is a Will but the same is fraudulent, Sham, fictitious, inoperative and illegal. But the reasons for the same has not been spelled out.

10. At the outset, it may be noticed that the plaintiffs had not disputed the execution of the Will but had only claimed the same to be an outcome of fraud and is a result of undue influence. Therefore, the first question that arises for consideration is as to whether the plaintiffs have raised these pleas as contemplated under Order 6 Rule 4 CPC, which reads thus:-

> *"**4.Particulars to be given where necessary**.- In all cases in which the party pleadings relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."*

11. The answer to this question is definitely in the negative for the simple reason that apart from using the words like fraud, undue influence, not genuine, there are no specific particulars that have been set-forth. It is more than settled that a vague or general plea can never serve this purpose and the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence and the unfair advantage obtained by the other.

12. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Subhas Chandra Das Mushib*** *vs.* ***Ganga Prosad Das Mushib and others AIR 1967 SC 878*** wherein it was held as under:-

> *"10. Before, however a court is called upon to examine whether undue influence was exercised or not, it must scrutinize the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6 Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal (1964) 1 SCR 270: (AIR 1963 SC 1279) above referred to. In that case it was observed (at p. 295 of SCR): (at p. 1288 of AIR):*
>
> > *"A vague of general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other."*
>
> *"25. There was practically no evidence about the domination of Balaram over Prasanna at the time of the execution of the deed of gift or even thereafter. Prasanna, according to the evidence, seems to have been a person who was taking an active interest in the management of the property even shortly before his death. The circumstances obtaining in the family in the year 1944 do not show tht the impugned transaction was of such a nature as to shock one's conscience. The plaintiff had no son. For a good many years before 1944 he had been making a living elsewhere. According to his own admission in cross-examination, he owned a jungle in his own right (the area being given by the defendant as 80 bighas) and was therefore possessed of separate property in which his brother or nephew had no interest. There were other joint properties in the village of Parbatipur which were not the subject matter of the deed of gift. It may be that they were not as valuable as the Lokepur properties. The circumstances that a grandfather made a gift of a portion of his properties to his only grandson a few years before his death is not on the face of it an unconscionable transaction. Moreover, we cannot lose sight of the fact that if Balaram was exercising undue influence over his father he did not go to the length of having the deed of gift in his own name. In this he was certainly acting very unwisely because it was not out of the range of possibility that Subhas after attaining majority might have nothing to do with his father."*

13. It shall be apt to make reference to the judgment of the Hon'ble Supreme Court in ***Afsar Shaikh and another*** vs. ***Soleman Bibi and others AIR 1976 Supreme Court, 163,*** wherein the Hon'ble Supreme Court has held as under:-

> *"While it is true that 'undue influence', 'fraud', 'misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, Rule 2 of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court."*

14. Thus, it is absolutely clear from the aforesaid exposition of law that if a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him and only where the circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free Will, then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

15. Reverting back to the facts, it would be noticed that save and except though a general statement that the Will is fraudulent, sham, fictitious, inoperative and illegal, there is no specific details qua the same and can conveniently be held that such pleadings are definitely deficit.

16. Nonetheless, as per settled law, it is for the propounder of the Will to repel all the suspicious circumstances surrounding the Will and to prove the genuineness of the Will. Besides this, the propounder would also be required to satisfy the following points qua the due execution of the Will:-

(i) the Will was signed by the testator;

(ii) at the relevant time, the testator was in sound disposing state of mind; and

(iii) testator had understood the nature and effect of depositions and had put his signatures on the document of his own free volition and will.

17. How the Will is required to be proved and what would constitute suspicious circumstance has been elaborately considered by the Hon'ble Supreme Court in ***Bharpur Singh and others*** *vs.* ***Shamsher Singh (2009) 3 SCC 687,*** wherein it was observed as under:

"*14. The legal principles in regard to proof of a will are no longer res integra. A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator.*

15. This Court in *H. Venkatachala Iyengar vs. B.N. Thimmajamma* ***[AIR 1959 SC 443] opined that the fact that the propounder took interest in execution of the Will is one of the factors which should be taken into consideration for determination of due execution of the Will. It was also held that: (AIR p. 451, para 19)***

one of the important features which distinguishes Will from other documents is that the Will speaks from the date of death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator.

16. In H. Venkatachala case[1], It was also held that the propounder of will must prove:

(i) that the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and

(ii) when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, and

(iii) If a Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to

dispel suspicion. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.

It was moreover held:(H. Venkatachala case[1], AIR p. 452, para 20

> *"20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."*

17. This Court in *Niranjan Umeshchandra Joshi vs. Mrudula Jyoti Rao & ors*. ***(2006) 13 SCC 433 :(2006) 14 SCALE 186, held: (SCC pp. 447-48, paras 33-34)***

> *"33. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [See Madhukar D. Shende v. Tarabai Shedage (2002) 2 SCC 85 and Sridevi and Ors. v. Jayaraja Shetty and Ors. (2005) 8 SCC 784]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.*
>
> *34. There are several circumstances which would have been held to be described (sic) by this Court as suspicious circumstances:*
>
> *(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;*
>
> *(ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;*
>
> *(iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.*

[See H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors. AIR 1959 SC 443 and Management Committee T.K. Ghosh's Academy v. T.C. Palit and Ors. AIR 1974 SC 1495]"

18. Respondent was a mortgagee of the lands belonging to the testatrix. He is also said to be the tenant in respect of some of the properties of the testatrix. It has not been shown that she was an educated lady. She had put her left thumb impression. In the aforementioned situation, the question, which should have been posed, was as to whether she could have an independent advice in the matter. For the purpose of proof of will, it would be necessary to consider what was the fact situation prevailing in the year 1962. Even assuming the subsequent event, viz., the appellants had not been looking after their mother as has been inferred from the fact that they received the news of her death only six days after her death took place, is true, the same, in our opinion, would be of not much significance.

19.The provisions of *Section 90* ***of the Indian Evidence Act keeping in view the nature of proof required for proving a Will have no application. A Will must be proved in terms of the provisions of*** *Section 63(c)* ***of the Indian Succession Act, 1925 and*** *Section 68* ***of the Indian Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely,*** *Sections 69* ***and*** *70* ***of the Indian Evidence Act providing for exceptions in relation thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as*** *Section 68* ***of the Indian Evidence Act postulates that execution must be proved by at least one of the attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence.*** *{See B. Venkatamuni vs. C.J. Ayodhya Ram Singh & ors****. [(2006) 13 SCC 449, SCC p. 458, para 19]}***

20. This Court in *Anil Kak vs. Kumari Sharada Raje & ors****. [(2008) 7 SCC 695] opined that court is required to adopt a rational approach and is furthermore required to satisfy its conscience as existence of suspicious circumstances play an important role, holding: (SCC p. 714, paras 52-55)***

> *"52. Whereas execution of any other document can be proved by proving the writings of the document or the contents of it as also the execution thereof, in the event there exists suspicious circumstances the party seeking to obtain probate and/ or letters of administration with a copy of the Will annexed must also adduce evidence to the satisfaction of the court before it can be accepted as genuine.*
>
> *53. As an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order.*
>
> *54. It may be true that deprivation of a due share by (sic to) the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a Will.*
>
> *55. Unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation."*

21. Unfortunately, the first appellate court as also the High court did not advert to these aspects of the matter.

22. We may notice that in *Jaswant Kaur vs. Amrit Kaur & ors****. [(1977) 1 SCC 369] this Court pointed out that when the Will is allegedly shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and defendant. An adversarial proceeding in such cases becomes a matter of Court's conscience and propounder of the Will has to remove all suspicious circumstances to satisfy that Will was duly executed by testator wherefor cogent and convincing***

explanation of suspicious circumstances shrouding the making of Will must be offered."

18. What would be suspicious circumstance was thereafter set out in para-23 of the judgment, which reads as follows:

> "23. *Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:*
>
> *i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.*
>
> *ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.*
>
> *iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.*
>
> *iv. The dispositions may not appear to be the result of the testator's free will and mind.*
>
> *v. The propounder takes a prominent part in the execution of the Will.*
>
> *vi. The testator used to sign blank papers.*
>
> *vii. The Will did not see the light of the day for long.*
>
> *viii. Incorrect recitals of essential facts."*

19. It was further clarified that the circumstances narrated hereinabove are not exhaustive and were subject to offer of reasonable explanation, existence thereof, which were required to be considered before coming to the conclusion on the genuineness of the Will. It was also clarified that even though the Will may be registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with.

20. The defendants examined eight witnesses. DW-1 Kishan Singh was retired as Registration Clerk from the D.C. Office, Una, who stated that an endorsement on 28.3.1973 on the Will in question was in his hand and it was made by him at the instance of the Sub Registrar, who has since died. However, in his cross-examination, he specifically stated that both of them i.e. the witness and the Registrar used to sit in separate rooms. He further admitted that endorsement in question was made by him while sitting in his own room and at that time he was not personally knowing the parties. All this shows that the testimony of this witness is of formal nature and it is insufficient to prove the execution of the Will.

21. DW-2 Shanti Lal is the Stamp Vendor, who was examined to prove the signatures of Sant Ram the attesting witness on the Will in question. But then he has not produced any register maintained by the said Sant Ram, scribe and has also not deposed that he used to work with Sant Ram. There is no explanation on the part of the defendants that why they did not examine the son or any other family members of deceased Sant Ram to prove his signatures and why the register maintained by him was not produced in the Court.

22. DW-4 Prem Singh was examined to prove the signatures of another marginal witness namely Udho Ram and that of the then Pradhan Harbans Singh. Though, this witness in examination-in-chief stated that he could identify the signatures of both these witnesses on the Will Ex. DW-4/A, but again in cross-examination, he admitted that he had a weak eye sight and was having cataract in both of his eyes. He was unable to read or identify the signatures appearing on the plaint by saying that he had a weak eye sight. When he was not able to identify the signatures on the plaint which are in the same language i.e. English due to his weak eye sight, it is doubtful that he was able to identify the signatures of Udho Ram on the Will in question which are in the same language.

23. DW-7 Kulwant Singh is the son of Harbans Singh, who deposed that the Will Ex.DW-4/A bears the signatures of his father and he can identify the same. The learned first Appellate Court has rightly noted that the signatures of Harbans Singh are in Urdu, whereas the witness cannot read and write Urdu. He did not produce any other material to show the signatures of his father on the basis of which some comparison

could have been drawn by the Court itself or the same could have been sent the same to the handwriting expert.

24. What is more intriguing is that no endeavour was made by the defendants to send the signatures of Udho Ram and thumb impression of Pohlo Ram on the Will for scientific examination.

25. Another fact which cannot be lost sight is that the recital in the Will claims that the same was being executed in view of the services being rendered by defendants No. 2 to 5 to the testator. The Will was executed in the year 1973 and as per admitted case of the defendants themselves, defendant No.1 was serving in the Army while all his sons were minors, so there was no occasion for them to serve the testator at that time.

26. That apart, even the defendants No.2 to 5, who by then have attained the majority, have not entered into the witness box to depose that it was on account of the services rendered by them that the grand-father Pohlo Ram had executed a part of the Will in their favour.

27. Further there is nothing on record to establish that the relations with plaintiff No.1 and his father Pohlo Ram were not good or otherwise not normal as those between defendant No.1 and Pohlo Ram. It is admitted case of the parties that at the time of execution of Will in the year 1973, plaintiff No.1 was residing at Chandigarh as he was employed there, whereas defendant No.1 who was employed in the Army and continued to serve there till 1975. The Court can take judicial notice of the fact that the Chandigarh is comparatively nearer from Una and therefore could be conveniently called by Pohlo Ram as and when desired, while the same is not true qua defendant No.1, who was serving in the boarder area. This assumes importance as there is no reasons given in the Will as to why the testator wanted to deprive his natural son i.e. plaintiff No.1 from his share in the valuable property situated in Lidkot.

28. The revenue records placed on record Ex. P-1 to Ex.P-12 clearly reveal that the land at village Changar is either in the shape of Nullah or Banjar Kadim, whereas majority of land at Lidkot is either cultivated or cultivable as is evident from copy of Missal Hakiyat for the year 1988-89 Tikka Lidkot, Tehsil Bangana, District Una, H.P.

29. To be fair to the learned counsel for the appellants, he has cited ***Suraj Lamp and Industries Private Limited vs. State of Haryana and another (2009) 7 SCC 363, Vishwanath Bapurao Sabale vs. Shalinibai Nagappa Sabale and others (2009) 12 SCC 101*** and ***Ningawwa vs. Byrappa Shiddappa Hireknrabar and others AIR 1968 SC 956*** to contend that there is a presumption of correctness attached to the registered document.

30. There can be no quarrel with the proposition as laid down in the aforesaid cases, but the moot question is that whether the said presumption will apply even to the cases of Will. The question has clearly been answered in the negative in ***Bharpur Singh's*** case (supra) wherein it has specifically been clarified that even though the Will may be registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with.

31. Mr. Verma has further relied upon ***R. Saraswathy v. P. Bhavathy Ammal and another AIR 1989 Kerala 228*** to canvass that the opinion of an expert as to identity of signature of testator in a Will was not relevant to decide whether Will had been validly executed. Obviously, there can be no quarrel with the aforesaid proposition, but then in this case the defendants have failed to prove from the signatures of the attesting witnesses on the Will.

32. Mr. Verma, learned counsel for the appellants would contend that merely because one of the attesting witnesses happened to be a relative of the defendants could not be a ground to discard the Will and place reliance on the following judgments:

i) Smt. Asharfi Devi vs. Tirlok Chand and others, AIR 1965 Punjab 140;

ii) Smt. Deokali vs. Nand Kishore (1996) 9 SCC 222 :and

iii) Smt. Deokali vs. Nand Kishore and others AIR 1996 SC 3242;

33. The judgments relied upon by learned counsel for the appellants have no applicability as the learned first Appellate Court has not taken the relation of the deceased with one of the attesting witnesses i.e. Udho Ram to be even one of the circumstance creating grave suspicion regarding the execution of the Will and Will in fact has not been discarded on this ground alone.

34. Lastly, Mr. Verma, learned counsel for the appellants would argue that since the learned first Appellate Court has not gone through the reasons assigned by the learned trial Court, therefore, its findings, are perverse and deserve to be set-aside. In support of his contention, reliance has been placed on the following judgments:

i) Vinod Kumar vs. Gangadhar (2015) 1 SCC 391;

ii) Shasidhar and others vs. Ashwini Uma Mathad and another (2015) 11 SCC 269; and

iii) C. Venkata Swamy vs. H.N. Shivanna and another (2018) 1 SCC 604.

35. Obviously, there is no quarrel with the aforesaid proposition, but in the instant case it would be noticed that the learned first Appellate Court had duly taken into consideration the judgment and decree passed by the learned trial Court and it is only thereafter that it reversed the same. Since the Will in question has not been proved in accordance with law and now the defendants/appellants have failed to dispel the suspicious circumstances, the mere fact that it is registered will not mean that the statutory requirements of proving the Will need not be complied with.

Substantial questions of law are answered accordingly.

36. In view of the aforesaid discussion, there is no merit in the appeal and the same is accordingly dismissed, so also the pending application(s) if any, leaving the parties to bear their own costs.

****

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

Pankaj .....Appellant

Versus

State of Himachal Pradesh. .....Respondents

Cr. Appeal Nos. 251, 257 and 258 of 2018
Reserved on : 29.08.2019
Decided on : 05 .09. 2019.

Indian Evidence Act, 1872 – Section 3 – Appreciation of evidence – Testimony of victim of sexual abuse – Held, conviction can be based on sole testimony of prosecutrix unless there are compelling reasons for seeking corroboration . (Para 39).

Code of Criminal Procedure, 1973 – Section 164 – Statement of witness – Evidentiary value – Held, statement recorded under Section 164 of Code is not a substantive evidence – It is like a statement recorded under Section 161 of Code by investigating officer though having higher value than statement recorded under Section 161 of Code. (Para 47).

Indian Penal Code – Section 376 D - Gang rape – Proof - Prosecutrix turning hostile and not identifying culprits during trial – Effect – Held, notwithstanding victim not identifying accused during trial yet mixed DNA retrieved from her vaginal swab clearly indicating that accused 'SS' and "RK' had sexual intercourse with her – But opening of door by her and absence of injuries indicating struggle by her and non-tearing of clothes worn by her at relevant time bely forcible sexual intercourse by accused with her. (Paras 53 , 56 & 67)

Cases referred:

State of Punjab vs. Gurmeet Singh (1996) 2 SC 384

State of Himachal Pradesh Vs. Asha Ram AIR 2006 SC 381

Rajinder Vs. State of Himachal Pradesh, (2009) 16 SCC 69

Rajoo Vs. State of Madhya Pradesh (2008) 15 SCC 133

Tameezuddin @ Tammu Vs. State (NCT of Delhi), (2009) 15 SCC 566
Dinesh Jaiswal Vs. State of MP, (2010) 3 SCC 323
Abbas Ahmad Choudhary Vs. State of Assam, 2010 (12) SCC 115
Rai Sandeep @ Deepu Vs. State of NCT of Delhi (2012(8 SCC 21
Ram Kishan Singh vs. Harmit Kaur and another, AIR 1972 S.C. 468
Ram Prasad vs. State of Maharashtra, 1999 Cri. L.J. 2889 (SC)
State of Rajasthan vs. N.K. The Accused (2000) 5 SCC 30
Pratap Misra and others vs. State of Orissa (1977) 3 SCC 41
Rai Sandeep alias Deepu vs. State (NCT of Delhi) (2012) 8 SCC 21
State of M.P. vs. Munna @ Shambhu Nath, (2016) 1 SCC 696

For the appellant(s):	Ms. Sheetal Vyas and Ms. Manika Mittal, Advocates.
For the respondent:	Mr. Hemant Vaid, Mr. Vinod Thakur, Addl. Advocate Generals, with Mr. Bhupinder Thakur, Dy. Advocate General and Mr. Ram Lal Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

It is on account of the diversion views and conclusions drawn by the Hon'ble Members of the Division Bench that the present appeals have been assigned to this Court for disposal.

2. The instant appeals are directed against the judgment dated 01.11.2017, rendered by the learned Additional Sessions Judge-I, Kangra at Dharamshala, District Kangra (H.P), in Session Case No. 8-I/VII/2015**,** whereby, the learned trial Court convicted, and, sentenced the appellants/accused to (a) undergo rigorous imprisonment for a period of two years, and, to pay a fine of Rs.2,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of three months, for commission of offence, punishable under Section 452 readwith Section 34 of the IPC, (b) undergo rigorous imprisonment for a period of two years, and, to pay a fine of Rs.2,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of three months, for commission of offence, punishable under Section 365 read with Section 34 of the IPC, (c) undergo rigorous imprisonment for a period of twenty years, and, to pay a fine of Rs.5,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of one year, for commission of offence, punishable under Section 376D readwith Section 34 of the IPC. All the sentences were ordered to run concurrently.

3. Brief facts of the case are that the husband of the prosecutrix was working as a labourer at Lali stone Crusher, Dhangu-Mazra Road. The prosecutrix was residing with her husband, and, a three years old son in a quarter near the Lali stone crusher. On 24.3.2015 at about 7.00-8.00 P.M. accused Shiv Singh alias Lambu, Rakesh and Pankaj, who were working at Pathania Stone Crusher came to the quarter of the prosecutrix, and, consumed liquor with the husband of the prosecutrix, and, left after about half an hour. At about 11.00-11.30 P.M when the prosecutrix, her husband, and, their son, were sleeping, the accused persons entered the quarter of the prosecutrix and gagged her mouth and lifted her from her bed and took her to a quarter that was lying vacant and raped her one by one. The prosecutrix tried to raise alarm but the accused Shiv Singh alias Lambu gagged her mouth. After committing rape, the accused persons lifted the prosecutrix, and, left her near her quarter. The prosecutrix informed her husband, who took her to Saroj, the chowkidar of the stone crusher. Saroj informed the police, and, accordingly police came at Lali Stone Crusher, where the statement of the prosecutrix

under Section 154 of Cr.P.C was recorded by ASI Mohinder Kumar. On the basis of the said statement, formal FIR was registered, and, on conclusion of the investigation into the offences, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

4. The accused persons were charged by the learned trial Court for theirs having committed offences punishable, under Sections 452, 365 and under section 376-D readwith Section 34 of IPC, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 26 witnesses. On closure of the prosecution evidence, the statements of the accused, under Section 313 of the Code of Criminal Procedure, were recorded wherein they pleaded innocence and claimed false implication. They did not choose to lead, any evidence in defence.

6. On appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused/appellants.

7. It is vehemently argued by Ms. Sheetal Vyas, learned counsel for the appellants that the findings recorded by the learned Courts below are absolutely perverse inasmuch as there is no legally admissible evidence against the accused, more particularly, accused Pankaj. She further argued that even if the prosecution case is accepted as it is, even then at best it can be a case of consensual sex and not to rape and, therefore, also the judgment passed by the learned Court below deserves to be set-aside.

8. On the other hand, Mr. Hemant Vaid, learned Additional Advocate General has argued that the findings of conviction recorded by the learned Courts below being based on correct appreciation of the facts and law calls for no interference and therefore, these appeals should be dismissed.

9. In order to appreciate the rival contentions, it would be necessary to refer to the statement of the relevant witnesses.

10. The prosecutrix appeared as PW-1 and deposed that she and her husband are labourers by profession and there are three stone crushers. They are working in the stone crusher of Lali situated at Mazra. On 24.3.2015, the accused came to their quarter in the evening and consumed liquor with her husband and thereafter all the accused persons left the house. At 10.00 p.m. she was sleeping in the quarter then 2-3 persons entered the quarter and gagged her mouth and lifted her outside the quarter. It was dark and therefore, she could not see the faces of those persons. They took her in a room behind the quarter and committed sexual intercourse with her and thereafter those 2-3 persons left the room. She disclosed the incident to her husband and thereafter went to the Police Station to lodge a complaint. The police came to the spot and recorded her statement Ex. PW-1/A over which she appended her thumb impression. Thereafter, the police got conducted her medical at hospital. She appended her thumb impression on MLC, Mark M-1. She also gave her wearing apparels to the doctor at hospital. During the investigation, the Investigating Officer had recovered one clip from the spot which belongs to PW-1. She further stated that she could not remember anything else and could not recognize the persons nor knew their names who had committed sexual intercourse with her.

11. The prosecutrix was declared hostile and was permitted to be cross-examined by the Public Prosecutor. In cross-examination, she admitted that the police interrogated and recorded her statement. She also admitted that at 10.00 p.m. her husband after having dinner went to sleep. She admitted that she closed the door of the quarter and went to sleep alongwith her son and husband. She also admitted that after sometime, someone opened the door and came inside and gagged her mouth and lifted her outside the room to Varandah. However, she denied that she disclosed to the police that one of the person was Lambu, who had pressed her mouth. However, she admitted that she had disclosed the names of accused Rakesh, Pankaj and Lambu to be present, who had committed sexual intercourse with her. Further she claimed that she had disclosed their names on the basis of suspicion as they had consumed liquor with her

husband prior to the incident. However, she again denied that her mouth had been gagged by accused Lambu when she had tried to cry for help. She denied that firstly Pankaj, secondly Rakesh and finally Lambu had committed sexual intercourse with her. However, she admitted that after the incident her husband had taken her to the Chowkidar of Crusher Saroj to whom she had narrated the entire incident. She also admitted that Saroj telephoned the police and thereafter the police had come to the spot. She admitted that during investigation, the Investigating Officer had found rubber band in the Varandah and one black colour clip at a distance of 10 meters from Varandah. She also admitted that the Investigating Officer had packed and sealed the rubber band along with clip inside the cloth parcel. She further admitted that the police had produced her before JMIC, Indora where she had got recorded her statement Ex.PW-1/D and also acknowledged her thumb impression over the same. She had disclosed to the JMIC that all the accused had committed sexual intercourse with her. However, she again stated that they had not committed sexual intercourse with her. She denied the suggestion that she was deposing falsely as she had compromised the matter with the accused. She denied having made the portion of statement A to A, B to B and C to C appearing in Ex. PW-1/A and claimed that she had made no such statement.

12. The prosecutrix was thereafter cross-examined by the counsel for the accused wherein she admitted that there are 3-4 crushers in the vicinity of crusher where she alongwith her husband were working. She also admitted that workers of these crushers were residing near the crusher in the quarter situated near their quarter. She admitted that there are 35-40 other workers who are working at crushers and are residing there. She admitted that she had bolted the door from inside before she went to sleep. She admitted that her quarter comprised of only one room which was meant for sleeping, cooking etc. She further admitted that the door of her quarter was not broken. She admitted that she was sleeping in the bed along with her son and husband. She admitted that when her mouth was gagged, she made efforts to raise alarm and further admitted that her husband had not woken up. She admitted that accused were frequent visitors to her quarter and due to this reason she personally knew their names. She admitted that when she lodged the complaint, she was accompanied by her husband and Saroj, Chowkidar of the crusher. She denied having disclosed the names of accused persons as the persons who had committed sexual intercourse with her and claimed to have disclosed the names to the police only because they had consumed liquor with her husband in their quarter. She admitted that the police did not read over her statement Ex. PW-1/A and claimed that the police had mentioned the names of these persons of their own. She further denied that she handed over her clip and rubber band to the police and stated that clip and rubber band shown to her in the Court was generally being used by those ladies residing in the vicinity. She admitted that she had made statement before the JMIC as was explained to her by the police. She further admitted that she had received injuries on mouth and neck due to the beatings given by her husband. She also admitted having implicated the accused persons due to misunderstanding.

13. PW-2 Chandesher is the husband of the prosecutrix, who stated that in the year 2015 the accused had come to his quarter where they had consumed liquor at 5-6 p.m. and thereafter they left the quarter. He had drunk so he went to sleep. At about 2.00 a.m. in the mid-night my wife told him that 2-3 persons had come inside the room and lifted her nearby quarter and committed sexual intercourse with her. Thereafter, he took his wife before Chowkidar Saroj of stone crusher where his wife narrated the incident to him. Saroj telephonically called the police on the spot, which apprehended the accused and took them to Police Post. They also went to the Police Post, however, no proceedings were recorded there and further stated that even his wife had not disclosed the names of the persons who had committed sexual intercourse with her nor did she identify them as it was dark.

14. The witness was declared hostile and permitted to be cross-examined by the Public Prosecutor. In cross-examination, he admitted that the police had interrogated him and recorded his statement. He also admitted that he had disclosed to the police

that at 2.30 a.m. midnight when his wife came to the quarter her hair were not in order and lips were swollen. He admitted that she was little bit nervous. He admitted that he disclosed to the police that my wife told me that at 11/11.30 p.m. when the light had gone someone had entered inside the quarter and gagged her mouth and thereafter lifted her out of the room to the Varandah. However, he denied that his wife had further disclosed to him that she had found three persons who had lifted her and one of them she recognized as Lambu, who had gagged her mouth. He further denied that his wife told him that the accused had committed sexual intercourse with her inside the quarter. He further denied that his wife told him that she was trying to cry for help but Lambu had gagged her mouth. He further denied that Pankaj, Rakesh and Lambu had committed sexual intercourse with his wife. However, he admitted that his wife had disclosed to him that all the three persons had run away from the spot after committing sexual intercourse. He admitted that the police had recorded the statement of his wife on the spot and had also conducted the photography and videography and other proceedings on the spot. However, he denied that he was deposing falsely as he had compromised the matter with the accused. He further denied that having made portion A to A, B to B and C to C of his statement Mark X-1 recorded under Section 161 Cr. P.C. He admitted that the accused persons were his very good friends. He admitted that the police had read over and explained the statement made by his wife and thereafter she had appended her thumb impression upon the same.

15. The witness was thereafter cross-examined by the learned counsel for the accused wherein he admitted that his wife had disclosed the names of accused as the persons who had consumed liquor with him and not as the persons who had committed sexual intercourse with her. He admitted that the accused had been apprehended due to suspicion.

16. The statement of PW-3 Anil Saini is only relevant to the extent that husband of the prosecutrix Chandesher alongwith his family shifted the quarter from the earlier place as the persons residing there used to tease the prosecutrix.

17. PW-4 Rajesh Kumar and PW-5 Ram Lal, are the witnesses of recovery of clip Ex.P-1, rubber band Ex.P-2 and parcel Ex.P-3, which were taken into possession vide memo Ex.PW-1/B.

18. PW-6 Dr. Shalini Dhiman was posted as Medical Officer, Civil Hospital, Nurpur and stated that on 25.3.2015 she received an application Ex.PW-6/A for medical examination of the prosecutrix. On the same day at about 2.50 p.m., she examined the prosecutrix, who was brought to her with alleged history of sexual assault and according to victim, three accused had sexually assaulted her on the previous night around 12.30 a.m. on 25.3.2015. She did not know whether condom was used during sexual assault. On medical examination, she found small multiple abrasion present above lips, below chin and over the neck. Lymph and blood dried up leaving a bright scab, well heal scar of tubectomy that had been conducted one year back was present over lower abdomen. No injury marks were found over external genitalia. Hymen torn multiple side along circumference old heal tags present, the prosecutix was found to be menstruating. Vaginal swabs were taken on four slides. Injuries found were simple in nature and were of duration of 12 to 24 hours. She proved MLC Ex. PW-6/B and thumb impression of the victim over the same. She also stated that blood sample of the victim had taken on the FTA card for chemical analysis and proved her report Ex.PW-6/C. FSL report is Ex.PA and based upon the report of FSL, she opined that sexual intercourse had taken place, however, exact duration of sexual intercourse could not be given. She further proved the final opinion Ex.PW-6/D. Her cross-examination was then deferred at the request of Public Prosecutor as the clothes of the victim that were taken into possession by the witness were not available in the Malkhana as the same had not been received back from FSL, Junga after DNA profiling. Examination was deferred and the same thereafter was resumed on 15.7.2016. However, since this witness has only stated about the result of DNA profiling and her statement could not be of much assistance at this stage as the

relevant witness from the FSL has not been examined by the prosecution to prove the report and the same shall be referred to at a later stage.

19. On being cross-examined by the defence counsel, the witness denied that the alleged history of occurrence was disclosed to her by the police. However, she admitted that the prosecutrix had not disclosed the name of any culprit. She also admitted that there was no injury marks on the private part of the prosecutrix. She further admitted the suggestion that the abrasions which were mentioned in MLC were possible by beating. She admitted that being married the prosecutrix was exposed to sexual intercourse. However, she denied that for preserving the vaginal swab refrigeration is required and further denied that the samples were not sealed.

20. PW-7 Dr. Rakesh Purohit, Medical Officer, CHC, Indora has stated that he examined all the accused persons and opined that they were capable of performing sexual intercourse.

21. PW-8 Rakesh Kumar stated that he was Foreman in Pathania Stone Crusher and on 25.4.2015 the crusher was closed being holiday. He stated that he went to the quarter of Chandesher and all the three accused came to the quarter where they consumed liquor. After consuming liquor, he returned at 11.00 p.m., whereas the accused remained in the quarter. On the next day, husband of the prosecutrix told him that the accused had committed rape with his wife in the night. In cross-examination, he stated that for the first time, he had gone to consume the liquor in the quarter of Chandesher on that date.

22. PW-9 SI Mast Ram, registered FIR Ex.PW-9/A on receiving rukka Ex.PW-1/A. He also proved an endorsement on rukka Ex. PW-9/B. After registration of the case, he sent the file along with copy of FIR to the Investigating Officer on the spot through PW-15 LHC Arjun Singh.

23. PW-10 Satwinder Singh is the owner of S. S. Stone Crusher, Dhangu Mazra Road, Damtal and he had given his quarter to PW-3 Anil Saini, who, in turn, had given the quarter to Chandesher with his permission in the year 2015.

24. PW-11 Roshan Lal, Photographer photographed and videographed the spot and proved the photographs, CD and certificate.

25. PW-12 Saroj Kumar is the Chowkidar of Lali Stone Crusher, who deposed that on the intervening night of 24/25.3.2015 at about 3.20-3.00 a.m. Chandesher, who was also working at Lali Stone Crusher, came to him and asked to give the telephone number of Lali Stone Crusher. He was upset. This witness was declared hostile as he did not support the case of the prosecution and was cross-examined by the Public Prosecutor, where he denied that Chandesher disclosed to him that the accused persons had taken his wife from the house to the adjoining room and then raped her. He denied that the prosecutrix was also accompanying her husband. He denied to have informed the police about the incident. He admitted that he has good relations with the accused persons, who too, met him in the court complex when his statement was recorded. He denied the suggestion that he was deposing falsely in order to protect the accused persons.

26. PW-13 Ranjeet Singh is the owner of the Happy Stone Crusher, Dhangu Mazra and did not support the prosecution and was thus declared hostile. On being cross-examined by the Public Prosecutor, he denied that the accused persons used to tease the prosecutrix and he also warned them. He denied that Chandesher disclosed to him on 25.3.2015 that the accused had raped his wife. He further denied that during investigation, accused persons had given demarcation of the spot where they had raped the prosecutrix and to this effect memo Ex. PW-3/A was prepared. Even though, he admitted his signatures on the memo, but clarified that his signatures were obtained in the office of his stone crusher. He admitted that his statement was recorded by the police. He denied that due to good relations with the accused persons, he was deposing falsely.

27. PW-14 HHC Mohinder Singh handed over the case property at FSL, Junga.

28. PW-15 HHC Arjun Singh, PW-16 HHC Ashok Kumar and PW-17 HHC Shashi Pal, got medically examined the accused Shiv Singh, Pankaj and Rakesh Kumar and thereafter handed over the three parcels each bearing seal impression "+" which they in turn, had handed over to PW-23 HC Chain singh, MHC, Police Station, Indora.

29. PW-18 HHC Kewal Kumar, proved rapat Ex.PW-18/A.

30. PW-19 Shamsher Singh, Munshi of Pathania Stone Crusher, Dhangu Mazra was on duty on 24.3.2015 during night hours and stated that he saw the accused persons near the stone crusher at 12.00 O'clock. He asked the accused persons to go to their quarters and on this, the accused persons disclosed that they had come to drink water from the water tank. He deposed that he had heard in the morning that a lady had been raped.

31. PW-20 Niranjan Singh, Judicial Magistrate, Indora recorded the statement of the prosecutrix Ex.PW-1/D under Section 164 of Cr.P.C. on 26.3.2015 and deposed that he had recorded the statement of prosecutrix as per her version wherein she had stated that rape had been committed by the accused at 12.00 midnight on 24.3.2015. According to this witness, the prosecutrix made this statement voluntarily and to this effect, he proved his certificate Ex. PW-20/D. During cross-examination by the counsel for the accused persons, he deposed that the prosecutrix volunteered for the statement, as such, she was given time for reflection and thereafter the statement of the prosecutrix was recorded after one hour. He denied that the prosecutrix did not disclose the names of the accused persons.

32. PW-21 LHC Ranjana Sharma got conducted the medical examination of the prosecutrix at Civil Hospital, Nurpur and deposed that after medical examination, the Medical Officer had handed over two cloth parcels sealed with seal impression "M", three plastic vials sealed with seal impression "M" and one envelope addressed to RFSL, Dharamshala, which was handed over to PW-23 MHC Chain Singh. On 26.3.2015, she accompanied the prosecutrix to Civil Hospital, Nurpur for obtaining her DNA sample and after obtaining the same, the Medical Officer handed over one plastic vial sealed with seal impression "M", one envelope sealed with seal impression "M" and the sample seal, which she handed over to PW-23 MHC Chain Singh, P.S., Indora.

33. PW-22 SI Chain Singh prepared the charge-sheet.

34. PW-23 HC Chain Singh, P.S. Indora, received the case property and entered the same in Malkhana Register and thereafter sent the same to FSL, Junga through PW-14 HHC Mohinder Singh vide R.C. Ex. PW-14/A. He also proved the CIPA Certificate Ex.PW-23/B. During cross-examination by the learned counsel for the accused persons, he denied that the parcels which he received were not sealed. He denied that the parcels were tampered with when these were in his possession.

35. PW-24 ASI Mohinder Kumar conducted investigation being Investigating Officer and deposed that it was surfaced in the investigation that during intervening night of 24/25.3.2015 the accused persons entered into the house of the prosecutrix, dragged her to the place of occurrence and committed forcible sexual assault on her. During cross-examination by the learned counsel for the accused persons, he deposed that on receiving information, he reached Lali Stone Crusher within half an hour where the prosecutrix, her husband and Saroj, the Chowkidar of the Lali Stone Crusher, were present. He recorded the statement of the prosecutrix under Section 154 of Cr.P.C. at Lali Stone Crusher. He denied that in her statement the prosecutrix did not disclose the name of any of the accused persons. According to him, the distance of the spot from the house of the prosecutrix was about 25 meters and there was no other house in the locality where the prosecutrix was residing. He however, could not tell that there was some tussle between the owners of Lali Stone Crusher and Happy Stone Crusher and owing to such tussle, the owner of Lali Stone Crusher got manipulated a false case against the accused

persons. He deposed that neither window nor door of the house of the prosecutrix was found broken. He denied that he tutored the prosecutrix about the statement to be recorded by the JMIC, Indora. He further denied that the samples had been tampered with. He denied that the accused persons had not committed sexual intercourse with the prosecutrix.

36. PW-25 Inspector Tilak Raj received the DNA Report Ex.PW-7/D and prepared and presented the supplementary challan.

37. PW-26 Dr. Arun Sharma, Director of Forensic Science Laboratory, Himachal Pradesh, proved the DNA Report Ex.PW-7/D, wherein it was concluded that mixed DNA profile was obtained from Ex.-1(vaginal swabs of prosecutrix) from which three DNA profiles could be identified. Of the mixed DNA profile; one DNA profile matched with the DNA profile obtained from Ex.11 (blood sample on FTA card, Shiv Singh), second DNA profile matched with the DNA profile obtained from Ex.-14 (blood sample on FTA card, Rakesh Kumar) and the third DNA profile matched with the DNA profile obtained from Ex.-5 (blood sample of prosecutrix)

This is the entire evidence led by the prosecution.

38. The law is well-settled that prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made basis of conviction unless corroborated in material particulars. However, the rule about the admissibility of corroboration should be present to the mind of the Judge. It has to be borne in mind that rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault – it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very should of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. The must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. (Refer: ***State of Punjab vs. Gurmeet Singh (1996) 2 SC 384).***

39. It is now well settled principle of law that conviction can be founded on the sole testimony of the prosecutrix, unless there are compelling reasons for seeking corroboration. It is also equally settled that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. (Refer: ***State of Punjab*** *Vs.* ***Gurmit Singh (1996) 2 SCC 384, State of Himachal Pradesh*** *Vs.* ***Asha Ram AIR 2006 SC 381*** and ***Rajinder*** *Vs.* ***State of Himachal Pradesh, (2009) 16 SCC 69.)*** However, it has to be borne in mind that a case of sexual assault has to be proved beyond reasonable doubt as any other case and there is no presumption that the prosecutrix would always tell the entire story truthfully.

40. In ***Rajoo*** *Vs.* ***State of Madhya Pradesh (2008) 15 SCC 133***, the Hon'ble Supreme Court held that the testimony of a victim of rape has to be treated as if she is an injured witness, but cannot be presumed to be a gospel truth. It was held that:-

> *"9. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of*

accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined."

41. In ***Tameezuddin @ Tammu*** Vs**. *State (NCT of Delhi), (2009) 15 SCC 566***, it was held as under:-

"7. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable. ....."

42. In ***Dinesh Jaiswal*** Vs**. *State of MP, (2010) 3 SCC 323***, the Hon'ble Supreme Court held as under:-

"10. Mr. C.D. Singh has however placed reliance on Moti Lal's case (supra) to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one."

43. In ***Abbas Ahmad Choudhary Vs. State of Assam, 2010 (12) SCC 115***, the Hon'ble Supreme Court observed that:-

"5. We are however, of the opinion that the involvement of Abbas Ahmad Choudhary seems to be uncertain. It must first be borne in mind that in hery statement recorded on 17th September, 1997, the prosecutrix had not attributed any rape to Abbas Ahmad Choudhary. Likewise, she had stated that he was not one of those who kidnapped her and taken to Jalalpur Tea Estate and on the other hand she categorically stated that while she along with Mizazul Haq and Ranju Das were returning to the village that he had joined them somewhere along the way but had still not committed rape on her. It is true that in her statement in court she has attributed rape to Abbas Ahmad Choudhary as well, but in the light of the aforesaid contradictions some doubt is created with regard to his involvement. Some corroboration of rape could have been found if Abbas Ahmad Choudhary too had been apprehended and taken to the police station by P.W. 5 -Ranjit Dutta the Constable. The Constable, however, made a statement which was corroborated by the Investigating Officer that only two of the appellants Ranju Das and Md. Mizalul Haq along with the prosecutrix had been brought to the police station as Abbas Ahmad Choudhary had run away while en route to the police station. Resultantly, an inference can be rightly drawn that Abbas Ahmad Choudhary was perhaps not in the car when the

complainant and two of the appellants had been apprehended by Constable Ranjit Dutta. We are, therefore, of the opinion that the involvement of Abbas Ahmad Choudhary is doubtful. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully."

44. In ***Rai Sandeep @ Deepu*** Vs. ***State of NCT of Delhi (2012(8 SCC 21***, the Hon'ble Supreme Court commented about the quality of the sole testimony of the prosecutrix, which would be made basis to convict the accused and it was held:-

"15. In our considered opinion, the sterling witness should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have correlation with each and everyone of other supporting such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a sterling witness whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

45. Reverting back to the facts, it would be noticed that the prosecutrix has resiled from her earlier statement and has not corroborated the one as recorded under Section 164 Cr.P.C. and she has not supported the case of the prosecution. As regards the statement given by her under Section 164 Cr.P.C., the objective behind recording the same is that it is for an assurance that the investigation is going on in right direction, it is going against a right person(s) and, a belief that it will instill a sense of feeling in the mind of the deponent that later she should not resile from it. Section 164 Cr.P.C. enables recording of statement of witnesses by the Magistrate and confession from the accused.

46. With regard to the value to be given to her statement recorded under Section 164 Cr.P.C., the Hon'ble Supreme Court in ***Ram Kishan Singh*** vs***. Harmit Kaur and another, AIR 1972 S.C. 468*** held as under:

> *"8. A statement under Section 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness. ..."*

47. Although, the statement of a witness recorded under Section 164 Cr.P.C. during investigation is also a previous statement like a statement recorded under Section 161 Cr.P.C., but, it has some higher value than the statement recorded under Section 161 Cr.P.C. by the police since it was recorded by a Magistrate.

48. In ***Ram Prasad vs. State of Maharashtra, 1999 Cri. L.J. 2889 (SC),*** the Hon'ble Supreme Court while dealing with Section 164 Cr.P.C. observed as follows:

> *"15. Be that as it may, the question is whether the Court could treat it as an item of evidence for any purpose. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before any authority legally competent to investigate the fact but its use is limited to corroboration of the testimony of such a witness. Though a police officer is legally competent to investigate, any statement made to him during such an investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section 162 of the Code. But a statement made to a Magistrate is not affected by the prohibition contained in the said section. A Magistrate can record the statement of a person as provided in Section 164 of the Code and such a statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or it would remain within the realm of what it was originally. A statement recorded by a Magistrate under Section 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof."*

49. Thus, what is evidently clear from the aforesaid exposition of law is that the statement of a witness under Section 164 Cr.P.C. cannot be treated as substantive piece of evidence as the statement of the witness is recorded where the accused have hardly any occasion to cross-examine him. It can be used only to corroborate the statement of witness or to contradict him.

50. The questions arising for consideration in such like cases would be: whether the prosecution story, as alleged, inspires confidence of the Court on the evidence adduced? Whether the prosecutrix, is a witness worthy of reliance? Whether the testimony of a prosecutrix who has been in victim of rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case? What was the age of the prosecutrix? Whether she was a consenting party to the crime? Whether there was unexplained delay in lodging the FIR? (Refer: ***State of Rajasthan*** *vs.* ***N.K. The Accused (2000) 5 SCC 30***).

51. Bearing in mind the aforesaid exposition of law, it would be noticed that the prosecutrix while appearing as PW-1 did not support the case of the prosecution regarding rape having been committed by the accused. As a matter of fact, she stated that she did not remember anything and could not recognize the persons who had committed sexual intercourse with her. She resiled from her earlier statement that it was Lambu, who had gagged her mouth. The prosecutrix further stated that she had made statement under Section 164 Cr.P.C. as was explained to her by the police.

52. Be that as it may, the presence and identity of all the accused at the relevant time and at the relevant place is duly established from the overwhelming evidence available on record. Their presence is not only duly established from the statement of the prosecutrix herself, but even her husband PW-2 Chandesher. PW-8 Rakesh Kumar and PW-19 Shamsher Singh, Munshi at Pathania Stone Crusher, who clearly stated that he had seen the accused persons near the stone crusher at about 12 O'clock in the intervening night of 24/25.3.2015.

53. DNA report Ex.PW-7/A, which has been duly proved by Dr. Arun Sharma, PW-26, proves beyond reasonable doubt that accused Shiv Singh and Rakesh Kumar had committed sexual intercourse with the prosecutrix. However, as regards the accused Pankaj, there is hardly any evidence to conclusively prove on record that he had committed sexual intercourse with the prosecutrix.

54. On conjoint reading of statements of PW-6, PW-7 and PW-26 and the relevant documents/exhibits in this regard, it is clearly established that DNA profile obtained from vaginal swabs of prosecutrix, though has matched with the DNA profile obtained from two accused i.e. Rakesh Kumar and Shiv Singh, but it did not match with that of Pankaj.

55. Thus, what stands established on the record is that the accused Shiv Singh and Rakesh Kumar had committed sexual intercourse with the prosecutrix. Yet, the question remains whether the accused had trespassed into the property and thereafter forcibly committed sexual intercourse with the prosecutrix so as to amount to rape.

56. It has specifically come in the statement of prosecutrix that she had bolted the door from inside and therefore it was she alone who could have opened the same as it has specifically come in the evidence that neither door nor window was broken for gaining entry to the one round quarter of the prosecutrix. It is the case of the prosecution which otherwise is not supported by the prosecutrix that victim i.e. prosecutrix was dragged by the accused, but the medical report does not indicate any sign or injury either internal or external. Even the apparels worn by the prosecutrix at the relevant time were not torn during the incident. In case the sexual intercourse was being performed by the accused forcibly, then obviously, there would be some struggle in which atleast the clothes worn would not remain safe. That apart, there was no marks of injury found on the private part or any other part of the body of the prosecutrix and small abrasion etc. have been attributed to the beatings given to the prosecutrix by her husband.

57. It is true that injury is not a sine qua non for deciding whether rape has been committed and this question to be decided on the factual matrix of each case. As was observed by the Hon'ble Supreme Court in ***Pratap Misra and others vs. State of Orissa (1977) 3 SCC 41***, where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration.

58. It would be apposite to refer to the decision of the Hon'ble Supreme Court in ***Rai Sandeep alias Deepu vs. State (NCT of Delhi) (2012) 8 SCC 21***, wherein the quality of the testimony of the prosecutrix which can be made basis to convict the appellant/accused was considered in detail and it was held in paragraph 22 as under:

> *"22. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of*

offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

59. As already observed above, leave alone there being the 'sterling witness' of high quality and caliber, the prosecutrix herself has not supported the case of the prosecution. When the testimony of the prosecutrix and her husband are tested on the arise of the principles laid down by the Hon'ble Supreme Court, then it is evidently clear that they have not supported the case of the prosecution in the court and, that is, what finally matters as is more than established the statement earlier given under Section 161 Cr.P.C. and under Section 164 Cr.P.C. are not substantive piece of evidence and cannot be relied upon except for a limited purpose.

60. Even the conduct of the prosecutrix during the alleged ordeal is also unlike a victim of forcible rape and betrays somewhat submissive and consensual disposition.

61. In ***State of M.P. vs. Munna @ Shambhu Nath, (2016) 1 SCC 696***, it was held by the Hon'ble Supreme Court that if the girl is found to be above 16 years of age, she would be competent to give her consent, thus, question of rape will not arise, if consensual intercourse has been proved.

62. Here, it needs to be clarified that this Court is not oblivious to the provisions of Section 114-A of the Indian Evidence Act, 1872, which was inserted by way of amendment, where there is a clear and specific provision that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

63. However, this is not the fact situation obtaining in the instant case as the prosecutrix has not at all supported the case regarding she being raped by the accused.

64. It is evidently clear that the accused did not trespass into the quarter of the husband of the prosecutrix, therefore, there was no question of the accused being charged under Section 452 IPC.

65. As regards the forcible sexual intercourse having been committed by the accused persons, the same have also not been conclusively established by the prosecution, and therefore, these appellants/accused are entitled to the benefit of doubt.

66. Unfortunately, the learned Court below did not at all advert to the consensual nature of the Act and simply on the basis of the DNA report, proceeded to convict the accused.

67. Consequently, the appeals filed by the appellants are allowed and they are acquitted of the commission of offences punishable under Sections 452, 365 and 376(D) read with Section 34 of IPC. Resultantly, the appellants, who are presently serving out the sentence, be released forthwith, if not required in any other case, subject to their furnishing personal bond in the sum of Rs.50,000/- each with one surety in the like

amount each to the satisfaction of concerned Jail Superintendent, who in turn, will send the same to the learned trial Court, so that in the event of any appeal against this judgment is preferred, their presence in the appellate Court be secured. The bonds so furnished shall, however, remain in force only for a period of six months. Release warrants be prepared accordingly.

68. The appeals are disposed of in the aforesaid terms, so also the pending application(s), if any.

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

National Hydroelectric Power Corporation Limited,
Chamera Project & another ...Appellants.

Versus

Rukmani Devi & another ...Respondents.

RFA No. 277 of 2010
Judgment reserved: 26.08.2019
Date of Decision: September 6, 2019

Tort Law - Negligence – Washing away of a girl alongwith gushing water of tunnel, whose gates were negligently opened by the Dam staff – Damages – Defendants denying negligence on their part and pleading that deceased sneaked into Dam area despite her stopping by the Security Guard – She was a trespasser in Dam area and highly negligent in conducting herself – Held, on facts, place near the tunnel outlet from where girl was washed away was neither fenced nor any 'Dangerous zone' warning was displayed – Public could visit that area easily – No siren was blown before releasing water from the Dam into tunnel – Deceased was standing near bridge which was an open space – Fencing of area was done after this incident as per orders of Deputy Commissioner – Defendants were highly negligent in releasing water from the Dam –This negligence resulted in death of daughter of plaintiff and she is entitled for damages. (Paras 18 to 27).

Tort Law – Negligence – Damages – Assessment – Held, principles laid down in Sarla Verma & others Vs. Delhi Transport Corporation and another (2009) 6 SCC 121 can be applied in determining quantum of damages in other cases involving tort of negligence. (Para 28)

Case referred:

Sarla Verma (Smt) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

For the Appellants: Mr. Vijay Arora, Advocate.

For the Respondents: Mr. Adarsh K. Vashisht, Advocate, for respondent No.1
Mr. Balram Sharma, Senior Panel Counsel, for respondent No.2.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Appellants herein were defendants No.1 and 2 in the Civil Suit, filed by the plaintiff (respondent No.1 herein) for recovery of damages amounting to Rs.10,40,000/- on account of death of her daughter alleged to have been caused for negligence of defendants. Respondent No.2 Union of India was defendant No.3 in the Civil Suit.

2. Instant appeal has been preferred by defendants No.1 and 2 against judgment and decree dated 01.06.2010, passed by learned District Judge, Chamba Division, Chamba, H.P., in Civil Suit No.1/2009/2007, titled as *Smt.Rukmani Devi vs. National Hydroelectric Power Corporation Ltd. & others,* whereby decree for recovery of

Rs.7,00,000/- on account of damages has been passed in favour of respondent No.1-plaintiff (hereinafter referred to as respondent No.1) and against defendants.

3. Appeal has been filed on the ground that for want of sufficient material on record, learned District Judge has committed a mistake by holding that accident had taken place on account of sheer negligent act on the part of officials of the defendants as plaintiff has failed to place on record any permission to visit Dam area and deceased daughter of plaintiff was herself negligent for entering in the prohibited area despite warnings published on sign boards affixed on the spot and adequate steps have already been taken by the defendants to warn the intruders from going in the Dam area and area was duly fenced. Further that in case it is found that there was some negligence on the part of the defendants, then, the amount of compensation is liable to be reduced as it has been determined on the higher side without any sufficient material on record and thus it is contended that impugned judgment suffers infirmity, illegality, irregularity and perversity.

4. Learned counsel for respondent No.2 (defendant No.3) has joined his shoulder with the appellants-defendants No.1 and 2 and endorsed arguments advanced on their behalf, whereas, learned counsel for respondent No.1-plaintiff has supported the judgment and award of compensation by way of damages for the reasons enumerated by learned District Judge in the impugned judgment.

5. After giving consideration to submissions of learned counsel for parties and going through record, for discussion hereinafter, I find no merits in the contentions raised on behalf of the appellants.

6. It is the case of respondent No.1 that her 29 years' old daughter was undergoing training for Co-operative Management Course at Mashobra, Shimla during the year 2006 and in the month of September 2006, she alongwith other trainees had gone to Chamba and on 09.09.2006 during their visit to Chamera Project in Chamba District, when these trainees were standing near Bakani tunnel, officials of appellants had opened the gates of water all of a sudden without any warning by blowing siren etc., and on account of which, daughter of respondent No.1 had washed away in the water alongwith another girl and had died. It is case of respondent No.1 that her daughter had died on account of negligent act of officials of appellants as they failed to blow siren or warning of alarm before opening gates and caused to allow students to visit the site which was in danger zone. It is claimed by respondent No.1 that after death of her husband prior to incident, she was totally dependent upon income of her deceased daughter, who was maintaining and looking after her, as she (respondent No.1) was not able to work and earn her livelihood due to ill health and even prior to joining of the course in question, her daughter was doing job of weaving shawl etc. in Bhuti Weavers Cooperative Society Limited, Bhuti Colony, Kullu, H.P, where-from she was earning monthly salary of Rs.8500/- and her daughter used to provide financial assistance to her @ Rs.6000/- per month for meeting day-to-day and medical expenses and further that on completion of the training course at Mashobra, her daughter was having a bright future for getting Government job and even private job at increased monthly salary and she would have earned about Rs.12,000/- per month with special avenues for promotion in her career.

7. By giving details of loss claim of Rs.10,40,000/- was put forth in the Civil Suit. Claim of respondent No.1 was refuted by the appellants on the ground that story put forward by respondent No.1 was wrong, false and misleading and it has been further explained that as and when silt is collected in the dam area the same is to be flushed out and gates of flushing tunnels are required to be opened and on 09.09.2006 flushing gates were opened after incorporating entries in the log book by the officials concerned and as per practice as and when gates are required to be opened, Supervising Officer deputes subordinate employees for opening the gates from the control panels after informing Security Guard, who is deputed at the flushing outlet at Bakani around the clock and on receiving information siren is blown thrice by Security Guard and thereafter employees go back to control panels and open the gates. It is further claimed that before going to the spot of accident three girls had approached Security Guard Jagdeep Singh to inquire about tunnels and had expressed desire to see the area but they were advised not to go in that area as it was dangerous to go near the gate for periodical release of water from those flushing tunnels and further that area around the flushing tunnels is fenced and Security Guard is deputed at a place just near the gate and siren is also installed on the red gate, which is blown before opening of the gates and proper boards have also been erected at four different places, warning general public about inherent danger in the area. It is further claimed that for the orders, notified by the District Magistrate, gates can be

opened at any time without notice and people have been cautioned not to go in the river even at the time when there is no flow of water and further that girls washed away in incident, who were warned and sent back by the Security Guard, had possibly sneaked into the place and went into the river and despite blowing of siren they did not come out and unfortunately were washed away in the water of flushing tunnels and these girls were trespassers in the area in question. It is canvassed that these girls were grown up and were able to understand the perils involved in their venture and, therefore, death of Sunita daughter of respondent No.1-plaintiff had occurred on account of her own fault, but not for the negligent act on the part of the appellants.

8. In replication filed on behalf of the plaintiff-respondent No.1, claim made in the suit was asserted and plea taken in written statement was refuted.

9. On the basis of pleadings of the parties, trial Court had framed the following issues:-

1. Whether the deceased Ms. Sunita died due to negligence of defendants No.1 and 2? OPP

2. If issue no.1 is proved in affirmative, the quantum of damages to which the plaintiff is entitled? OPP

3. Whether the suit is not maintainable as alleged by the defendant in paras 13 and 14 of the written statement? OPD

4. Whether the suit is not filed through competent person? OPD

5. Relief.

10. Thereafter, on conclusion of the trial considering evidence on record led by parties, trial Court had decided all the issues in favour of the plaintiff-respondent No.1 and decree was passed in favour of respondent No.1-plaintiff and against the defendants for recovery of Rs.7,00,000/- on account of damage.

11. Accident in question wherein daughter of respondent No.1-plaintiff was washed away and expired on release of water from gates of Project of appellants-defendants No.1 and 2, is not in dispute. Only issues, raised in present appeal are that the finding returned by learned District Judge, that accident is a result of sheer negligence on the part of defendants No.1 and 2, is perverse and thus, is liable to be set aside, and in case this finding is affirmed, then amount of compensation determined by learned District Judge is excessive.

12. Respondent No.1-plaintiff has examined six witnesses to substantiate her claim, whereas, appellants-defendants have examined seven witnesses to establish their plea taken in written statement.

13. In order to support plea taken in the appeal, learned counsel for the appellants has referred statements of PW.2 Gaurav, PW.3 Rukmani, PW.4 Pawan Kumar, PW.5 Vijay Singh, DW.2 Rajesh Kumar, DW.3 Diwakar Prashad and DW.7 S.L. Ukey.

14. PW.2 Gaurav is a Lecturer in H.P. Cooperative Management Training Center Mashobra, Shimla, where deceased was undergoing training. Referring his admission in cross-examination, wherein he has admitted that they were not having any permission to visit the Dam area, it is contended that deceased Sunita alongwith her companion was a trespasser in the area and therefore, plaintiff is not entitled to anything on account of her death which was caused due to own negligence of deceased Sunita and further that this witness has failed to produce any document on record to indicate that the Training Institute was a Government Institution.

15. Referring statement of PW.4 Pawan Kumar, it is contended that in his cross-examination, this witness has admitted that they had not taken permission to visit inside Chamera Project and on the spot wire fencing was existing.

16. Referring photographs (Mark A-1 to Mark A-9), it is claimed that there is wire fencing and warning boards on the spot and this fact has been proved as PW.5 Vijay Singh, in his cross-examination, has admitted that these photographs (A-1 to A-9) are of the spot, and it substantiates plea of the appellants that adequate steps, by fixing wire fence and warning board on the spot, were taken by the appellants to prevent incidents like one involved in present case.

17. Deposition of PW.1 B.S. Mahal, in his cross-examination, has also been referred on behalf of the appellants, wherein he has admitted that where there is road of

the Project, barriers have been installed and it has been notified by the Deputy Commissioner directing the public not to visit the dangerous area and that area concerned where incident had occurred has been declared as a dangerous zone with warning that water can be released there at any time.

18. Learned counsel for the appellants has picked up selective sentences from the statements of the aforesaid witnesses, whereas, rule is that entire evidence is to be read as a whole to infer correct conclusion. PW.1 is a Station Fire Officer of Chamba, who had visited the spot immediately after the occurrence. In his examination-in-chief, he has categorically stated that as per information gathered from the persons present on the spot, at that time, it was revealed that girls were washed away from the place, near to outlet of the Project of defendants No.1 and 2 on account of air pressure created on release of water and on the spot, neither any sign board of dangerous zone warning was there nor place was properly fenced and general public could visit the area easily. In his cross-examination, he has admitted the general suggestions that there are directions by the Deputy Commissioner not to visit the dangerous zone and that area concerned has also been notified as dangerous zone. But no suggestion has been put to him with respect to positive assertions made by him in his examination-in-chief, wherein he has stated that on the spot there was no sign board and on the spot there was no proper fencing. Therefore, this part of his assertion remained unrebutted being not disputed in his cross-examination.

19. PW.2 Gaurav is not the person, who was present on the spot. He has proved the fact on record that deceased Sunita was undergoing training from the Institute at Mashobra. In his cross-examination, he has admitted that they were not having the permission to visit the Dam area, but this fact is of no help to the appellants as it is not case of respondent No.1-plaintiff that her daughter had visited with pass or permission of the defendants in the area, rather case of respondent No.1-plaintiff is that defendants were negligent in notifying warning or fencing the area or prohibiting visit of the public in the dangerous area and also that defendants had not taken precautionary steps before releasing water like blowing siren or issuing any kind of other warning.

20. PW.4 Pawan Kumar was accompanying deceased Sunita and other trainees. In cross-examination, besides portion, which has been referred on behalf of the appellants-defendants wherein he has admitted that wire fencing was there on the spot, he has further stated that at many places there was a space to go to the river area and further that where from they had entered, it was an open place and there were no wires at all and they had not visited the Dam or Power House, but had visited the place near the bridge. He has denied that siren was blown and warning was issued by Security Guard and despite that deceased Sunita had ventured to go to the dangerous zone and was responsible for causing her death on account of her own omissions.

21. PW.5 Vijay Singh has admitted the photographs A-1 to A-9 being photographs of the spot, but has explained that on the day of accident, it was not the position as has been depicted in these photographs. He has further clarified that they had not visited the Dam area, but were taking rest in the parking area and Sunita had already washed away in the water before blowing of siren.

22. DW.2 Rajesh Kumar is Assistant Manager of the appellants. In his cross-examination he has stated that on 09.09.2006 gates were opened by the orders of Chief Engineer (Civil). He has not only admitted that there are no written orders placed on the record of the case, but has also stated that only verbal orders were there, which were imparted to DW.3 Diwakar Prashad as recorded in the log book. He has admitted that on 15.11.2006, Deputy Commissioner, Chamba, had sent a letter to their Chief Engineer directing them for fencing the dangerous area and to install boards and they had complied with the directions issued by the Deputy Commissioner vide letter dated 15.11.2006. He has admitted that on Chamba-Bharmour road and at Bakani bridge general public keeps on going and from Chamba side towards Bakani space is open. This fact has also been admitted by DW.3 Diwakar Prashad by stating that Chamba-Bharmour road and Bakani bridge are general passages and towards Bakani entire space is open and there is no fencing from the side of Bakani. The same admission has also been made by DW.5 Jagdeep Singh, who is Security Guard of the appellants. It is noticeable that spot of incident is also adjacent to Bakani Bridge.

23. DW.7 S.L. Ukey had snapped photographs (Ex.DW.7/A-1 to A-9). In his cross-examination, he has admitted that these photographs were taken by him after filing of the suit by respondent No.1-plaintiff. The suit was filed on 24.05.2007 and thereafter

notices, returnable on 27.07.2007, were issued to the defendants on 12.06.2007, meaning thereby defendants were served in July 2007 and these photographs were taken in July 2007. Whereas incident had occurred on 09.09.2006.

24. DW.2 Rajesh Kumar has admitted that sign boards were fixed and area was fenced in compliance of direction dated 15.11.2006 issued by the Deputy Commissioner. Therefore, these photographs cannot be said as photographs of the area depicting situation on the spot at the time of accident, rather there is sufficient material on record so as to construe that fencing of the area and installation of warning sign boards was completed after the incident that too in compliance of direction issued by the Deputy Commissioner. No other evidence has been pointed out on behalf of the appellants to rebut the claim of respondent No.1-plaintiff.

25. From the aforesaid discussion, it is evident that there is no force in the contentions raised by the appellants-defendants that there was no negligence on their part. In view of this, findings returned by learned District Judge that accident had taken place on account of sheer negligent act on the part of officials of defendants is affirmed.

26. So far as quantum of compensation is concerned, respondent No.1-plaintiff has claimed a sum of Rs.10,40,000/- and learned District Judge has awarded compensation to the tune of Rs.7,00,000/- only. It is claimed by respondent No.1-plaintiff that after completion of training deceased would have earned Rs.12,000/- per month, whereas, before training she was earning Rs.8500/- per month.

27. PW.3 Rukmani has placed on record salary slips of her daughter, which were proved by PW.6 Rakeshwar, who is Secretary of the Weaver's Society, wherein deceased Sunita was working. As per salary slip, salary of the deceased was Rs.8000/- per month. Age of the deceased at the time of incident was 29 years, whereas, age of respondent No.1-plaintiff (her mother) at that time was 58 years. Learned District Judge has not taken future income of Rs.12,000/- in consideration, but has considered her income as Rs.8000/- per month out of which he has deducted Rs.2000/- towards her personal expenses and accordingly taking loss of Rs.6000/- per month, he has calculated annual loss to respondent No.1-plaintiff to the tune of Rs.72,000/-.

28. For assessing damages on account of death in motor vehicle accidents, Courts have evolved a method as pronounced in ***Sarla Verma (Smt) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121***. Further Second Schedule of Motor Vehicles Act with reference to Section 163(A) of Motor Vehicles Act also provides different multipliers for calculation of compensation on account of accidental death on the basis of age of victim. These methods are time tested and can be taken into consideration for determining damages in present case. According to Second Schedule with reference to Section 163(A) of the Motor Vehicles Act, in case of 29 years of age of the victim, multiplier of 18 is applicable, whereas, as per decision of Apex Court in *Sarla Verma's* case, multiplier of 17 is applicable and in case age of respondent No.1-plaintiff is taken into consideration i.e. 58 years i.e. multiplier of 9 is applicable. By applying multiplier of 18, amount of compensation becomes Rs.12,96,000/-, whereas, by applying multiplier of 9, compensation becomes to the tune of Rs.6,48,000/- and in case multiplier of 17 is applied, compensation amount will be Rs.12,24,000/-. Whereas, learned District Judge has quantified a compensation of Rs.6,00,000/- and has further awarded Rs.1,00,000/- for loss of love and affection. Total compensation determined by learned District Judge is Rs.7,00,000/-. For discussion herein above, I do not find that amount of compensation determined by learned District Judge is excessive in nature.

29. No other point is urged or raised. In view of aforesaid discussion, I find no infirmity, irregularity, illegality or perversity in the impugned judgment, hence appeal is dismissed, being devoid of merit. No order as to costs. Record be sent back.

Pending application(s), if any, also stand disposed of in the aforesaid terms.

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

Chander Kant ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1242 of 2019 with
CrMP(M)'s Nos. 1243, 1244 and 1245 of 2019

Decided on: August 1, 2019

Code of Criminal Procedure, 1973 – Section 438 – Pre-arrest bail – Grant of - Petitioners seeking pre-arrest bail in case registered against them for cheating and forgery etc. Held –FIR was got registered by complainant against petitioners on ground of their alleged refusal to execute sale deed in his favour – Petitioners not disputing receipt of amount from complainant – Dispute is regarding balance sale price which complainant is alleged to have to pay to petitioners – Complainant has remedy to get the agreement specifically enforced through court of law – Investigation is complete – Petitioners fully cooperated in investigation – No ground to deny pre-arrest bail to them – Petitions allowed – Pre-arrest bail granted subject to conditions. (Paras 9, 10, 17 & 18)

Cases referred:

Rashmi Jain v. State of U.P. (2014)13 SCC 553

Dalip Kaur v. Jagnar Singh (2009) 14 SCC 696

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

Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218

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

For the petitioners	Mr. N.K. Thakur, Senior Advocate with Mr. Umesh Kanwar, Advocate.
For the respondent	Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General. Mr. Ashok Chaudhary, Advocate, for the complainant. SI Hans Raj, I/C Police Post Rehan, Police Station, Nurpur, District Kangra, Himachal Pradesh

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Since all these petitions arise out of same FIR, all were taken together and are being disposed of vide this common judgment.

2. By way of present petitions filed under S.438 CrPC, prayer has been made on behalf of the bail petitioners for grant of interim bail in case FIR No. 115, dated 30.5.2019, under Ss.417, 418, 42, 468 and 120(B) IPC registered at Police Station, Nurpur, Kangra, Himachal Pradesh.

3. Sequel to order dated 24.7.2019, SI Hans Raj has come present with the record. Status report containing details with regard to investigation of the case stands already filed on previous date. Record perused and returned.

4. Close scrutiny of the record made available to this Court reveals that on 30.5.2019, complainants, Rajat Thakur and Ruchi Thakur, submitted a complaint through Superintendent of Police, Kangra at Dharamshala, alleging therein that that vide Agreement to Sell dated 28.8.2018, bail petitioners, who are proprietors of M/s A-1 Citi Walk Private Limited, agreed to transfer their shares in the property/Company named above for total sale consideration of Rs.2.30 Crore but, despite complainants having paid aforesaid sum in terms of Agreement to Sell, referred to herein above, bail petitioners, with a view to cheat them, are now refusing to get the sale deed registered, as such, appropriate action in accordance with may be taken against them. On the basis of aforesaid complaint, a formal FIR came to be lodged against the bail petitioners at Police Station, Nurpur, Kangra, Himachal Pradesh, under aforesaid provisions of law. Though, the investigation in the FIR is yet to be completed, but the record reveals that during

investigation, it transpired that the complainants, with a view to bail out the bail petitioners, who were under obligation to pay Rs.1,85,00,000/- to the Kangra Central Co-operative Bank Limited agreed, by way of Agreement to Sell, to pay entire amount to the Bank concerned, in lieu of the shares held by bail petitioners in the property/company concerned. Allegedly, the complainants paid entire sum of Rs.2.30 Crore to the Bank concerned in terms of Agreement to Sell arrived *inter se* parties, but despite that bail petitioners refused to get the sale deed registered on the ground that still a sum of Rs. 55,00,00/- is payable by the complainants. Though the terms and conditions of the Agreement to Sell suggest that a sum of Rs. 1,85,00,000/- was to be deposited in the Bank, which subsequently came to be deposited in the Registry of this Court and Rs.45,00,00/- to the bail petitioners, but, in the case at hand, entire sum of Rs.2.30 Crore came to be deposited by the complainants with the Bank concerned, against the loan liability of the bail petitioners., because No Objection Certificate (NOC) for further sale in favour of complainants was not being issued by the Bank.

5. Mr. N.K. Thakur, learned Senior Advocate duly assisted by Mr. Umesh Kanwar, Advocate, while espousing the case of the bail petitioners contended that as per agreed terms *inter se* parties, total consideration was Rs.2.85 Crore, whereas, in the case at hand, only a sum of Rs.2.30 Crore has been deposited by the complainants and as such, bail petitioners cannot be compelled to execute sale deed in terms of Agreement to Sell, till such time, remaining amount of Rs.55,00,00/- is paid to the bail petitioners. Mr. Thakur, learned Senior Advocate further contended that the question, whether the complainants are under obligation to pay Rs.55,00,00/- in terms of Agreement to Sell, is to be decided in the totality of circumstances, which led to the settlement *inter se* parties, but, definitely, criminal proceedings initiated against bail petitioners at the behest of the complainants, that too, on the allegations contained in the same are not tenable as such, bail petitioners deserve to be enlarged on bail. Lastly, Mr. Thakur, learned Senior Advocate contended that as per agreed terms, complainants are otherwise entitled to seek enforcement of Agreement to Sell by taking recourse to legal remedy. He also contended that nothing remains to be recovered from the bail petitioners and they have already joined the investigation, as such, no fruitful purpose would be served in case, their custodial interrogation, as prayed for, is granted.

6. Mr. N.K. Thakur, learned Senior Advocate, while buttressing his arguments, relied upon **Rashmi Jain** v. **State of U.P.** (2014)13 SCC 553 to suggest that a purely civil dispute cannot be converted into criminal proceedings. Learned Senior Advocate for the bail petitioners while relying upon **Dalip Kaur** v. **Jagnar Singh** (2009) 14 SCC 696, argued that non-registration of sale deed by the bail petitioners can, at best, be said to be a breach of Agreement to Sell and not a criminal breach of trust or an act of cheating, as such, present proceedings are nothing but an attempt on the part of complainants to arm-twist the bail petitioners into doing an act, which is prejudicial to their civil rights, as such, bail petitioners are entitled for grant of bail.

7. Mr. Sudhir Bhatnagar, learned Additional Advocate General appearing for the respondent-State and Mr. Ashok Chaudhary, Advocate representing complainant, while opposing prayer made on behalf of the bail petitioners for grant of bail, contended that there is no document, if any, to suggest that the complainants were under any obligation to pay amount over and above Rs.2.30 Crore as such, bail petitioners have been rightly booked under the aforesaid provisions of law. Learned counsel for the complainant further contended that a sum of Rs.1.85 Crore was deposited by complainants in the Registry of this Court, pursuant to order dated 30.10.2018 passed in CWP No. 1983 of 2018 titled A-**1 City Walk Pvt Ltd** vs. **Kangra Central Cooperative Bank Ltd and another**, having been filed by the bail petitioners. Learned counsel for the complainant further contended that the bail petitioners have not only duped the complainants but, just with a view to get rid of the loan liability, made them to pay huge sum of Rs.2.30 Crore to the Bank by concealing material facts. Lastly, learned counsel for the complainant contended that keeping in view the conduct of the bail petitioners, they do not deserve any leniency from this Court, as such, prayer having been made by them

for grant of bail, may be rejected outrightly. While referring to the documents available on record, learned counsel for the complainant contended that apart from loan amount, complainants were made to purchase stamp papers worth Rs.13,18,000/- approximately for the registration of sale deed but till date, same has not been executed in terms of Agreement to Sell.

8. Having heard learned counsel for the parties and perused material available on record, this court finds that as per Agreement to Sell dated 28.8.2018, Rs.2.30 Crore was required to be paid by the complainants enabling bail petitioners, who are proprietors /shareholders of A-1 Citi Walk Pvt. Ltd., to execute sale deed as such, there is no force in the argument of Mr. Thakur, learned Senior Advocate appearing for the bail petitioners that at the time of registration of sale deed sum of Rs.55,00,00/- over and above Rs.2.30 Crore already paid by the complainants, is/was required to be paid. Factum with regard to deposit of Rs.2.30 Crore with the Kangra Central Co-operative Bank Ltd. towards loan liability of the bail petitioners has not been denied by the bail petitioners, but their claim, which is not supported by any document, is that complainants are under obligation to pay an additional amount of Rs.55,00,00/-.

9. Having carefully perused/seen the documents available on record as well as conduct of the bail petitioners, this Court is not in agreement with the submission made by Mr. Thakur, learned Senior Advocate that no case, if any, is made out against the bail petitioners under the aforesaid provisions of law, but, definitely, this Court finds force in his arguments that since there is specific condition in the Agreement to Sell that in the event of failure on the part of the bail petitioners, who are the First Party to said Agreement to Sell, to execute the sale deed, complainants being the Second Party can get the same executed through process of court. Whether, amount, if any, in addition to Rs.2.30 Crore is required to be paid to the bail petitioners, is a question to be determined by trial court in the totality of evidence to be led on record by the parties, but, definitely, complainants, being Second Party in the Agreement to Sell, are well within their right to get the Agreement to Sell executed by approaching competent Court of law, as mentioned in Clause (3) of the Agreement to Sell.

10. Criminal culpability as well as liability, if any, of the bail petitioners is yet to be ascertained/determined by court of law in the totality of evidence, as such, no fruitful purpose would be served in case, prayer for grant of bail is not accepted at this stage, especially when the bail petitioner have already joined the investigation. Factum with regard to deposit of Rs.2.30 Crore is not disputed by bail petitioners, rather, controversy, if any, is with regard to balance payment of Rs.55,00,00/-, which definitely cannot be ascertained in the present proceedings. Besides this, the Investigating Officer, in his report has fairly stated that the investigation is complete and nothing remains to be recovered from the bail petitioners. Moreover, when specific recourse is available to the complainants to get the sale deed registered in terms of clause (3) of the Agreement to Sell, this Court is of the view that present proceedings cannot be used to compel bail petitioners to do something, which is disputed.

11. Guilt, if any, of the bail petitioners is yet to be proved in accordance with law by the prosecution, as such, it would not be appropriate to curtail the freedom of bail petitioners for an indefinite period, especially when nothing remains to be recovered from them. Apprehension expressed by learned Additional Advocate General that in event of bail petitioners being enlarged, they may tamper with the evidence, can be best met by putting the bail petitioners to stringent conditions, as has been fairly admitted by learned counsel for the bail petitioner.

12. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to Police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his

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

14. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

15. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

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

(ii) nature and gravity of the accusation;

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

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

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

(vi) likelihood of the offence being repeated;

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

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

17. In view of above, bail petitioners have carved out a case for themselves and as such, present petitions are allowed. Orders dated 2.7.2019 passed in each one of the petitions are made absolute, subject to the bail petitioners furnishing fresh bail bonds in the sum of Rs.2,00,000/-(Rs. Two Lakh) each with one local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides the following conditions:

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

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

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

(d). They shall not leave the territory of India without the prior permission of the Court.

(e). They shall surrender passport, if any, held by them.

18. It is clarified that if the petitioners misuse the liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

19. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of these petitions alone.

The petitions stand accordingly disposed of.

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

Manohar Lal ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1233 of 2019

Decided on August 6, 2019

Code of Criminal Procedure, 1973 – Section 439 – Regular bail in case registered for kidnapping and rape of a minor girl – Held, victim had prior proximity with accused and they had been meeting each other since long – She voluntarily joined his company and was aware of consequences of her being in his company – Accused in custody for the last

more than two years – Maternal witnesses stand examined during trial – No prejudice would cause to prosecution case by release of accused on bail – Petition allowed – Accused admitted on regular bail subject to conditions. (Paras 7 to 9 & 15)

Cases referred:

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

Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218

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

For the petitioner	Mr. H.R. Chauhan, Advocate.
For the respondent	Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General. ASI Kulmesh Singh, I/O, Police Station, Padhar, District Mandi, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Bail petitioner namely Manohar Lal, who is behind bars since 5.8.2017, has approached this Court in the instant proceedings for grant of bail in FIR No. 68, dated 5.8.2017, under Ss.363, 366 and 376 IPC and S.4 of Protection of Children from Sexual Offences Act, registered at Police Station, Padhar, District Mandi, Himachal Pradesh.

2. Sequel to orders dated 23.7.2019 and 1.8.2019, ASI Kulmesh Singh, I/O, Police Station, Padhar, District Mandi, Himachal Pradesh has come present with the record. Mr. Kunal Thakur, learned Deputy Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. Record made available to this Court, reveals that on 5.8.2017, complainant Anoop Singh lodged a complaint at Police Station, Padhar, District Mandi, Himachal Pradesh, alleging therein that his minor daughter, aged 15 years (name withheld), had gone to School on 29.7.2017, but has not come back from School. Complainant further alleged that on 1.8.2017, victim-prosecutrix telephonically called him and informed that she was at Chandigarh and disconnected the phone. Complainant further alleged that thereafter father of the bail petitioner, Med Ram and one Kewlu Ram, came to his house and informed that Med Ram's son i.e. bail petitioner had also not come home for the last 2-3 days. He alleged that the person namely Kewlu Ram managed conversation between victim-prosecutrix and the complainant, who informed that she was in the company of the bail petitioner. Complainant alleged that he apprehends that the bail petitioner compelled the victim-prosecutrix to elope with him on the pretext of marriage and as such, appropriate action be taken against the bail petitioner.

4. Before appropriate proceedings could be initiated against the bail petitioner, he alongwith victim-prosecutrix appeared in the Police Station, Padhar. Wife of the complainant identified the victim-prosecutrix. Police after recording the statement of the victim-prosecutrix under S.161 CrPC also got recorded her statement under S.164 CrPC before Judicial Magistrate 1st Class, Joginder Nagar, Mandi. Though, initially the victim-prosecutrix refused to subject herself to medical examination, however, subsequently, on the pursuance of her parents, she agreed and accordingly, she was medically examined at Zonal Hospital, Mandi. On the basis of complaint (supra), a formal FIR came to be registered against the bail petitioner under the aforesaid provisions of law.

5. Mr. Kunal Thakur, learned Deputy Advocate General, on the instructions of the Investigating Officer, stated that the statements of seven prosecution witnesses out of total 19 stand recorded. He further stated that the statements of material prosecution witnesses i.e. victim-prosecutrix, her mother and father (complainant), stand recorded.

While opposing prayer made in the instant application for grant of bail, Mr. Thakur, contended that keeping in view the gravity of the offence, alleged to have been committed by the bail petitioner, he does not deserve any leniency and as such, his prayer for grant of bail may be rejected. Mr. Thakur, further contended that since 12 witnesses are yet to be examined, it may not be in the interest of justice to release bail petitioner at this stage, because in such an eventuality, he may tamper with prosecution evidence or may dissuade the witnesses from deposing against him.

6. Mr. H.R. Chauhan, learned counsel for the bail petitioner, while making this Court to peruse the statements made by the victim-prosecutrix, her mother and complainant before the trial Court, strenuously argued that no offence, much less an offence under S.376 IPC is made out against the bail petitioner as such, his client deserves to be enlarged on bail. Mr. Chauhan, further contended that there are material contradictions and inconsistencies in the statements of the victim-prosecutrix recorded under Ss.161 and 164 CrPC and the statement recorded during trial. Learned counsel for the bail petitioner contended that perusal of evidence led on record clearly reveals that the victim-prosecutrix and bail petitioner had prior acquaintance and at no point of time, bail petitioner compelled her to join his company, rather, she of own volition, joined the company of the bail petitioner. lastly, Mr. Chauhan, argued that since statements of material prosecution witnesses stand recorded, no prejudice whatsoever, would be caused to prosecution case, in case bail petitioner, who has already suffered for more than two years, is ordered to be enlarged on bail.

7. Having heard learned counsel for the parties and perused the material available on record, especially initial statements of the victim-prosecutrix recorded under Ss.161 and 164 CrPC, vis-à-vis her statement recorded in the court during trial, this court finds that there are material contradictions and inconsistencies with regard to abduction/kidnapping of the victim-prosecutrix by the bail petitioner. Initially the victim-prosecutrix in her statements recorded under Ss. 161 and 164 CrPC, though claimed that she was taken to Mandi and Chandigarh by the bail petitioner but, she never stated that she was sexually assaulted by the bail petitioner. If her statements as referred to above are read in entirety, this court is compelled to agree with learned counsel for the bail petitioner that the victim-prosecutrix had prior proximity with the bail petitioner and had been meeting each other for quite long. Statement having been made by victim-prosecutrix further reveal that she of her own volition without there being any pressure from bail petitioner, joined his company and she was fully capable of understanding the consequences of her being in the company of the bail petitioner.

8. At this stage, it may be noticed that victim-prosecutrix during her stay with the bail petitioner called her parents twice, but never stated that she was being held captive forcibly.

9. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court in the totality of evidence collected on record by the investigating agency, but having noticed aforesaid glaring aspects, this court sees no reason to let the bail petitioner incarcerate in jail for an indefinite period during trial, especially when bail petitioner has already suffered for more than two years. Apart form above, statements of material prosecution witnesses stand recorded, as such, no prejudice whatsoever is going to be caused to the prosecution case, in case prayer made by the bail petitioner for grant of bail is considered.

10. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> “2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent

> until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
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> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

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

12. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

13. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-

trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

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

(ii) nature and gravity of the accusation;

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

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

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

(vi) likelihood of the offence being repeated;

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

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

15. In view of above, bail petitioner has carved out a case for himself and as such, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

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

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

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

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

(e). He shall surrender passport, if any, held by him.

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

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

The petition stands accordingly disposed of.

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

Smt. Parveeta ...Petitioner

Versus

State of Himachal Pradesh and another ...Respondents

CrMMO No. 450 of 2019

Decided on: August 6, 2019

Code of Criminal Procedure, 1973 – Section 482 – Inherent power – Exercise of – Quashing of FIR arising out of matrimonial dispute – Held, alleged offences do not involve mental depravity on part of petitioner – Offences not heinous or of serious nature - Parties having compromised dispute between them – Marriage already stands dissolved by way mutual consent – Wife not interested in continuing with criminal case – Petition allowed – FIR quashed with all consequential proceedings. (Para 12)

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 SCC 466

Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497

For the petitioner: Mr. Rakesh Manta, Advocate.

For the respondents: Mr. Sanjeev Sood and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, for respondent No.1.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under S. 482 Cr.P.C., prayer has been made on behalf of the petitioner for quashing and setting aside FIR No. 2, dated 14.4.2018, under Ss. 498A, 506, 323 an 325 IPC registered at FMPS Shimla alongwith consequential proceedings pending in the competent Court of law, on account of amicable settlement *inter se* parties.

2. FIR, detailed herein above came to be lodged at the behest of petitioner Parveeta, who alleged that she is being mentally harassed by respondent No.2, who happens to be her ex-husband, on account of dowry. After completion of investigation, police filed *Challan* in the competent Court of law, which is still pending adjudication. During pendency of the criminal proceedings, a joint petition under S.13B of the Hindu Marriage Act came to be filed by petitioner and respondent No.2. Careful perusal of judgment and decree dated 1.5.2019 passed in HMA Petition No. 75-S/3 of 2019/18, (Annexure P-1) reveals that learned District Judge (Family Court), Shimla, Himachal Pradesh, vide aforesaid judgment and decree, has ordered for dissolution of marriage between petitioner and respondent No.2 by way of mutual consent. Paragraph-3 of the judgment reveals that in terms of amicable settlement *inter se* parties, petitioner, who was co-petitioner in the proceedings referred to herein above, agreed that she would move this Court for quashing of FIR as well as consequential proceedings.

3. In view of aforesaid undertaking given by the petitioner, present petition has been filed by the petitioner, who is otherwise present in the court, for quashing of FIR detailed herein above, as well as consequential proceedings.

4. This Court, with a view to ascertain the correctness and genuineness of the compromise as well as identity of the petitioner/complainant, at whose behest, FIR sought to be quashed came to be lodged, summoned Investigating Officer of the case. In the post-lunch sessions, LH ASI Meera Chauhan No. 1431 from FMPS, BCS, New Shimla has come present. She states that the Investigating Officer of the case stands transferred to other Police Station, but record brought by her clearly reveals that Smt. Parveeta, who is present in court, is the complainant in the case. She also showed photographs of the complainant, at whose behest FIR came to be lodged.

5. Having heard learned counsel for the parties and perused material available on record, especially judgment dated 1.5.2019 passed by learned District Judge (Family Court), Shimla, this court is of the view that since both the parties have agreed to dissolve their marriage by way of mutual consent and appropriate orders in this regard

stand passed, there is no impediment in accepting the prayer made in the instant petition. Moreover, as has been taken note herein above, present petitioner has undertaken before the Family court to withdraw the case lodged by her against respondent No.2. Petitioner, Smt. Parveeta on oath stated before this court that she of her own volition and without there being any external pressure has filed present petition, seeking quashment of FIR as well as consequential proceedings, as such, she shall have no objection, in case FIR as well as consequential proceedings initiated at her behest are ordered to be quashed and set aside. Her statement is taken on record.

6. Mr. Sanjeev Sood, learned Additional Advocate General, having heard statement of the petitioner as well as perused material available on record, fairly states that there is no impediment in accepting the prayer made in the instant petition, because now both the parties have mutually agreed to dissolve their marriage.

7. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

8. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

9. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

10. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
>
> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to

an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

11. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

"… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"

"…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the

institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or

misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

12. In the case at hand also, the offences alleged against the petitioner does not involve offences of mental depravity or of heinous nature like rape, dacoity or murder and as such, with a view to maintain harmony and peace in the society, this court deems it appropriate to quash the FIR as well as consequential proceedings thereto, especially keeping in view the fact that petitioner and respondent No.2 have compromised the matter with each other, in which case, the possibility of conviction is remote and no fruitful purpose would be served in continuing with the criminal proceedings.

13. Since the matter stands compromised between respondent No.2 and petitioner, no fruitful purpose would be served in case proceedings initiated at the behest of complainant are allowed to continue. Moreover, present is a marriage dispute and since marriage stands already dissolved coupled with the fact that petitioner/complainant, at those instance FIR came to be lodged against respondent No.2, is no more interested in carrying on with the criminal proceedings,, as such, prayer made in the petition at hand can be accepted.

14. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 2, dated 14.4.2018, under Ss. 498A, 506, 323 an 325 IPC registered at FMPS Shimla against respondent No.2 alongwith consequential proceedings pending in the competent Court of law, are quashed and set aside. Respondent No.2 is acquitted of the offences levelled against him in the aforesaid FIR.

15. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Vice Chancellor, Dr. Y.S. Parmar University of Horticulture and Forestry and another

...Petitioners

Versus

Dr. S.P. Bhartiya ...Respondent

CMPMO No. 11 of 2018
Decided on August 6, 2019

Code of Civil Procedure, 1908- Order XXIII Rule 1 (4) – Bar as to institution of fresh suit – Applicability – Held, bar as to institution of fresh suit as contemplated in order XXIII Rule 1 (4) is not attracted when the previous proceedings were not initiated in terms of provisions of Code of Civil Procedure – Withdrawal of writ petition without leave of High Court will not debar petitioner from filing suit in respect of such subject matter or part of claim. (Para 13)

Cases referred:

Lakshmanan Chetty v. Muthaya Chetty 40 Mad. LJ

Mahant Biharidasji v. Parshotamdas Ramdas ILR 32 Bom 345

Sunder Lal v. Himachal Pradesh State Forest Corporation, Law Suit (HP) 1053

For the petitioners Mr. Avinash Jaryal, Advocate.

For the respondent Mr. Paresh Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Instant petition under Art.227 of the Constitution of India is directed against order dated 18.3.2017 passed by Civil Judge (Senior Division), Court No.2, Solan, Himachal Pradesh, whereby an application filed under S.151 CPC, by petitioners-defendants (hereinafter, 'defendants') for dismissal of the suit being hit by the provisions of Order XXIII CPC, came to be dismissed.

2. Precisely, the facts as emerge from the record are that the respondent-plaintiff (hereinafter, 'plaintiff') earlier filed an Original Application i.e. OA No. 1873 of 1998 before erstwhile Himachal Pradesh Administrative Tribunal, seeking therein direction to the defendants to promote him as Assistant Professor with effect from 6.3.1976 and as a Professor with effect from 24.10.1980, with all consequential benefits of pay, arrears, seniority etc. Aforesaid Original Application subsequently came to be transferred to this Court, on account of abolition Himachal Pradesh Administrative Tribunal and was registered as CWP(T) No. 5332 of 2008. However, the fact remains that aforesaid petition came to be disposed of as infructuous on the statement of learned counsel for the plaintiff, vide order dated 25.6.2010 (Annexure P-7).

3. After passing of order dated 25.6.2010, plaintiff filed a Civil Suit in the court of learned Civil Judge (Senior Division), Solan (Annexure P-1), seeking therein decree of mandatory injunction directing defendants to promote him to the post of Assistant Professor with effect from 6.3.1976 and to the post of Professor with effect from 24.10.1980 on notional basis with all consequential benefits. Defendants filed written statement but never raised the question of maintainability, rather contested the suit on merit. However, after filing of the written statement, defendants filed an application under S.151 CPC (Annexure P-3), for dismissal of the suit of the plaintiff being hit by the provisions of Order XXIII CPC. Defendants averred in the application that since the plaintiff had earlier filed CWP(T) No. 5332 of 2008, before this Court seeking same and similar relief, as claimed in the present suit, as such, suit at hand, be dismissed being hit by the provisions of Order XXIII CPC.

4. Learned trial Court, vide order dated 18.3.2017, dismissed the application. In the aforesaid background, defendants have approached this Court in the present proceedings.

5. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned in the impugned order by the learned Court below, this Court finds no illegality or infirmity in the order, as such, same does not call for any interference.

6. Careful perusal of the provisions contained in Order XXIII CPC reveals that these provisions come into force only when application, if any, is filed by the plaintiff for withdrawal of suit or abandonment of part of the claim. If a suit is not withdrawn or a part of claim is not abandoned in terms of provisions contained under Order XXIII, opposite party in subsequent suit, if any, can raise objections. Undisputedly, in the case at hand, plaintiff before filing of the civil suit at hand, had approached Himachal Pradesh Administrative Tribunal seeking therein same and similar reliefs as prayed for in the aforesaid suit, but the fact remains that the Original Application as filed in the Himachal Pradesh Administrative Tribunal, which ultimately came to be converted into CWP(T), never came to be adjudicated on merits. Civil Writ Petition filed by the plaintiff as referred to herein above, subsequently came to be dismissed as infructuous vide order dated 25.6.2010, on the statement made by learned counsel representing the plaintiff in those proceedings.

7. Question, which needs determination in the present proceedings is that whether, before filing Civil Suit, which is subject matter of present proceedings, plaintiff was required to seek leave of the Writ Court. As has been taken note herein above, petition filed by the plaintiff never came to be adjudicated on merit by the Writ Court, as such there was no necessity for the plaintiff to seek leave of the court for filing appropriate proceedings in the competent Court of law.

8. Leaving everything aside, appropriate remedy for redressal of the grievance of the plaintiff, as raised before Writ Court, was civil suit, as such, suit having been filed by the plaintiff rightly came to be entertained by the civil court. Moreover, application filed under S.151 CPC for dismissal of the suit being hit by provisions of Order XXIII CPC, is wholly misconceived, because no such application could be filed by the defendants in the civil suit having been filed by the plaintiff, especially when no civil suit earlier came to be filed on behalf of the plaintiff seeking same and similar relief, as prayed for in the subsequent suit.

9. There is another aspect of the matter that no civil suit, prior to filing of civil suit in question, ever came to be filed by the plaintiff seeking same and similar relief. Plaintiff filed Original Application, which ultimately came to be converted into CWP(T) for the redressal of his grievances as such, there was no requirement for him to seek leave of the court in terms of provisions of Order XXIII CPC, before withdrawal of writ petition, which otherwise he being *dominus litis* could have withdrawn at any stage of the pleadings.

10. Order XXIII CPC is related to withdrawal of suits and as so far question with regard to unconditional withdrawal of a Writ Petition is concerned, it is the sole discretion of the party, which files the same and court has nothing to do with the same. Learned Court below, while passing impugned order has already taken note of the judgments passed by Constitutional courts i.e. **Lakshmanan Chetty** v. **Muthaya Chetty** 40 Mad. LJ and **Mahant Biharidasji** v. **Parshotamdas Ramdas** ILR 32 Bom 345, wherein it has been held that withdrawal in terms of Order XXIII contemplates withdrawal not of suit but from suit, and such a withdrawal may be either with or without liberty to bring a fresh suit. If a party desires to withdraw from the suit with such liberty, then he must apply to the court to permit him so to withdraw but if he does not desire to have that liberty, then he can withdraw of his own and no order of the court is necessary.

11. Recently, this Court in and **Sunder Lal** v. **Himachal Pradesh State Forest Corporation**, LawSuit(HP) 1053 held that principle underlying Rule(1) of Order XXIII CPC should be extended in the interest of administration of justice to the cases of withdrawal of writ petition also, not on the ground of *res judicata,* because it would also discourage litigants indulging in 'Bench Hunting' tactic.

12. This Court, in the aforesaid judgment, has also observed that it often happens that during hearing of a petition, court makes observation orally indicating that it is inclined to dismiss the petition and at that stage, counsel seeks permission to withdraw without getting any verdict on merit, with the intention of filing fresh petition.

13. In the case at hand, as clearly emerges from the record, plaintiff has been running from pillar to post for redressal of his grievances since 1998, when he initially filed Original Application before the Himachal Pradesh Administrative Tribunal, but such Original Application subsequently came to be transferred to this Court, on account of abolition of the Tribunal. It is not in dispute that at the time of passing of order dated 25.6.2010, (Annexure P-7), whereby petition having been filed by plaintiff came to be dismissed as infructuous, appropriate remedy for the redressal of grievances of the plaintiff was to file civil suit in competent Court of law, as such, it can be safely presumed that learned counsel representing the plaintiff in writ proceedings, having heard oral observations of the court, proceeded to get the writ petition filed by plaintiff, dismissed as infructuous. Since appropriate remedy for redressal of the grievance of the plaintiff at the time of passing of order dated 25.6.2010, was to file a civil suit, learned court below rightly rejected the application filed by defendants under S.151 CPC, which otherwise in no terms could have been entertained, because provisions of Order XXIII CPC cannot be made applicable qua the proceedings, which admittedly were not initiated in terms of provisions of Code of Civil Procedure, rather same were filed under different provisions of law.

14. With the aforesaid observations, present petition is dismissed. Impugned order passed by learned Court below is upheld. Interim directions, if any, are vacated. All pending misc. applications are disposed of.

15. Parties undertake to appear before learned Court below on **19.8.2019**, enabling it to proceed further with the matter, in accordance with law. Registry to apprise learned Court below with regard to passing of instant order, enabling it to do the needful.

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

Anu Sharma ...Petitioner

Versus

Punjab National Bank ...Respondent

CrMMO No. 216 of 2019
Decided on: August 7, 2019

Negotiable Instruments Act, 1881- Section 145(2)- Whether accused is required to give reasons in his application seeking leave to summon and cross-examine complainant and his witness? Trial Court dismissing application of accused having been filed for summoning and cross-examining complainant on ground that he has not mentioned in it that amount was not due from him- Petition against- Held, Section 145(2) of Act has two parts- First part deals with suo motu power of court to summon and examine witness whose evidence has already been recorded on affidavit- Whereas second part casts a duty on court to summon such person for examination if application is filed in this regard either by the complainant or the accused- Party is not required to give reasons in his application for summoning such a person for purpose of examination. (Paras 15 to 17)

Cases referred:

Mandvi Cooperative Bank Ltd. vs. Nimesh B. Thakore, (2010) 3 SCC 83
Indian Bank Assn. v. Union Bank of India (2014) 5 SCC 590

For the petitioner: Mr. Prem P. Chauhan, Advocate.
For the respondent: Mr. G.S. Rathour, Advocate, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 2.2.2019 passed by learned Chief Judicial Magistrate, Nurpur, District Kangra, Himachal Pradesh in Case No. 295-IV/16, whereby an application under S.145(2) of the Negotiable Instruments Act (hereinafter, 'Act'), having been filed by the petitioner-accused (hereinafter, 'accused'), seeking therein permission to cross-examine the respondent-complainant (hereinafter, 'complainant'), came to be dismissed, accused has approached this Court in the instant proceedings filed under S.482 CrPC, praying therein to set aside the impugned order and permit the accused to cross-examine the complainant.

2. Necessary facts, as emerge from the record are that the complainant initiated proceedings under S.138 of the Act against the accused in the competent Court of law, alleging therein that a Term Loan facility was availed by the accused amounting to Rs.5,75,000/- on 17.12.2014 for the purchase of Tractor. Entire loan amount was paid by the complainant to the dealer. Accused opened account No. JT-72 with the Bank and he, with a view to discharge his liability on account of loan availed by him, issued Cheque No. 656081 on 12.7.2016, amounting to Rs.5,90,000. However, the fact remains that the aforesaid cheque subsequently came to be dishonoured on account of insufficient funds in the account of the accused. Since the accused, despite having received legal notice

served upon him, failed to make good the payment, complainant-Bank initiated proceedings under S.138 of the Act.

3. During proceedings of the case, an application under S.145(2) of the Act seeking therein permission to cross-examine the complainant and complainant's witnesses on behalf of the accused, came to be filed, however, such application (Annexure P-2) was rejected by Court below vide order dated 2.2.2019 (Annexure P-3), on the ground that the accused has not mentioned as to what was legally due from him to the Bank or that the amount mentioned in the cheque was not legally recoverable from him at the relevant time. In the aforesaid background, accused has approached this Court in the instant proceedings, as has been taken note herein above.

4. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned in the impugned order passed by learned Court below, this Court is persuaded to agree with Mr. Prem P. Chauhan, learned counsel for the accused that there is/was no requirement, if any, for the accused to assign reasons in the application filed by him, seeking therein permission to examine complainant and its witnesses.

5. At this stage, it would be apt to reproduce provisions of S.145 of the Act *ibid* as under:

> "145. Evidence on affidavit.—
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.
>
> (2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

6. Careful perusal of S.145(1) reveals that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the evidence of the complainant may be given by him on affidavit and same, subject to all just exceptions can be read in evidence in any enquiry, trial or other proceeding under the said Code. S.145(2) further provides that the Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

7. Close scrutiny of the aforesaid provisions contained in S.145(2) clearly reveals that it is in two parts, first part provides that the court, of its own, may summon accused to examine him with regard to the contents contained in the affidavit given by him in his evidence, whereas second part casts a duty upon the court to summon a person, who has given evidence by way of affidavit, if application is made for this purpose by the opposite party. Aforesaid provision nowhere suggests that a party making application under this provision of law, is required to assign reasons for summoning the person, who has given evidence by way of affidavit. No doubt, S.145 (1), as has been taken note herein above, provides that notwithstanding anything contained in the Code, evidence of the complainant can be given by him on affidavit, but this provision further provides that the evidence given by way of affidavit may be read subject to all just exceptions in evidence, in any enquiry, trial or proceedings under the said Code.

8. S.145, with its non obstante clause, as taken note herein above, though provides for evidence of the complainant by way of affidavit but, certainly, affidavit of the complainant can be read in evidence, subject to all just exceptions, meaning thereby nothing inadmissible in evidence i.e. irrelevant facts or hearsay evidence would be taken as evidence even though stated on affidavit.

9. True it is that the plea of the accused that on being summoned under S.145(2), complainant or any of its witnesses, whose evidence is on affidavit, must be made to depose in examination-in-chief, all over again, cannot be accepted because, acceptance of the same would amount to duplication. S. 137 of the Evidence Act, nowhere defines "examine" to mean and include three kinds of examination of witnesses; it simply defines examination-in-chief, cross-examination and re-examination, whereas, S.145(2) provides that court may at its discretion, call a person giving his evidence again to be examined as to facts contained therein.

10. S.145(2) expressly provides that a court may, if it thinks fit, summon and examine any person, giving evidence on affidavit. Affidavit filed by the person, who is summoned is already on record in the nature of examination-in-chief, hence, on being summoned on the application made by the accused, deponent of the affidavit (complainant or any of its witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit.

11. At this stage, it would be apt to reproduce following paragraphs of judgment rendered by Hon'ble Apex Court in **Mandvi Cooperative Bank Ltd.** vs. **Nimesh B. Thakore**, (2010) 3 SCC 83:

> "30. Nevertheless, the submissions made on behalf of the parties must be taken note of and properly dealt with. Mr Ranjit Kumar, learned Senior Advocate, appearing for the appellant in appeal arising from SLP (Crl.) No. 4760/2006 pointed out that sub-section (2) of section 145 uses both the words, "may" (with reference to the court) and "shall" (with reference to the prosecution or the accused). It was, therefore, beyond doubt that in the event an application is made by the accused, the court would be obliged to summon the person giving evidence on affidavit in terms of section 145(1) without having any discretion in the matter. There can be no disagreement with this part of the submission but the question is when the person who has given his evidence on affidavit appears in court, whether it is also open to the accused to insist that before cross-examining him as to the facts stated in the affidavit he must first depose in examination-in-chief and be required to verbally state what is already said in the affidavit.
>
> 31. Mr. Ranjit Kumar referred to section 137 of the Indian Evidence Act, that defines "examination-in- chief", "cross-examination" and "re-examination" and on that basis sought to argue that the word "examine" occurring in section 145(2) must be construed to mean all the three kinds of examination of a witness. This, according to him, coupled with the use of the word "shall" with reference to the application made by the accused made it quite clear that a person giving his evidence on affidavit, on being summoned under section 145(2) at the instance of the accused must begin his deposition with examination-in-chief, before he may be cross-examined by the accused. In this regard he submitted that section 145 did not override the Evidence Act or the Negotiable Instruments Act or any other law except the Code of Criminal Procedure. He further submitted that the plain language of section 145(2) was clear and unambiguous and was capable of only one meaning and, therefore, the provision must be understood in its literal sense and the High Court was in error in resorting to purposive interpretation of the provision. In support of the submission he relied upon decisions of this court in Dental Council of India vs. Hari Prakash and Ors., (2001) 8 SCC 61 and Nathi Devi vs. Radha Devi, (2005) 2 SCC 271.
>
> 32. Mr. Siddharth Bhatnagar, learned counsel for the appellant in the appeal arising from SLP (Crl.) No. 1106/2007 also joined Mr. Ranjit Kumar in the submission based on literal interpretation. He also submitted that ordinarily the rule of literal construction should not be departed from, particularly when the words of the statute are clear and unambiguous. He relied upon the decision

in Raghunath Rai Bareja vs. Punjab National Bank, (2007) 2 SCC 230.

> 34. We are completely unable to appreciate the submission. The plea for a literal interpretation of section 145(2) is based on the unfounded assumption that the language of the section clearly says that the person giving his evidence on affidavit, on being summoned at the instance of the accused must start his deposition in court with examination-in-chief. We find nothing in section 145(2) to suggest that. We may also make it clear that section 137 of the Evidence Act does not define "examine" to mean and include the three kinds of examination of a witness; it simply defines "examination-in- chief", "cross-examination" and "re-examination". What section 145(2) of the Act says is simply this. The court may, at its discretion, call a person giving his evidence on affidavit and examine him as to the facts contained therein. But if an application is made either by the prosecution or by the accused the court must call the person giving his evidence on affidavit, again to be examined as to the facts contained therein. What would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in light of the provision of section 145(1) and having regard to the object and purpose of the entire scheme of sections 143 to 146. The scheme of sections 143 to 146 does not in any way affect the judge's powers under section 165 of the Evidence Act. As a matter of fact, section 145(2) expressly provides that the court may, if it thinks fit, summon and examine any person giving evidence on affidavit. But how would the person giving evidence on affidavit be examined, on being summoned to appear before the court on the application made by the prosecution or the accused? The affidavit of the person so summoned that is already on the record is obviously in the nature of examination-in-chief. Hence, on being summoned on the application made by the accused the deponent of the affidavit (the complainant or any of his witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit."

12. Subsequent to aforesaid judgment, question with regard to the competence of a Magistrate to summon a person, who has tendered his evidence by way of affidavit, while exercising power under S.145 CrPC came up for consideration before Hon'ble Apex Court in **Indian Bank Assn.** v. **Union Bank of India** (2014) 5 SCC 590, wherein Hon'ble Apex Court, while taking note of the aforesaid judgment rendered in **Mandvi Cooperative Bank** (supra) reiterated that even if Legislature in their wisdom have deemed it not appropriate to incorporate "accused" with the word "complainant" in S.145 (1), it does not mean that the Magistrate could not allow the accused to give his evidence on affidavit, unless there was just and reasonable ground to refuse such permission. Hon'ble Apex Court in the aforesaid judgment also took note of the its earlier judgment rendered in *Radhey Shyam Garg* v. *Naresh Kumar Gupta* (2009) 13 SCC 201, wherein court observed that the words, "examine any person giving evidence on affidavit as to the facts contained therein, in the event, the deponent is summoned by the court in terms of sub-section (2) of Section 145 of the Act", would mean for the purpose of cross-examination.

13. Hon'ble Apex Court held that the affidavit and the documents filed by the complainant along with complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and the post-summoning stage. In other words, there is no necessity to recall and re-examine the complaint after summoning of accused, unless the Magistrate passes a specific order as to why the complainant is to be recalled. Such an order is to be passed either on an application made by the accused or under Section 145(2) of the Act or suo motu by the Court. Reliance is placed upon following paragraphs of **Indian Bank Assn.** (supra):

> "13. Section 145 of the Act deals with the evidence on affidavit and reads as follows :

"145. Evidence on affidavit.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974.) the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

14. The scope of Section 145 came up for consideration before this Court in Mandvi Cooperative Bank Limited v. Nimesh B. Thakore (2010) 3 SCC 83, and the same was explained in that judgment stating that the legislature provided for the complainant to give his evidence on affidavit, but did not provide the same for the accused. The Court held that even though the legislature in their wisdom did not deem it proper to incorporate a word "accused" with the word "complainant" in Section 145(1), it does not mean that the Magistrate could not allow the complainant to give his evidence on affidavit, unless there was just and reasonable ground to refuse such permission.

15. This Court while examining the scope of Section 145 in Radhey Shyam Garg v. Naresh Kumar Gupta (2009) 13 SCC 201, held as follows :-

"If an affidavit in terms of the provisions of Section 145 of the Act is to be considered to be an evidence, it is difficult to comprehend as to why the court will ask the deponent of the said affidavit to examine himself with regard to the contents thereof once over again. He may be cross-examined and upon completion of his evidence, he may be re-examined. Thus, the words "examine any person giving evidence on affidavit as to the facts contained therein, in the event, the deponent is summoned by the court in terms of sub-section (2) of Section 145 of the Act", in our opinion, would mean for the purpose of cross-examination. The provision seeks to attend a salutary purpose."

16. Considerable time is usually spent for recording the statement of the complainant. The question is whether the Court can dispense with the appearance of the complainant, instead, to take steps to accept the affidavit of the complainant and treat the same as examination-in-chief. Section 145(1) gives complete freedom to the complainant either to give his evidence by way of affidavit or by way of oral evidence. The Court has to accept the same even if it is given by way of an affidavit. Second part of Section 145(1) provides that the complainant's statement on affidavit may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceedings. Section 145 is a rule of procedure which lays down the manner in which the evidence of the complainant may be recorded and once the Court issues summons and the presence of the accused is secured, an option be given to the accused whether, at that stage, he would be willing to pay the amount due along with reasonable interest and if the accused is not willing to pay, Court may fix up the case at an early date and ensure day-to-day trial.

17. Section 143 empowers the Court to try cases for dishonour of cheques summarily in accordance with the provisions of Section 262 to 265 of the Code of Criminal Procedure, 1973. The relevant provisions being Sections 262 to 264 are extracted hereinbelow for easy reference :

"262. Procedure for summary trials.

(1) In trials under this Chapter, the procedure specified in this Code for the trial of summons- ease shall be followed except as hereinafter mentioned.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

263. Record in summary trials.-In every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, the following particulars, namely:-

(a) the serial number of the case:

(b) the date of the commission of the offence;

(c) the date of the report or complaint;

(d) the name of the complainant (if any);

(e) the name, parentage and residence of the accused;

(f) the offence complained of and the offence (if any) proved, and in cases coming under clause (ii), clause (iii) or clause (iv) of sub-section (1) of section 260, the value of the property in respect of which the offence has been committed;

(g) the plea of the accused and his examination (if any);

(h) the finding;

(i) the sentence or other final order

(j) the date on which proceedings terminated.

264. Judgment in cases tried summarily. – In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding."

18. We have indicated that under Section 145 of the Act, the complainant can give his evidence by way of an affidavit and such affidavit shall be read in evidence in any inquiry, trial or other proceedings in the Court, which makes it clear that a complainant is not required to examine himself twice i.e. one after filing the complaint and one after summoning of the accused. Affidavit and the documents filed by the complainant along with complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and the post summoning stage. In other words, there is no necessity to recall and re- examine the complaint after summoning of accused, unless the Magistrate passes a specific order as to why the complainant is to be recalled. Such an order is to be passed on an application made by the accused or under Section 145(2) of the Act suo moto by the Court. In summary trial, after the accused is summoned, his plea is to be recorded under Section 263(g) Cr.P.C. and his examination, if any, can be done by a Magistrate and a finding can be given by the Court under Section 263(h) Cr.P.C. and the same procedure can be followed by a Magistrate for offence of dishonour of cheque since offence under Section 138 of the Act is a document based offence. We make it clear that if the proviso (a), (b) & (c) to Section 138 of the Act are shown to have been complied with, technically the commission of the offence stands completed and it is for the accused to show that no offence could have been committed by him for specific reasons and defences.

14. It is quite clear from the aforesaid exposition of law that though there is no necessity to recall and reexamine complainant but Magistrate can pass a specific order to recall the complainant. Such an order is to be passed either on an application made by the accused or under Section 145(2) of the Act or suo motu by the Court.

15. In the case at hand, application under S.145(2) came to be filed on behalf of the accused, seeking therein permission to cross-examine the accused with regard to contents contained in the affidavit tendered by him in evidence. But, as has been taken note herein above, application filed by accused came to be dismissed on the ground that the accused has not mentioned as to what was legally due from him to the Bank or what amount mentioned in the cheque was not legally recoverable from him at the relevant time, which reasoning given by learned Court below does not appear to be plausible, in view of the specific stand taken by accused in his application filed under S.145 (2), wherein he has stated that the accused issued blank cheque as security to the

complainant, but complainant filled up wrong amount in the said cheque and subsequently concocted a false story with a view to grab money from the accused. Accused specifically mentioned in the application that he wants to cross-examine complainant's witnesses, who have given evidence on affidavit to protect his interest as well as to bring truth before the court.

16. Having carefully perused aforesaid plea raised by accused in the application, this court is not in agreement with the findings recorded by learned Court below, while passing impugned order that the defence plea raised by the accused is neither substantial nor specific. Accused has specifically taken a plea that though he had issued blank cheque as security, but subsequently wrong amount came to be filled in the same by complainant, as such, accused is well within his right to cross-examine the complainant and its witnesses, specifically on the aforesaid points. Moreover, as has been observed herein above, a careful perusal of the second part of S.145(2), nowhere talks about assigning reasons in the application for recall/re-examination of a witness, meaning thereby that it is obligatory for the court to recall complainant or its witnesses, if an application is made in that behalf.

17. Leaving everything aside, no prejudice, whatsoever, would be caused to the complainant, in case, complainant and its witnesses are cross-examined on the specific points, taken note herein above, rather, this would help the court below to effectively adjudicate upon the controversy *inter se* parties.

18. Consequently, in view of detailed discussion made herein above, present petition is allowed. Order dated 2.2.2019 passed by learned Chief Judicial Magistrate, Nurpur, District Kangra, Himachal Pradesh in Case No. 295-IV/16 is quashed and set aside. Application moved by the accused under S.145(2) is allowed. Learned Court below to fix a date for cross-examination of the complainant and its witnesses.

All pending applications are disposed of. Interim directions, if any, are vacated.

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

Dharamjeet Kaur ...Plaintiff

Versus

Smt. Jagiro ...Defendant

Civil Suit No. 31 of 2014
Reserved on: July 30, 2019
Decided on: August 9, 2019

Specific Relief Act, 1963- Section 10 - Specific performance of agreement to sell- Escalation of prices of land- Consequences- Held, parties entering in to an agreement to sell land- Advance payment of Rs.8.00 lakh as part of consideration also paid- Plaintiff ready and willing to perform her part of the agreement and to pay balance sale price- Plea of defendant that agreement was the result of undue influence or fraud not proved on record- Plaintiff entitled for specific performance of agreement to sell-Defendant not entitled for payment of interest on balance sale price on account of escalation of prices because it was she who was delaying execution of sale deed on one pretext or another. (Para 26, 27 & 33).

Cases referred:

K. Prakash v. B.R. Sampath Kumar (2015) 1 SCC 597

Nanjappan v. Ramasamy (2015) 14 SCC 341

For the plaintiff : Mr. B.B. Vaid, Advocate.

For the defendant : Mr. Sanjeev Kuthiala, Senior Advocate with Ms. Kamlesh, Advocate.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge

Plaintiff-Dharamjeet Kaur has instituted the present suit under the provisions of Order 7 Rule 1 read with S.26 CPC for specific performance of contract arrived at between the plaintiff and the defendant on 18.1.2014, whereby, allegedly the defendant agreed and contracted with the plaintiff to sell and transfer the ownership and possession of the land bearing Khewat Khatauni No. 48/70, Khasra No. 316/125 measuring 11-0 Bigha and Khewat Khatauni No. 170 Khasra No. 288/125, measuring 4-16 Bigha total land measuring 5-7 Bigha as entered in Jamabandi for the years 2006-07, situate in Village Mangseri, Pargana Plassi, Tehsil Nalagarh, District Solan, Himachal Pradesh by way of execution of registered sale deed in favour of the plaintiff. In the alternative, plaintiff has also prayed for payment of compensation i.e. double the amount of earnest money and also for permanent perpetual injunction restraining the defendant from alienating, transferring or creating third party interest or changing the nature of the suit land in any manner whatsoever.

2. Plaintiff averred in the plaint that the suit land is owned and possessed by the defendant, who with a view to sell the same executed an agreement dated 18.1.2014 at Nalagarh, with the plaintiff for the transfer of the suit land in favour of plaintiff. As per agreement to sell, defendant agreed to sell his land at the rate of Rs.6,50,000/- per Bigha for total consideration of Rs.34,77,500/-. Plaintiff averred that at the time of execution of agreement, plaintiff had paid a sum of Rs.8 Lakh to the defendant, which was duly received by the defendant. At the time of execution of agreement to sell, it was agreed between the parties that the balance amount i.e. Rs.26,77,500/-, would be paid to the defendant at the time final execution and registration of the sale deed. As per agreed terms, sale deed was to be executed and registered by the defendant in favour of the plaintiff on or before 15.5.2014, after receipt of balance amount of Rs.26,77,500/- payable by the plaintiff. Plaintiff and defendant also agreed that in case, defendant refuses to get the sale deed registered in favour of the plaintiff, plaintiff would be entitled to get the sale deed registered in his favour through process of court at the cost of defendant or the plaintiff would be entitled to receive double the amount of earnest money paid to the defendant. Averments contained in the plaint further suggest that it was also agreed *inter se* parties that in case the plaintiff refuses to make payment of the balance amount of sale consideration or get the sale deed registered,, the earnest money of Rs.8.00 Lakh paid by her to the defendant shall stand forfeited. Agreement to sell allegedly came to be executed *inter se* parties in the presence of the witnesses namely Madan Lal and Vikas Gupta. Defendant put her thumb impression on the agreement to sell and plaintiff put her signatures in token of the acceptance of terms and conditions of the agreement to sell in the presence of above named witnesses. Agreement to sell was duly registered in the Register of Shri J.S. Rana, Notary Public, Nalagarh. Plaintiff has averred that the agreement to sell was duly authenticated by the Notary Public, who read over the contents of the same to the defendant, who in turn put her thumb impression on the same, after fully understanding the contents thereof. Subsequently, plaintiff received a notice dated 3.3.2014, from the defendant through her counsel, alleging that agreement to sell in question was got signed from the defendant by the plaintiff by playing fraud upon her. Such notice was replied by the plaintiff through her counsel specifically denying therein the allegations of fraud. Plaintiff, vide aforesaid reply, also requested the defendant to get the sale deed registered after receiving balance sale consideration in terms of agreement to sell. Plaintiff kept on approaching the defendant again and again for doing the needful, however, she having found the defendant disinclined to get the sale deed registered, got her served with legal notice dated 14.5.2014 intimating therein that she would reach the office of Sub Registrar, Nalagarh at 10.00 AM for the registration of sale deed. Plaintiff reached the office of Sub Registrar, Nalagarh on 15.5.2014 at 10.00 AM and remained there upto 5.00 PM. Plaintiff had allegedly brought the total balance

sale consideration for the registration of the sale deed but the fact remains that the defendant did not turn up. With a view to prove her presence in the office of the Sub Registrar, plaintiff got two affidavits attested from the Executive Magistrate one at 10.30 AM and another at 4.30 PM. Plaintiff averred in the plaint that she has been approaching the defendant time and again with the request to get the sale deed executed but to no avail. Plaintiff also made a request to the defendant for doing the needful on 18.5.2014, however, on that day, defendant clearly told the plaintiff that she would transfer the land in favour of third person. Plaintiff served another registered Acknowledgement Due notice on 20.5.2014 through her counsel calling upon the defendant to receive the balance sale consideration and thereafter, execute the sale deed in favour of the plaintiff. Plaintiff specifically informed vide aforesaid notice that in case no reply is received from her, it would be assumed that the defendant is not ready and willing to abide by the terms of the said agreement. Aforesaid registered notice though reached the address of the defendant on 22.5.2014, but the defendant despite her being present at her given address between 20.5.2014 to 22.5.2014, purposely avoided receipt of the notice. Plaintiff again requested the defendant orally to perform her part of the contract on 23.5.2014 and 24.5.2014 but all such requests were rejected and declined by the defendant. Since despite best efforts put in by the plaintiff, defendant failed to get the sale deed registered in terms of the agreement to sell dated 18.1.2014, she filed the instant suit for specific performance of the contract. Plaintiff has averred that the cause of action first arose in her favour on 18.1.2014 when agreement to sell was executed between the plaintiff and the defendant in respect of the suit land and when it was attested and authenticated by the Notary Public on 3.3.2014. Finally, cause of action is said to have accrued in favour of the plaintiff on 20.5.2014, when last notice was served upon the defendant by the plaintiff and said cause of action is said to be still continuing.

3. Defendant, by way of written statement, denied the claim of the plaintiff as projected in the plaint, in toto by stating therein that the plaintiff has filed the suit with an oblique motive of harassing the defendant, specially stating therein that the plaintiff has no locus standi to file the suit. Defendant further stated that no cause of action, whatsoever has accrued in favour of the plaintiff and there was no privity of contract between the plaintiff and the defendant. Defendant averred that she had nothing to do with the alleged controversy. Defendant also alleged that the plaintiff is guilty of suppressing true and correct facts and suit has been filed on false and baseless facts, as such, same deserves outright dismissal. Defendant also averred that the agreement to sell dated 18.1.2014 was never entered into *inter se* plaintiff and the defendant nor the defendant had ever entered into the same and there is no valid and subsisting agreement to sell between the parties. Defendant alleged that the agreement to sell was fraudulent for the reason that no agreement to sell was ever entered into nor any earnest money was ever paid. Defendant alleged that the plaintiff taking undue advantage of the old age of the defendant and her simplicity, played fraud upon her. Defendant alleged that she had never entered into a valid agreement with the plaintiff and alleged agreement to sell being outcome of fraud, deceit and undue influence, does not affect the rights of the defendant. Defendant further averred that she is an old aged and uneducated lady, having no worldly knowledge. Defendant averred in the written statement that the plaintiff got thumb impression of the defendant on certain papers under the pretext of enhancement and receipt of widow pension. Defendant further averred that contents of the document, which was thumb marked by her, were never read over and she was never made to understand the contents thereof and it was only when defendant alongwith her nephew went to the Document Writer, who had scribed the papers at Nalagarh and had obtained thumb impression of the defendant on the Register as well as backside of the documents, it transpired that the alleged agreement to sell qua suit land has been got executed by the plaintiff by playing fraud upon her. Defendant has further averred in the written statement that she having come to know that fraud has been played upon her, served the plaintiff with legal notice that she is not under any obligation to get the sale deed registered in terms of the agreement to sell dated 18.1.2014. Defendant further stated hat

she is an uneducated rustic lady and does not know the intricacies of law and she also does not how to sign. She further averred that the suit land is the only land, which is in her ownership and possession and as such there is no question of her entering into agreement to sell because in that eventuality she would become landless and homeless. She further averred in the written statement that there is litigation pending qua the suit land as such, there is no question of her having entered into agreement to sell with the plaintiff, with the aforesaid pleadings, defendant sought dismissal of the suit with exemplary costs.

4. Plaintiff filed replication to the written statement, thereby refuting the contentions made therein and reiterating the stand taken in the plaint.

5. Before issues could be framed, plaintiff filed an application under Order 14 Rule 1 read with Order 10 Rule 2 and S. 151 CPC, seeking therein permission to examine the parties i.e. plaintiff and the defendant before framing of issues stating therein that since the defendant in the written statement has specifically stated that she was duped by the plaintiff regarding agreement to sell and she was made to put her thumb impression on certain documents under the pretext of pension, it is essential under the circumstances to examine the parties before framing of issues. Plaintiff averred in the application that in case thumb impression on agreement to sell is admitted by the defendant, controversy would narrow down and as such, plaintiff and defendant be examined before framing of issues. Aforesaid application came to be rejected by this Court vide order dated 16.10.2015.

6. On 24.12.2015, this court, on the basis of pleadings of the parities, framed following issues:

"1. Whether plaintiff is entitled for decree of specific performance of contract as alleged? ...OPP

2. Whether in alternative plaintiff is entitled for decree of compensation as alleged? ...OPP

3. Whether plaintiff is entitled for decree of permanent perpetual injunction as alleged? ...OPP

4. Whether plaintiff is guilty of suppresio vari and suggestio falsi as alleged? ...OPD

5. Whether plaintiff has no locus standi to file present suit as alleged? ...OPD

6. Whether suit filed by plaintiff is not maintainable in the present form as alleged? ...OPD

7. Whether plaintiff has no cause of action as alleged? ..OPD

8. Whether suit filed by plaintiff is false, frivolous and fictitious and vague as alleged? ...OPD

9. Relief."

7. Plaintiff with a view to prove her case examined six witnesses and on 28.9.2016, she closed her evidence in the affirmative, whereafter, the matter came to be repeatedly adjourned on the request of learned counsel for the defendant, for getting statement of the defendant's witnesses recorded. Defendant, by way of OMP No. 42 of 2017, prayed that since the defendant is an old aged lady, she may be permitted to examine herself after examination of formal witnesses. However, such application was dismissed by this Court vide order dated 7.3.2017, whereafter, matter repeatedly came to be adjourned for getting the statement of the defendant recorded. Defendant also filed an application i.e. OMP No. 324/2017, under Order 26 Rule 9 CPC for appointment of a Commission for the examination of the defendant, however, subsequently same came to be dismissed as not pressed on 13.9.2017. On 14.12.2017, this court granted one last opportunity to the defendant to remain present in the court on 10.1.2018 for getting her statement recorded but said order was laid challenge by way of OSA No. 11 of 2017,

which came to be dismissed on 21.12.2017, as withdrawn. Finally, on 8.3.2018, defendant came present before the court alongwith her Power of Attorney, Shri Jaswant Singh son of Shri Karam Chand. Perusal of order dated 8.3.2018, reveals that on that day, learned counsel for the defendant, on instructions, submitted that the defendant is/was ready and willing to execute the sale deed in favour of the plaintiff in performance of her part of agreement to sell, after receipt of balance sale consideration alongwith interest. Learned counsel for the defendant also submitted that his client was ready and willing to indemnify her brothers, namely, Karam Singh and Sarwan Singh, with regard to Rs.1.00 Lakh allegedly received from them in 2001. It was further stated that the defendant was ready and willing to make statement on oath to this effect in the court. In view of aforesaid submission made by learned counsel for the defendant, Court also recorded statement of defendant Jagiro, on oath. It stands recorded in the aforesaid order that the plaintiff expressed her reservations with regard to payment of interest on the remaining consideration. It has been noticed in the aforesaid order that the defendant at the time of getting her statement recorded was quite vigilant and understood the subject matter. However, keeping in view her health condition, her evidence came to be deferred till the next date of hearing. Court specifically observed in the order that if defendant is not able to attend the court on the next date of hearing on account of her physical health, issue with regard to her presence for cross-examination shall be considered after recording examination-in-chief or filing her statement by way of affidavit.

8. Interestingly, in the aforesaid order, it also stands recorded that learned counsel for the plaintiff, defendant and proposed defendants (real brothers of the defendant), who also moved an application OMP No. 6 of 2018 under Order 1 Rule 10 for impleadment, which was rejected on 6.3.2019, submitted that from the statement of defendant, Jagiro, it appears that the dispute can be resolved through amicable settlement and as such, efforts to resolve the dispute amicably and to finalise modalities for settlement, matter be referred to mediation. Court, after recording aforesaid submissions made by learned counsel for the parties, referred the matter for mediation to the Mediator, Mr. G.D. Verma, learned Senior Advocate, however, fact remains that the mediation failed and ultimately the matter landed before this court again, for decision on merit.

9. Vide order dated 22.3.2018, this Court dismissed OMP No. 61 of 2018 under S.10 CPC for stay of the suit, having been filed by Karam Singh and Sarwan Singh, i.e. real brothers of the defendant. Record reveals that subsequent to passing of the order dated 22.3.2018, matter repeatedly came to be adjourned for recording the evidence of defendant's witnesses, but on one pretext or the other, defendant avoided to get her statement recorded.

10. On 25.7.2018, the defendant filed an application under S.151 CPC (OMP No. 396 of 2018) seeking therein direction to the plaintiff to make balance payment or to deposit the balance sale consideration with upto date interest enabling her to get the sale deed executed in terms of agreement to sell. In the application referred to herein above, defendant averred that in view of her statement recorded on 8.3.2018, she is ready and willing to execute the registered sale deed in favour of the plaintiff on receipt of balance sale consideration, as such, direction may be issued in favour of the defendant. Plaintiff, by way of reply, though expressed her readiness and willingness to pay the sale consideration but stated that she is not under any obligation to pay the interest, if any, on the sale consideration.

11. On 17.6.2019, learned counsel for the defendant, on instructions of the Attorney, stated that the defendant does not intend to appear in the witness box and she is ready and willing to get the sale deed registered in terms of agreement to sell dated 18.1.2014. Learned counsel for the defendant, while referring to OMP No. 396 of 2018, contended that prayer has already been made on behalf of defendant to issue appropriate directions to the plaintiff to get the sale deed executed and registered after paying balance sale consideration and such directions may be issued.

12. This Court, vide order dated 18.6.2019, 8.7.2019 and 18.9.2019, directed the defendant as well as her Attorney, Shri Jaswant Singh, to remain present in Court. On 26.6.2019, defendant, Smt. Jagiro as well as her Special Power of Attorney, Jaswant Singh, came present in the court. Shri Jaswant Singh, Special Power of Attorney also made available Special Power of Attorney executed in his favour by Smt. Jagiro, defendant, authorizing him to represent her in the present proceedings. On that day, defendant stated that in view of her old age, it is not possible for her to visit the court time and again and further action, if any, is to be taken by her after consulting her daughter, Smt. Amarjeet Kaur, who resides at Surajpur.

13. This Court, taking note of the fact that the examination-in-chief of Smt. Jagiro, already stands recorded on 8.3.2018, whereafter, the matter repeatedly came to be adjourned for her cross-examination, directed Mr. B.B. Vaid, learned counsel appearing for the plaintiff to cross-examine her on that day itself, so that defendant Jagiro, who is 90 years old, is saved from the ordeal of coming to the court again. Learned Senior Advocate for the defendant did not oppose the aforesaid process proposed to be adopted in the present case and accordingly, Mr. B.B. Vaid, learned counsel representing the plaintiff cross-examined Smt. Jagiro, defendant, whereafter, Ms. Sonia Saini, learned counsel for the defendant, on instructions, stated that no further evidence is required to be adduced on record, on behalf of the defendant, as such, evidence of the defendant be closed.

14. I have heard learned counsel for the parties and perused the material available on record.

15. Since all the issues are interconnected and interlinked, as such, are being taken up together for determination, to avoid repetition of discussion of evidence.

Issues No. 1 to 8

16. In order to prove the execution of agreement to sell dated 18.1.2014 and advance payment of Rs.8.00 lakh to the defendant, plaintiff has examined herself as PW-1. While deposing before the court, she stated that agreement dated 18.1.2014 (Ext. PW-1/A) was entered into between her and defendant, for the sale of suit land at the rate of Rs.6.5 Lakh per Bigha and a sum of Rs.8.00 lakh was paid by the plaintiff to the defendant at the time of execution of agreement to sell. Money was lent by her aunt Pyari Devi, after withdrawing the same from her account. Money was counted by nephew of defendant, Jaswant Singh. Agreement was typed out by Shri Raj Kumar, which was witnessed by Madan and Vikas. Jagiro (defendant) had thumb marked the agreement and then plaintiff had signed the agreement and thereafter the witnesses aforesaid. Contents of agreement to sell were read over and explained to the defendant. Agreement was produced before Notary Public, who read over the contents to the defendant. Plaintiff acknowledged factum of service of notice upon her by defendant, Ext. PW-1/B, which was replied to her vide reply, Ext. PW-1/C. She has stated that the sale deed was to be executed on or before 15.5.2014. Plaintiff specifically stated that she visited the defendant many times. Plaintiff stated that she was present in the court campus on 15.5.2014 throughout the day, however, the defendant did not turn up. Plaintiff further deposed that she served the defendant with legal notice dated 18.5.2014 (Ext. PW-1/F). Post receipt is Ext. PW-1/G. Legal notice was received back by her undelivered, vide Ext. PW-1/H. Plaintiff specifically stated that she is ready and willing to pay the balance sale consideration. In her cross-examination, plaintiff stated that she does not know when husband of the defendant had expired and whether she was in receipt of any widow pension. She has denied that she called defendant to court premises on 18.1.2014 under the pretext of getting her pension enhanced. She has specifically stated that stamp papers were purchased by defendant. She further stated that the witnesses of the agreement to sell, Madan and Vikas were not known to her, rather they were known to Jaswant Singh. Agreement to sell was reduced into writing at the instance of the defendant. She has denied the suggestion put to her that she never paid Rs.8.00 lakh to the defendant.

17. PW-2 Jagat Singh Rana, has stated that plaintiff had gone to him for getting reply Ext. PW-1/C to legal notice, Ext. PW-1/B drafted from him.

18. PW-3 Vikash Gupta stated that he worked as a Document Writer. He was asked by the plaintiff to witness the agreement to sell. This witness has specifically stated that he was told by defendant that she has sold the land measuring 5 Bigha 7 Biswa to the plaintiff. This witness stated that he read over the contents of the agreement to sell to the defendant. Defendant told this witness that she received Rs.8.00 Lakh in advance. He has identified his signatures encircled at point 'A' on Ext. PW-1/A. This witness also identified signatures of plaintiff at point 'B' and that of defendant at point 'C' and that of witness Madan at point 'D'. In cross-examination, this witness has specifically stated that Jaswant Singh, nephew of defendant is known to him. This witness has stated that Rs.8.00 Lakh was paid to defendant in his presence. This witness has further stated in his cross-examination that the agreement to sell was firstly thumb marked by defendant, then signed by plaintiff, witness Madan and lastly by him. This witness has denied the suggestion put to him that he being friend of plaintiff's brother, had managed to execute the sale deed to grab land of the defendant.

19. Madan Lal was given up by learned counsel for the plaintiff on 21.6.2016.

20. PW-4 Arvind Kumar, Registration Clerk of Tehsil Office Nalagarh produced record qua affidavits executed by plaintiff Exts. PW-1/D and PW-1/E. He has identified signatures of Tehsildar. In his cross-examination, he stated that these affidavits were attested by Tehsildar in his presence.

21. PW-5 Varun Singh, Junior Associate, State Bank of Patiala, Nalagarh produced photocopy of withdrawal voucher and account opening form submitted by Smt. Ram Pyari wife of Shri Hem Raj. He has verified that Ram Prayi had withdrawn Rs.8,00,000/- from her account on 18.1.2014.

22. PW-6, Smt. Ram Pyari has stated that plaintiff is daughter of her real sister Jabero, who was married to her husband as a second wife. She stated that she withdrew Rs.8,00,000/- from her account in State Bank of Patiala and paid the same to the plaintiff. This witness though appeared to be blind, but there was no medical record to prove the same. However, in her cross-examination, she stated that she was blind for the last 20 years. She has denied the suggestion that the amount of Rs.8,00,000/- was not paid by plaintiff to the defendant.

23. PW Nand Lal was given up by learned counsel for the plaintiff on 28.9.2016.

24. Defendant has examined Trilok Singh Chandel, SWO, UCO Bank, Nalagarh. This witness stated that saving bank account of defendant was opened on the introduction by Pradhan, Gram Panchayat, which is compulsory in case of widow pension and senior citizens. In his cross-examination, he admitted that in case of opening of account by widow pensioner and senior citizen, any other person known to the Bank Authority can identify the person opening the account.

25. DW Chhaju Ram was given up by learned counsel for the defendant on 21.3.2017.

26. Defendant appeared herself as DW-2 on 8.3.2018, wherein she has straightway admitted the factum with regard to execution of agreement to sell dated 18.1.2014 for a total sale consideration of Rs.34,77,500/- and receipt of Rs.8.00 Lakh at the time of execution of agreement to sell. She also stated that she was ready and willing to get the sale deed executed in favour of petitioner. She expressed her intention to refund Rs.1.00 Lakh to her brothers, namely Karam Singh and Sarwan Singh, since agreement with them had not been acted upon. Due to her ill-health, her cross-examination was conducted on 26.7.2019. During her cross-examination, this witness admitted that she had received Rs.8.00 lakh at the time of execution of agreement to sell dated 18.1.2014 (Ext. PW-1/A). She admitted in cross-examination that in case of payment of balance sale

consideration of Rs.26,77,500/-, she was ready and willing to execute and register sale deed in favour of defendant. She has stated in her cross-examination that the agreement entered into with her brothers, namely Karam Singh and Sarwan Singh, was result of fraud and without her consent. She expressed her intention to consult her daughter, Smt. Amarjeet Kaur, before taking further action. She admitted Jaswant Singh to be her Special Power of Attorney. She also admitted copy of Special Power of Attorney, Ext. PW-1/J, to be true and correct. Evidence of defendant was closed on 26.7.2019, with the cross-examination of the defendant. Most importantly, this witness categorically deposed in her examination-in-chief that she had received Rs.1.00 Lakh from her brothers, Karam Singh and Sarwan Singh, but she intended to return the same since the agreement with them could not be acted upon.

27. Though the defendant tried to carve out a case in her written statement that the agreement to sell allegedly entered *inter se* parties is the result of fraud by the plaintiff, but the defendant has not led any evidence in this regard. The only evidence she has led is oral testimony of DW-1, Trilok Singh Chandel and her own deposition, wherein it has not been stated that the agreement to sell was either not executed between the parties or same was result of fraud. Defendant has not been able to prove that the plaintiff got the agreement to sell executed from the defendant under the pretext of receipt or enhancement of her widow pension.

28. From the evidence led on record, this court is convinced that Rs.8.00 Lakh was paid by the plaintiff at the time of execution of agreement to sell, whereby defendant agreed to sell the suit land in favour of the plaintiff on payment of balance sale consideration of Rs.26,77,500/-. As has been discussed herein above, evidence further reveals that the plaintiff remained ever ready and willing to get the sale deed executed in terms of agreement to sell by making balance sale consideration. On the other hand, defendant, on one pretext or the other failed to get the sale deed executed and registered despite her having received Rs.8.00 Lakh, which fact has been admitted by defendant in her statement given before this Court. Though, in the written statement, defendant made an attempt to dispute the execution of agreement to sell by stating that prior to execution of agreement to sell dated 18.1.2014, she had entered into agreement to sell with her brothers and she had received Rs.1.00 Lakh in advance but said stand taken by her in the written statement has not been corroborated by her by leading any evidence in this regard. To the contrary, in her statement, defendant has stated that she intends to return the sum of Rs.1.00 Lakh to her brothers since agreement alleged to have been executed with them had not been acted upon.

29. In view of findings above, issues No. 1 to 3 are answered in the affirmative i.e. in favour of the plaintiff and issues No. 4 to 8 are answered in the negative i.e. against the defendant.

30. Defendant has shown her readiness to get the sale deed executed subject to payment of balance sale consideration alongwith interest at the rate of 18% per annum on account of escalation in the prices of the property.

31. Mr. Sanjeev Kuthiala, learned Senior Advocate for the defendant contended that since the defendant has shown her readiness and willingness to get the sale deed executed subject to payment of balance sale consideration, she may also be awarded interest at the rate of 18% per annum, on account of escalation in the prices of property. In support of his contention, Mr. Kuthiala, learned Senior Advocate placed reliance upon judgment passed by Hon'ble Apex Court in **K. Prakash** v. **B.R. Sampath Kumar** (2015) 1 SCC 597, wherein it has been held that rise in price is a normal change of circumstance and, therefore, on that ground a decree for specific performance cannot be reversed. In that case, Hon'ble Apex Court had directed plaintiff to pay Rs.25.00 Lakh instead of Rs.16.10 Lakh since agreement to sell had been executed ten years back in that case. Hon'ble Apex Court observed as under:

> "18. Subsequent rise in price will not be treated as a hardship entailing refusal of the decree for specific performance. Rise in price is a normal change of

circumstances and, therefore, on that ground a decree for specific performance cannot be reversed.

19. However, the court may take notice of the fact that there has been an increase in the price of the property and considering the other facts and circumstances of the case, this Court while granting decree for specific performance can impose such condition which may to some extent compensate the defendant-owner of the property. This aspect of the matter is considered by a three Judge Bench of this Court in Nirmala Anand vs. Advent Corporation (P) Ltd. and Others, (2002) 8 SCC 146, where this Court held :-

> "6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

20. As discussed above the agreement was entered into between the parties in 2003 for sale of the property for a total consideration of Rs.16,10,000/- . Ten years have passed by and now the price of the property in that area where it situates has increased by not less than five times. Keeping in mind the factual position we are of the view that the appellant should pay a total consideration of Rs.25 lakhs, being the price for the said property.

32. However, Hon'ble Apex Court in **Nanjappan** v. **Ramasamy** (2015) 14 SCC 341 has held that jurisdiction of decreeing specific performance is a discretion of the court and it depends upon facts and circumstances of each case. The court would take into consideration circumstances of each case, conduct of the parties, recitals in the sale agreement and the circumstances outside the contract have to be seen. Hon'ble Apex Court observed as under:

> "12. Under Section 20 of the Specific Relief Act, grant of specific performance of contract is discretionary. Though the decree for specific performance is discretionary, yet the court is not bound to grant such a relief merely because it is lawful to do so. But the discretion of the court is not arbitrary, but sound and reasonable, guided by judicial principles of law and capable of correction by a court of appeal and should be properly exercised keeping in view the settled principles of law as envisaged in Section 20 of the Act. The jurisdiction of decreeing specific performance is a discretion of the court and it depends upon facts and circumstances of each case. The court would take into consideration circumstances of each case, conduct of the parties, recitals in the sale agreement and the circumstances outside the contract have to be seen."

33. In the case at hand, plaintiff was ever ready and willing to perform her part of contract and it is the defendant, who delayed execution of the sale deed. Plaintiff cannot be said to be responsible for any delay. As observed by Hon'ble Apex Court in

judgment (supra), conduct of parties is to be seen while granting relief of specific performance. Thus, the interest claimed by defendant on the balance sale consideration, on account of rise in price or delay in execution of sale deed cannot be granted to her simply on account of her own act and conduct. Moreover, it stands duly established on record that the plaintiff had paid a sum of Rs.8.00 Lakh at the time of execution of agreement to sell, but till date, despite her being ready and willing to get the sale deed executed and registered by paying balance sale consideration, defendant has failed to execute the sale deed, as such, loss, if any, on account of delay in execution of agreement to sell is that of the plaintiff, whose money (Rs.8.00 Lakh) came to be utilized by the defendant, for almost five years, without paying any interest.

34. Thus, the defendant has failed to make out a case for grant of interest on the balance sale consideration of Rs.26,77,500/-.

35. In view of the detailed discussion made herein above, suit filed by the plaintiff is decreed. Defendant is directed to execute and register sale deed in favour of the plaintiff in terms of agreement to sell dated 18.1.2014 (Ext. PW-1/A) qua suit land i.e. land bearing Khewat Khatauni No. 48/70, Khasra No. 316/125 measuring 11-0 Bigha and Khewat Khatauni No. 170 Khasra No. 288/125, measuring 4-16 Bigha total land measuring 5-7 Bigha as entered in Jamabandi for the years 2006-07 situate in Village Mangseri Pargana Plassi, Tehsil Nalagarh, District Solan, Himachal Pradesh within a period of three months. Plaintiff is directed to deposit the amount of balance sale consideration of Rs.26,77,500/- with the Registry of this Court within a period of two months from today. However, in case, plaintiff fails to deposit the amount of Rs.26,77,500/- within the aforesaid period, the suit shall stand dismissed. In the event of failure on the part of defendant to execute and register the sale deed in favour of the plaintiff within stipulated time, the plaintiff shall be entitled to get the sale deed of the suit land executed through this Court.

36. So far decree for grant of compensation is concerned, since the suit stands decreed for specific performance of the agreement to sell dated 18.1.2014, said relief has become redundant and is declined.

37. Defendant is further restrained from selling the suit property in favour of third party and changing the nature thereof till the time of execution and registration of sale deed in favour of the plaintiff.

38. Parties are left to bear their own costs.

39. Decree sheet be prepared accordingly.

40. File after due completion be consigned to record room.

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

Sh. Gurdev Kumar and others .....Petitioners

Versus

State of H.P. and others .....Respondents

CWP No. 9102 of 2013

Decided on: August 26, 2019

Industrial Disputes Act, 1947 – Sections 2 (k), 12(4) & (5) – Industrial dispute – Existence of – Role of Appropriate Government – Held, under Section 12(5) of Act , Appropriate Government has limited role to the extent of ascertaining whether there exists an industrial dispute inter-se parties ?– It can not touch or adjudicate the merits of such a dispute –Adjudication of merits of dispute can be done only by Authority having adjudicatory powers under the Act. (Paras 9 & 10).

Case referred:

Sarva Shramik Sangh vs. Indian Oil Corporation Limited and others , (2009) 11 SCC 609

For the petitioners : Mr. Anuj Gupta, Advocate.
For the respondents : Mr. Sudhir Bhatnagar and Mr. Sanjeev Sood, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General for respondent No.1.
Mr. Shivank Singh Panta, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Being aggrieved and dissatisfied with order dated 19.7.2013, passed by Labour Commissioner, Himachal Pradesh, whereby he refused to refer the matter for adjudication to Labour Court-cum-Industrial Tribunal, petitioners have approached this court in the instant proceedings filed under Art.226 of the Constitution of India with a prayer to set aside the impugned order and refer the dispute to Labour Court-cum-Industrial Tribunal for adjudication.

2. Succinctly, the facts as emerge from the record are that the petitioners came to be employed as daily wagers with respondent No.2 i.e. Himachal Pradesh Tourism Development Corporation (hereinafter, 'Corporation') between the year 1993-1997, whereafter, their services were regularized in the respective Class IV categories i.e. Malis, Helpers, Beldars, Painters and Sweepers, in the year 20005 and they were put in the pay scale of Rs.2520-4140. On 12.9.2003, respondent No.2 issued an office order, whereby petitioners and other categories in the respondent-Corporation were granted different pay scales. In September, 2011, petitioners served a demand notice upon respondents for grant of same pay scale i.e. Rs.2720-4260 as granted to the category of Utility Workers, because both the categories i.e. petitioners and Utility Workers were covered in same pay scale/Class IV, category of workman, however, the fact remains that such claim of the petitioners came to be denied, as a consequence of which, dispute arose *inter se* petitioners and employee.

3. Careful perusal of Annexure P-6 suggests that the petitioners served demand notice upon respondent No.1 alleging therein that at the first instance they were employed on daily wages and later on, after good number of years, their services were regularized in the pay scale of Rs.2520-4140 (with initial start of Rs.2620). They further averred that similarly the Utility Workers in the Corporation were granted equivalent /similar pay scale at par with them, till 25.8.2003, because all were unskilled categories of workmen. On 25.8.2003, pay scale of Utility Workers was revised from 2520-4140 to 2720-4260, however, said revision was not made in the case of the petitioners. It is further averred by the petitioners that during pay revision of the year 2006, Utility Workers were granted pay scale of Rs.6700-7500 as such, petitioners are also entitled to pay scale of Rs.6700-7500 as granted to Utility Workers.

4. Record reveals that the Labour Officer-cum-Conciliation Officer, Solan, tried to settle the dispute amicably *inter se* parties but since conciliation proceedings failed, he submitted a report under Sub-section (4) of S. 12 of the Act to the 'appropriate Government' i.e. respondent No.1. Respondent No.1, while exercising power of 'appropriate Government' examined the report submitted by Labour Officer-cum-Conciliation Officer, Solan, District Solan, Himachal Pradesh and thereafter, arrived at a conclusion that since petitioners are regular employees of the Corporation, they ought to have raised dispute before appropriate Forum, under FR SR & CCS Rules. In the aforesaid background, petitioners have approached this Court in the instant proceedings, seeking quashment of impugned order dated 19.7.2013, Annexure P-8.

5. Having heard learned counsel for the parties and perused the material available on record, this Court finds force in the arguments of Mr. Anuj Gupta, learned counsel for the petitioners that the 'appropriate Government', while considering report of

Labour Officer-cum-Conciliation Officer, under Sub-section (4) of S.12 of the Act, could not have gone into the merits of the dispute.

6. At this stage, S.12 of the Act is reproduced hereunder:

> "12. Duties of conciliation officers.—
>
> (1) Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under section 22 has been given, shall hold conciliation proceedings in the prescribed manner.
>
> (2) The conciliation officer shall, for the purpose of bringing about a settlement of the dispute, without delay, investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.
>
> (3) If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government 6 [or an officer authorised in this behalf by the appropriate Government] together with a memorandum of the settlement signed by the parties to the dispute.
>
> (4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.
>
> (5) If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, 7 [Labour Court, Tribunal or National Tribunal], it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor.
>
> (6) A report under this section shall be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government:
>
> 1 [Provided that, 2 [subject to the approval of the conciliation officer,] the time for the submission of the report may be extended by such period as may be agreed upon in writing by all the parties to the dispute.]"

7. The Act *ibid* is a complete code in itself, wherein a mechanism has been provided for identification and adjudication of the industrial dispute. Expression, "industrial dispute" defined in S.2(k) envisages existence of a dispute or difference between the parties in connection with employment or non-employment or terms of employment or conditions of labour of any person. S.10 of the Act lays down that where appropriate Government is of the opinion that an industrial dispute exists or is apprehended, it may refer the dispute at any time by issuing an order in writing. Such reference may be made to a Board for settlement thereof

8. Object underlying the procedure set out in S.12 of the Act is for the purpose of bringing about a settlement of the dispute, without delay, whereby authorities under the Act *ibid* are required to investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as they think fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings, the conciliation officer is required to send a report thereof to

the appropriate Government together with a memorandum of the settlement signed by the parties to the dispute. If no such settlement is arrived at, the conciliation officer is required to send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at. If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference, it may make such reference to Labour Court-cum-Industrial Tribunal. In case, the appropriate Government does not make such a reference, it shall record and communicate its reasons to the parties concerned.

9. In the case at hand, respondent No.1, while exercising power of appropriate Government, examined the report submitted by Labour Officer-cum-Conciliation Officer, Solan Zone, District Solan, Himachal Pradesh and arrived at a conclusion that the petitioners are regular employees of the Corporation, as such, they should raise their dispute before appropriate Forum under FRSR and CCS Rules. Such a finding returned by respondent No. 1, in exercise of power of appropriate Government, is on merits of the dispute and as such refusal of respondent No.1 may be said to be result of appropriate Government examining merits of the dispute and prejudging/adjudicating/determining the dispute, which could not be done by respondent No.1, while exercising power Sub-section (5) of S.12 of the Act. Moreover, sub-section (5) of the Act provides that, if on consideration of report under Sub-section (4), appropriate Government is satisfied that there is a case for referring the dispute to Labour Court, Tribunal or National Tribunal, it may make such reference but, where the appropriate Government does not make such a reference, it shall record and communicate to the parties concerned its reasons therefor.

10. In the case at hand, reason assigned by respondent No.1, while refusing to refer the dispute to Labour Court-cum-Industrial Tribunal for adjudication, is highly untenable because, admittedly, question, whether the petitioners being regular employees of the Corporation are entitled to the pay scale of 2720-4260 (pre revised) (now revised to Rs.6700-7500) with effect from 1.12.2009, equivalent to their counterparts i.e. Utility Workers in the Corporation, can only be gone into by the authority possessing adjudicatory powers, which definitely are vested in the Labour Court-cum-Industrial Tribunal, as has been noticed herein above.

11. Since respondent No. 1 is not an adjudicator, he has no right to enter into arena of adjudication on merits of dispute, reliance is placed upon judgment rendered by Hon'ble Apex Court in **Sarva Shramik Sangh vs. Indian Oil Corporation Limited and others** , (2009) 11 SCC 609, wherein it has been held by Hon'ble Apex Court as under:

> "Thus it can safely be concluded that a writ of mandamus would be issued to the appropriate government to reconsider the refusal to make a reference, where (i) the refusal is on irrelevant, irrational or extraneous grounds; (ii) the refusal is a result of the appropriate government examining the merits of the dispute and prejudging/ adjudicating/determine the dispute; (iii) the refusal is mala fide or dishonest or actuated by malice; (iv) the refusal ignores the material available in the failure report of the Conciliation Officer or is not supported by any reason."

12. Reliance is also placed upon judgment rendered in R.K. Madan and Anr. v. Govt. of NCT and Ors, 118 (2005) DLT 542, wherein complaint having been made by workmen to the Assistant Labour Commissioner under Ss.25T and 25U read with Schedule V(1) of the Act, came to be dismissed on the ground that complainants were not workmen as per definition of 'workman' under the Act. High Court of Delhi held that such an order amounts to adjudicating the dispute on merits and same was not justified since Labour Commissioner had no power to adjudicate the matter on merits.

13. Consequently, the writ petition is allowed. Order dated 19.7.2013 (Annexure P-8) is quashed and set aside. Respondent No. 1 is directed to refer the dispute to the Labour Court-cum-Industrial Tribunal, after framing terms of reference, expeditiously, preferably within a period of four weeks.

Pending applications, if any, also stand disposed of.

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

Smt. Sunil Kaur .....Petitioner

Versus

Yashpal Singh .....Respondent

CMPMO No. 206 of 2019
Decided on: August 30, 2019

Code of Civil Procedure, 1908 - Section 24 – Transfer of case – Guiding principles- - Parties, husband and wife living separately and filing cases against each other at different places- Wife seeking transfer of case filed by husband to the court of her place of residence – Held, for transferring case ,the relevant parameters are, convenience or inconvenience of parties or the witnesses, convenience or inconvenience at a particular place of trial having regard to nature of evidence, issues raised by parties etc – On facts, restitution petition filed by husband ordered to be transferred to jurisdictional family court of the place where wife is residing. (Paras 7 & 14).

Cases referred:

Urvashi Rana versus Himanshu Nayyar, Latest HLJ 2016(HP) 925

Rajani Kishor Pardeshi versus Kishor Babulal Pardeshi, (2005) 12 SCC 237

Kulwinder Kaur alias Kulwinder Gurcharan Singh versus Kandi Friends Education Trust and others, (2008) 3 SCC 65

Arti Rani alias Pinki Devi and another versus Dharmendra Kumar Gupta, (2008) 9 SCC 353

Krishna Veni Nagam versus Harish Nagam, (2017) 4 SCC 150

For the petitioner: Mr. Sanjeev Kumar Suri, Advocate.
For the respondent: Mr. Vijay Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under Art. 227 of the Constitution of India read with S.24 CPC, prayer has been made for transfer of HMA No. 11/2018 titled Yashpal Singh vs. Sunil Kaur, from the court of leaned Civil Judge (Senior Division), Sundernagar, Mandi to the court of learned District Judge, Kullu, District Kullu, Himachal Pradesh.

2. Further perusal of the averments contained in the petition suggests that the marriage between petitioner and respondent was solemnised on 18.10.2015 at Village Halel, Post Office Kanaid, Tehsil Sundernagar, Mandi, Himachal Pradesh. It seems that soon after marriage, differences arose between the parties leading to filing of complaint under the provisions of the Protection of Women from Domestic Violence Act, 2005 by the petitioner and aforesaid petition under Hindu Marriage Act, for restitution of conjugal rights by the respondent.

3. From the pleadings, it is elicited that petitioner is residing at her parental house in Village Badah, Post Office Mahol, Tehsil and District, Kullu, Himachal Pradesh. She apprehends some untoward incident at Sundernagar and as such, has prayed for

transferring the petition filed by the respondent in the court of Civil Judge (Senior Division), Sundernagar, Mandi to the court of learned District Judge, Kullu, Himachal Pradesh.

4. Though learned counsel for the respondent vehemently argued that case filed by his client under S.9 of Hindu Marriage Act, for restitution of conjugal rights has been filed in the court having jurisdiction in the matter and same ought to be conducted at Sundernagar.

5. On this, learned counsel for the petitioner argued that since petitioner is a lady and has to travel from Kullu to Sundernagar to attend the proceedings of the case, she is being put to great hardships and further she apprehends danger to her life and liberty at Sundernagar. At this stage, learned counsel representing the petitioner, in support of his aforesaid contentions, placed reliance upon the judgment rendered by this Court in **Urvashi Rana** versus **Himanshu Nayyar,** (CMPMO No. 177 of 2016)decided on 15.7.2016, reported in **Latest HLJ 2016(HP) 925**, to demonstrate that convenience of wife is required to be considered over and above the inconvenience of the husband.

6. Aforesaid judgment passed by this Court is based upon law laid down by the Hon'ble Apex Court in various cases, wherein it has observed that wife's convenience is required to be considered over and above the inconvenience of the husband.

7. In **Rajani Kishor Pardeshi** versus **Kishor Babulal Pardeshi**, (2005) 12 SCC 237, Hon'ble Apex Court has held that convenience of wife is of prime consideration. Similarly, Hon'ble Apex Court in **Kulwinder Kaur alias Kulwinder Gurcharan Singh** versus **Kandi Friends Education Trust and others,** (2008) 3 SCC 659, has laid down parameters for transferring the cases i.e. balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceedings, etc. While laying aforesaid broad parameters, Hon'ble Apex Court has further held that these are illustrative in nature and by no means can be taken to be exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a 'fair trial', in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order. The Hon'ble Apex Court has held as under:

> "23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order."

8. Similarly, Hon'ble Apex Court in **Arti Rani alias Pinki Devi and another** versus **Dharmendra Kumar Gupta**, (2008) 9 SCC 353, while dealing with a petition preferred by wife for transfer of proceedings on the ground that she was having minor child and it was difficult for her to attend the Court at Palamu, Daltonganj, which was in

the State of Jharkhand and at a quite distance from Patna, where she was now residing, with her child, ordered transfer of proceedings taking into consideration convenience of wife.

9. In the case at hand, facts, as have been discussed above, which have not been refuted, it clearly emerges that at present, petitioner resides in Kullu, which is at a considerable distance from the place where respondent-husband has filed petition for restitution of conjugal rights.

10. Leaving everything aside, this Court can not lose sight of the fact that petitioner is unnecessarily being made to spend huge sum of money on transportation, as she being respondent in the petition in the court below initiated at the behest of respondent (husband), is always under obligation to attend the Court at Sundernagar.

11. During proceedings of the case, attention of this Court was invited to the judgment passed by Hon'ble Apex Court in **Krishna Veni Nagam** versus **Harish Nagam**, (2017) 4 SCC 150, wherein Hon'ble Apex Court has held as under:

> "We are of the view that if orders are to be passed in every individual petition, this causes great hardship to the litigants who have to come to this Court. Moreover in this process, the matrimonial matters which are required to be dealt with expeditiously are delayed. In these circumstances, we are prima facie of the view that we need to consider whether we could pass a general order to the effect that in case where husband files matrimonial proceedings at place where wife does not reside, the court concerned should entertain such petition only on the condition that the husband makes appropriate deposit to bear the expenses of the wife as may be determined by the Court. The Court may also pass orders from time to time for further deposit to ensure that the wife is not handicapped to defend the proceedings. In other cases, the husband may take proceedings before the Court in whose jurisdiction the wife resides which may lessen inconvenience to the parties and avoid delay. Any other option to remedy the situation can also be considered.
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> 17. We are thus of the view that it is necessary to issue certain directions which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place away from their ordinary residence on the ground that if proceedings are not transferred it will result in denial of justice.
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> 18. We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be:-
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> i) Availability of video conferencing facility.
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> ii) Availability of legal aid service.
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> iii) Deposit of cost for travel, lodging and boarding in terms of Order XXV CPC.
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> iv) E-mail address/phone number, if any, at which litigant from out station may communicate."

12. Recently, the Hon'ble Apex Court in Transfer Petition (Civil) No. 1278 of 2016, titled **Santhini** versus **Vijaya Venketesh**, has overruled the judgment passed in

Krishna Veni Nagam versus **Harish Nagam**, (2017) 4 SCC 150 (Supra). Relevant paras of aforesaid latest judgment are reproduced below:

"51. In this context, we may refer to the fundamental principle of necessity of doing justice and trial in camera. The nine-Judge Bench in Naresh Shridhar Mirajkar and Ors v. State of Maharashtra and Anr.46, after enunciating the universally accepted proposition in favour of open trials, expressed:-

> "While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal and it is held that it admits of no exceptions whatever, cases may arise where by following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasise that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera; but to deny the existence of such inherent power to the court would be to ignore the primary object of adjudication itself. The principle underlying the insistence on hearing causes in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said that the said requirement should be sacrificed because of the principle that every trial must be held in open court."

52. The principle of exception that the larger Bench enunciated is founded on the centripodal necessity of doing justice to the cause and not to defeat it. In matrimonial disputes that are covered under Section 7 of the 1984 Act where the Family Court exercises its jurisdiction, there is a statutory protection to both the parties and conferment of power on the court with a duty to persuade the parties to reconcile. If the proceedings are directed to be conducted through videoconferencing, the command of the Section as well as the spirit of the 1984 Act will be in peril and further the cause of justice would be defeated.

53. A cogent reflection is also needed as regards the perception when both the parties concur to have the proceedings to be held through videoconferencing. In this context, the thought and the perception are to be viewed through the lens of the textual context, legislative intent and schematic canvas. The principle may had to be tested on the bedrock that courts must have progressive outlook and broader interpretation with the existing employed language in the statute so as to expand the horizon and the connotative expanse and not adopt a pedantic approach.

54. We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in Krishna Veni Nagam (supra) that if either of the parties gives consent, the case can be transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we find from the scheme of

the Act, the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in Bhuwan Mohan Singh (supra), the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in video conferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. However, we make it clear that in a transfer petition, no direction can be issued for video conferencing. We reiterate that the discretion has to rest with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing.

55. Be it noted, sometimes, transfer petitions are filed seeking transfer of cases instituted under the Protection of Women from Domestic Violence Act, 2005 and cases registered under the IPC. As the cases under the said Act and the IPC have not been adverted to in Krishna Veni Nagam (supra) or in the order of reference in these cases, we do intend to advert to the same.

56. In view of the aforesaid analysis, we sum up our conclusion as follows :-

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.

(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in Krishna Veni Nagam (supra) is overruled to the aforesaid extent"

13. Accordingly, perusal of aforesaid judgment clearly suggests that in a transfer petition, video conferencing cannot be directed and hearing of matrimonial disputes is required to be conducted in camera. In the aforesaid judgment, Hon'ble Apex Court has further held that after the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the

discretion to allow the said prayer, but in transfer petition, video conferencing can not be directed.

14. Though vide petition at hand, prayer has been made by the petitioner to transfer the case from the Court of learned Civil Judge (Senior Division), Sundernagar, Mandi to the court of learned District Judge, Kullu, but having taken note of the fact that petition under Hindu Marriage Act can only be adjudicated by a Family Court, aforesaid prayer of the petitioner cannot be accepted since jurisdiction to try the matrimonial cases pertaining to Kullu District is with the Family Court at Mandi, as such, the parties have agreed through their counsel for transferring the HMA in question to the Family Court at Mandi.

15. Accordingly, present petition is allowed. HMA No. 11/2018 titled Yashpal Singh vs. Sunil Kaur, is ordered to be transferred from the court of leaned Civil Judge (Senior Division), Sundernagar, Mandi to the court of learned Family Court at Mandi, District Mandi, Himachal Pradesh.

16. Learned counsel for the petitioner undertakes to cause appearance of the petitioner before learned Family Court at Mandi, District Mandi, Himachal Pradesh, on **16.9.2019**, on which date, said Court shall issue notice to the respondent, to put in appearance on the date to be fixed by it. Learned Civil Judge (Senior Division), Sundernagar, Mandi shall transfer the aforesaid petition to the Court of learned Family Court at Mandi, District Mandi, Himachal Pradesh, forthwith, to enable it to do the needful, as ordered vide this judgment.

17. Registry to send copy of instant judgment to the learned Civil Judge (Senior Division), Sundernagar, Mandi, Himachal Pradesh as well as learned Family Court at Mandi, District Mandi, Himachal Pradesh, forthwith, to enable them to do the needful well within stipulated time.

18. In view of above, the present petition is disposed of, alongwith pending applications, if any.

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

Ashish Sardana ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

CrMP(M)'s Nos. 1423 and 1450 of 2019
Decided on September 2, 2019

Code of Criminal Procedure, 1973 – Section 438 – Pre-arrest bail – Grant of - Recovery of prohibited drugs from Godown of a Pharma company owned by co-accused - Petitioners sought to be implicated on account of some financial transactions between them and one 'RK', owner of company – Prosecution alleging that the Pharma company was actually being run by the petitioners by projecting 'RK' as its ostensible owner- Held, on facts, 'RK' owner of company had borrowed money from petitioner 'AS' for construction of his house – Whereas money used to be paid to another petitioner 'TB' by the company as commission for bringing supply orders for it – No material showing that company is actually being run by petitioners 'AS' and 'TB' – Owner of building not stating that premises was ever let out by him to 'AS' & TB' – Nothing on record to connect petitioners with recovered contraband – Petitioners admitted on pre-arrest bail subject to conditions. (Paras 10 to 13).

For the petitioner(s) : Mr. B.C. Negi, Senior Advocate with Mr. Jeevan Kumar, Advocate.

For the respondent : Mr. Sudhir Bhatnagar and Mr. Sanjeev Sood, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.

SI Sewa Singh, Police Station Majra, Sirmaur, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Since both the bail petitions arise out of same FIR, as such, they were taken up together for disposal vide this common judgment.

2. Bail petitioners, namely Ashish Sardana and Tarun Batra, have approached this Court in the instant proceedings filed under S.438 CrPC, for grant of anticipatory bail in FIR No. 54, dated 26.4.2019, under Ss.21 and 29 of the Narcotic Drugs & Psychotropic Substances Act and S.18C of Drugs and Cosmetics Act, 1945 registered with Police Station, Majra, Sirmaur, Himachal Pradesh.

3. SI Sewa Singh has come present with the record. Mr. Sudhir Bhatnagar, learned Additional Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

4. Record reveals that on 25.4.2019, Police after having received secret information, raided premises of "Apple Field International", situate in Village Puruwala, Tehsil Paonta Sahib, District Sirmaur. Drug Inspector, Suresh Kumar inspected the record and the documents of the Factory named above and found no inconsistency in the documents as well as stock available in the Factory. Police also raided /searched store/godown allegedly owned and possessed by above named firm and recovered a huge quantity of prohibited drugs. Owner of store/godown, Ram Swaroop disclosed to the police that he had given premises to M/s Apple Field International on monthly rent. Assistant Drug Controller after having inspected contraband allegedly recovered from the aforesaid premises, gave a report to the following effect:

> ".....(1) Mecodine syrup B.No. AF19075,02/2021Mfd. By Apple Field International Puruwala01 Bottle 100 ML(2) CoreX Syrup 100ML each C. No. AF1834009/2010 mfd by Remec Health care Banglore 13 Bottles. (3) unlabelled Codine Syrup 88 xrk isfV;ka dqy 9508 cksrysa (4) Loose coloured Blue Capsule containing Tromadol 67 Packets 26.15 Kg Total weight -645 Mg (filled cap) NDPS Act dh tn esa vkrs gS blds vfrfjDr 132 iSdsV loose label of Codine Phosphet Hkh is'k fd, gSa o cryk;k fd blds vfrfjDr dejk esa ekStwn vU; nokbZ;kaa Drugs and Cosmetics Act ds vRuxZr vkrh gS tks Drug. Deptt. }kjk ekSdk ls gh vius dCtk esa yh xbZ gSA tks ekSdk ij ADC }kjk mijksDr nkokbZ;ksa Sr. No. 1 ls 4 o 132 iSdsV loose label of Codine Phosphet eu mi fu0 dks NDPS Act ds vUrxZr dk;Zokgh djus gsrq is'k dh gh tks is'k djnk dqy 9508 cksrysa unlabelled Codine Syrup dks 88 xrk isfV;ksa esa Mkydj xRrk ifV;ksa esa Mkydj ....."

5. After completion of necessary codal formalities, Police registered case under S.21 of Narcotic Drugs & Psychotropic Substances Act and S.18C of Drugs and Cosmetics Act, 1945 against the bail petitioner Tarun Batra and co-accused Rajiv Kumar and Dinesh Kumar, who happened to be owner and employee, respectively of M/s Apple Field International. Police arrested Dinesh Kumar on 1.5.2019 and Rajiv Kuamr on 14.5.2019, who is owner of the Apple Field International and since then, both the above named persons are behind the bars. Bail petitioner Tarun Batra was ordered to be enlarged on bail vide order dated 2.8.2019, with the condition that he would make himself available for investigation, as and when required by the investigating agency.

6. During investigation, police found involvement of bail petitioner Ashish Sardana and accordingly, summoned him for investigation. Ashish Sardana was also ordered to be enlarged on bail vide order dated 2.8.2019, subject to his joining the investigation. On 19.8.2019, respondent State with a view to prove involvement of bail petitioners, Tarun Batra and Ashish Sardana, claimed before this Court that as per

investigation, a sum of Rs. 11,99,782/- came to be transferred in the account of accused Ashish Ssrdana from the account of M/s Apple Field International between the years 2016-2019. Investigating agency further claimed that during the years 2017-19, a sum of Rs.7,57,260/- was also transferred in the account of wife of Ashish Sardana from the account of aforesaid Company. SI Sewa Singh also informed the Court that during investigation it has emerged that a sum of Rs.2,40,000/- came to be transferred into bank account of another accused namely Tarun Batra from the account of Apple Field International, as such, it cannot be said that persons named herein above, who have applied for bail, have no connection with M/s Apple Field International.

7. On 19.8.2019, Mr. Sudhir Bhatnagar, learned Additional Advocate General, strenuously argued that the bail petitioners named herein above are real conspirators because the firm in question is actually being run by these two persons and not by Rajiv Kumar, who is otherwise said to be owner of M/s Apple Field International.

8. On that day, during proceedings of the case, Mr. B.C. Negi, learned Senior Advocate appearing for the bail petitioner, produced an affidavit allegedly executed by accused Rajiv Kumar to demonstrate that a sum of Rs.15.00 Lakh was advanced by Ashish Sardana to Rajiv Kumar, after setting up of Factory in question. Mr. Negi, learned Senior Advocate also contended that though Rajiv Kumar had issued cheques amounting to Rs.19.00 Lakh and Rs.5.00 Lakh, as security but, subsequently the amount of loan advanced to him came to be repaid to accused Ashish Sardana by way of transactions, as have been reflected in the status report.

9. This court, solely with a view to ascertain the correctness and genuineness of the affidavit produced before this Court, directed SI Sewa Singh to verify the same from the accused Rajiv Kumar, who otherwise is lodged in Model Central Jail, Nahan.

10. Today, during proceedings of the case, fresh status report has been filed by the investigating agency, wherein it has been categorically stated that accused Rajiv Kumar has verified the factum with regard to affidavit referred to herein above. As per statement given to the police, accused Rajiv Kumar has admitted that a sum of Rs.15.00 Lakh was taken by him from the bail petitioner, Ashish Sardana for the construction of his house. He has also admitted that he had purchased stamp papers allegedly used for preparing affidavit in question. Accused Rajiv Kumar during his statement given in Jail, stated that the bail petitioner Tarun Batra used to bring supply orders for his factory and in lieu thereof, aforesaid Tarun Batra used to get commission from M/s Apple Field International

11. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly stating before this Court that nothing remains to be recovered from the bail petitioners, vehemently opposed the prayer made on behalf of bail petitioners for grant of bail and contended that keeping in view gravity of the offence alleged to have been committed by the bail petitioners, they do not deserve any leniency. He further argued that both the bail petitioners are the actual culprits, who have simply used Rajiv Kumar, as such, their prayer for grant of bail may be rejected outrightly.

12. Having heard learned counsel for the parties, this court finds that as per documents collected on record, co-accused Rajiv Kumar is owner of M/s Apple Field International and investigating agency has not been able to recover any document suggestive of the fact that the present bail petitioners are the real owners, rather as per own investigation of the investigating agency, bail petitioner Tarun Batra used to get some money on account of commission from M/s Apple Field International. Owner of shop/godown, from where huge quantity of contraband came to be recovered has also nowhere named bail petitioners, rather, he has stated that he had given shop/godown in question to M/s Apple Field International. Though the investigating agency has brought on record certain transactions allegedly made *inter se* M/s Apple Field International and bail petitioners, but as has been taken noted herein above, co-accused Rajiv Kumar i.e. main accused has categorically stated that an amount of Rs.15.00 Lakh was advanced to

him by Ashish Sardana for construction of his house. Similarly, he has admitted that the amounts used to be transferred to the account of Tarun Batra on account of commission charges.

13. At this stage, this Court finds no material evidence to connect the bail petitioners with the contraband allegedly recovered from the shop/godown possessed by M/s Apple Field International as such, sees no reason for custodial interrogation of the bail petitioners, who have otherwise made themselves available for investigation in terms of order dated 2.8.2018 passed by this Court. Since nothing remains to be recovered from the bail petitioners, as has been fairly stated by investigating agency, this Court is of the view that no fruitful purpose would be served in case bail petitioners are sent behind the bars for an indefinite period during trial, especially when their guilt, if any, is yet to be proved in accordance with law.

14. Though, the status report suggests that previously also bail petitioner, Ashish Sardana was found to be involved in an offence under Narcotic Drugs & Psychotropic Substances Act, but that cannot be a ground to deny him bail because even in that case, his guilt has not yet been proved. Hon'ble Apex Court in **Maulana Mohammed Amir Rashadi** v. **State of U.P.** (2012) 2 SCC 382 has held that merely on the basis of criminal antecedents, the claim of the bail petitioner cannot be rejected. Hon'ble Apex Court has observed as under:

> "10. It is not in dispute and highlighted that the second respondent is a sitting Member of Parliament facing several criminal cases. It is also not in dispute that most of the cases ended in acquittal for want of proper witnesses or pending trial. As observed by the High Court, merely on the basis of criminal antecedents, the claim of the second respondent cannot be rejected. In other words, it is the duty of the Court to find out the role of the accused in the case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the Court etc."

15. Otherwise also, apprehension expressed by the learned Additional Advocate General that in the event of being enlarged on bail, bail petitioners may tamper with the prosecution evidence, can be best met with by imposing stringent conditions upon the bail petitioners.

16. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect

whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

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

conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

18. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

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

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

(ii) nature and gravity of the accusation;

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

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

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

(vi) likelihood of the offence being repeated;

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

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

20. In view of above, bail petitioners have carved out a case for grant of bail and as such, present petitions are allowed. Orders dated 2.8.2019 passed in both the petitions are made absolute, subject to petitioners furnishing fresh bail bonds in the sum of Rs.10,00,000/- (Rs. Ten Lakh) each with one local surety in the like amount, to the satisfaction of the Chief Judicial Magistrate concerned/trial court, besides the following conditions:

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

(B). They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

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

(D). They shall not leave the territory of India without the prior permission of the Court.

(E). They shall surrender passports, if any, held by them.

21. It is clarified that if the petitioners misuse the liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

22. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of these petitions alone.

The petitions stand accordingly disposed of.

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

Gulam Navi ...Petitioner

Versus

State of Himachal Pradesh and another ...Respondents

CrMMO No. 324 of 2019

Decided on: September 2, 2019

Code of Criminal Procedure, 1973 - Sections 320 & 482- Inherent powers – Quashing of FIR pursuant to compromise between parties in case involving non-compoundable offences – Held, under Section 482 of code , High Court has inherent power to quash criminal proceedings even in cases involving non-compoundable offences pursuant to compromise between parties. (Para 8)

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 SCC 466

Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497

For the petitioner: Mr. Bodh Raj, Advocate.

For the respondents: Mr. Sudhir Bhatnagar and Mr. Sanjeev Sood, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General for respondent No.1/State.

Mr. Subhash Chander, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under S.482 CrPC, prayer has been made on behalf of the petitioner for quashing and setting aside FIR No. 51, dated 25.6.2015 under Ss. 279, 337 and 338 IPC and S.181 of Motor Vehicles Act registered with Police Station, Kihar, Chamba and consequent proceedings against the petitioner pending before competent Court of law, on the basis of compromise dated 13.5.2019 (Page-22) arrived *inter se* parties.

2. Facts as emerge from the record are that FIR in question came to be registered against the petitioner at the behest of respondent No.2, Shri Abdul Kareem, who allegedly suffered injuries on account of being hit by motor cycle bearing No. HP73-3761, being driven by petitioner-accused. After completion of investigation, Police presented *Challan* in the competent Court of law, however, pending trial, parties have resolved to settle their dispute amicably inter se them as such, petitioner has approached this Court in the instant proceedings for quashing and setting aside FIR as detailed herein above alongwith consequent proceedings pending in the competent Court of law.

3. On 26.8.2019, this Court having taken note of the fact that respondent No.2 Abdul Kareem, who is otherwise represented by Mr. Subhash Chander, Advocate, is admitted in Hospital at Chamba, directed Investigating Officer to get the factum with regard to compromise, if any, *inter se* parties, verified.

4. Today, ASI Amar Nath, Police Station, Sadar, Chamba, Himachal Pradesh has come present with the record. He stated that pursuant to order dated 26.8.2019, statement of respondent No.2 has been recorded at Chamba Hospital, wherein he has categorically stated that he has compromised the matter with the petitioner, Gulam Navi, on 13.5.2019. He further stated that since he is admitted in hospital, he was unable to attend the Court on 26.8.2019, pursuant to order dated 17.7.2019. Respondent No.2 in his statement before Police, has further stated that he shall have no objection in case FIR

in question lodged at his behest, is ordered to be quashed and set aside. Statement made by respondent No.2 before the Police is taken on record.

5. At this stage, Mr. Sanjeev Sood, learned Additional Advocate General, having read the statement made by respondent No.2 before the Police, as well as material available on record, states that no fruitful purpose shall be served in case FIR in question as well as consequent criminal proceedings initiated at the behest of respondent No. 2, are allowed to stand and as such, prayer made in the petition may be accepted.

6. In view of the aforesaid statement of respondent No. 2, this Court sees no impediment in accepting the prayer made in the instant petition, so far as quashment of FIR in question and consequent proceedings is concerned.

7. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

8. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.
>
> 29.4. On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial

transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

9. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

10. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different

from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
>
> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

11. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

"… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"

"…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

12. In the case at hand also, the offences alleged against the petitioner do not involve offences of mental depravity or of heinous nature like rape, dacoity or murder and

as such, with a view to maintain harmony and peace in the society, this court deems it appropriate to quash the FIR as well as consequential proceedings thereto, especially keeping in view the fact that petitioner and respondent No.2 have compromised the matter with each other, in which case, the possibility of conviction is remote and no fruitful purpose would be served in continuing with the criminal proceedings.

13. Since the matter stands compromised between respondent No.2 and petitioner, no fruitful purpose would be served in case proceedings initiated at the behest of respondent No.2 are allowed to continue. Moreover, present is a simple dispute and since respondent No.2, is no more interested in carrying on with the criminal proceedings, as such, prayer made in the petition at hand can be accepted.

14. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 51, dated 25.6.2015 under Ss. 279, 337 and 338 IPC and S.181 of Motor Vehicles Act registered with Police Station, Kihar, Chamba, Himachal Pradesh and consequent proceedings against the petitioner pending in the competent Court of law, are quashed and set aside. Petitioner is acquitted of the offences levelled against him in the aforesaid FIR.

15. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Ms. Yashu Priya …Petitioner

Versus

Vinay Guleria …Respondent

CMPMO's Nos. 275 and 482 of 2016

Decided on: September 2, 2019

Hindu Marriage Act, 1955 (Act) – Section 24 – Maintenance pendente-lite – Right under Act vis-a-vis other statutes – Held, right of wife for maintenance under Section 24 of Act is independent of her right to maintenance under other provisions of law – But while determining amount of maintenance under this provision, court must take into consideration the amount which has been awarded to her under other provisions of law. (Para 8)

CMPMO No. 275 of 2016

For the petitioner: Mr. R.K. Bawa, Senior Advocate with Mr. Amit Kumar Dhumal, Advocate.

For the respondent: Mr. Vikrant Thakur, Advocate.

CMPMO No. 482 of 2016

For the petitioner: Mr. Vikrant Thakur, Advocate.

For the respondent: Mr. R.K. Bawa, Senior Advocate with Mr. Amit Kumar Dhumal, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of the petitions at hand, order dated 11.5.2016 passed by learned District Judge, Shimla, Himachal Pradesh in Case No. 42-S/3 of 2014 titled Vinay Guleria vs. Ms. Yashu Priya has been laid challenge to by both the parties. Vide aforesaid order, a sum of Rs.23,500/- per month has been granted as *maintenance pendente lite* in favour of the wife besides a sum of Rs.15,000/- as litigation expenses.

2. By way of CMPMO No. 275 of 2016, wife-Yashu Priya has sought enhancement of the maintenance pendente lite to Rs.35,000/- per month besides Rs.10,000/- per month as residential charges at Shimla and Rs. 21,000/- as litigation cost under S.24 of the Hindu Marriage Act.

3. By way of CMPMO No. 482 of 2016, husband-Vinay Guleria has sought quashment of order dated 11.5.2016.

4. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by the learned Court below while passing impugned order, this Court finds no illegality or infirmity in the impugned order, as such, same calls for no interference.

5. For the sake clarity, parties would be referred to as mentioned in CMPMO No. 275 of 2016. Respondent has filed a petition under S.13 of the Hindu Marriage Act, in which an application under S.24 of the Hindu Marriage Act came to be filed on behalf of the petitioner claiming that since she had no independent source of income, she may be provided maintenance pendente lite at the rate of Rs.35,000/- per month. Apart from above, she also claimed Rs.10,000/- as residential charges and Rs.21,000/- as litigation expenses. Record reveals that though petitioner made an attempt to prove on record that respondent was earning Rs.90,000/- per month but learned Court below, in the totality of evidence led on record by petitioner, arrived at a conclusion that total earning of the respondent is not more than Rs.82,619/-. Learned court below also found from the record that a sum of Rs.38,729/- out of total Rs.82,619/- is being deducted on account of statutory deductions. Learned Court below further noticed that petitioner is getting Rs.20,000/- per month from the respondent in proceedings under the Protection of Women from Domestic Violence Act, 2005, initiated at Sarkaghat and, accordingly, awarded another sum of Rs.23,500/- per month as maintenance pendente lite from the date of application. Learned Court below also awarded Rs.15,000/- as litigation expenses.

6. Mr. Vikrant Thakur, Advocate appearing for the respondent, strenuously argued that since there is ample evidence on record that the petitioner is a Civil Engineer and was rendering her services as Assistant Manager with Axis Bank, learned Court below ought not have awarded amount under S.24 of the Hindu Marriage Act, especially when petitioner was already in receipt of Rs.20,000/- per month in proceedings under the Protection of Women from Domestic Violence Act, 2005. Mr. Thakur further contended that though there was no occasion at all for learned Court below to award amount under S.24 of the Hindu Marriage Act, in view of the order already passed in proceedings under the Protection of Women from Domestic Violence Act, 2005, but even otherwise also, maintenance pendente lite awarded under S.24 is on higher side, as such, same needs to be modified. Mr. Thakur further contended that the petitioner has not been able to prove that at the time of filing of petition under S.13 of the Hindu Marriage Act, respondent was drawing salary of Rs.90,000/- per month, rather, it stands duly proved on record that a sum of Rs.38,729/- was being regularly deducted from monthly salary of the respondent, meaning thereby that respondent was getting Rs.43,890/- in hand at that time, out of which he was paying rent of Rs.10,000/- per month and Rs.10,000/- was being paid into loan account. Mr. Thakur argued that out of remaining amount, Rs.23,500/-has been ordered to be paid as maintenance pendente lite to the petitioner, as such, respondent is left with no money to maintain himself.

7. Mr. R.K. Bawa, learned Senior Advocate, duly assisted by Mr. Amit Kumar Dhumal, Advocate, appearing for the petitioner, while seeking dismissal of the petition filed by respondent, prayed that the petition filed by petitioner may be allowed and amount awarded by learned Court below may be enhanced. Mr. Bawa, learned Senior Advocate strenuously argued that no material evidence ever came to be placed on record to prove the earning, if any, of the petitioner, rather, there is ample evidence, suggestive of the fact that the petitioner was compelled to leave her job by the respondent on account of matrimonial dispute. Mr. Bawa, learned Senior Advocate further contended that a sum of Rs.23,500/- awarded by learned Court below on account of maintenance pendente lite is

on lower side, keeping in view total earning of the respondent, who has otherwise unnecessarily dragged the petitioner to the court for dissolution of marriage.

8. Needless to say, provisions of S.24 of the Hindu Marriage Act, empower court in any proceedings under the Act *ibid* to order monthly maintenance , if it appears to the Court that the party applying for the same has no independent /sufficient income for his or her support. Right of wife for maintenance under S. 24 is definitely independent of her right of maintenance under other provisions of law, but definitely while determining the amount of maintenance under S.24 of the Act *ibid*, courts are required to take into consideration the amount of compensation, if any, awarded under the other provisions of law. Right of wife for maintenance under S.24 of eth Act *ibid* is an incident of the status or estate of matrimony and since she on account of compelling circumstances is bound to live separately, it is the duty of the husband to defray the expenditure, if any, incurred by the wife for maintaining herself and towards litigation expenses. Moreover, order for maintenance pendente lite or cost of proceedings is not permanent rather, same is conditional depending upon circumstances of the applicant, who has filed application specifically stating therein that he/she has no independent source of income for his /her support and to meet necessary expenditure of the proceedings.

9. True it is that in the case at hand, respondent had been paying a sum of Rs.20,000/- per month to the petitioner in order passed under the Protection of Women from Domestic Violence Act, 2005 at Sarkaghat but learned Court below, while passing impugned order, under S.24 of the Act *ibid* has specifically clarified that the petitioner is entitled to get maintenance pendente lite under S.24 of the Act *ibid* or under provisions of the Protection of Women from Domestic Violence Act, 2005, whichever is higher, meaning thereby she would not be entitled to a sum of Rs.20,000/- awarded in her favour in proceedings under the Protection of Women from Domestic Violence Act, 2005, because, admittedly, in the proceedings under S.24 she has been awarded a sum of Rs.23,500/- per month, which is definitely higher than the amount awarded under other proceedings at Sarkaghat.

10. Apart from above, this Court finds from the record that the factum with regard to receipt of RS.82,619/- as monthly salary never came to be disputed by the respondent, rather, he failed to dispute the documents adduced on record by the petitioner, with regard to statutory deductions made out of aforesaid amount, as such, learned Court below rightly arrived at a conclusion that a sum of Rs.82,619/- is being received by respondent as salary but thereafter, learned Court below, while determining maintenance under S.24, specifically concluded that a sum of Rs.38,729/- is being deducted from the salary of the respondent on account of statutory deductions.

11. Though, in the case at hand, attempt has been made by respondent to show that the petitioner was in job with Axis Bank as Assistant Mangser, but that could not be a ground for the learned Court below to reject the claim of the petitioner because, admittedly, nothing came to be proved on record that at the time of passing impugned order, petitioner was in receipt of some amount as salary from any organisation, rather, factum with regard to leaving the job by petitioner has been virtually acknowledged by the respondent, who has categorically stated that the petitioner was working as an Assistant Manager. Mere acquisition of higher education by an applicant, cannot be a ground to disentitle him/her from claiming maintenance under S.24 of the Act *ibid*, because, in case applicant succeeds in proving that he/she has no independent source of income to maintain himself/herself, court on his/her application is bound to grant maintenance pendente lite under S.24, taking into consideration the income of the person, from whom, such, maintenance is being claimed.

12. So far claim of the petitioner is concerned, this court finds that the respondent is getting Rs.43,890/- after statutory deductions, out of which a sum of Rs.23,500/- has been ordered to be paid to her as maintenance pendente lite. Since respondent resides in Shimla in rented accommodation and he has a mother to look after, he cannot be compelled to pay the amount more than what has been awarded by learned

Court below, because, in that case, respondent would be left with no amount to sustain himself.

13. In view of above, this court finds no merit in both the petitions, which are accordingly dismissed. Order passed by learned Court below is upheld.

Pending applications, if any, are disposed of. Interim directions, if any, stand vacated.

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

Diwan Chand ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1632 of 2019

Decided on September 3, 2019

Code of Criminal Procedure, 1973 –Section 438 – Recovery of commercial quantity of charas – Pre-arrest bail – Grant of - Held, on facts, person holding rucksack had fled away from spot – Bail petitioner not identified by any police personnel as the same person – Cell phone recovered from bag though found to be being used by petitioner in fact, had been lost by him – Earlier police had filed an untrace report in the case – Identity of petitioner is not connected with recovery of commercial quantity of charas – Pre-arrest bail granted subject to conditions. (Paras 7, 8 & 15)

Cases referred:

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

Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218

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

For the petitioner	Mr. N.S. Chandel, Senior Advocate with Mr. Deepak Gupta, Advocate.
For the respondent	Mr. Sudhir Bhatnagar and Mr. Sanjeev Sood, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General. Shri Mukesh Kumar, Dy.SP. Crime, Bharari with HC Joginder Singh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Bail petitioner, Diwan Chand, has filed the instant petition under S.438 CrPC, for grant of anticipatory bail in connection with FIR No. 6, dated 19.1.2015, under S.20 of the Narcotic Drugs & Psychotropic Substances Act, registered with Police Station, State CID, Bharari, Shimla, Himachal Pradesh.

2. Sequel to orders dated 28/30.8.2019, Shri Mukesh Kumar, Dy.SP. Crime, Bharari with HC Joginder Singh has come present with the record. Mr. Kunal Thakur, learned Deputy Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

3. Perusal of record/status report reveals that on 19.1.2015, SHO, Police Station, State CID, Bharari, Shimla, received a *Rukka* from Inspector Lal Singh i.e. Investigating Officer, State CID, Mandi stating therein that on 19.1.2015, when he was present with the investigating team at Talgar Bridge near Urla National Highway, at 6.30 pm, a person wearing black jacket and grey pants, came towards the road from Ghatasani side. Said person was carrying a rucksack in his right hand. Inspector having suspicion

tried to stop the person but that person left behind his rucksack and fled from the spot. Though police officials tried to apprehend him but said person escaped. Police opened the bag and allegedly recovered charas, which on weighment was found to be 1.5 Kg. Police also recovered a mobile phone of Nokia make, number whereof was found to be 94593-22871. On the basis of aforesaid *Rukka*, complainant Lal Singh prayed for registration of case under S.20 of the Act *ibid* against unknown person. Formal FIR, as detailed herein above came to be lodged in Police Station State CID, Bharari.

4. During investigation, police found that telephone found in the bag containing charas belonged to a person namely Lalit. On investigation, Lalit informed the police that though SIM of the phone in question is in his name, but phone is being used by his uncle, Diwan Chand. On 19.1.2015, police investigated the bail petitioner, who disclosed that on 18/19.1.2015, he had lost his phone but he did not lodge any report qua the same. Police party, which was present at the time of alleged recovery expressed their inability to recognize the bail petitioner, Diwan Chand. Bail petitioner also made available proceedings of Gram Panchayat Latraan to demonstrate that on the date of alleged incident, he was present in the office of Gram Panchayat Latraan, being its Vice President. FSL Junga, in its report held the contraband to be a sample of charas but since the police failed to identify and apprehend the actual culprit, vide communication dated 28.1.2016, it prepared Untrace Report and sent the same to the Superintendent of Police. On 6.5.2017, Superintendent of Police ordered further investigation. During fresh investigation, police found that mobile number 94593-22871 recovered from the rucksack containing contraband was actually being used by bail petitioner on the date of alleged incident. It has been stated in the status report that Call Detail Record pertaining to that period reveals that on the date of alleged incident, bail petitioner was using mobile number, 94593-22871 till 3.37 am. Apart from above, a few persons from the locality also disclosed to the police that on the date of alleged incident, they had telephonic talk with the bail petitioner on the mobile number 94593-22871. As per investigation, bail petitioner Diwan Chand was present in the proceedings of Gram Panchayat held after alleged incident. Investigation further reveals that bail petitioner despite having received notice from State CID, Shimla failed to make himself available for investigation. It appears that bail petitioner instead of joining investigation, approached this Court by way of instnt petition seeking anticipatory bail.

5. Mr. Kunal Thakur, learned Deputy Advocate General, while opposing prayer made in the petition for grant of bail, strenuously argued that keeping in view the gravity of offence alleged to have been committed by bail petitioner, he does not deserve any leniency. Mr. Thakur, further contended that it stands duly proved on record that on the date of alleged incident, it was bail petitioner, who after having seen police fled from the spot leaving behind his rucksack. Mr. Thakur, further contended that since commercial quantity of contraband i.e. 1.5 Kg *Charas* came to be recovered from the rucksack left behind by the bail petitioner, rigors of S.37 of the Act are attracted in the present case as such, petition filed by bail petitioner deserves to be dismissed.

6. Mr. N.S. Chandel, learned Senior Advocate duly assisted by Mr. Vinod Gupta, Advocate, appearing for the bail petitioner, while making this Court peruse the record/status report, contended that it has specifically come in the investigation that persons/police officials, who had claimed to have laid *Naka* and seen the person fleeing from the spot, failed to identify the bail petitioner, who allegedly left behind the phone at the time of alleged incident. Mr. Chandel further contended that at this stage, there is no evidence to connect the bail petitioner with the alleged recovery of contraband as such, he deserves to be enlarged on bail. Mr. Chandel, further contended that though the Call Detail Record for the period in question produced by the investigating agency is seriously doubtful because it is not understood that after such a long delay, how the investigating agency could procure Call Detail Record but even otherwise as per the investigation itself, bail petitioner was using mobile number 94593-22871 till 3.37 am on 18/19.1.2015 whereas, alleged incident took place at 6.30 pm on 19.1.2015, as such, statement, if any, made by some persons that they had telephonic conversation with the bail petitioner is of

no consequence. Lastly, Mr. Chandel contended that since bail petitioner has already joined the investigation and nothing remains to be recovered from, he deserves to be enlarged on bail.

7. Having heard learned counsel for the parties and perused the material available on record, this court finds that as per own case of investigating agency, police officials present on the spot had actually seen the person fleeing from the spot but interestingly, police officials subsequently were unable to recognize the person, who as per fresh investigation had fled away from the spot leaving his rucksack containing commercial quantity of *Charas*. Since Police failed to trace the person, who allegedly left behind phone in question alongwith rucksack containing alleged contraband, it proceeded to file Untrace Report on 28.1.2016, whereafter, Superintendent of Police ordered further investigation. As per fresh investigation police has found that on the date of alleged incident, phone in question was being used by bail petitioner who while candidly admitting that he was using phone, stated to the police that he had lost his phone on 18/19.1.2015. No doubt, police has recorded statements of a few persons, who claimed that they had telephonic talk with the bail petitioner on the date of alleged incident, but there is no reference to the time, if any, in the statements, which is very crucial. As per own investigation, person using SIM No. 94593-22871 lastly talked on 3.35 am whereas alleged recovery was made at 6.30 pm. Since identity of the person who allegedly fled away from the spot leaving behind rucksack containing commercial quantity of contraband, is doubtful, this Court sees no reason to keep the bail petitioner behind the bars especially when he has already joined the investigation. Identity of the accused on the spot has been further made doubtful by the police officials, who subsequently refused to recognize bail petitioner, as such, freedom of bail petitioner cannot be allowed to be curtailed for an indefinite period during trial.

8. More over, FIR in the case at hand came to be filed on 19.1.2015 but even after expiry of four and a half years, police has not been able to trace the actual culprit. At the first instance, police officials investigating the case made no sincere efforts to find out the actual culprit rather, members of police party could not identify the accused on the ground that incident is eleven months old. Though, in the case at hand, Superintendent of Police ordered further investigation on 6.5.2017, but even in the last two and half years, no headway has been made and it appears that it is only after filing of the instant bail petition, that the police have sprung into action. So far rigors of S.37 of the Act ibid are concerned, same may not be applicable in the present case since the contraband allegedly recovered in the case never came to be recovered from the conscious possession of the bail petitioner, rather, he has been named in the FIR on the basis of mobile phone allegedly recovered from the spot.

9. Though aforesaid aspects of the matter are to be considered and decided by the learned trial Court in the totality of evidence collected on record by the investigating agency but this Court, having noticed aforesaid glaring aspects of the matter sees no reason for custodial interrogation of the bail petitioner.

10. Apprehension expressed by the learned Additional Advocate General that in the event of enlargement on bail, the bail petitioner may flee from justice, can be best met by putting the bail petitioner to stringent conditions. Otherwise also, Hon'ble Apex Court and this Court have repeatedly held that till the time, guilt of an individual is proved in accordance with, he/she is deemed to be innocent. In the case at hand, guilt, if any, of the bail petitioner, who has otherwise joined the investigation, is yet to be determined in the totality of the evidence collected on record by the prosecution.

11. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his

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

13. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

14. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

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

(ii) nature and gravity of the accusation;

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

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

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

(vi) likelihood of the offence being repeated;

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

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

16. In view of above, bail petitioner has carved out a case for himself. Present petition is allowed. In the event of arrest in the aforesaid FIR, bail petitioner is ordered to be released on bail, subject to his furnishing bail bonds in the sum of Rs.5,00,000/-(Rs. Five Lakh) with two local sureties in the like amount, to the satisfaction of the Investigating Officer concerned, besides the following conditions:

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

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

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

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

(e) He shall surrender passport, if any, held by him.

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

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

The petition stands accordingly disposed of.

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

Shri Om Prakash ...Petitioner

Versus

Shri Rajan Chopra ...Respondent

CMPMO No. 424 of 2019

Decided on: September 3, 2019

Code of Civil Procedure, 1908 - Section 51, Proviso – Money decree – Execution of - Detention of judgment debtor – Pre -conditions – Held, before issuing warrant of arrest of judgment debtor, in a case involving execution of money decree, executing court must record its reasons that despite having sufficient means to pay the decretal amount, he is

purposely avoiding the same – Issuing warrant without holding any inquiry and recording said satisfaction is unwarranted. (Paras 4 & 6)

Case referred:

Jolly George Varghese v. Bank of Cochin, (1980) 2 SCC 360

For the petitioner: Mr. B.L. Soni and Mr. Aman Parth Sharma, Advocates.
For the respondent: nemo.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Having regard to the nature of order proposed to be passed in the case at hand, this court sees no necessity to issue notice to the respondent.

2. By way of present petition filed under Art. 227 of the Constitution of India, prayer has been made to set aside order dated 26.9.2018 passed by learned Civil Judge, Manali in Ex. Petition No. 38-X/2017 titled Rajan Chopra vs. Om Prakash, whereby warrant of arrest against the petitioner-judgment debtor came to be issued in the execution petition filed by the respondent-Decree Holder, for different dates and lastly returnable for 15.7.2019.

3. Having heard learned counsel for the petitioner and perused the material available on record, this Court finds that since the petitioner-judgment debtor despite repeated notices issued to him, failed to put in appearance in the execution proceedings initiated at the behest of the respondent, learned executing Court was left with no other option but to issue warrants of arrest against the petitioner. Warrant of arrest, as referred to above, was though also issued on 25.2.2019, but *Zimni* orders placed on record clearly suggest that till last date of hearing i.e. 3.6.2019, same could not be executed. It has been averred in the petition that since the petitioner was not available in Manali as he had gone to Lahul & Spiti, factum with regard to passing of order dated 26.9.2018 never came to the knowledge of the petitioner.

4. Having carefully perused the judgment passed by Hon'ble Apex Court in **Jolly George Varghese** v. **Bank of Cochin**, (1980) 2 SCC 360, this Court is persuaded to agree with Mr. B.L. Soni, Advocate that in terms of proviso to S.51 CPC, executing court, before issuing warrant of arrest, ought to have recorded its satisfaction that though the petitioner has sufficient means to pay the decretal amount, but he is purposely avoiding the same. Hon'ble Apex Court in the judgment (supra) has held as under:

> "8. Indeed, the Central Law Commission, in its Fifty Fourth Report, did cognise the Covenant, while dealing with s. 51 C.P.C.:
>
> > The question to be considered is, whether this mode of execution should be retained on the statute book, particularly in view of the provision in the International Covenant on Civil and Political Rights prohibiting imprisonment for a mere non-performance of contract.
>
> The Law Commission, in its unanimous report, quoted the key passages from the Kerala ruling referred to above and endorsed its ratio. 'We agree with this view' said the Law Commission and adopting that meaning as the correct one did not recommend further change on this facet of the Section. It is important to notice that, interpretationally speaking, the Law Commission accepted the dynamics of the changed circumstances of the debtor :
>
> > However, if he once had the means but now has not, or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment.
>
> This is reiterated by the Commission:
>
> > Imprisonment is not to be ordered merely because, like Shylock, the creditor says:

"I crave the law, the penalty and forfeit of my bond."

The law does recognise the principle that "Mercy is reasonable in the time of affliction, as clouds of rain in the time of drought."

9. We concur with the Law Commission in its construction of s. 51 C.P.C. It follows that quondom affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with Art. 11 of the Covenant, because then no detention is permissible under s. 51, C.P.C."

5. No doubt, order dated 26.9.2018, has been laid challenge approximately after one year of passing of the same, but as has been noticed herein above, till date, warrants of arrest issued against the petitioner on various dates, ahve not been executed.

6. Leaving everything aside, perusal of *Zimni* orders placed on record nowhere suggests that before issuing warrants of arrest, learned executing Court made endeavour, if any, to find out that petitioner has sufficient means to pay the amount but he is not depositing the same, rather the record made available suggests that since the petitioner failed to put in appearance pursuant to notices issued to him in the execution petition, learned executing Court straightway proceeded to issue warrants of arrest against him, which otherwise is/was not permissible, as has been held by Hon'ble Apex Court in the judgment (supra).

7. Be that as it may, Mr. B.L. Soni, learned counsel for the petitioner states that his client would make himself available before learned executing Court on a date to be fixed by it, provided that he is not arrested by the Police pursuant to latest warrant of arrest issued in terms of order dated 3.6.2019.

8. Consequently, in view of above, present petition is allowed. Order dated 26.9.2018 passed by learned executing Court is set aside, subject to payment of costs of Rs.5,000/- to the respondent. Petitioner is directed to remain present before learned executing Court on **16.9.2019**, failing which order dated 26.9.2018 shall automatically revive and no more opportunity shall be afforded to the petitioner for the purpose. However, needless to say that in the event of petitioner presenting himself before learned executing Court on the date fixed above, learned executing Court shall afford him opportunity of hearing before proceeding to pass order, if any, in the matter.

9. The present petition stands disposed of in the aforesaid terms, alongwith pending applications, if any. Interim directions, if any, stand vacated.

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

Nathu Ram ...Petitioner

Versus

Atma Ram ...Respondent

Cr. Revision No. 341 of 2017

Decided on: September 5, 2019

Negotiable Instruments Act, 1881- Sections 118 & 139 – Dishonour of cheque – Presumptions of consideration – Effect – Whether additionally, complainant is required to prove source of money having been lent by him to accused? Held, in view of statutory presumptions as contained in Sections 118 & 139 complainant is not required to prove source of money lent to accused in proceedings under Section 139 of Act - Onus is upon accused to rebut the presumption that cheque was not drawn for consideration – Complainant's case can not be disbelieved for want of evidence regarding source of funds for advancing loan to accused. (Para 7).

Case referred:

Hiten P. Dalal v. Bartender Nath Bannerji, (2001) 6 SCC 16

For the petitioner: Mr. Maan Singh, Advocate.
For the respondent: Mr. Rohit Thakur, vice counsel.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under S.397 read with S.401 CrPC, lays challenge to judgment dated 19.9.2017 passed by learned Sessions Judge, Kullu, Himachal Pradesh in Cr. Appeal No. 10 of 2017, affirming judgment of conviction/sentence dated 6.12.2016/7.12.2016 passed by learned Additional Chief Judicial Magistrate, Kullu, District Kullu, Himachal Pradesh in Criminal Complaint No. 1524-I of 2013/424-I of 2015 (Old) 854-I of 2016(2013)(854-II of 2016(2013) (New), whereby court below, while holding petitioner-accused (hereinafter, 'accused') guilty of having committed offence punishable under S.138 of the Negotiable Instruments Act (hereinafter, 'Act') convicted and sentenced him to undergo simple imprisonment for a period of three months and to pay compensation of Rs.2,60,000/- to the respondent, and, in default of payment of fine, to further undergo simple imprisonment for one month.

2. Precisely, the facts as emerge from the record are that the respondent-complainant (hereinafter, 'complainant') instituted a complaint under S.138 of the Act in the court of Additional Chief Judicial Magistrate, Kullu, Himachal Pradesh, alleging therein that in the month of April, 2013, accused borrowed a sum of Rs.2.00 Lakh from him and assured to return the same within a period of one month. After expiry of said period, accused, with a view to discharge his liability, issued cheques amounting to Rs.1.00 Lakh each, Exts. CW-1/B and CW-1/C in favour of the complainant, however the fact remains that aforesaid cheques were dishonoured on account of insufficient funds. Complainant, after receipt of memo from the Bank concerned, served accused with legal notice Ext. CW-1/F, calling upon him to make the payment good within stipulated period but since the accused failed to make the payment good within the period prescribed in the legal notice, complainant was compelled to initiate proceedings under S.138 of the Act in the competent Court of law.

3. Learned trial Court, on the basis of evidence adduced on record by the respective parties, held accused guilty of having committed offence punishable under S.138 of the Act and accordingly convicted and sentenced him as per description given herein above. Being aggrieved and dissatisfied with aforesaid judgment/order of conviction recorded by learned trial Court, accused preferred an appeal in the court of learned first appellate Court, who vide judgment dated 19.9.2017, dismissed the appeal, as a consequence of which, judgment/order of conviction passed by learned trial Court came to be upheld. In the aforesaid background, accused has approached this Court in the instant proceedings seeking his acquittal after setting aside impugned judgments of conviction and sentence recorded by learned Courts below.

4. I have heard learned counsel for the parties and perused the material available on record.

5. Before adverting to the factual matrix of the matter, it may be noticed that the case at hand repeatedly came to be adjourned on the request of learned counsel for the accused enabling him to make good the payment qua cheque in issue, but till date, no amount has been paid in terms of judgment passed by trial Court, which otherwise stands affirmed by learned first appellate Court.

6. On 1.5.2019, Mr. Maan Singh, learned counsel for the accused stated before this Court that since accused is not coming forward to impart instructions, he may be permitted to withdraw his Power of Attorney. This Court having taken note of the aforesaid prayer made by Mr. Maan Singh, issued bailable warrants against the accused. On 19.6.2019, bailable warrants issued against accused came to be received back duly executed with the report that the accused is lodged in Central Jail, Nahan. Accused in his

statement given to the Police categorically stated that he has already engaged Mr. Maan Singh, Advocate to represent him in the Court. In view of aforesaid, case at hand is being heard finally.

7. After having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned Courts below while holding accused guilty of having committed offence punishable under S.138, this Court is not persuaded to agree with Mr. Maan Singh, Advocate appearing for the accused that both the learned Courts below have failed to appreciate the evidence in its right perspective, rather this Court finds from the record that the complainant has successfully proved on record that the accused, with a view to discharge his liability, issued cheques Exts. CW-1/B and CW-1/C amounting to Rs.1.00 Lakh each, which ultimately came to be dishonoured on account of insufficient funds, as is evident from memos Exts. CW-1/D and CW-1/E issued by the Bank concerned. Though, Mr. Maan Singh, learned counsel for the accused while making this Court to peruse the defence taken by accused made a serious attempt to persuade this Court to agree with his contention that since the complainant failed to prove source of money, courts below ought not have accepted the complaint having been filed under S.138 of the Act, but this Court is not inclined to accept aforesaid submission made by learned counsel for the accused, for the reason that issuance of cheques as well as signatures thereupon have not been denied specifically by the accused. Moreover, it is well settled by now that it is not necessary for the complainant in proceedings under S.138 to prove the source of money. In this regard, reliance is placed upon judgment rendered by Hon'ble Apex Court in **Rohitbhai Jivanlal Patel** vs. **State of Gujarat & Anr**, Cr. Appeal No. 508 of 2019, decided on 15th March, 2019, wherein Hon'ble Apex Court has held that in view of statutory presumptions as contemplated under Ss.118 and 139 of the Act, onus is shifted upon accused and unless accused discharges onus by leading evidence on record as to show preponderance of probabilities tilting in his favour, complainant's case cannot be disbelieved for want of evidence regarding source of funds for advancing as loan to the accused. Hon'ble Apex Court in the judgment (supra) has held as under:

> "17. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence.
>
> 19. Hereinabove, we have examined in detail the findings of the Trial Court and those of the High Court and have no hesitation in concluding that the present one was clearly a case where the decision of the Trial Court suffered from perversity and fundamental error of approach; and the High Court was justified in reversing the judgment of the Trial Court. The observations of the Trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the complainant and his witness, or that the witness of the

> complaint was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complaint to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 and 139 of the NI Act. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not. The other observations as regards any variance in the statement of complainant and witness; or want of knowledge about dates and other particulars of the cheques; or washing away of the earlier cheques in the 23 rains though the office of the complainant being on the 8th floor had also been of irrelevant factors for consideration of a probable defence of the appellant. Similarly, the factor that the complainant alleged the loan amount to be Rs. 22,50,000/- and seven cheques being of Rs. 3,00,000/- each leading to a deficit of Rs. 1,50,000/-, is not even worth consideration for the purpose of the determination of real questions involved in the matter. May be, if the total amount of cheques exceeded the alleged amount of loan, a slender doubt might have arisen, but, in the present matter, the total amount of 7 cheques is lesser than the amount of loan. Significantly, the specific amount of loan (to the tune of Rs. 22,50,000/-) was distinctly stated by the accused-appellant in the aforesaid acknowledgment dated 21.03.2017."

8. Though, the accused in his statement made under S.313 CrPC, has stated that neither any money was borrowed by him from the complainant nor any cheques were issued in favour of the complainant but, as has been take note herein above, no plausible evidence has been led on record to deny signatures upon the cheques in question. Accused though made an attempt to carve out a case that the cheques in question were issued to one Smt. Ram Chandi and complainant connived with said Ram Chandi and filed the complaint, but neither said Ram Chandi ever came to be examined nor accused led any specific evidence with regard to aforesaid defence taken by him, despite having been afforded opportunity by the court. Accused also tried to set up a case that cheques in question never came to be issued towards discharge of any lawful liability, but he has not been able to rebut the statutory presumption under Ss.118 and 139 of the Act *ibid*, in favour of holder of the cheques i.e. complainant. Once signatures on the cheques are not disputed, rather stand duly admitted, aforesaid plea with regard to cheques having not been issued towards discharge of lawful liability, rightly came to be rejected by learned Courts below. Reliance is placed upon **Hiten P. Dalal** v. **Bartender Nath Bannerji**, (2001) 6 SCC 16, wherein it has been held as under:

> "The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....."

9. Complainant, while examining himself as CW-1 tendered his evidence by way of evidence, Ext. CW-1/A, specifically deposing therein that the accused approached him and demanded Rs.2.00 Lakh, which was given to him and accused, with a view to discharge his legal liability, issued Cheques Exts. CW-1/B and CW-1/C. Said cheques

were dishonoured with the endorsements on memos i.e. 'insufficient fund' (Ext. CW-1/D and Ext. CW-1/E). Complainant also deposed that legal notice (Ext. CW-1/F) was issued by him to the accused but despite that accused failed to return the aforesaid amount to the complainant. Complainant in his cross-examination, specifically denied the suggestion put to him that the accused had not issued the cheque in question to him. Complainant also examined CW-2, Vivek Kapoor, Clerk, Punjab National Bank, Dhalpur.

10. Though, in the case at hand, record reveals that the defence counsel made an attempt to carve out a case that the complainant has failed to prove on record that cheques in question were issued by the accused to the complainant in discharge of legal liability but as has been noticed herein above, there is no specific denial, if any, with regard to signatures of the accused on the cheques in question. When signatures on the cheques in question are not denied, there is statutory presumption as envisaged under Ss.118 and 139 of the Act, in favour of holder of cheque i.e. complainant.

11. Having carefully perused the evidence, be it ocular or documentary, led on record by complainant, this Court is convinced and satisfied that that the complainant has successfully proved on record beyond reasonable doubt that the accused had drawn cheque in question for consideration and issued the same in discharge of legally enforceable liability towards complainant. Evidence led on record by complainant proves beyond doubt that cheques Exts. CW-1/B and CW-1/C were presented by complainant for encashment with the Banker of the accused and same were dishonoured on account insufficient funds vide Exts. CW-1/D and CW-1/E.

12. Similarly, complainant has also proved that he had issued legal notice Ext. CW-1/F prior to instituting complaint under S.138 demanding cheque amounts from the accused, as is clearly evident from the postal receipts, Ext. CW-1/G. Acknowledgement Ext. CW-1/H, which bears signatures of accused clearly proves that notice was received by the accused but despite having received the same, he failed to make the payment good within stipulated period. All the ingredients of S.138 of the Act stand duly proved in the case at hand as such, this Court finds no illegality or infirmity in the judgments of conviction and sentence passed by learned Courts below, as such, same do not call for an interference

13. In view of above, the petition at hand is dismissed being devoid of merit. Judgment passed by learned Court below is upheld.

Pending applications, if any, stand disposed of. Bail bonds, if any, furnished by the accused stand cancelled.

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

Nathu Ram .....Petitioner

Versus

Devinder Singh .....Respondent

Cr. Revision No. 32 of 2018 with
Cr. Revisions Nos. 340 and 341 of 2017
Decided on: September 5, 2019

Negotiable Instruments Act, 1881- Sections 118 & 139 – Dishonour of cheque – Presumptions of consideration – Effect – Whether additionally complainant is required to prove source of money having been lent by him to accused ? Held, in view of statutory presumptions as contained in Sections 118 & 139 complainant is not required to prove source of money lent to accused in proceedings under Section 139 of Act - Onus is upon accused to rebut the presumption that cheque was not drawn for consideration – Complainant's case can not be disbelieved for want of evidence regarding source of funds for advancing loan to accused. (Para 8).

For the petitioner: Mr. Maan Singh, Advocate.

For the respondents: Mr. B.L. Soni and Mr. Aman Parth Sharma, Advocate, for the respondent in Cr. Revision Nos. 38 of 2018 and 340 of 2017.

Mr. Rohit, vice counsel for the respondent in Cr. Revision No. 341 of 2017.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Since common questions of law and facts are involved in these petitions, which have been filed by one and same person namely Nathu Ram, same were tagged together and are being disposed of vide this common judgment. However, for the sake of clarity, facts of Cr. Revision No. 32 of 2018, shall be discussed hereinafter.

2. Instant criminal revision petition filed under S.397 read with S.401 CrPC, lays challenge to judgment dated 2.8.2017 passed by learned Additional Sessions Judge, Kullu, Himachal Pradesh in Cr. Appeal No. 23 of 2017, affirming judgment of conviction/sentence dated 6.12.2016/7.12.2016 passed by learned Additional Chief Judicial Magistrate, Kullu, District Kullu, Himachal Pradesh in Criminal Complaint No. 300-I/2013/195-1/2015 (old), 388-I/2016/13/288-III/2016/13 (new), whereby court below, while holding petitioner-accused (hereinafter, 'accused') guilty of having committed offence punishable under S.138 of the Negotiable Instruments Act (hereinafter, 'Act') convicted and sentenced him to undergo simple imprisonment for a period of two month and to pay compensation of Rs.1,30,000/- to the respondent, and, in default of payment of fine, to further undergo simple imprisonment for one month.

3. Precisely, the facts as emerge from the record are that the respondent-complainant (hereinafter, 'complainant') instituted a complaint under S.138 of the Act in the court of Additional Chief Judicial Magistrate, Kullu, Himachal Pradesh, alleging therein that in the month of March, 2013, accused borrowed a sum of Rs.1,00,000/- from him and assured to return the same within a period of one month. After expiry of said period, accused, with a view to discharge his liability, issued cheque amounting to Rs.1,00,000/- Ext. CW-1/B in favour of the complainant, however the fact remains that aforesaid cheque was dishonoured on account of insufficient funds. Complainant, after receipt of memo from the Bank concerned, served accused with legal notice Ext. CW-1/D, calling upon him to make good the payment within stipulated period but since the accused failed to make good the payment within the period prescribed in the legal notice, complainant was compelled to initiate proceedings under S.138 of the Act in the competent Court of law.

4. Learned Additional Chief Judicial Magistrate, on the basis of evidence adduced on record by the respective parties, held accused guilty of having committed offence punishable under S.138 of the Act and accordingly convicted and sentenced him as per description given herein above. Being aggrieved and dissatisfied with aforesaid judgment/order of conviction recorded by learned trial Court, accused preferred an appeal in the court of learned Additional Sessions Judge, Kullu, Himachal Pradesh, who vide judgment dated 2.8.2017, dismissed the appeal, as a consequence of which, judgment/order of conviction passed by learned trial Court came to be upheld. In the aforesaid background, accused has approached this Court in the instant proceedings seeking his acquittal after setting aside impugned judgments of conviction and sentence recorded by learned Courts below.

5. I have heard learned counsel for the parties and perused the material available on record.

6. Before adverting to the factual matrix of the matter, it may be noticed that the case at hand repeatedly came to be adjourned on the request of learned counsel for the accused enabling him to make good the payment qua cheque in issue, but till date, no

amount has been paid in terms of judgment passed by trial Court, which otherwise stands affirmed by learned Additional Sessions Judge on 2.8.2017.

7. On 1.5.2019, Mr. Maan Singh, learned counsel for the accused stated before this Court that since accused is not coming forward to impart instructions, he may be permitted to withdraw his Power of Attorney. This Court having taken note of the aforesaid prayer made by Mr. Maan Singh, issused bailable warrants against accused. On 19.6.2019, bailable warrants issued against accused came to be received back duly executed with the report that the accused is lodged in Central Jail, Nahan. Accused in his statement given to the Police categorically stated that he has already engaged Mr. Maan Singh, Advocate to represent him in the Court. In view of aforesaid, case at hand is being heard finally.

8. After having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned Courts below while holding accused guilty of having committed offence punishable under S.138, this Court is not persuaded to agree with Mr. Maan Singh, Advocate appearing for the accused that both the learned Courts below have failed to appreciate the evidence in its right perspective, rather this Court finds from the record that the complainant has successfully proved on record that accused, with a view to discharge his liability, issued cheque Ext. CW-1/B amounting to Rs.1.00 Lakh, which ultimately came to be dishonoured on account of insufficient funds, as is evident from memo Ext. CW-1/C issued by the Bank concerned. Though, Mr. Maan Singh, learned counsel for the accused while making this Court to peruse the defence taken by accused made a serious attempt to persuade this Court to agree with his contention that since the complainant failed to prove source of money, courts below ought not have accepted the complaint having been filed under S.138 of the Act, but this Court is not inclined to accept aforesaid submission made by learned counsel for the accused, for the reason that issuance of cheque as well as signatures thereupon have not been denied specifically by the accused. Though, accused in his statement made under S.313 CrPC, has stated that neither any money was borrowed by him from the complainant nor cheque was issued in favour of the complainant but, as has been take note herein above, no plausible evidence has been led on record to deny signatures upon the cheque in question. Moreover, it is well settled by now that it is not necessary for the complainant in proceedings under S.138 to prove the source of money. In this regard, reliance is placed upon judgment rendered by Hon'ble Apex Court in **Rohitbhai Jivanlal Patel** vs. **State of Gujarat & Anr**, Cr. Appeal No. 508 of 2019, decided on 15th March, 2019, wherein Hon'ble Apex Court has held that in view of statutory presumptions as contemplated under Ss.118 and 139 of the Act, onus is shifted upon accused and unless accused discharges onus by leading evidence on record as to show preponderance of probabilities tilting in his favour, complainant's case cannot be disbelieved for want of evidence regarding source of funds for advancing as loan to the accused. Hon'ble Apex Court in the judgment (supra) has held as under:

> "17. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such

facts/material/circumstances which could be of a reasonably probable defence.

19. Hereinabove, we have examined in detail the findings of the Trial Court and those of the High Court and have no hesitation in concluding that the present one was clearly a case where the decision of the Trial Court suffered from perversity and fundamental error of approach; and the High Court was justified in reversing the judgment of the Trial Court. The observations of the Trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the complainant and his witness, or that the witness of the complaint was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complaint to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 and 139 of the NI Act. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not. The other observations as regards any variance in the statement of complainant and witness; or want of knowledge about dates and other particulars of the cheques; or washing away of the earlier cheques in the 23 rains though the office of the complainant being on the 8th floor had also been of irrelevant factors for consideration of a probable defence of the appellant. Similarly, the factor that the complainant alleged the loan amount to be Rs. 22,50,000/- and seven cheques being of Rs. 3,00,000/- each leading to a deficit of Rs. 1,50,000/-, is not even worth consideration for the purpose of the determination of real questions involved in the matter. May be, if the total amount of cheques exceeded the alleged amount of loan, a slender doubt might have arisen, but, in the present matter, the total amount of 7 cheques is lesser than the amount of loan. Significantly, the specific amount of loan (to the tune of Rs. 22,50,000/-) was distinctly stated by the accused-appellant in the aforesaid acknowledgment dated 21.03.2017."

9. Complainant, while examining himself as CW-1 tendered his evidence by way of evidence Ext. CA specifically deposing therein that the accused approached him and demanded Rs.1.00 Lakh, which was given to him and accused, with a view to discharge his legal liability, issued Cheque Ext. CW-1/B. Said cheque was dishonoured with the endorsement on memo i.e. 'insufficient fund' (Ext. CW-1/C). Complainant also deposed that legal notice (Ext. CW-1/D) was issued by him to the accused but despite that accused failed to return the aforesaid amount to the complainant. Complainant in his cross-examination, specifically denied the suggestion put to him that the accused had not issued the cheque in question to him. Complainant also examined CW-2, Ramesh Kumar Postmatn, who categorically deposed that the registered letter Ext. CW-1/D was delivered to the accused. Registered delivery letter is Ext. CW-2/A.

10. CW-3 Roshan Lal, Dealing Hand of Union Bank of India, Bhunter proved statements of account (Ext. CW-3/B).

11. Though, in the case at hand, record reveals that the defence counsel made an attempt to carve out a case that since the complainant failed to prove on record that

cheque Ext. CW-1/B was issued by the accused to the complainant in discharge of legal liability but as has been noticed herein above, there is not specific denial, if any, with regard to signatures of the accused on the cheque in question, whereas signatures on the cheque in question are not denied, there is statutory presumption as envisaged under Ss.118 and 139 of the Act in favour of holder of cheque i.e. complainant.

12. Having carefully perused evidence, be it ocular or documentary, led on record by complainant, this Court is convinced and satisfied that that the complainant successfully proved on record beyond reasonable doubt that the accused had drawn cheque in question for consideration and issued the same in discharge of legally enforceable liability towards complainant. Evidence led on record by complainant proves beyond doubt that cheque Ext. CW-1/B was presented by complainant for encashment with the Banker of the accused and same was dishonoured on account insufficient funds vide Ext. CW-1/C.

13. Similarly, complainant has also proved that he had issued legal notice Ext. CW-1/D prior to instituting complaint under S.138 demanding cheque amount from the accused, as is clearly evident from the postal receipt, Ext. CW-1/E. Acknowledgement Ext. CW-1/F, which bears signatures of accused and certificate Ext. CW-2/A placed on record clearly prove that notice was received by the accused but despite having received the same, accused failed to make good the payment within stipulated period. All the ingredients of S.138 of the Act stand duly proved in the case at hand as such, this Court finds no illegality or infirmity in the judgments of conviction and sentence passed by learned Courts below, as such, same do not call for an interference

14. In view of above, all the petitions are dismissed being devoid of merit. Judgments passed by appellate court(s), are upheld.

Pending applications, if any, in all the petitions stand disposed of. Bail bonds, if any, furnished by the accused stand cancelled.

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

Suresh Kumar and another .....Appellants/Defendants.

Versus

Laxmi Devi .....Respondent/Plaintiff.

RSA No.318 of 2007.
Judgment reserved on: 04.09.2019.
Date of decision: 9th September, 2019.

Indian Registration Act, 1908 – Section 17 (1-A) – **Transfer of Property Act, 1882 (TPA)** – Section 53–A - Agreement to sell – Requirement of registration - Held, agreement to sell immoveable property does not create any interest in the land and thus it is not compulsorily registrable – it is only when party seeks to invoke Section 53 – A of TPA, that question of registration of such agreement comes into picture (Paras 11 & 12)

Specific Relief Act, 1963 – Section 38 – Permanent prohibitory injunction - Grant of – Held, plaintiff in settled possession of land, is entitled for a decree of permanent prohibitory injunction against defendant against his unauthorized interference (Para 14)

For the Appellants : Mr. J.L. Bhardwaj and Mr. Sanjay Bhardwaj, Advocates.
For the Respondent : Mr. Vishal Panwar, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Defendants are the appellants, who aggrieved by the judgment and decree passed by the learned first appellate Court, whereby it reversed the judgment and decree

passed by the learned trial Court and decreed the suit of the plaintiff, have filed the instant appeal.

2. The parties hereinafter shall be referred to as the 'plaintiff' and 'defendants'.

3. The plaintiff filed a suit for permanent injunction on the allegations that she is owner in possession of the land bearing Khata Khatauni No.10/10, Khasra Nos. 88/18, 85/31, 86/31, 84/32, total kitas-4, measuring 14 biswas, situated in Mauza Mashobra, Pargana Dharti, Tehsil Kasauli, District Solan, H.P., as per the agreement dated 22.08.1993, executed between the plaintiff and S/Sh. Babu Ram, Sant Ram, Roshan Lal, Vidya Devi, Naresh Kumar, Banwari Lal, Gianwanti, Prem Lata, Raksha Devi and Krishna Devi. It was averred that pursuant to the agreement, possession was delivered to the plaintiff at the spot and since then she is in peaceful possession thereof. The defendants despite being strangers and having no right, title or interest were interfering in her possession, hence, the suit.

4. The defendants contested the suit by filing written statement wherein preliminary objections regarding locus standi, maintainability, no cause of action, bad for non-joinder of necessary parties, not properly valued for the purpose of court fee and jurisdiction and the Court having no territorial jurisdiction etc., were raised. On merits, it was contended that the plaintiff is neither owner nor in possession of the suit land. It was averred that neither the plaintiff nor her predecessor-in-interest ever remained in possession of the suit land for the last 50 years and these were the defendants and earlier to that their parents, who were in actual and physical possession of the suit land. The agreement dated 22.08.1993 was denied and was alleged to be void and illegal on the basis of which no lawful right or title could be transferred to the plaintiff. It was further averred that the revenue record showing the names of Babu Ram etc. as owners in possession was not based upon the factual position existing on the spot. It was also averred that the agreement in question was of no value as the same was not registered under the provisions of law.

5. On the pleadings of the parties, the learned trial Court framed the following issues/additional issues on 04.12.1996 and 22.11.2002:

> "1. Whether the plaintiff is owner in possession of the suit land and defendants are threatening to dispossess the plaintiff? OPP.
>
> 2. Whether the plaintiff has no locus standi? OPD.
>
> 3. Whether the suit is not maintainable? OPD.
>
> 4. Whether the plaintiff has no cause of action? OPD.
>
> 5. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.
>
> 6. Whether the suit is bad for want of mis-joinder and non-joinder of necessary parties? OPD.
>
> 7. Whether this Court has no jurisdiction? OPD.
>
> 8. Whether the plaintiff is estopped from filing the suit, as alleged? OPD.
>
> 8A. Whether the defendant has become owner in possession of the suit land by way of adverse possession, as alleged? OPD.
>
> 9. Relief."

6. The learned trial Court after recording evidence and evaluating the same dismissed the suit vide judgment and decree dated 26.04.2004. Feeling aggrieved by the aforesaid judgment and decree, the plaintiff filed an appeal before the learned first appellate Court, who vide judgment and decree dated 20.09.2004 allowed the appeal, constraining the defendants to file the instant appeal.

7. On 23.05.2008, the appeal came to be admitted on the following substantial questions of law:

"1. Whether the impugned judgment and decree passed by the Ld. Lower Appellate Court is sustainable especially when the Ext. PW-1/C was not registered as required under law?

2. Whether any reliance can be placed upon Ex. PW-1/C an agreement of sale especially when it was not admissible in evidence without its registration?

3. Whether the plaintiff has proved the possession upon the suit land especially when the true owners had later on filed the suit for injunction against the appellants qua the same property?"

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

8. At the outset, it needs to be observed that defendants during the pendency of this appeal filed an application being CMP No.10471 of 2016 for placing on record certified copy of the plaint, written statement and the order of withdrawal of suit dated 26.11.2005 passed in Civil Suit No. 1/1 of 2002 titled Basheshwar Prasad and others versus Smt. Shyami and others.

9. Since, the application is intrinsically interlinked and interconnected with question No.3, therefore, the same will be taken up for consideration along with question No.3.

Substantial Questions of Law No.1 and 2.

10. Since, both these questions are somehow interlinked and interconnected, therefore, they are taken up together for consideration.

11. It is more than settled that an agreement for sale by itself does not create any interest or charge in a property agreed to be sold and it is for this purpose that the agreement for sale is not treated as a conveyance for the purpose of Registration Act and, therefore, not compulsorily registered under Clause (b) of sub-section(1) of Section 17 of the Registration Act.

12. The learned counsel for the appellants vehemently argued that since the agreement of sale whereby possession has been delivered to the plaintiff was not admissible in evidence as the same was not registered and, therefore, could not have been relied upon by the learned first appellate Court for decreeing the suit of the plaintiff. In support of this submission, learned counsel for the appellants sought sustenance to be drawn from the provisions of Section 17(1A) of the Registration Act. It has to be noticed here that sub-section(1A) of Section 17 of the Indian Registration Act, 1908 was introduced by the Registration and Other Related Laws (Amendment) Act 2001, which came into force with effect from 24.09.2001. As per sub-section(1A) of Section 17 of the Registration Act, the documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53-A.

13. However, the agreement of sale relied upon by the defendants in this case is dated 22.08.1993, much prior to sub-section(1A) of Section 17 of the Registration Act coming into force. Therefore, the document in question was not a compulsorily registrable document, even for the purpose of Section 53-A of the Act, since sub-section (1A) of Section 17 of the Registration Act was not in force as on 22.08.1993.

14. Apart from above, the suit filed by the plaintiff was for injunction and the Courts below were only required to see as to whether the plaintiff was in actual and physical possession of the property so as to entitle her to claim injunction. The defendants could have opposed the claim only if they could have proved a better title than

the one possessed by the plaintiff and were in possession. On failure to do so, the learned first appellate Court committed no error in decreeing the suit of the plaintiff.

15. At this stage, it would be apposite to refer to the judgment of the Hon'ble Supreme Court in ***Ramesh Chand Ardawatiya*** *vs.* ***Anil Panjwani (2003) 7 SCC 350***. The facts therein were that a person had been put in possession of certain immovable properties in part performance of the agreement to sell under Section 53-A of the Transfer of Property Act. The plaintiff filed a suit for declaration that he is owner in possession of the suit property as also for permanent prohibitory injunction against the third party. The Hon'ble Supreme Court held that the plaintiff cannot get a declaration as to the ownership because of the sale deed having not been executed, but is entitled to the declaration of possessory title and permanent prohibitory injunction. It is apt to reproduce the relevant observations as contained in paras 38 and 39 which read as under:

> "*38. From the above evidence it is proved that the title of the plot vests in Shri Niwas Vaidhya. He has entered into contract for sale for consideration in favour of the plaintiff. Upto 1.12.1985 he was in possession of the property. On and after 1.12.1985 the plaintiff remained in possession of the plot. He raised a boundary wall to protect the possession as a prospective vendee. The contract for sale was acted upon. The defendant has not been able to prove any right to possess the suit property--a right better than that of the plaintiff--much less a title in himself. This is an appropriate case where the plaintiff must be held to have been in peaceful and lawful possession of the suit property invaded upon by the defendant otherwise than by due process of law and hence the status quo ante by reference to the date of accrual of cause of action must be restored followed by incidental and consequential reliefs of injunctions. The defendant may then seek recovery of possession but only by establishing his title therefore in duly constituted legal proceedings before a competent forum. The plaintiff had rushed to the Court without any loss of time. His averments made in the plaint and the evidence have remained uncontroverted and unrebutted.*
>
> *39. On the proven facts stated hereinabove the plaintiff is not entitled to a declaration that he is owner of the property. It will not be out of place of mention that it was conceded at the Bar during the course of hearing that the plaintiff has filed as suit for specific performance of agreement to sell dated 1.12.1985 against Shri Niwas Vaidhya which is pending in the Civil Court. The suit had to be filed because Shri Niwas Vaidhya fully supporting the plaintiff upto the date of his being examined in the Court seems to have changed his mind subsequently. There is no pleading and no proof of the defendant having any title - much less a title better than that of the plaintiff- to the suit property. He could not have dispossessed the plaintiff nor interfered with the peaceful possession and enjoyment of the plot by the plaintiff. The plaintiff is, therefore, entitled to a declaration of his possessory title that he was in peaceful possession and enjoyment of the property until 8.2.1987 on which date his possession was threatened by the defendant by attempting to raise unauthorized construction over the property. The judgment and decree passed by the Trial Court and maintained by the First Appellate Court and the High Court need to be modified suitably to bring it in conformity with the finding arrived at by us herein."*

The substantial questions of law, referred supra, are answered accordingly.

Substantial Question of Law No.3 and CMP No. 10471 of 2016.

16. By medium of this application, the defendants have sought to bring on record the certified copy of the plaint, written statement and order of withdrawal of suit

dated 26.11.2005 passed in Civil Suit No. 1/1 of 2002, titled as 'Basheshwar Prasad and others versus Smt. Shyami and others'.

17. Learned counsel for the appellants would contend that in the suit so filed, the plaintiffs therein i.e. Basheshwar Prasad and others, who happened to be the owners of the land have claimed themselves to be not only the owners, but even in possession of the same. He would further contend that once the suit filed by the owners is dismissed as withdrawn, the present appeal would not be maintainable.

18. I really do not find any force in this contention. Admittedly, the plaintiff herein was not a party to the suit instituted by Basheshwar Prasad and others against the defendants herein. Once that be so, then obviously, neither the suit nor the pleadings therein nor result thereof can be used against the plaintiff.

The application is disposed of and the substantial question of law is answered accordingly.

19. Consequently, I find no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Prem Chand .....Appellant.

Versus

State of H.P. .....Respondent.

Cr. Appeal No. 56 of 2017.
Reserved on: 10.7.2019.
Decided on: 5.9.2019.

Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 20 – Recovery of 'charas' – Non-joining of independent persons in search proceedings – Effect – Held, mere non-joining of witnesses in search proceedings per-se is not a ground to disbelieve prosecution case – The relevant consideration is whether independent persons were actually available at that place and time. (Para 17). Title: Prem Chand vs. State of H.P. Page - 267

Narcotic Drugs Psychotropic Substances Act, 1985 – Sections 35 & 54 – Presumption – Applicability – Held, presumption as envisaged in Sections 35 & 54 of Act can be drawn against accused only on proof of his being in exclusive possession of a rucksack containing 'charas'. (Para 30).

Cases referred:

Makhan Singh V. State of Haryana (2015) 12 SCC 247

State of H.P. V. Balkrishan, ILR 2017 (I) HP 229 (D.B.)

Krishan Chand vs. State of H.P., AIR 2017 SC 3751

Noor Aga V. State of Punjab and another, 2008

State of Punjab V. Baldev Singh (1999) 3 SCC 977

Girija Prasad V. State of M.P. (2007) 7 SCC 625

Govindaraju alias Govinda V. State by Sriramapuram Police Station and another, (2012) 4 SCC 722

For the appellant : Ms. Sheetal Vyas, Advocate.

For the respondent : Mr. Narender Guleria, Addl. Advocate General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Appellant herein is a convict. He has been convicted by learned Addl. Sessions Judge (Special Judge) Kullu, District Kullu, H.P. for the commission of offence punishable under Section 20 of the Narcotic Drugs and Psychotropic substances Act, 1987 (hereinafter referred to as the ND & PS Act in short) and sentenced to undergo rigorous imprisonment for 10 years and to pay Rs.1,00,000/- as fine vide judgment dated 16.12.2016 passed in Sessions Trial 25 of 2015.

2. The allegations against the appellant (hereinafter referred to as the accused) in a nut shell are that on 6.1.2015 around 5:00 PM, when apprehended by the police of Police Post Jari, PS Sadar Kullu near Village Chowki, 3 km. ahead of dam site, Manikaran, District Kullu, was found in conscious and exclusive possession of charas weighing 1197 grams (1 kg 197 grams) un-authorisedly and thereby committed offence punishable under Section 20 of the ND & PS Act.

3. Now, if coming to the factual matrix, the prosecution case as disclosed from the report filed under Section 173 Cr.P.C. in a nut shell is that on 6.1.2015, police party headed by PW-12 ASI Dharam Chand, In-charge Police Post Jari (Investigating Officer) and comprising PW-10 HHC Lal Singh, Constable Nitish Kumar, Constable Nitin Kumar and PW-11 Const. Naveen Kumar left the Police Post towards Village Chowki, Dam side etc. for patrolling at 2:00 PM. Rapat in daily diary Ext. PW-2/A was entered by PW-12 ASI Dharam Chand in the daily diary. The police party when reached at a place 3 kms. away from Village Chowki towards Malana Dam site, laid Naka around 3:00 PM. The accused was noticed walking on the road around 5:00 PM. He was going towards Jari side and carrying a black coloured rucksack on his back. On seeing the police, he became perplexed and took reverse turn and started walking. He was nabbed and on enquiry by PW-12 ASI Dharam Chand disclosed his name as Prem Chand son of Sh. Sui Ram, resident of Village Malana. A suspicion arose in the mind of PW-12 ASI Dharam Chand that accused may have some contraband in his bag and as such it was deemed appropriate to conduct the search of his bag. The spot, however, was secluded in a forest and there was no habitation at least up to a distance of 3 kms. Irrespective of it, PW-11 Const. Naveen Kumar was deputed to find out some persons for being associated as witnesses. This witness, however, returned to the spot after 15-20 minutes without finding anyone available there. The I.O. PW-12 ASI Dharam Chand associated PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar present on the spot as witnesses. The rucksack Ext. P-8 with inscription “HP” the accused carrying on his back was opened by PW-12 ASI Dharam Chand. Another carry bag of beige colour with inscription “ELITE” was found kept therein. On opening this bag, 4 polythene zipper pouches Ext. P-2 to P-5 were found and each of the pouch was containing charas in the shape of squares, plates and bars Ext. P-6. The recovered charas was weighed with electronic scale in the I.O. Kit and found 1197 grams. It was repacked firstly in the brown coloured carry bag and thereafter in the rucksack and thereafter put in a cloth parcel. The memo Ext. PW-10/B was prepared by PW-12 ASI Dharam Chand regarding identity of the recovered contraband allegedly charas. The photographs Ext. P-1 to P-6 were also clicked. The parcel containing the recovered charas was sealed with 6 seals of impression “T”. Facsimile of seal “T” was taken on 4 pieces of cloth at 3 places each Ext. PW-10/C. NCB form Ext. PW-4/A was filled in triplicate. Seal “T” was handed over to PW-10 HHC Lal Singh vide memo Ext. PW-10/E. The recovered charas was taken into possession vide seizure memo Ext. PW-10/D. It is thereafter rukka Ext. PW-12/A was scribed by PW-12 ASI Dharam Chand and handed over to PW-11 Const. Naveen Kumar to take the same to the Police Station for registration of FIR. PW-11 Const. Naveen Kumar handed over the rukka Ext. PW-12/A to PW-8 SHO Neel Chand in Police Station Sadar Kullu on 6.1.2015 itself. PW-8 SHO Neel Chand in turn has registered FIR Ext. PW-8/A and handed over the case file to PW-11 Const. Naveen Kumar with a direction to take it back to the spot and hand over the same to I.O. there.

4. The I.O. PW-12 ASI Dharam Chand has prepared the spot map Ext. PW-12/B. He had recorded the statements of the witnesses under Section 161 Cr.P.C. The accused was arrested vide arrest memo Ext. PW-10/F and the information qua his arrest

was given to his father Sui Ram, as he desired. On 7.1.2015, at about 12:30 PM, the case property was handed over by PW-12 ASI Dharam Chand to PW-8 SHO Neel Chand, PS Sadar Kullu along with seizure memo and NCB form. He re-sealed the case property by affixing 3 impressions of seal "A". Column Nos. 9 to 11 of NCB-1 form were also filled by PW-8 SHO Neel Chand and handed over to PW-4 MHC Gajender Pal along with sample of seals, NCB form and seizure memo etc. for safe custody in the malkhana. Consequently, PW-4 MHC Gajender Pal entered the same in malkhana register. The special report Ext. PW-9/A was prepared by PW-12 ASI Dharam Chand and personally handed over the same to Addl. Superintendent of Police, Nihal Chand. On 8.1.2015, PW-4 MHC Gajender Pal handed over the sealed parcel, sample of seal, NCB form and seizure memo to PW-1 Const. Mahesh Kumar vide RC No. 12 of 2015 Ext. PW-4/C and directed him to deposit the same in FSL, Junga for chemical analysis. PW-1 Const. Mahesh Kumar deposited the case property with FSL Junga for chemical analysis on the same day and handed over the receipt on RC to PW-4 MHC Gajender Pal on his arrival in the Police Station. The report of FSL is Ext. PX. On 26.1.2015, Const. Suresh Kumar who had gone to deposit the case property of FIR No. 22/2015 have brought the case property of this case from the FSL and handed over the same to the MHC.

5. On completion of the investigation, PW-8 SHO Neel Chand has prepared the final report under Section 173 Cr.P.C. and filed the same in the Court.

6. Learned trial Judge has framed the charge under Section 20 of the ND & PS Act against the accused who pleaded not guilty to the same and claimed trial. The prosecution in support of its case has examined 12 witnesses in all.

7. The material prosecution witnesses are PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar because the search and seizure having taken place on the spot at the instance of I.O. PW-12 ASI Dharam Chand has been witnessed by both of them.

8. The remaining witnesses i.e. PW-1 Const. Mahesh Kumar who handed over the case property vide RC No. 12/15 by PW-4 MHC Gajender Pal, PW-2 Sanjay Kumar, who proved the report Ext. PW-2/A vide which the police party headed by ASI PW-12 ASI Dharam Chand left for patrolling towards village Chowki and Dam side, PW-3 HC Rakesh Kumar, who has proved the certificate Ext. PW-3/A qua writing rapat Nos. 25 & 26 and also FIR on computer in the Police Station, PW-4 MHC Gajender Pal, the Addl. MHC to whom the sealed parcel containing the case property, another sealed parcel containing rucksack, samples of seal "A" & "T", NCB form in triplicate were handed over by PW-8 SHO Neel Chand for safe custody in the malkhana, PW-5 LC Saroj who has proved rapat Nos. 25 & 26 Ext. PW-5/A and Ext. PW-5/B and also the certificate Ext. PW-5/C, PW-6 HHC Khub Ram who has proved the rapat No. 25 dated 8.1.2015 (Ext. PW-6/A) and rapat No. 28 dated 26.1.2015 (Ext. PW-6/B), PW-7 Const. Suresh Kumar, who on 23.1.2015 went to FSL, Junga to deposit the case property pertaining to FIR No. 22/15 and when returned on 26.1.2015 brought back the same and handed over to PW-4 MHC Gajender Pal, PW-8 SHO Neel Chand recorded the FIR Ext. PW-8/A on 6.1.2015 on receipt of the rukka Ext. PW-12/A brought to him by PW-11 Const. Naveen Kumar, he resealed the two parcels brought to him by PW-12 ASI Dharam Chand on 7.1.2015, the I.O. filled in relevant columns of NCB form and thereafter handed over the same to PW-4 MHC Gajender Pal and PW-9 HC Balbir Sharma, the then Reader to Addl. Superintendent of Police, Kullu who has proved the special report Ext. PW-9/A and abstract of the register Ext. PW-9/B, endorsement made thereon by Addl. Superintendent of Police Ext. PW-9/C and affidavit Ext. PW-9/D are formal and the evidence as has come on record by way of their testimony can be used as link evidence.

9. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C. has denied all the incriminating circumstances appearing against him in the prosecution evidence either being wrong or for want of knowledge. According to him, on way back to home with kerosene oil and eatables, he was intercepted by the police near Malana Barrier. He disclosed his antecedents to the police in Police Post Jari. The independent witnesses were available and vehicles were plying on the road. All the

documents were tampered by the police to implicate him falsely in this case. It has also been pleaded in his defence that he is innocent, poor villager and was carrying kerosene oil and eatables for winter. He had no charas in his possession. The police implicated him falsely in this case.

10. Learned Trial Judge, on appreciation of the oral as well as documentary evidence and taking into consideration the arguments addressed on behalf of the prosecution as well as in defence of the accused, has concluded that charas weighing 1197 grams has been recovered from the conscious and exclusive possession of the accused. He, therefore, has been convicted and sentenced as pointed out at the outset.

11. The legality and validity of the impugned judgment has been questioned on the grounds, inter alia, that the impugned judgment is against law and facts of the case. The same is based on surmises and conjectures which has resulted in miscarriage of justice to the accused. Contradictory versions having come in the statements of prosecution witnesses have erroneously been made basis while recording the findings of conviction and sentence against him. The case property was tampered with when dispatched from the malkhana to FSL, Junga for testing. The story of the prosecution is usual as is being concocted by the Himachal Pradesh Police in most of the cases registered under the ND & PS Act. The search of the rucksack allegedly carried by the accused was conducted in the manner which is contrary to the statutory requirements. The prosecution has failed to prove that the contraband allegedly recovered is charas within the meaning of ND & PS Act. The report Ext. PX of the laboratory is inconclusive to hold that the substance allegedly recovered falls within the scope of prohibited substances under the ND & PS Act. It is only the police personnel were associated to witness the search and seizure. Since the present allegedly is a case of chance recovery, the Investigating Officer should have associated the independent witnesses. The investigation was conducted in the police station and not at the spot. The link evidence is missing. The seal used for sealing the parcel containing the recovered substance was not produced in the Court. The trial Court allegedly failed to appreciate the evidence available on record in its right perspective. The impugned judgment, as such, has been sought to be quashed and set aside and the accused acquitted of the charge framed against him.

12. Ms. Sheetal Vyas, Advocate, learned counsel representing the accused has argued that in the given facts and circumstances when the spot is a secluded place in forest, having no evidence of any source of light, the investigation could have not been conducted there as by 5-5:20 PM, it was already dark being month of January. There being no evidence that torch or search light was available with police officials, the plea of the defence that investigation has been conducted in the Police Post is nearer to the factual position. The photographs having clicked in sunlight falsify the prosecution case. It has also been argued that in the rapat Ext. PW-2/A there is nothing that the police party had the I.O. kit, the empty parcel, cloth and seal etc. The burden to prove so, therefore, was on the prosecution that too in a case of chance recovery. The non-production of the seal in the Court is also stated to have resulted in miscarriage of justice to the accused. Independent witnesses, could have been easily associated because as per the prosecution evidence itself, the employees and labour reside at Dam site at village Chowki having their shops situated nearby. It has, therefore, been urged that no case against the accused is made out and the findings of conviction as recorded by learned trial Court against him are not legally sustainable.

13. On the other hand, Mr. Narender Guleria, learned Addl. Advocate General while repelling the arguments addressed on behalf of the State has pointed out from the testimony of material prosecution witnesses PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar that the same is consistent and worthy of credence. They both have corroborated each and every aspect of the prosecution case. The I.O. PW-12 ASI Dharam Chand also lends corroboration to their testimony. The I.O. PW-12 ASI Dharam Chand had deputed PW-11 Const. Naveen Kumar in search of someone available nearby for being associated as independent witness, however, PW-11 Const. Naveen Kumar returned

alone after 15-20 minutes as no one was available nearby. According to learned Addl. Advocate General, the present is a case where the I.O. made all efforts to trace out someone for being associated as independent witness but of no avail. The prosecution is stated to have proved its case against the accused beyond all reasonable doubt. The impugned judgment, as such, is stated to be well reasoned, hence calls for no interference by this Court.

14. Considering the rival submissions made on both sides, following points arise for determination in the present appeal:-

> i) Is the present a case where witnesses could have been easily associated to witness the search and seizure but PW-12, the Investigating Officer has failed to do so intentionally and deliberately and as a result thereof the proceedings qua search and seizure of the contraband from the conscious and exclusive possession of the accused have vitiated and as such the impugned judgment is not legally sustainable ?
>
> ii) Is the evidence as has come on record by way of testimony of official witnesses i.e. PW-10 HHC Lal Singh and PW-11 Constable Naveen Kumar is not consistent and rather contradictory in nature, hence not worthy of credence?
>
> iii) Whether the inconsistencies, contradictions and other procedural irregularities, if any, in the prosecution evidence renders the prosecution case qua recovery of contraband allegedly charas from the conscious and exclusive possession of the accused doubtful?

15. All the points have been taken up for consideration together. It is well settled at this stage that joining the independent persons to witness the search and seizure in a case of this nature is in the interest of fair trial. However, one should not lose sight of the fact that independent persons are not available at all places and at every time for being associated as witnesses by the Investigating Officer to witness the search and seizure. The support in this regard can be taken from the judgment of the Apex Court in ***Makhan Singh V. State of Haryana (2015) 12 SCC 247***, which reads as follows:-

> "……In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places and at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid of to come and depose in favour of the prosecution. Though it is well settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available…."

It is held so by this Court also in ***Criminal Appeal No. 165 of 2011*** titled ***State of H.P. V. Balkrishan***, decided on 27th February, 2017.

16. Ms. Sheetal Vyas, learned counsel representing the accused has placed reliance on the following extract of the judgment of the Apex Court in ***Krishan Chand vs. State of H.P., AIR 2017 SC 3751,*** to persuade this Court to form an opinion that in search and seizure independent witnesses allegedly could have been easily associated had efforts been made by the I.O. PW-12 ASI Dharam Chand and as such the trial has vitiated:

> "15. From the evidence which has come on record, it is quite clear that the place, where the accused is alleged to have been apprehended, cannot be said to be an isolated one as the house of Govind Singh DW-2 is situated on the edge of Patarna bridge. Thus the version of the complainant PW-6 that independent witnesses could not be associated as it was an isolated place does not inspire confidence. Moreover, from the evidence of Govind Singh PW-2 the case of the prosecution regarding apprehension of the accused, at Patarna bridge, while being in possession of bag containing 7

> kgs of charas, becomes highly doubtful because had he been so apprehended by the police, this fact was to come to his notice, for the reason, that his house is situated at the edge of the bridge in which he resides alongwith his family.
>
> 17. In our opinion, the High Court failed to appreciate that the harsher is the punishment, the more is the strictness of proof required from the prosecution and that failing to associate independent witnesses at the time of recovery created a dent in the case of prosecution.
>
> 18. As rightly pointed out by the counsel for the appellant that the High Court failed to appreciate that in the absence of independent witnesses, the evidence of the police witnesses must be scrutinized with greater care especially when police witnesses contradicted themselves on the issue as to in whose hand writing the seizure memo, the arrest memo, consent memo and the NCB form were written and the evidence adduced by the prosecution is not reliable."

17. The ratio of the judgment in ***Krishan Chand's case*** supra is, however, not attracted in the case in hand for the reason that PW-10 HHC Lal Singh, PW-11 Const. Naveen Kumar and PW-12 ASI Dharam Chand, all have stated in one voice that PW-11 Const. Naveen Kumar was deputed by the I.O. in search of independent witnesses. He went towards village Chowki and came back after 15-20 minutes alone. He told the I.O. that no person was available who could have been brought by him to the spot for being associated as independent witness. It is after that the I.O. as per his version associated them (PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar) as witnesses to witness the search and seizure. No suggestion has been given either to PW-10 HHC Lal Singh or PW-11 Const. Naveen Kumar that the I.O. did not depute PW-11 Const. Naveen Kumar in search of independent witnesses. Even, no such suggestion has been given to PW-12 ASI Dharam Chand, the I.O. that he did not depute PW-11 Const. Naveen Kumar in search of independent witnesses. Interestingly enough, PW-11 Const. Naveen Kumar was questioned about the site towards which he had gone in search of independent witnesses and as per opening sentence of his cross-examination, it has come that he went in search of independent witnesses towards village Chowki. Therefore, the prosecution case that PW-11 Const. Naveen Kumar was deputed in search of independent witnesses towards village Chowki and he returned alone after 15-20 minutes as well as apprized the I.O. that no one was available who could have been brought by him to witness the search and seizure, stands satisfactorily proved on record. Be it stated that all the three material prosecution witnesses i.e. PW-10 HHC Lal Singh, PW-11 Const. Naveen Kumar and PW-12 ASI Dharam Chand have been cross-examined to the effect that two Projects, namely, Malana (I) and Malana(II) are in existence in that area, dam site of both these projects are different, 5-6 more Power Projects are situated within the radius of 30-35 kms. from Jari, road to Malana is through, the vehicles are being plied on this road from dam side and village Chowki and that at the dam site labour and employees of the projects also reside. The suggestions so put to them have been admitted being correct. However, the answers to the suggestions so put to all the three witnesses do not substantiate the plea of the defence in any manner for the reason that as per the clarification given by the I.O., no vehicle came on this road and at the spot during the period search and seizure has taken place and that the dam site is 3-4 km. away from the spot. The suggestions that Naka was laid at the barrier adjacent to Malana (I) project and Police Post Jari has been denied being wrong by all of them in one voice. It has also been denied that village Chowki was at a distance of 2-3 kms. From Police Post Jari which according to the testimony of PW-10 HHC Lal Singh is 1 kms. He has self stated that the distance between the spot and Police Post Jari is 5-6 kms.. As per the statements made voluntarily by PW-11 Constable Naveen Kumar and PW-12 ASI Dharam Chand, the I.O. it is 1-1½ kms. The police, therefore, was 3-4 kms. away from Malana(I) project, whereas 1-1½ kms. from Police Post Jari. As per the suggestion given in defence, the shops were also situated in village Chowki and not ahead of that towards the spot. The evidence, therefore, leads to the only

conclusion that though efforts were made by the I.O. PW-12 ASI Dharam Chand to associate the independent witnesses, however, the spot being in forest and secluded place, no habitation within the radius of 2-3 kms. and even beyond that also, it was not possible for the I.O. to have associated independent witnesses. The ratio of the judgment of the Apex court in ***Makhan Singh's case*** supra that independent persons are not available at all places and at every time for being associated as witnesses by the I.O. at the time of search and seizure is fully attracted in the given facts and circumstances of this case.

18. On the other hand, in ***Krishan Chand's case***, cited by learned defence counsel, the house of DW Govind Singh was situated at the edge of Patarna bridge, the place of recovery, therefore, it is in this backdrop, the apex court has held that efforts were not made to associate the independent witnesses. True it is that as per the settled legal principles reiterated by the apex Court in ***Krishan Chand's case,*** cited supra when harsher is the punishment, the degree of proof required from the prosecution must also be high. In the case in hand, this principle, however, is not attracted as the official witnesses PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar have supported the prosecution case in one voice and their testimony even could not be shattered in their cross-examination also.

19. The apex Court in ***Noor Aga V. State of Punjab and another, 2008 and State of Punjab V. Baldev Singh (1999) 3 SCC 977***, has also held that if the law provides for severe punishment against an offender, greater care and caution is required to be taken while appreciating the evidence on record and holding the accused as guilty. In view of such being the settled legal position, of course, as per the requirement of provisions contained under Section 100 and 108 of the Code of Criminal Procedure, it is the duty of the I.O. to conduct search and seizure in the presence of independent witnesses, if available. In the case in hand, the evidence discussed hereinabove leads to the only conclusion that the I.O. PW-12 ASI Dharam Chand though has made efforts to associate independent person to witness the search and seizure, however, no one was available nearby and as such, the search of the rucksack being carried by the accused was conducted in the presence of police officials PW-10 HHC Lal Singh and PW-11 Constable Naveen Kumar. Irrespective of the present being not a case of prior information of illicit trafficking of contraband and rather the accused was spotted at the place of recovery all of a sudden, though the question of association of independent witnesses would have arisen after the recovery of the incriminating substance i.e. charas, however, the I.O. before resorting to the search of the rucksack of the accused deputed PW-11 Constable Naveen Kumar in search of the independent witnesses, however, when no one could be traced out, it is PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar who were associated to witness the search and seizure. The present, as such, is a case where independent witnesses were not available.

20. Above all, it is well settled at this stage that evidence of official witnesses being consistent and inspiring confidence cannot be ignored and rather relied upon to record the findings of conviction against the accused. The reliance in this behalf can be placed on the judgment of the Apex Court in ***Girija Prasad V. State of M.P. (2007) 7 SCC 625***, in which it has been held that the testimony of official witnesses is as much good as that of an independent person, however, close scrutiny of their statements is required and the same can be relied upon after having all circumspection and caution. Learned trial Judge has also placed reliance on the judgment of the Apex Court in ***Govindaraju alias Govinda V. State by Sriramapuram Police Station and another, (2012) 4 SCC 722,*** in which it has been held that whenever the evidence of the official witnesses after careful scrutiny inspires confidence and is found to be trustworthy it can form basis for recording findings of conviction against the accused and non-association of some independent person to witness the search and seizure is not fatal to the prosecution case. The relevant extract of this judgment reads as follows:-

> "We are certainly not indicating that despite all this, the statement of the police officer for recovery and other matters could not be believed and form the basis of conviction but where the statement of such witness is not reliable and does not inspire confidence, then the accused would be entitled to the benefit of doubt in accordance with law. Mere absence of independent witnesses when the investigating officer recorded the statement of the accused and the article was recovered pursuant thereto, is not sufficient ground to discard the evidence of the police officer relating to recovery at the instance of the accused. [See (Govt. of NCT of Delhi) v. Sunil.] Similar would be the situation where the attesting witnesses turn hostile, but where the statement of the police officer itself is unreliable then it may be difficult for the court to accept the recovery as lawful and legally admissible. The official acts of the police should be presumed to be regularly performed and there is no occasion for the courts to begin with initial distrust to discard such evidence."

21. Now, if coming to the question as to whether the testimony of the official witnesses PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar inspires confidence and could have been relied upon to record the findings of conviction against the accused, they both have stated in one voice that the police party headed by PW-12 ASI Dharam Chand left the police station for patrolling towards village Chowki and dam side at 2:00 PM. They laid naka at a place ahead of 3 km. from village Chowki towards Malana dam side. At about 5:00 PM the accused was spotted coming from Malana dam side and going towards Jari side having rucksack on his back. On seeing the police party, he at once turned behind and tried to go back. He was nabbed at a distance of 20 paces. On being asked to disclose his antecedents by ASI Dharam Chand, he disclosed his name Prem Chand son of Sui Ram, resident of village Malana. As per their version, the place where the accused was nabbed was forest and isolated one. At that time, no one was present there for being associated as independent witness. On the other hand, police party had suspicion that the accused may be carrying some illegal substance in his bag. The I.O., therefore, deputed PW-11 Constable. Naveen Kumar in search of independent witnesses. None was, however, available. PW-11 Constable Naveen Kumar returned alone after about 15-20 minutes. On this I.O. associated PW-10 HHC Lal Singh and PW-11 Constable Naveen Kumar as witnesses to witness search and seizure on the spot. I.O. PW-12 ASI Dharam Chand gave his personal search to the accused vide memo Ext. PW-10/A, however, nothing incriminating could be recovered from this witness. It is thereafter, the rucksack having inscription "HP" was searched. On opening the same, carry bag of brown colour with inscription "ELITE" was found kept therein. On opening this bag, 4 polythene zipper pouches Ext. P-2 to P-5 were found kept and each of the pouch was containing charas in the shape of squares, coins and bars Ext. P-6. On the basis of experience and smell, the recovered contraband was found to be charas. The charas was taken out from the polythene zippers. It was fresh charas and its pieces were sticking with each other. The recovered charas was weighed with electronic scale in the I.O. Kit and found 1197 grams. The same was put in 4 same polythene wrappers from which it was recovered. The beige coloured carry bag and rucksack both were packed in another cloth parcel and sealed with six seals of impression "T". The memo Ext. PW-10/B qua the identification of the recovered contraband i.e. charas was also prepared by the I.O. The I.O. filled in the relevant columns of NCB –I form Ext. PW-4/A in triplicate. Sample of seals Ext.W-10/C were drawn on separate piece of cloth. Both sealed parcels were taken into possession vide seizure memo Ext. PW-10/D. The seal after its use was handed over to PW-10 HHC Lal Singh vide memo Ext. PW-10/E. Rukka Ext. PW-12/A was prepared by the I.O. and he deputed PW-11 Const. Naveen Kumar to take the same to Station House Officer, PS Sadar Kullu. The spot map Ext. PW-12/B was prepared. The accused was interrogated and on finding that he has committed the offence punishable under Section 20 of the ND & PS Act has arrested him vide arrest memo Ext. PW-10/F. In the Police Station, FIR Ext. PW-8/A was recorded by PW-8 SHO Neel Chand.

PW-11 Constable Naveen Kumar had taken the file to the spot. On completion of the investigation at the spot, the accused along with the case property was brought to the Police Post Jari and the record of the investigation conducted on the spot. The personal search of the accused was conducted in Police Post vide memo Ext. PW-10/G. Photographs Ext. P-1 to P-6 were clicked. Both of them have identified the parcel Ext. P-1 and Ext. P-2 which were sealed on the spot with 6 seals of impression "T". The same were re-sealed with 3 seals of impression "A" and when returned from FSL, Junga with 3 seals of FSL-II. They have also identified the 4 polythene zippers Ext. P-2 to P-5 containing the charas Ext. P-6. They also identified the rucksack Ext. P-8 and beige coloured carry bag taken out of the parcel Ext. P-7 when opened in the Court. It is thus seen that the scrutiny of statements made by PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar while in the witness-box leads to the only conclusion that the same are consistent, having no contradiction and improvement. There is thus no reason to disbelieve the same nor non-joining of independent person as a witness in this case is fatal to the prosecution.

22. Now, if their statements in cross-examination are seen, as already discussed in para supra, they both have stated in one voice that the police party headed by ASI PW-12 ASI Dharam Chand left for patrolling towards village Chowki and Dam side at 2:00 PM. They laid Naka at an isolated place in the forest 3 kms. ahead of Village Chowki towards Dam side at 3:00 PM. The Projects Malana (I) & (II) are situated in that area adjacent to each other though sites of these dams are different. Other 5-6 Power Projects are also situated within the radius of 30-35 kms. Near and around Jari. They are also categoric that road to Malana leads from Project Malana (I) and village Chowki and that the vehicles used to ply on this road. They have also stated in one voice that at Dam site, labour and employees reside. They both denied in one voice that Naka was laid at barrier adjacent to Malana (I) Project and the Police Post Jari. They also denied that the accused when apprehended was accompanied by one Budh Ram. It is also denied that the accused was carrying kerosene oil. The suggestion that village Chowki is at a distance of 2-3 kms. from the spot has also been denied by both of them and as they stated at their own, the distance between Village Chowki and the spot is 1-1½ kms. According to PW-10 HHC Lal Singh, the distance between Village Chowki and Police Station Jari is 5-6 kms. The suggestion that charas was not "chakor" in shape has also been denied by them being incorrect. They are in agreement that the dam was not visible from the spot. The dam even is not there in the photographs clicked on the spot. The suggestion that the accused was going to his house with kerosene and eatables, and that one unclaimed bag lying on the spot was planted on him to implicate him falsely on the basis of suspicion has also been denied being wrong. It is also denied by both of them that charas was not recovered from the rucksack, the accused was carrying on his back and that proceedings in this case have taken place in Police Post Jari. According to them, the place where the accused was apprehended is at a distance of 5-6 kms. from Police Post Jari.

23. Therefore, when the testimony of both the official witnesses i.e. PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar is consistent, free from contradictions and improvements, the same has rightly been relied upon by learned trial Court while recording the findings of conviction. The contentions to the contrary have been raised by learned defence counsel merely for rejection.

24. Now, if coming to the statement of PW-12 ASI Dharam Chand, the I.O., he has said all in his examination-in-chief as has come in the statements of PW-10 HHC Lal Singh and PW-11 Constable Naveen Kumar discussed supra. As a matter of fact, all the three witnesses have supported the prosecution case in one voice. Even the I.O., PW-12 ASI Dharam Chand in his cross-examination has also corroborated the testimony of PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar on all material aspects i.e. the police party left the Police Post at 2:00 PM and reached at the spot at 3:00 PM. According to him, the road leading to Malana village passes through Village Chowki and also the place where the Naka was laid. However, he has clarified that no vehicle came at the place of Naka during the period when search and seizure had taken place. Like PW-10 HHC Lal

Singh and PW-11 Constable Naveen Kumar, the I.O. has also stated that there are two Projects in Malana at two different sites i.e. Malana (I) and Malana (II). Village Chowki, according to him though is thickly populated, however, situate at a distance of 3 kms. from the spot. The suggestion that adjacent to Chowki village on the road there exists shop has been admitted by him as correct, however, according to him, no shop exists ahead of Village Chowki. He has also admitted that the labourers and employees are available at Dam site, however, the same according to him is situated at a distance of 3 kms. from the spot. Though, he admitted that no local person nor any labourer/employee of the Malana Project is associated as a witness, however, self stated that Village Chowki and dam site are situated at a considerable distance from the spot and there being no four wheeler vehicle available in the Police Post Jari, it was not possible to associate someone from such a distant place. The distance of Village chowki according to him is 1-1½ kms. from Police Post Jari as has been said by PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar. He has also denied the suggestion that the accused accompanied by one Budh Ram was on his way to home with kerosene oil and that he did not give his personal search to the accused. Like PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar, the I.O. has also denied the suggestion that all the documents and proceedings had taken place in Police Post Jari and not on the spot. The suggestion that the charas was not recovered from the rucksack Ext. P-8, the accused was carrying with him is denied by PW-12 ASI Dharam Chand also being incorrect. He has clarified that the Dam site is not there in the photographs because of its distance from the spot is 4 kms. It has also been denied that rucksack Ext P-8 was lying unidentified and that false case has been registered against the accused. Therefore, the evidence as has come on record by way of the testimony of I.O. PW-12 ASI Dharam Chand also substantiates the prosecution case.

25. The further prosecution case that spot map Ext. PW-12/B was prepared by the I.O. PW-12 ASI Dharam Chand and he has also recorded the statements of the prosecution witnesses find corroboration from the evidence as has come on record by way of testimony of PW-10 HHC Lal Singh and PW-11 Const. Naveen Kumar and also from that of I.O. PW-12 ASI Dharam Chand.

26. In this case, the link evidence is also complete as PW-1 Const. Mahesh Kumar has proved the prosecution case qua he having taken the case property to FSL Junga vide RC No. 12 of 2015 Ext. PW-5/C. PW-2 Const. Sanjay Kumar has proved the rapat rojnamcha Ext. PW-2/A which substantiates the prosecution case qua the police party headed by PW-12 ASI Dharam Chand left the Police Post Jari at 2:00 PM towards village Chowki and Dam side for patrolling. PW-3 HC Rakesh Kumar, the MHC, PS Sadar Kullu has supported the prosecution case that rapat Nos. 25 and 26 are computerized and the system was working at that time properly as per certificate Ext. PW-3/A, he issued. PW-4 MHC Gajender Pal was posted as Addl. MHC in Police Station Sadar, Kullu at the relevant time. The case property sealed with six seals of impression “T” and three seals of impression “A” were handed over to him on 7.1.2015 by PW-8 SHO Neel Chand along with another parcel which was also sealed with 6 seals of impression “T”. According to him, the sample of seals “A” & “T”, NCB form in triplicate and seizure memo were also handed over to him. He retained the same in the malkhana in his safe custody and entry in this regard was made at Sr. No. 1708 of the malkhana register. On 8.1.2015, the case property was sent by him to laboratory through Const. Mukesh Kumar. The case property, according to him was brought back on 26.1.2015 by PW-7 Suresh Kumar from the laboratory who had taken sample of another case, FIR No. 22/15 to the laboratory on 23.1.2015. PW-5 LC Saroj has proved that rapat in the daily diary No. 25 & 26 are computerized and certificate Ext. PW-5/A and PW-5/B according to her are qua functioning of the computer system properly when the same were entered. PW-6 HHC Khoob Ram, author of rapat No. 45 dated 8.1.2015 and rapat No. 28 dated 26.1.2015 Ext. PW-6/A and PW-6/B has proved the same being recorded as correctly. PW-7 Suresh Kumar has supported the prosecution case qua he having brought the case property back from FSL Junga on 26.1.2015 as he had gone on 23.1.2015 along with sample of the case

registered vide FIR No. 22/15 to the laboratory. PW-8 SHO Neel Chand has supported the prosecution case qua he having resealed the parcel containing the contraband with 3 impressions of seal "A" and handed over the same to PW-4 MHC Gajender Pal for safe custody in the malkhana. He has also supported the prosecution case qua he registered the FIR Ext. PW-8/A on the receipt of rukka Ext. PW-12/A brought to him by PW-11 Const. Naveen Kumar. According to him, he filled in column Nos. 9 to 11 of the NCB forms at the time of re-sealing of the parcel containing the charas. On completion of the investigation, he prepared the challan and filed in the Court. PW-9 HC Balbir Singh was posted as Reader to Addl. S.P. Kullu, at the relevant time. He has supported the prosecution case that the special report Ext. PW-9/A was handed over by the I.O. to Addl. S.P. He has also proved the extract of the special report register Ext. PW-9/B in which the entries qua special report Ext. PW-9/A were made. He has also proved the endorsement Ext. PW-9/C made by the Addl. S.P. and the affidavit Ext. PW-9/D sworn in by him. Therefore, the evidence as has come on record by way of testimony of PWs 1 to 9 also supply link and connect the accused with the commission of the offence.

27. On the other hand, if coming to the statement of accused recorded under Section 313 Cr.P.C., he has admitted his presence on the spot as it has come in reply to question No. 6 that when apprehended by the police, he was on his way to the village along with kerosene oil and other eatables. The trend of cross-examination of the material prosecution witnesses also substantiate his presence on the spot because a suggestion was given to them that accused was apprehended by the police when he accompanied by one Budh Ram was going to the village with kerosene oil. Said Budh Ram has not been examined by him irrespective of opportunity to produce the evidence in his defence granted by the learned trial Court. Therefore, it cannot be believed by any stretch of imagination that he has been implicated in this case falsely. Otherwise also, huge quantity of charas i.e. 1197 grams could have not been planted by the police upon him.

28. The non-production of seal used by the I.O. is not fatal to the prosecution case because nothing suggesting that any prejudice has been caused thereby to the defence has come on record. As a matter of fact, it has not been suggested to the I.O. PW-12 ASI Dharam Chand that due to non-production of seal, prejudice has been caused to the accused. It has been held so by this Court in Cr. Appeal No. 305/2014 titled ***Sohan Lal vs. State of H.P.,*** decided on 2.11.2016.

29. There is also no substance in the arguments addressed by learned defence counsel that in view of there being already sunset at 5:30 PM and dark outside and that there being no evidence that the police official had torch with them, search and seizure and also the documentation could have not taken place on the spot. It is worth mentioning that as per the prosecution evidence which remained uncontroverted, the accused was apprehended at 5:00 PM. The search of the bag at the most was conducted within 15-20 minutes immediately after PW-11 Const. Naveen Kumar who was deputed in search of independent witnesses returned to the spot alone. The search of the bag, therefore, was conducted around 5:20 PM. As per the plea raised by the accused in his defence, the time of sunset on that day was around 5:30 PM. It is not dark with sunset itself and rather there used to be light for about 1-1½ hours after sunset also. True it is that the rukka Ext. PW-12/A was sent at 7:15 PM to Police Station, meaning thereby that the investigation qua search and seizure was already complete by that time. True it is that by 7:15 PM, it may have become dark outside, however, these days each and everyone is equipped with cell-phones having the facility of torch also. Although, it is not the case of the prosecution that the cell phone with torch facility was available with the police party and used nor the defence has put any such plea, however, as said hereinabove, there being light for 1-1½ hours even after sunset also, therefore, this much time was sufficient to complete search and seizure and also the documentation on the spot. The photographs Ext. P-1 to P-6 reveal on the face of it show that the same were clicked in the evening time as at that time neither there was light nor darkness. The another submission that in rapat Ext. PW-2/A, nothing has come that the police party

had investigation kit with them is again without any substance for the reason that the I.O. posted in the Police Station as and when are on patrolling or laying Naka in the area, they invariably take I.O. kit with them.

30. In view of the above, the prosecution has satisfactorily proved that charas weighing 1197 grams (1 kg. 197 grams) has been recovered from the conscious and exclusive possession of the accused and thereby shifted the burden to prove otherwise upon him. The present, therefore, is a case where presumption as envisaged under Sections 35 and 54 of the Act has to be drawn against the accused.

31. True it is that the accused in order to prove his innocence has raised the plea in his defence that he was apprehended on the spot by the police at a stage when accompanied by one Budh Ram was on his way to his village with kerosene oil and eatables. Also that one unclaimed bag lying on the spot was planted upon him by the police to implicate him in this case falsely. In order to substantiate the plea so raised by accused he should have examined so called Budh Ram accompanying him. He, however, failed to do so irrespective of the opportunity granted by learned trial Court to produce evidence, if any, in his defence. No plausible and reasonable explanation has also come on record as to why the police had planted upon him huge quantity of charas weighing 1197 grams. On the other hand, there being no evidence to the contrary that the police officials were inimical to the accused and it is for this reason they have implicated him falsely in this case, the plea so raised by him in his defence cannot be believed to be true. Therefore, when the accused has failed to prove his innocence, it would not be improper to conclude that the charas weighing 1197 grams has been recovered from his conscious and exclusive possession. The impugned judgment, therefore, cannot be said to be the result of misreading and mis-appreciation of the prosecution evidence. Learned trial Court has rather appreciated the evidence in its right perspective and committed no illegality or irregularity while recording the findings of conviction and subsequently sentencing the accused to undergo rigorous imprisonment for a period of 10 years and also to pay Rs. 1,00,000/- as fine. The impugned judgment, as such, cannot be said to be legally and factually unsustainable. The same rather deserves to be upheld.

31. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. Consequently, the impugned judgment is upheld.

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

Parminder Singh ..Petitioner

Versus

State of H.P. & others ..Respondents.

Civil Revision No. 115 of 2019

Decided on : 6.9.2019

Code of Civil Procedure, 1908 – Order VII Rule 11(c) – Court fees – Payment of - Suit for damages – Non-payment and rejection of plaint – Held, when damages as claimed in plaint are unascertainable and required to be calculated by way of evidence during trial, a fixed court fees is to be paid initially – Court has no other alternative but to accept plaintiff's tentative court fees till matter is finally decided by it – Court can not reject plaint in such circumstances for non-payment of court fees. (Paras 2 & 3)

For the petitioner: Mr. Dinesh Chander Sharma, Advocate.

For the respondents: Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel Dy. A.Gs. for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The plaintiff is aggrieved, by, rejection of his plaint, hence by the learned trial Court, through its, recoursing, the, mandate, under, Order 7 Rule 11 CPC. He submits that the learned trial Judge concerned, has not, both understood, the, subtle import thereof nor also aptly applied, vis-a-vis, the averments, cast, in, the plaint, the apt mandate, of, clause (c), of, Order 7 Rule 11 CPC, provisions whereof, are, extracted hereinafter:-

> "where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so"

(i) ,and, he further thereonwards also submits, that, the learned trial judge, has, fallaciously, made the impugned order, upon, an untenable anvil qua (ii given the plaintiff, despite earlier, hence being granted, several opportunities, for affixing court fee, on the plaint, carrying advalorem valuation, vis-a-vis, the valuation of the suit, hence, for the purpose of jurisdiction, yet, his failing to render compliance therewith, (ii) as, apparently he has not made an apt deference, vis-a-vis, the hereinafter alluded verdict.

2. The pronouncement made by the Punjab & Haryana High Court, in a judgment rendered in case titled Saleem vs. Usman Gani & another, reported in 2015 (3) RCR (Civil), relevant paragraph No.3, whereof is is extracted hereinafter:-

> "In Shiv Kumar Sharma vs. Santosh Kumari 2007 (40 R.R.C. (Civil) 515 : 2007 (5) Recent Apex Judgments (R.A.J.) 321 : 2007 (4) Civil Court Cases 333 (SC, it was held by the Hon'ble Supreme Court of India that though court fees is payable on claim of damages but in a case where damages are required to be calculated, a fixed court fee is to be paid and balance court fees is payable only on the quantum, when the same is determined by the court. Reliance may be placed on Hem Raj vs. Harchet Singh and others, 1993 Civil Court Cases 48 (P & H), wherein it was held that the court has no other alternative but to accept the plaintiff's tentative court fees till the matter is finally decided by the court. To the same effect State of Punjab & others vs. Jagdip Singh Chowhan, 2005 (1) R.C.R. (Civil) 54: 2005 (2) Civil Court Cases 37 (H&H)."

(i) makes clear expostulations qua in contemporaneity, vis-a-vis, filing of the plaint or within the tenure, of, the requisite extension being granted, it, being imperative for the plaintiff, to, fix court fees advalorem, vis-a-vis, valuation of the suit, for the purpose of jurisdiction, and, wants thereof entailing rejection of the plaint, (ii) however, a further expostulation, is, also carried therein qua the afore necessity being sparked, only upon, when in a suit for damages, the monetary sums of damages are settled, and, are precisely averred, and, (iii) the afore imperative necessity, being dispensable, upon, the amount(s) of damage(s) remaining unascertained or remaining unsettled in the plaint, (iv) and, obviously, upon the latter event, court fees hence bearing commensuration, with, the subsequently determined values of sums of monies, hence claimed as damages, rather, being enjoined, to, in contemporaneity therewith, hence affixed on the plaint, for, hence, the, learned Civil Court, rendering an efficacious enforceable decree.

3. However, prima facie in making the afore order, the learned trial Judge concerned, prima facie, appears to discard the merits of the verdict, pronounced, in the afore verdict, (i) and, also prima facie appears, to, not apply, its, expostulations, inter-se, the, similar therein averments cast, in, the plaint thereof, vis-a-vis, the extant plaint., (ii) conspicuously, with, the averments, cast in para 9 of the plaint, when do carry absolute compatibility, vis-a-vis, the averments borne, in, the plaint, alluded, in, the relevant para, of, verdict supra, and when, in, concurrence therewith, the, learned trial Judge, was, not empowered, to, suo moto, and, for afore wants hence reject, the, plant. Consequently, the

impugned verdict is set aside. The parties are directed to appear before the learned trial Court on 27.9.2019.

4. Any observation made herein above shall not be taken as any expression of opinion on the merits of the case, and, the learned Court concerned, shall decide the matter uninfluenced, by any observation made hereinabove.

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

Yash Pal ....Petitioner

Versus

State of Himachal Pradesh ....Respondent

Cr.MPs(M) No. 1276 to 1280, 1375 & 1419 to 1421 of 2019

Decided on: 9th September, 2019

Code of Criminal Procedure, 1973 – Section 438 – Pre -arrest bail – Economic offences – Held, on facts, petitioners involved in economic offences where huge government money is involved – Money yet to be recovered from them - Their release on bail will hamper investigation – There is likelihood of their fleeing away from justice – Petition dismissed. (Para 11).

In Cr.MPs(M) No. 1276 to 1280 of 2019:

For the petitioners: Mr. Sanjeev Bhushan, Sr. Advocate, with Mr. Rajesh Kumar, Advocate.

For the respondent/State: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. Raju Ram Rahi and Mr. Gaurav Sharma, Deputy Advocates General.

Inspector Sandeep Sharma, SHO Police Station Joginder Nagar, District Mandi, H.P.

In Cr.MPs(M) No. 1375 & 1419 to 1421 of 2019:

For the petitioner (Objector): Mr. Rajiv Jiwan, Sr. Advocate, with Mr. Prashant Sharma, Advocate.

For the respondent/State: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. Raju Ram Rahi and Mr. Gaurav Sharma, Deputy Advocates General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The first set of petitions has been maintained by petitioners, viz., Yash Pal, Rajender Singh, Niketan Kumar, Mohinder Singh and Desh Raj under Section 438 of the Code of Criminal Procedure for releasing them on bail, in the event of their arrest, in case FIR No. 69 of 2019, dated 25.04.2019, under Sections 420, 468, 471, 120B and 506 read with Section 34 IPC, registered in Police Station Joginder Nagar, District Mandi, H.P. The record transpires that the Hon'ble Co-ordinate Bench of this Court, vide order dated 05.07.2019, enlarged the above petitioners on bail, in the event of their arrest, initially till 25.07.2019 and the said order was extended time and again, in fact, order dated 05.07.2019 is still operative today.

2. The second set of petitions has been maintained by petitioner/complainant/ objector, Shri Mujesh (hereinafter referred to as "the complainant/objector") under Section 439(2) Cr.P.C., whereby cancellation of bail, granted to petitioners Desh Raj, Rajender Thakur, Yash Pal and Mohinder Singh, vide order dated 05.07.2019, has been sought.

3. All the petitions are being taken up together for consideration and disposal, as succinctly the gamut of the matter is interwoven and it would be inapt to take up both the above set of cases separately for consideration and disposal.

4. The petitioners averred in their petitions that they are innocent and have been falsely implicated in the present case. They are residents of Himachal Pradesh and neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so they may be released on bail.

5. Police reports stand filed. As per the prosecution story, on 25.04.2019 complainant, Shri Mujesh Kumar (objector herein) made a written complaint to the police and alleged that in the year 2018-19 he and Yash Pal (petitioner in Cr.MP(M) No. 1276 of 2019), being his partner, were granted liquor licence for selling liquor in the areas of Gumma Shanan, Padhar, Old Mandi and Samkhetar. He has further contended that due to his personal problem he used to remain in his house and all the management was being looked after by his partner Yash Pal and Desh Raj, Mohinder, Niketan (brother of Yash Pal) and one Rajinder Singh. As per the complainant, they had current account in State Bank of India and through this account they used to deposit their tax with the Excise Department. Petitioner Niketan had affable relations with one Shri Rishi, who used to work in SBI, where they used to deposit the tax. Subsequently, Niketan changed the mobile number for OTP, as earlier OTP used to come in his mobile. The complainant has further contended that they had three offices, viz., at Shanan, Padhar and Khaliyara and these offices were being looked after by the petitioners. Petitioner Desh Raj had good relations in Excise Department, so he, without any permit took a stock of approximately 4500 beer bottles and liquor, which was sold and the concerned Inspector used to check the stock in the shop, but as he had connived with the petitioners and did not take any action. This practice of selling liquor without any permit continued at Shanan and when the complainant asked, he was shown stock as per the permits. The complainant could not get any clue about the misdeeds of the petitioners. Later on, the Excise Inspector pressurized petitioners Desh Raj and Yashpal to deposit the due tax, which was ascertained to be one crore rupees. As per the complainant, the petitioners invested the said money in properties. Thereafter, liquor licence, for the next financial year was obtained in the name of petitioner Rajinder Singh and on 1st April the complainant convened a meeting with the petitioners to distribute the profit amongst them, but petitioner Desh Raj sought an excuse. The complainant came to Shanan for looking after liquor work and when he made telephonic calls to Desh Raj, his mobile was switched off. So, he asked for manual books from Mohinder Singh and Rajinder Singh and the next day, when he was present in liquor shop at Shanan, petitioner Mohinder, Rajinder, Niketan alongwith 4-5 persons came there and started abusing him and also scuffled with him. Thereafter, the complainant tried to contact Desh Raj, but he did not pick up the phone and on the next day he picked up the call. Shri Pradeep Thakur whatsapped L-1 and L-13 account of Desh Raj, which revealed loss of sixty lac and liquor of rupees one crore was purchased illegally. So, the complainant telephoned the petitioners, but they threatened him. The complainant sought action against the petitioners. Police, on the complaint, so filed by the complainant, registered a case and the investigation ensued. Police prepared the spot map and also recorded the statements of the witnesses. Police made the relevant recoveries and investigated all the records. It has come in the police investigation that total Rs.4,79,66,843/- had been embezzled by the petitioners and the said amount is recoverable from the petitioners. Lastly, it is prayed that the bail application of the petitioner be dismissed, as the amount recoverable from the petitioners is huge and the petitioners were found involved in a serious offence of cheating and thereby caused huge financial loss to the Government of Himachal Pradesh and in case the petitioners are released on bail, they may tamper with the prosecution evidence and may also flee from justice.

6. The complainant/objector, by filing petitions under Section 439(2) Cr.P.C. sought cancellation of bail granted vide order dated 05.07.2019. Precisely, the objector is seeking cancellation of bail on the premises that on 13.07.2019, when the complainant

was coming back from Mandi to Dehra, petitioner Desh Raj stopped him and pressurized him to withdraw the FIR, wherein the petitioners were granted interim bail. As per the complainant, the petitioners are misusing the liberty granted to them. It is further contended that the petitioners, through their misdeeds, committed the offence of cheating and huge public money is involved in the matter. As per the complainant, the petitioners, in connivance with others, committed a big scam. Lastly, the complainant prayed that the bail applications of the petitioners be dismissed.

7. I have heard the learned Senior Counsel for the petitioners, learned Deputy Advocate General for the State, learned Senior Counsel for the complainant/objector and gone through the record, including the police reports, carefully.

8. The learned Senior Counsel for the petitioner has argued that the dispute, if any, is of civil nature and police has registered the FIR. He has further argued that the custody of the petitioners is not at all required in the instant case. The petitioners are joining and co-operating in the investigation. The petitioners are residents of Himachal Pradesh and neither in a position to flee from justice nor in a position to tamper with the prosecution evidence, so the petitions be allowed and the petitioners be enlarged on bail. Conversely, the learned Deputy Advocate General has argued that custodial interrogation of the petitioners is required, as the amount involved is huge and the recovery is yet to be effected. He has further argued that the petitioners, if enlarged on bail, may tamper with the prosecution evidence and may also flee from justice. He has prayed that keeping in view the huge amount, which is involved in the present petitions, the petitions be dismissed.

9. Learned Senior Counsel for the complainant/objector argued that the petitioners have cheated the complainant and caused huge pecuniary loss to the State exchequer. He has further argued that in case the petitioners are enlarged on bail, they may tamper with the prosecution evidence and may also flee from justice, so the bail application be dismissed.

10. In rebuttal, the learned Senior Counsel for the petitioners has argued that the petitioners are permanent residents of Himachal Pradesh and they are neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. He has further argued that the custody of the petitioners is not at all required by the police. They are joining and co-operating in the investigation, so the bail applications be allowed.

11. At this stage, considering the material collected by the police during the course of investigation, which shows the involvement of the petitioners in the alleged offences, the fact that huge amount of government money is involved and the same is yet to be recovered, the fact that there is every likelihood that in case the petitioners are enlarged on bail, they may tamper with the prosecution evidence and may also flee from justice and also considering the overall material, which has come on record, and without discussing the same at this stage, this Court finds that the present are not the fit cases where the judicial discretion to admit the petitioners on bail, in the event of their arrest, is required to be exercised in their favour.

12. In view of what has been discussed hereinabove, the petitions (Cr.MPs(M) No. 1276 to 1280 of 2019) being devoid of merits, deserves dismissal and are accordingly dismissed.

13. With the disposal of the petitions preferred by the petitioners, Cr.MPs(M) No. 1375 & 1419 to 1421 of 2019 (petitions preferred by the complainant/objector) are disposed of as having become infructuous.

14. In view of the above, all the petitions stand disposed of.

15. Needless to say that the observations made hereinabove shall not be construed as an opinion expressed on the merits of the case and the same shall be adjudicated on its own.

As prayed, copy *dasti*.

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

Shri Raj Kishore Gupta and another ....Petitioners.

Vs.

Shri Suresh Kumar and another ....Respondents.

CMPMO No.: 216 of 2019
Reserved on: 28.08.2019
Date of Decision: 02.09.2019

Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts, Act 2015 (Act)- Section 16- Schedule affecting amendments in Code of Civil Procedure, 1908 (Code) - Held, provisions of the Code as amended vide aforesaid Act are applicable only when suit is being adjudicated under the provisions of the said Act and not otherwise – M/s SC & Contracts. (Paras 9 & 10)

Code of Civil Procedure, 1908- Order VIII Rule 6-A(3) – Written statement to counter claim- Filing of- Time limitation- Held, plaintiff can file written statement to counter claim of defendant within such period as may be fixed by the court. (Para 11).

For the petitioner: M/s Sumit Sood and Gautam Sood, Advocates.

For the respondents: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent No. 1.

No notice has been issued to respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

By way of this petition, the petitioners have challenged order, dated 05.04.2019 (Annexure P-13), passed by the Court of learned Civil Judge, Court No. 3, Shimla in CMA Nos. 9004832/18 and 9004892 filed in Civil Suit No. 339-1 of 2018, vide which, inter alia, the learned Court below has grantedtime to the plaintiff to file written statement to the Counter-claim preferred by the petitioners.

2. Brief facts necessary for the adjudication of present petition are that a suit has been filed by plaintiff-Suresh Kumar (respondent No. 1 in this petition) for permanent perpetual prohibitory injunction for restraining the defendants from interfering in any manner in the peaceful possession of the plaintiff over the suit property. The defendants impleaded in the said suit are petitioners as also proforma respondent No. 2 herein. Alongwith their written statement, the petitioners herein also preferred a Counter-claim. Plaintiff filed an application for rejection of the Counter-claim under Order VII, Rule 11 & Order 8 Rule 6 (C) read with Section 151 of the Code of Civil Procedure. This application was rejected by the Court of learned Civil Judge, Court No. 3, Shimla vide order, dated 16.08.2018.

3. Feeling aggrieved, plaintiff filed a Civil Revision No. 188/2018, titled Suresh Kumar Vs. Deepak Sood and others before this Court. This petition was dismissed by Hon'ble Co-ordinate Bench of this Court vide judgment, dated 26.11.2018. After dismissal of said petition, the plaintiff filed an application under Order VIII, Rule 1 read with Section 148 and 151 of the Code of Civil Procedure before the learned Court below for extension of time for filing written statement to the Counter-claim filed on behalf of defendants No. 2 and 3. Before this, an application was also filed under Order VIII, Rule 1 of the Code of Civil Procedure by the Counter-claimants for striking off the defence of the Non-counter claimant/plaintiff. Vide impugned order, whereas the application filed by the plaintiff for extension of time to file written statement to the Counter claim has been allowed, the application filed by the counter claimants for striking off the defence of non-counter claimant/plaintiff, has been dismissed.

4. Mr. Sumit Sood, learned counsel for the petitioners has argued that the impugned order is not sustainable in law, as the learned Court while allowing the application filed by the plaintiff for extension of time to file written statement to the Counter-claim, erred in not appreciating that the Court could not have granted any extension of time in terms of the provisions of Order VIII, Rule 1 of the Code of Civil Procedure, as also the law laid down by the Hon'ble Supreme Court in ***M/s SCG Contracts India Pvt. Ltd.*** Vs. **K. S. Chamankar Infrastructure Pvt. Ltd. & Ors**., Civil Appeal No. 1638 of 2019, decided on February 12, 2019, in which, Hon'ble Supreme Court has held that under the amended provisions of the Code of Civil Procedure, mere filing of an application under Order VII, Rule 11 of the Code of Civil Procedure would not extend the time to file written statement beyond the statutory period 120 days.

5. I have heard learned counsel for the parties and have also gone through the impugned order as well as other documents appended therewith.

6. Before proceeding further, it is clarified that though in the grounds of petition, challenge is also there to the order passed by the learned Court below on an application filed under Order VI, Rule 17 of the Code of Civil Procedure by the plaintiff, which was also allowed vide order, dated 05.04.2019, however, no arguments were addressed on this issue by learned counsel for the petitioners.

7. It is a matter of record that written statement to the plaint was filed by the petitioners before the learned Court below on 10.05.2018 and alongwith the written statement, they also preferred a Counter-claim. It is also a matter of record that whereas no written statement to the Counter-claim was filed by the plaintiff, yet he preferred an application under Order VII Rule 11 & Order VIII Rule 6 (C) read with Section 151 of the Code of Civil Procedure for rejection of the Counter- claim. After dismissal of the said application by the learned Civil Court, plaintiff preferred a Civil Revision before this Court, which was dismissed by this Court on 26.11.2018. It is thereafter that he filed an application for extension of time for filing written statement to the Counter-claim, which was allowed by the learned Court below.

8. Order VIII, Rule 1 of the Code of Civil Procedure provides that the defendant shall within thirty days from the date of service of summons on him, present a written statement of his defence, provided that where defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

9. Hon'ble Supreme Court in M/s SCG Contracts India Pvt. Ltd. (supra) was dealing with the situation where an application under Order VII, Rule 11 for rejection of the plaint was filed by the defendants and no written statement to the plaint was preferred. The suit was being adjudicated under the provisions of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and Hon'ble Supreme Court in this judgment was dealing with the amendments to the Code of Civil Procedure, 1908 by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

10. In the present case, the suit between the parties, which is pending before the learned Trial Court, is not being adjudicated under the provisions of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. Therefore, the judgment of the Hon'ble Supreme Court (supra) cited by learned counsel for the petitioners is not at all applicable to the facts of this case.

11. Even otherwise, in the present case, the extension of time, which has been granted by the learned Trial Court in favour of respondent No. 1/plaintiff is with regard to filing of written statement to the Counter-claim. Rule (6-A) of Order VIII of the Code of Civil Procedure deals with the Counter-claim by defendant. Sub-clause (3) of Rule (6-A) of Order VIII of the Code stipulates that the plaintiff shall be at liberty to file a written

statement in answer to the Counter-claim of the defendant within such period, as may be fixed by the Court.

12. In this background, according to me, perhaps there was no need for the plaintiff to have had filed an application for extension of time to file written statement to the Counter-claim. Besides this, the Civil Revision which was filed by the plaintiff against rejection of his application under Order VII, Rule 11 and Order VIII, Rule 6(C) read with Section 151 of the Code of Civil Procedure was decided by this Court on 26.11.2018 and he approached the learned Court below for extension of time for filing the written statement to the Counter-claim in less than a fortnight of the said petition having been dismissed by the Court. Therefore also, it cannot be said that the plaintiff was unnecessarily avoiding filing of the written statement to the Counter-claim. In these circumstances, in my considered view, learned Trial Court has correctly allowed the plaintiff to file written statement to the Counter-claim by extending time, as the same, but obvious, would help the Court in adjudication of the dispute between the parties.

13. This Court further concurs with the findings returned by the learned Trial Court that non-compliance with any procedural requirement should not come in the way of the Courts in dispensing justice. Therefore, as this Court finds no infirmity with the impugned order, dated 05.04.2019 (Annexure P-13), passed by the Court of learned Civil Judge, Court No. 3, Shimla CMA Nos. 9004832/18 and 9004892 filed in Civil Suit No. 339-1 of 2018 and further as this Court finds no merit in the petition, the same is dismissed, so also pending miscellaneous applications, if any.

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

FAO No.150 of 2010 a/w
FAO No.329 of 2010
Date of Decision: 16.08.2019

Employees Compensation Act, 1923 – Section 4-A(3) (a) & (b) – Imposition of penalty – Whether insurer is bound to pay penalty imposed upon insured ? Held - penalty is not a part and parcel of the legal liability of the employer - It is imposed upon him under contingencies contemplated by Section 4-A (3)(a) and (b) of the Act on account of his default in paying due compensation to his employee -Insurer is under contractual obligation to indemnify the employer for his legal liability only- Since penalty is not part of legal obligation of employer, the insurer is not liable to pay it. (Para 13)

1. <u>FAO No.150 of 2010</u>

Oriental Insurance Company Ltd. ...Appellant

Versus

Smt. Neena Devi & Others ...Respondents

2. **<u>FAO No.329 of 2010</u>**

Smt. Subhadra Devi ...Appellant

Versus

Smt. Neena Devi & others ...Respondents

Case referred:

Ved Prakash Garg vs. Premi Devi and Others, 1998 (1) ACJ 1

For the Appellant(s)**:**	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Sharma, Advocate, for the appellant in FAO No.150 of 2010 and for respondent No.2 in FAO No.329 of 2010. Mr. Raman Sethi, Advocate for the appellant in FAO No.329 of 2010.
For the Respondents:	Mr. Baldev Singh Negi, Advocate, for respondents No. 1 to 4 and 6 in FAO No.150 of 2010. Mr. Sat Prakash, Advocate, for respondent No.7 in FAO No.150 of 2010.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(oral):*

Since both the above captioned appeals arise out of same order, same are being taken up together, for disposal by way of this common judgment.

2. Instant appeals under Sections 30 & 30(1)(aa) of the Workmen Compensation Act, lay challenge to order dated 22.3.2010, passed by learned Commissioner under Workman Compensation Act, Rampur Bushahr, District Shimla, Himachal Pradesh, in case No.7/2006, titled as ***Smt. Neena Devi and others versus Smt. Subhadra Devi and another,*** whereby learned Court below held respondents/ claimants No. 1 to 6 entitled to compensation to the tune of Rs.5,30,556/- alongwith interest at the rate of 12% per annum.

3. Briefly stated facts, as emerge from the record are that respondents No. 1 to 6 ***(hereinafter referred to as the claimants)*** filed a petition under Section 22 of the Workmen Compensation Act ***(for short 'Act')*** in the Court of learned Commissioner under Workmen Compensation Act, Rampur Bushahr, District Shimla, H.P., being legal representatives/dependents of deceased Gopal Singh, who unfortunately died on 26.3.2005 while driving vehicle bearing registration No. HP-63-0793 (Swaraj Mazda). The claimants alleged that deceased Gopal Singh died during the course of employment and as such, they are entitled to compensation to the tune of Rs. 11,00,000/- being his legal representatives/dependents. The claimants averred that deceased Gopal Singh was engaged as a driver in the ill-fated vehicle by respondent No.7, Smt. Subhadra Devi (appellant in FAO No.329 of 2010), who used to pay a sum of Rs. 5000/-, as monthly wages to the deceased Gopal Singh. Record reveals that at first instance claimants filed a petition in the Court of learned Motor Accident Claims Tribunal, Rampur, but same was ultimately dismissed as withdrawn.

4. Petition, as referred hereinabove, came to be opposed on behalf of the respondents (appellant herein) on the ground that deceased was not having valid driving licence and he was only being paid a sum of Rs.3000/- per month. Appellant-Insurance Company ***(hereinafter referred to as 'Insurance Company'),*** specifically alleged that deceased Gopal Singh was not employed as driver by the employer in vehicle No. HP-63-0793 and petition has been filed in collusion with respondent No.7(appellant in FAO No.329 of 2010), with a view to extract money.

5. Learned Court below on the basis of the totality of evidence led on record by the respective parties, held claimants entitled to compensation to the tune of Rs.2,96,400/-. Learned Court below also held claimants entitled for interest for a period from 26.3.2005 to 26.4.2010, amounting to Rs. 1,74,876/- in terms of Section 4(A) sub section 3(b) of the Act. Learned Court below also held respondent No.7 (employer-appellant in FAO No.329 of 2010) liable to pay penalty at the rate of 20% i.e. Rs. 59,280/- , in total a sum of Rs. 5,30,556/- came to be awarded in favour of the claimants.

6. Being aggrieved and dissatisfied with the aforesaid order dated 22.3.2010, both the appellant-Insurance Company and respondent No.7, Smt. Subhadra Devi filed two separate appeals bearing FAO No.150 of 2010 and FAO No.329 of 2010. Appellant-Insurance Company has come before this Court on a very precise ground that since a sum of Rs. 3 lacs was deposited on 28.4.2009 in terms of compromise arrived i*nter se* parties, learned Court below ought not have granted interest, if any, beyond 28.4.2009, whereas respondent No.7 by way of separate appeal bearing FAO No.329 of 2010, has alleged/raised ground that since there was no breach or willful violation of law on the part of the owner, learned Court below ought not have held her liable to pay amount of penalty. She has further raised a ground that learned Court below ought to have given specific ground/reason for awarding penalty and as such, impugned order, which is totally non-speaking qua this aspect of the mater, deserves to be modified/remanded back to that extent. She has further stated that learned Court below has awarded amount of penalty against the appellant without giving any notice or opportunity of being heard and as such, matter may be remanded back with the direction to the learned Court below to afford an opportunity of being heard before levying penalty, if any, as contained under Section 4(A) of the Act.

7. FAO No.150 of 2010 was admitted on 27.10.2010 on the following substantial questions of law:-

"1. Whether liability of payment of interest on compensation amount under the Workmen's Compensation Act arises only "when due" towards compensation is determined by the prescribed authority under the Act?.

2. Whether the amount of Rs.3 lacs deposited on 28.4.2009 by the insurance company towards the amount due was required to be taken into consideration while determining the interest liability under the Act?

8. Similarly, FAO No.239 of 2010 was admitted on 27.10.2010 on the following substantial questions of law:-

1. Whether the grant of penalty against the appellant without giving any finding or the reason in the award is sustainable?.

2. Whether order of the learned Commissioner, Workmen Compensation awarding penalty against the Owner of the vehicle without giving any notice or opportunity of being heard on this point, is not in violation of natural justice?.

3. Whether the learned Commissioner, Workmen Compensation has erred in law in awarding penalty in favour of the claimant, when there is neither any pleading nor any issue is framed to that extent?.

4. Whether the appellant is entitled to file and maintain the present appeal under Section 30(1)(aa) of the Workmen Compensation Act without filing certificate of deposit of award amount before the Commissioner alongwith the appeal?."

9. Having heard learned counsel representing the parties and perused the material available on record, especially receipts issued by the Commissioner, Under Workmen Compensation/SDM, Rampur Bushahr (available at page No.11 of the paper book), this Court is in agreement with Mr. Ishan Sharma, Advocate that since a sum of Rs. 3 lacs was deposited on 28.4.2009, learned Court below while awarding interest in terms of Section 4(A) of the Act, ought not to have held claimants entitled for interest beyond 28.4.2009. It is quite apparent from the receipts placed on record that sum of Rs. 3 lacs came to be deposited in the Office of the Commissioner under Workmen Compensation/ SDM, Rampur Bushahr by way of Demand Draft No.192290, dated 23.5.2009 and as such, learned Court below fell in error while determining interest. As per Section 4(a) of the Act, compensation was required to be paid/deposited as soon as it fell due. In the case at hand, alleged accident occurred on 26.3.2005, meaning thereby amount in terms of Section 4 of the Act, was to be deposited by employer/insurer on or before 26.4.2005, but in the case at hand admittedly amount qua the compensation, if any, in terms of Section 4 of the Act, came to be deposited by the appellant-insurance Company being insurer of vehicle owned by respondent No.7 (appellant in FAO No.329 of 2010) on 28.4.2009 and as such, learned Court below rightly held claimants entitled to the interest qua the delayed deposit, but certainly that could not be beyond 28.4.2009 when sum of Rs. 3 lacs was deposited by the Insurance Company in terms of compromise arrived *inter se* parties, which fact is quite evident from the receipts placed on record.

10. Accordingly, in view of the above, order dated 22.3.2010 passed by the learned Commissioner needs to be modified and accordingly, it is ordered that claimants shall be entitled to the interest w.e.f. 26.4.2005 up to 28.4.2009. In view of the above, compensation amount as awarded by the learned Commissioner, is re-calculated and determined as under:-

1	Completed year of age on he last birthday of the Workman immediately proceeding the date on which the compensation fell due	35 years
2	Relevant factor to calculate compensation.	197.6
3	Wages of Workman	Rs. 3000/-
4	Compensation amount due	197.6x3000=Rs.2,96, 400/-
5	Penalty @ 20%	Rs.59,280/-
6	Interest @ 12% per annum	Rs. 35,568/-

7	Date of accident	26.3.2005
8	Due date	26.4.2005
9	Interest of 4 years i.e. 26.4.2005 to 28.4.2009	35568x4= Rs.1,42,272/-
10	Total compensation due to claimants 4+5+9	Rs2,96,400 +59280+1,42,272 =Rs4,97,952/-

11. As far as pleas raised by respondent No.7 (appellant in FAO N0.329 of 2010) are concerned, this Court having carefully perused Section 4(A) and 3(b) of the Act, is not in agreement with Sh. Raman Sethi, learned counsel representing respondent No.7-appellant that learned Court below could not levy penalty upon respondent No.7-appellant. Bare perusal of Section 4(A)3(b) of the Act, suggests that if there is no justification for the delay, employer would be liable to pay sum not exceeding 50% of such amount in addition to the amount of arrears and interest by way of penalty.

12. True, it is that proviso to aforesaid provision of law suggests that order for the penalty would not be passed under Clause (b) without giving a reasonable opportunity to the employer to show cause why it not be passed, but in the case at hand, it is not in dispute that impugned order came to be passed in the presence of respondent No7 (appellant in FAO No.329 of 2010), who in so many words admitted the claim of the claimants, especially by admitting the fact that she used to pay sum of Rs. 3000/- to the deceased as monthly wages. Factum with regard to accident and unfortunate death of deceased Gopal Singh never came to be refuted by respondent No.7-appellant. Needless to say, as per scheme of the Act, especially Section 4 and 4(A) of the Act, which deals with awarding of compensation with penalty, no separate proceedings, if any, are/were required to be initiated either by the claimants or by the Court while determining penalty in terms of Section 4(A)3(b) of the Act, rather issue with regard to penalty is /was required to be considered and decided in the petition filed by the claimants under Section 22 of the Act, seeking therein compensation on account of death of deceased. There is nothing on record suggestive of the fact that plausible explanation, if any, ever came to be rendered on record by respondent No.7 for delay in payment of compensation, which otherwise as per Section 4 and 4(A) of the Act is/ was required to be paid as soon as it fell due. Since factum with regard to the accident, wherein deceased Gopal Singh died, was very much in the knowledge of respondent No.7, she ought to have taken steps for depositing the amount in terms of aforesaid provisions contained in the Act. Similarly, this Court is of the view that since full opportunity to participate in the proceedings filed on behalf of the claimants came to be afforded to respondent No.7-appellant, she cannot be permitted to raise the plea at this stage that learned Court below ought to have granted opportunity of being heard or should have issued show cause notice prior to determining the penalty in view of Section 4(3)(b) of the Act. Substantial questions of law, as referred hereinabove, are decided accordingly.

13. This Court does not find any force in the arguments of Mr. Raman Sethi, learned counsel representing respondent No.7 (appellant in FAO No.329 of 2010) that it is the insurer, who is liable to pay penalty. Penalty is not a part and parcel of the legal liability of the insurer to compensate his employee and since the insurer is under contractual obligation to indemnify the employer for his legal liability the insurer is not liable to pay the penalty. As regards the issue of payment of penaltyis concerned, the Hon'ble Supreme Court in ***Ved Prakash Garg vs. Premi Devi and Others, 1998 (1) ACJ 1,*** after examining the entire scheme of the Workmen's Compensation Act, has held that payment of interest and penalty are two distinct liabilities arising under the Workmen Compensation Act; penalty is not a part and parcel of the legal liability of the employer to compensate his employee and since the insurer is under contractual obligation to indemnify the employer for his legal liability the insurer is not liable to pay the penalty. So far as the amount of penalty imposed on the insured employer under contingencies contemplated by Section 4-A(3) (a) and (b) of the Act is concerned as that is on account of personal fault of the insured not backed up by any justifiable cause, the Insurance Company cannot be made liable to reimburse that part of the penalty amount imposed on the employer and liability to pay interest is part and parcel of legal liability of the employer to pay compensation upon default of payment of that amount within one month. The relevant para of the aforesaid judgment is read as under:-

"14. On a conjoint operation of the relevant schemes of the aforesaid twin Acts, in our view, there is no escape from the conclusion that the insurance companies will be liable to make good not only the principal amounts of compensation payable by insured employers but also interest thereon, if ordered by the Commissioner to be paid by the insured employers. Reason for this conclusion is obvious. As we have noted earlier the liability to pay compensation under the Workmen's Compensation Act gets foisted on the employer provided it is shown that the workman concerned suffered from personal injury, fatal or otherwise, by any motor accident arising out of and in the course of his employment. such an accident is also covered by the statutory coverage contemplated by Section 147 of the Motor Vehicles Act read with the identical provisions under the very contracts of insurance reflected by the Policy which would made the insurance company liable to cover all such claims for compensation for which statutory liability is imposed on the employer under Section 3 read with Section 4A of the Compensation Act. All these provisions represent a well- knit scheme for computing the statutory liability of the employers in cases of such accidents to their workmen. As we have seen earlier while discussing the scheme of Section 4A of the Compensation Act the legislative intent is clearly discernible that once compensation falls due and within one month it is not paid by the employer then as per Section 4A(3)(a) interest at the permissible rate gets added to the said principal amount of compensation as the claimants would stand deprived of their legally due compensation for a period beyond one month which is statutorily granted to the employer concerned to make good his liability for the benefit of the claimants whose bread-winner might have either been seriously injured or might have lost his life. Thus so far as interest is concerned it is almost automatic once default, on the part of the employer in paying the compensation due, takes place beyond the permissible limit of one month. No element of penalty is involved therein. It is a statutory elongation of the liability of the employer to make good the principal amount of compensation within permissible time limit during which interest may not run but otherwise liability of paying interest on delayed compensation will ipso facto follows. Even though the Commissioner under these circumstances can impose a further liability on the employer under circumstances and within limits contemplated by Section 4A(3)(a) still the liability to pay interest on the principal amount under the said provision remains a part and parcel of the statutory liability which is legally liable to be discharged by the insured employer. Consequently such imposition of interest on the principal amount would certainly partake the character of the legal liability of the insured employer to pay the compensation amount with due interest as imposed upon him under the Compensation Act. Thus the principal amount as well as the interest made payable thereon would remain part and parcel of the legal liability of the insured to be discharged under the Compensation Act and not dehors it. It, therefore, cannot be said by the insurance company that when it is statutorily and even contractually liable to reimburse the employer qua his statutory liability to pay compensation to the claimants in case of such motor accidents to his workmen, the interest on the principal amount which almost automatically gets foisted upon him once the compensation amount is not paid within one month from the date it fell due, would not be a part f the insured liability of the employer. No question of justification by the insured employer for the delay in such circumstances would arise for consideration. It is of course true that one month's period as contemplated under section 4A(3) may start running for the purpose of attracting interest under sub-clause (a) thereof in case where provisional payment becomes due. But when the employer does not accept his liability as a whole under circumstances enumerated by us earlier then section 4A(2) would not

get attracted and one month's period would start running from the date on which due compensation payable by the employer is adjudicated upon by the Commissioner and in either case the Commissioner would be justified in directing payment of interest in such contingencies not only from the date of the award but also from the date of the accident concerned. Such an order passed by the Commissioner would remain perfectly justified on the scheme of Section 4A(3)(a) of the Compensation Act. But similar consequence will not follow in case where additional amount is added to the principal amount of compensation by way of penalty to be levied on the employer under circumstances contemplated by Section 4A(3)(b) of the Compensation Act after issuing show cause notice to the employer concerned who will have reasonable opportunity to show cause why on account of some justification on his part for the delay n payment of the compensation amount he is not liable for this penalty. However if ultimately the Commissioner after giving reasonable opportunity to the employer to show cause takes the view that there is no justification for such delay on the part of the insured employer and because of his unjustified delay and due to his own personal fault he is held responsible for the delay, then the penalty would get imposed on him. That would add a further sum upto 50% on the principal amount by way of penalty to be made good by the defaulting employer. So far as this penalty amount is concerned it cannot be said that it automatically flows from the main liability incurred by the insured employer under the Workmen's Compensation Act. To that extent such penalty amount as imposed upon the insured employer would get out of the sweep of the term 'liability incurred' by the insured employer as contemplated by the proviso to Section 147(1)(b) of the Motor Vehicle Act as well as by the terms of the Insurance Policy found in provisos (b) and (c) to sub-section (1) of section II thereof. On the aforesaid interpretation of these tow statutory schemes, therefore, the conclusion becomes inevitable that when an employee suffers from a motor accident injury while on duty on the motor vehicle belonging to the insured employer, the claim for compensation payable under the Compensation Act along with interest thereon, if any, as imposed by the Commissioner Section 3 and 4A(3)(a) of the Compensation Act will have to be made good by the insurance company jointly with the insured employer. But so far as the amount of penalty imposed on the insured employer under contingencies contemplated by Section 4A(3)(b) is concerned as that is on account of personal fault of the insured not backed up by any justifiable cause, the insurance company cannot be made liable to reimburse that part of the penalty amount imposed on the employer. The latter because of his own fault and negligence will have to bear the entire burden of the said penalty amount with proportionate interest thereon if imposed by the Workmen's Commissioner."

(emphasis supplied)

14. It is apparent from the aforesaid exposition of law that though claim for compensation payable under the Workmen's Compensation Act alongwith interest thereon is required to be made good by the Insurance Company jointly with the insured employer, but, Insurance Company cannot be made liable to reimburse the amount of penalty imposed upon the employer.

15. Consequently, in view of the above, appeal bearing FAO No.150 of 2010 filed by the appellant-Insurance Company is allowed and order dated 22.3.2010 passed by the learned Commissioner is modified to the aforesaid extent only. Appeal bearing FAO No.329 of 2010 filed by respondent No.7-appellant Smt. Subhadra Devi is dismissed being devoid any merit. Excess amount, if any, deposited by the appellant-Insurance company, may be refunded after adjusting the proportionate interest towards the compensation awarded by this Court. Similarly, amount of compensation as directed by this Court may be released in favour of the claimants strictly as per their shares, which have been otherwise defined in the the award passed by the learned Court below. Appeals stand disposed of, so also pending applications, if any.

Copy of this judgment be placed on the case file of FAO No.329 of 2010.

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

Neha Sharma & others .....Petitioners

Versus

Ms. Rajani Devi & another .....Respondents

Cr.MMO No. 52 of 2019

Date of Decision: 27.8.2019

Code of Criminal Procedure, 1973 –Section 482 – Inherent powers – Quashing of complaint under Domestic Violence Act – Circumstances- Held, settlement between parties if going to result in harmony and may improve their future relationship, is a relevant consideration for exercise of powers under Section 482 of Code. (Para 11)

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 Supreme Court Cases 466

Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497

Veena Vs. State (Government of NCT of Delhi) and another, (2011)14 SCC 614

Priyanka Khanna v. Amit Khanna (2011) 15 SCC 612

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

For the Respondents: Mr. Aman Sood, Advocate, for respondents No.1 and 2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under Section 482 of the Code of Criminal Procedure read with Section 227 of the Constitution of India, prayer has been made on behalf of the petitioners for quashing of complaint dated 13.10.2015 filed under Section 12 of the Protection of Women under Domestic Violence Act, 2005 ***(Annexure P-1)*** as well as consequent proceedings pending in the Court of learned Chief Judicial Magistrate, Sirmaur, District Nahan, Himachal Pradesh.

2. Briefly stated facts, as emerge from the record are that marriage *inter se* respondent No.1, Ms. Rajani Devi and respondent No.3, Sh. Rahul Sharma, was solemnized on 13th May, 2013 as per Hindu customs and rights, however, since they were unable to get along for considerable time, respondent No.1 started residing separately w.e.f. 12th November, 2014. Subsequently, respondent No.1 filed a complaint under Section 12 of the Protection of Women under Domestic Violence Act, 2005 ***(for short 'Act')*** against the petitioners as well as respondent No.3, who happened to be her in-laws and husband respectively. Though, complaint, as referred hereinabove, is pending adjudication in the Court of learned Chief Judicial Magistrate, Sirmaur, District Nahan, H.P., but vide order dated 24.5.2016 ***(Annexure P-3)*** learned Chief Judicial Magistrate, Sirmaur, District Nahan, H.P., granted interim maintenance of Rs.7000/- per month in favour of respondents No.1 and 2.

3. Respondent No.3, being aggrieved and dissatisfied with the aforesaid order dated 24.5.2016 ***(Annexure P-3),*** preferred Criminal Revision No.22-Cr.R/10 of 2016 in the Court of learned Sessions Judge, Sirmaur, District Nahan, H.P., who vide judgment dated 29.4.2017 ***(Annexure P-4),*** dismissed the revision petition, as a consequence of which, order passed by learned Chief Judicial Magistrate, Sirmaur, District Nahan, H.P, awarding the interim maintenance, came to be upheld.

4. Respondent No.3, being aggrieved and dissatisfied the aforesaid judgment dated 29.4.2017 ***(Annexure P-4),*** preferred Cr.MMO No.242 of 2017 before this Court, wherein respondent No.1 and respondent No.3 agreed to settle their dispute amicably *inter se* them, but it appears that compromise arrived *inter se* parties before this Court could not be given effect to because of adamant attitude of the parties. In view of the subsequent developments, respondent No.1 got the complaint filed by her under Section

12 of the Act revived as per the liberty granted to her by this Court while disposing of the Cr.MMO No.242 of 2017 vide judgment dated 25.8.2017. In the aforesaid background, petitioners have approached this Court, seeking therein quashment of complaint as well as consequent proceedings pending in the Court of learned Chief Judicial Magistrate, Sirmaur, District Nahan, H.P.

5. On 17.6.2019, this Court having noticed the controversy *inter se* parties, deemed it fit to summon both the parties to the Court, so that possibility, if any, of amicable settlement *inter se* them, is explored. On 8.7.2019, respondent No.1 expressed her unwillingness/inability to reside with her husband respondent No.3 and stated before this Court that she is ready for one time settlement. This Court on the request of learned counsel representing the parties, adjourned the matter for some time on 8.7.2019, enabling the parties to settle the terms and conditions of amicable settlement. This Court was informed that as per agreed terms, respondent No.3 would pay lump sum amount of Rs. 2.50 lac to respondent No.1, Ms. Rajni Devi, who in turn would deposit the same in the name of her minor daughter, namely Ananya (Respondent No.2).

6. On 19.8.2019, petitioners who had come present in Court also brought the FDR, amounting to Rs. 2.50 lac made in the name of respondent No.2, but since respondent No.1 was not present on that day, matter could not proceed further. Today, respondent No.1 has come present in Court. Both respondents No.1 and 3 have stated on oath that they of their own volition and without there being any external pressure have entered into the compromise, whereby they agreed to withdraw all the cases initiated/lodged at their behest against each other. They further stated that FDR, amounting to Rs. 2.50 lac made in the name of respondent No.2 has been handed over to respondent No.1 and as such, prayer made in the petition for quashing of complaint as well as consequent proceedings pending adjudication in the Court of learned Chief Judicial Magistrate, Sirmaur, District Nahan, H.P., may be accepted. They further stated that both the parties have jointly moved a petition under Section 13-B of the Hindu Marriage Act, praying therein for grant of decree of divorce by way of mutual consent. Statements made by respondents No.1 and 3 are taken on record.

7. Having heard learned counsel representing the parties and perused the material available on record, especially statement made by respondent No.1 in this Court, this Court sees no impediment in accepting the prayer made in the petition for quashment of complaint as well as consequent proceedings pending in the Court of learned Chief Judicial Magistrate, Sirmaur, District Nahan, H.P.

8. Since the petition has been filed under Section 482 Cr.P.C, this Court deems it fit to consider the present petition in the light of the judgment passed by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another (*2014)6 Supreme Court Cases 466,** whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt,under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However,this power is to be as under:-

> 29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
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> 29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the

trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

9. The Hon'ble Apex Court in case ***Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303*** has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497** has also held as under:-

"7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.

The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and se serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite

> *full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)*
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> *8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."*

10. Recently Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others versus State of Gujarat and Another***, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in ***Narinder Singh's*** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

> "13. The same principle was followed in **Central Bureau of Investigation v. Maninder Singh** (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify arecourse to the power under Section 482:
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> > "...In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."
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> 14. In a subsequent decision in **State of Tamil Nadu v R Vasanthi Stanley** (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:
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> > "... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or

getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"

"…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15.The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has bee inherent n settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transac mental tions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

11. It is quite apparent from the aforesaid exposition of law that High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable, but such power is to be exercised sparingly and with great caution. In the judgments, referred hereinabove, Hon'ble Apex Court has categorically held that Court while exercising inherent power under Section 482 Cr.P.C. must have due regard to the nature and gravity of offence sought to be compounded. Hon'ble Apex Court has though held that heinous and serious offences of mental depravity, murder, rape, dacoity etc. cannot appropriatelybe quashed though the victim or the family of the victim have settled the dispute,but it has also observed that while exercising its powers, High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases. Hon'ble Apex Court has further held that Court while exercising power under Section 482 Cr.P.C can also be swayed by the fact that settlement between the parties is going to result in harmony between them which may improve their future relationship. Hon'ble Apex Court in its judgment rendered in ***State of Tamil Nadu*** *supra*, has reiterated that Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice and has held that the power to quash under Section 482 is attracted even if the offence is non-compoundable. In the aforesaid judgment Hon'ble Apex Court has held that while forming an opinion whether a criminal proceedings or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

12. Consequently, in view of the averments contained in the petition as well as the submissions having been made by the learned counsel for the parties that the matter has been compromised, and keeping in mind the well settled proposition of law as well as the compromise being genuine, this Court has no inhibition in accepting the compromise and quashing the complaint as well as consequent proceedings pending in the Court of learned Chief Judicial Magistrate, Sirmaur, District Nahan, H.P.

13. Accordingly, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, complaint dated 13.10.2015 ***(Annexure P-1)*** as well as consequent proceedings pending adjudication in the Court of learned Chief Judicial Magistrate, Sirmaur, District Nahan, H.P.,are quashed and set-aside.

14. As far as joint petition filed under Section 13-B of the Hindu Marriage Act, praying therein for grant of decree of divorce by way of mutual consent, this Court direct the Registry to register the same and thereafter transfer the same to the learned District Judge (Family Court) Shimla, today itself, so that necessary action on the same is taken at the earliest. Learned District Judge (Family Court) Shimla, H.P, is directed to take note of aforesaid petition filed under Section 13-B of the Hindu Marriage Act filed by respondent No.1 and respondent No.3 and record their statements today itself , so that parties are saved from the ordeal of coming to the Court again and again.

15. Careful perusal of the averments contained in the petition filed under Section 13-B of the Hindu Marriage Act as well as statements made before this Court clearly suggest that there is no possibility of rapprochement or conciliation between respondent No.1 and respondent No.2 and as such, prayer made on their behalf for divorce by way of mutual consent deserve to be considered. Since parties are living separately for the last so many years and they have been litigating with each other, statutory period of six months as envisaged under Section 13-B of the Act for grant of divorce by way of mutual consent can be waived, especially when there is no possibility of rapprochement of the parties and marriage has broken beyond repair. Learned District Judge (Family Court) Shimla, while considering the aforesaid aspect of the matter may also take note of the judgment rendered by this Court in case titled ***Bharti Kapoor versus Des Raj,*** CMPMO No.271 of 2017, decided on 31.10.2018 as well as judgments rendered by Hon'ble Apex Court in ***Veena Vs. State (Government of NCT of Delhi) and***

another, (2011)14 SCC 614, ***Priyanka Khanna v. Amit Khanna*** (2011) 15 SCC 612, Civil Appeal No.11158 of 2017 (arising out of Special Leave Petition (Civil) No.20184 of 2017) titled as ***Amardeep Singh Vs. Harveen Kaur,*** decided on 12.9.2017.

16. Learned counsel representing the parties undertake to cause presence of respondent No.1 and 3 before the learned District Judge (Family Court)Shimla, H.P., today at 2:00 PM, enabling him to do the needful in terms of the instant judgment passed by this Court.

17. Registry is directed to ensure that copy of the petition filed under Section 13-B of the Hindu Marriage Act alongwith instant judgment are sent to the learned District Judge(Family Court)Shimla, H.P., immediately, preferably on or before 2:00 PM, enabling him to do the needful in terms of the direction contained in the instant judgment.

The present petition is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

Authenticated copy.

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

Cr. Revision No.365 of 2015 a/w
Cr. Revision No.290 of 2016
Date of Decision: 3rd September, 2019

Juvenile Justice Act, 2000 – Section 15(1) (g) – Dispositional orders – Detention in Special Home – Held, if juvenile in conflict with law has attained majority during pendency of inquiry/ appeal / revision, then he can not be detained in Special Home even if, he is found having committed the offence. (Para 3)

1. Cr. Revision No. 365 of 2015

Anil Kumar @ Ballu .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

2. Cr. Revision No. 290 of 2016

State of Himachal Pradesh .....Petitioner

Versus

Anil Kumar @ Ballu .....Respondent

For the Petitioner(s): Mr. T.S.Chauhan, Advocate, for the petitioner in Cr. Revision No.365 of 2015 and for the respondent in Cr. Revision No.290 of 2016.

For the Respondent: Mr. Sudhir Bhatnagar, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General for the petitioner in Cr. Revision No.290 of 2016 and for the respondent in Cr. Revision No.365 of 2015.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Both the above captioned Criminal Revision Petitions, lay challenge to judgment dated 30.7.2015, passed by learned Additional Sessions Judge (I), Una, District Una, Himachal Pradesh, in Criminal Appeal No.1/2014, affirming the judgment of conviction recorded by learned Principal Magistrate, Juvenile Justice Board, Una, District Una, Himachal Pradesh, in Criminal Inquiry No.4/2011, whereby petitioner namely, Anil Kumar @ Ballu ***(hereinafter referred to as Juvenile in conflict with law)***, who has filed Criminal Revision No.365 of 2015 has been convicted and ordered to be sent to Special Home for a period of one year for having committed the offence punishable under Sections 376(2)(f) and 201 of IPC.

2. By way of Criminal Revision Petition No.365 of 2015, Juvenile in conflict with law namely, Anil Kumar has sought acquittal after setting aside the judgment of conviction recorded by the learned Courts below, whereas State of Himachal Pradesh in Criminal Revision No.290 of 2016 has prayed for enhancement of sentence awarded by

the learned Courts below while holding Juvenile in conflict with law guilty of having committed the offence punishable under Sections 376(2)(f) and 201 of IPC.

3. Having heard learned counsel representing the parties and perused the material available on record vis-a-vis reasoning assigned by learned Courts below while passing the impugned judgments, this Court finds no reason at this stage to determine the correctness and genuineness of the judgment impugned before it because by now both the petitions have become infructuous. Admittedly, vide judgment dated 31.12.2013 learned Principal Magistrate, Juvenile Justice Board, Una, District Una, H.P. while holding Juvenile in conflict with law guilty of having committed the offence punishable under Section 376(2)(f) of IPC, sent him to Special Home for a period of one year, but now since Juvenile in conflict with law has attained majority, he cannot be sent to Special Home for a period of one year in terms of the judgment passed by Principal Magistrate, Juvenile Justice Board. Juvenile Justice Board while awarding sentence under Section 15(g) of the Act, has categorically observed that juvenile shall not suffer disqualification on account of the conviction in view of Section 19 of the Juvenile Justice Act.

4. As far as criminal petition filed by the respondent/ State is concerned, whereby they have prayed for enhancement, same has also rendered infructuous for the reason that maximum punishment as per Juvenile Justice (Care and Protection of Children) Act, 2000, which was applicable at the time of alleged incident, specifically provides provision of sending the Juvenile in conflict with law to Special Home for a period of three years. Though, in the instant case, this Court has not made an attempt to ascertain the correctness of the judgment of conviction recorded by the court below on its own merit, but even otherwise for the sake of arguments, if it is presumed that in peculiar facts and circumstances of the case, Juvenile in conflict with law ought to have been awarded maximum punishment of three years as provided under Section 15(1)(g) of the Act, same cannot be awarded at this stage when Juvenile in conflict with law has attained majority.

5. Otherwise also, Section 15(1) of the Act provides that where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it so thinks fit can award any of the following punishment:-

(a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;

(b) direct the juvenile to participate in group counselling and similar activities;

(c) order the juvenile to perform community service;

(d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;

(e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(g) make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.

6. Section 15(1)(g) of the Act though provides for sending the Juvenile in conflict with law to Special Home for a period of three years, but proviso to this section further provides that such period can be reduced by the Board taking note of nature of the offence and circumstances of the case and as such, it cannot be said that in any eventuality period of three years, as prescribed under Section 15(f) of the Act, cannot be reduced by the Court.

7. Consequently, in view of the above, both the criminal petitions are disposed of as having rendered infructuous with the efflux of time. Pending application(s), if any, also stands disposed of.

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BEFOREHON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Pushpinder Singh .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

Cr.MMO No. 426 of 2019
Date of Decision: 4.9.2019

Code of Criminal Procedure, 1973 – Sections 173 (8) & 190 – **Prevention of Corruption Act, 1988** – Section 13 – Disproportionate assets – Cancellation report by police – Non – acceptance thereof by Special Judge - Petition against – Held, court has the discretion to accept or reject cancellation/closure report filed by the investigating officer – But this discretion has to be exercised only after evaluating the said report vis-a-vis material placed on record – Cancellation/closure report clearly mentioning that benefit of doubt can be given to accused for acquiring 9.38% disproportionate assets as laid in Krishnanand vs. State of Madhya Pradesh AIR 1977 SCC 796 – Refusal to accept cancellation report without going into the details given in closure report, was erroneous - Petition allowed –Order of trial court set aside – Matter remanded. (Paras 6 to 9).

Case referred:
Krishnanand versus State of Madhya Pradesh, 1977 SC 796

For the Petitioner: Mr. Naresh Kaul, Advocate.
For the Respondent: Mr. Sudhir Bhatnagar & Mr. Sanjeev Sood, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant Criminal Main Miscellaneous Petition filed under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India, lays challenge to order dated 27.6.2019 passed by learned Special Judge, Kangra at Dharamshala in case No. UTR/CR No.5/2017, titled as ***State of H.P. Vs. Pushpinder Singh,*** whereby recommendation for cancellation of FIR No.5/13, dated 5.4.2013 made by Superintendent of Police, SV & ACB, Dharamshala, has been declined.

2. Reply of the respondent filed on the affidavit of Superintendent of Police, SV & ACB, Dharamshala, reveals that report No.01/2012 (DMA) 987,dated 112-01-2012 was received in police Station SV & ACB, Dharamshala from the Office of Vigilance Headquarter, Shimla against the petitioner herein with the direction to verify the allegations levelled in the source report. In the complaint, complainant alleged that petitioner herein collected wealth beyond his known sources of income. Complainant alleged that petitioner herein has no other earning member in his family, but he has specious house, luxurious household and has also a luxurious car. Complainant also alleged that petitioner herein repaid loan amounting to Rs. 7,00,000/- within a year.

3. On the basis of aforesaid complaint, inquiry was conducted by Sub Inspector Geeta Prakash and Jagdish Chand. During the course of inquiry, 43% disproportionate assets were found, hence FIR, detailed hereinabove, came to be lodged against the present petitioner. During investigation, 9.38 % disproportionate assets were found unaccounted from the known sources of the income of the accused and therefore keeping in view 10% margin of disproportionate assets a closure report came to be submitted in the Court of learned Special Judge, Dharamshala. However, learned Special Judge, Dharamshala vide impugned order dated 27.6.2019 declined to accept the aforesaid closure report. In the aforesaid background, petitioner against whom FIR, as mentioned hereinabove, came to be lodged on the basis of source report, as referred

hereinabove, has approached this Court in the instant proceedings, praying therein to accept the closure report after setting aside the impugned order.

4. Having heard learned counsel representing the parties and perused the material available on record vis a vis reasoning assigned in the impugned order, this Court finds that impugned order passed by learned Special Judge, Dharamshala, declining to accept the cancellation report is wholly untenable. In para-6 of the impugned order, learned Court below has itself recorded that as per the law laid down by the Hon'ble Apex Court in ***Krishnanand versus State of Madhya Pradesh,*** 1977 SC 796, benefit of doubt for possessing disproportionate assets upto 10% increase of the known source of income can be given to the accused, but even thereafter it refused to accept the cancellation report filed on behalf of the Investigating Agency on the ground that discretion to grant benefit of doubt lies only with the Court after evaluating the evidence led by the prosecution before the Court.

5. There cannot be any quarrel with the aforesaid proposition of law because Hon'ble Apex Court in the judgment, referred hereinabove, has categorically held that benefit of doubt of possessing disproportionate assets upto 10% increase of the known source of income can be given to the accused, but as far as power to extend benefit of doubt, as referred above, is concerned admittedly, same lies with the Court. In the case at hand, careful perusal of closure report filed on behalf of the Investigating Agency, clearly reveals that Investigating Officers after having made detailed investigation made a report stating therein that 9.38% disproportionate assets are unaccountable from the known source of income of the accused and as such, keeping in view the 10% margin of disproportionate assets, benefit is required to be given to the accused. But close scrutiny of cancellation report nowhere suggests that Investigating Officers have extended any benefit of doubt, rather in their own wisdom they have submitted cancellation report to the Court, enabling it to pass appropriate orders.

6. Needless to say, discretion to accept or reject cancellation report, if any, filed on behalf of the Investigating Agency solely lies with the Court concerned, but such decision is usually taken after evaluating the report vis-a vis material placed on record alongwith closure report. Careful perusal of closure report filed in the instant case, clearly reveals that complete details with regard to assets owned and possessed by the petitioner herein during check period w.e.f. 1.1.2004 to 31.3.2012 have been furnished, but it appears that learned Court below without going into the details given in the closure report, arrived at a erroneous conclusion that since Investigating Agency has given benefit of doubt, applying the principle of 10% margin of disproportionate assets, closure report cannot be accepted.

7. True, it is that discretion, if any, to grant/extend benefit of doubt lies with the Court concerned, but definitely there is no embargo/ bar for the party against whom complaint is filed to raise such plea at the time of consideration of closure report because if at the time of consideration of closure report, court after having carefully perused the recommendation made in the closure report vis-a vis material placed before it, comes to the conclusion that person concerned has possessed disproportionate assets upto 10% increase of the known source of income, it can always proceed to accept the cancellation report and thereafter discharge the person against whom case for having acquired disproportionate assets to the known source of income is registered.

8. Having carefully perused the impugned order, this Court has no hesitation to conclude that learned Court below has gone astray while considering the prayer made on behalf of the Investigating Agency to accept the cancellation report wrongly presuming that Investigating Officer has extended/granted benefit of doubt to the accused, whereas as has been observed above, Investigating Officers have simply made recommendation for cancellation report, stating therein that during the investigation petitioner has been found to have possessed/acquired 9.38 % disproportionate assets from the known source of his income. Learned Court below while passing the impugned order has not gone into the reasoning assigned by the Investigating Agency while drawing the aforesaid conclusion with regard to acquisition of 9.38% disproportionate assets to the known source of income by the petitioner/accused.

9. Consequently, in view of the above, the present petition is allowed and impugned order dated 27.6.2019 is quashed and set-aside. The matter is remanded back to the learned Court below to consider the cancellation report filed by the Investigating Agency afresh taking into consideration the law on the point as well as observations made by this Court in the instant judgment.

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

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

Vijay Kumar .....Petitioner

Versus

Roop Lal Koundal .....Respondent.

CMPMO No. 444 of 2019

Decided on : 11.9.2019

Code of Civil Procedure, 1908 – Order XVII Rule 1 – Adjournment – Grant of - Held, no peremptory mandate can be rendered by High Court directing trial court to grant or not to grant any further adjournment in a case as it may prejudice the interest of parties. (Para 1).

For the petitioner: Mr. Mukesh Sharma, Advocate.

For the respondent: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The learned counsel, for the plaintiff/petitioner herein, submits, that, on 31.7.2019, upon, Civil Suit No. 136/10, of, 2015, coming up, before the learned trial Judge concerned, yet, the defendant, omitting, to, take the requisite completest steps, for, ensuring adduction, of, his evidence, upon, the relevant issues. He further submits that, despite, the learned trial Judge concerned, also prior thereto, affording opportunities, for the afore purpose, to the defendant, yet, he failed to avail, the, afore granted opportunitie(s) and, hence he seeks a pronouncement being made, upon, the learned judge, to, not afford any further opportunities. However, since, the, order, as, made, on, 27.8.2019, is, not under challenge, (i) thereupon, without any challenge being cast thereto, it would be inappropriate, to, interfere with the process, engaged into, by the learned trial Judge concerned, appertaining to grant of adjournments, by him, for the relevant purpose, (ii) as, the relevant thereto reason, which may have been argued, before the learned trial Judge concerned, and, on anvil thereof, he became objectively satisfied, to, grant an adjournment, is, not contended to be stained, with, an aura, of, malafide, (iii) hence no per-emptory mandate, can be rendered, by this Court, vis-a-vis, the learned trial Judge concerned, to, not grant any further adjournment, for, the relevant purpose, (iv) as, thereupon, despite sufficient reasons prevailing, upon, the defendant, to, omit, to, take the relevant steps, for, the relevant purpose, he yet may be precluded, to canvass, and, agitate, them, and, also the learned trial Judge concerned, may untenably be precluded, to make any appropriate order, hence thereon, (v) whereupon his defence, may be, prejudiced or may untenably become, the, ill casuality.

2. In view of the above observations, the petition is disposed of. However, in the interest of justice, the learned trial Judge concerned, is, directed to ensure that, after 24.9.2019, upon, the defendant, failing to adduce his evidence, he may not permit, any, further opportunity, to the defendant, for, the relevant purpose. All pending applications, if any, also stand disposed of.

3. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case, and, the learned the learned trial judge concerned, shall decide, the matter uninfluenced, by any observation, made hereinabove.

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IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No.4263 of 2015

Date of Decision:3.9.2019

Constitution of India, 1950 – Article 226 – Regularization as Creche Teacher/ Bal Sevika - Entitlement – Held, petitioner was appointed as crèche teacher on fixed honorarium under Rajiv Gandhi National Crèche Scheme, Ministry of Women and Child Development of Union Government – She can not claim parity with Bal Sevikas appointed under state sponsored schemes – She can not be considered for promotion / recruitment as Balwadi teacher as per R & P Rules for said posts. (Paras 7 to 10).

Prem Lata Sanehi .....Petitioner

Versus

Union of India & others ... Respondents.

Coram:
Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting? [3] Yes.

For the Petitioner : Mr. Subhash Mohan Snehi, Advocate.

For the Respondents: Mr.Shashi Shirshoo, Central Government Counsel, for the respondent-Union of India.

Mr. Rajinder Singh, Advocate, for respondent No.2.

Mr. Sudhir Bhatnagar & Mr. Sanjeev Sood, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General, for the respondent-State.

Mr. Dalip K. Sharma, Advocate, for respondent No.5.

Sandeep Sharma, Judge(oral):

Certain undisputed facts, as emerge from the pleadings and projected by the learned counsel representing the parties are that in the year, 1976-77 Government of India launched Creche Scheme throughout the country for the children of working mothers. In the year, 2006 respondent No.1 renamed the aforesaid Creche Scheme as ***"Rajiv Gandhi National Creche Scheme for the children of Working mothers***". In the year, 1982 petitioner came to be appointed as Creche Teacher at Stangidhar, District Kullu, Himachal Pradesh. In the year, 1983-84 petitioner while serving as Creche Teacher, also did Balsevika Training Course. It is also not in dispute that petitioner after having rendered her services as Creche Teacher retired from service on 31.8.2014.

2. In nutshell, the grouse of the petitioner is that since she had undergone Balsevika Training Course on the pretext that after completion of such training, she would be given status of Junior Basic Teacher, she ought to have been promoted in terms of Clause 10 of R&P Rules framed by the respondent for the Recruitment of Balwadi Teacher, wherein 10% appointments are to be made from the post of Balsevikas and 90% by direct recruitment.

[3] *Whether the reporters of the local papers may be allowed to see the judgment?*

Petitioner has claimed that since she discharged her duties w.e.f.1982 continuously and uninterruptedly as Balsevika, she is entitled to promotion to the post of Balwadi Teacher, but it appears that her such request never came to be paid any heed by the respondents, as a consequence of which, she was compelled to approach this Court in the instant proceedings under Article 226 of the Constitution of India, seeking therein following reliefs:-

> "(i) That writ of mandamus may kindly be issued, directing the respondents to give promotion to the petitioner as per R& P Rules to the post of Balwadi Teacher on completion of her 10 years service i.e. from the year, 1992 since the petitioner was appointed in the year, 1982.
>
> (ii) That writ of mandamus may kindly be issued, directing the respondents to give regular pay scale to the petitioner(Creche Teacher/Balsevika) at par with Balwadi Teacher from the due date of her entitlement for the same.
>
> (iii) That writ of mandamus may kindly be issued directing the respondents to extend the benefit of pension and pensionary benefits in favour of the petitioner from the date of her retirement I.e 31.08.2014 onwards with all consequential service benefits."

3. Petitioner has also made reference to the judgments passed by this Court in CWP (T) No. 12225 of 2008, titled as ***Kumari Meera Thakur and others Vs. State of Himachal Pradesh and others*** and CWP(T) No.12348 of 2008, titled as ***Kubja Sharma vs. State of Himachal Pradesh and others***, wherein respondents were directed to consider the case of the petitioners therein to revise the pay scale of Rs. 950-1800/- to Rs.3120-5160/- with effect from 1.1.1996. Careful perusal of the orders passed by this Court in the aforesaid cases, reveals that this Court directed the petitioners therein to file representations before the appropriate authorities for redressal of their grievance, but since their representation were rejected, petitioners in the aforesaid writ petitions, again approached this Court in CWP No.7364 2010 titled as ***Meera Thakur and others versus State of HP and others***, which ultimately came to be disposed of on 28.6.2011. Pursuant to the aforesaid judgment passed by this Court, the respondents extended the benefit of revised pay scale in favour of Balwadi Teachers and their services were also regularized.In the aforesaid background, petitioner has claimed that since she has rendered long service of 30 years prior to her retirement and she has been retired from the service w.e.f.31.08.2014 at the meagre salary of Rs. 1400/- per month, respondent may be directed to promote her in terms of Clause 10 of R & P Rules to the post of Balwadi Teacher. Petitioner has further claimed that since her appointment is governed by the guidelines as are applicable to the Balwadi Teachers coupled with the fact that she alongwith Balwadi Teachers had undergone same and similar Balsevika Training, she ought to have been given regular/ revised pay scale during her services.

4. Having heard learned counsel representing the parties and perused the material available on record, this Court is of the view that claim put forth by the petitioner is not justifiable because all the respondents in unison have stated before this Court that petitioner was employed as Creche Teacher/ Balsevika on fixed honorarium in terms of the guidelines and terms and conditions contained in ***"Rajiv Gandhi National Creche Scheme"*** implemented by the Ministry of Women and Child Development. It has been specifically stated by respondent No.5, who is appointing authority of the petitioner, that since petitioner came to be appointed under the **sc**heme floated by the Indian Council for Child Welfare on the fixed remuneration, she cannot claim regularization as well as parity with Balsevikas appointed under State Sponsored Schemes. Respondent No.5 has categorically denied that petitioner was given impression that after having obtained Balsevika Training Course, she would be given status of Junior Basic Teacher.

5. Respondent No. 5 has submitted that since 2002 after framing of the Recruitment and Promotion Rules, no Balwadi Teacher was appointed and promoted because centres were closed and such claim of the petitioner is not justified. It has been further stated that functioning of both the schemes are different. Creches are meant for children of Working Women, whereas Balwadi Centres are/were being run for all type of beneficiaries. Rajiv Gandhi National Scheme placed on record clearly reveals that there is no provision of fixed pay scale to the Creche Teacher, whereas on the other hand, the Balwadi Teachers appointed under State Sponsored Scheme are paid regular pay scale.

6. This Court with a view to find out the nature of appointment of the petitioner, directed the General Secretary, Himachal Pradesh State Council for Child Welfare (respondent No.5) vide order dated 7.8.2019 to file supplementary affidavit disclosing therein the nomenclature of the post held by the petitioner and to clarify whether mere awarding of Balsevika Training Certificate by the Indian Council for Child Welfare would entitle a person to the benefits, which otherwise are available to Balsevikas appointed by the Council in Balwadis.

7. In supplementary affidavit, General Secretary, H.P. State Council for Child Welfare, has stated that petitioner was initially appointed as Balsevika under the Creche Programme financed by the Indian Council for Child Welfare, New Delhi on the fixed honorarium of Rs. 190/- per month, which subsequently came to be enhanced from time to time. It has been further stated that mere on the basis of Balsevika Training Certificate, Balsevikas are not entitled for the post of Balwadi Teacher because awarding of Balsevika Training Certificate by the Indian Council for child Welfare, New Delhi is/ was meant for taking better care of the Children in the age group of 0 to 5 yeas.

8. In the case at hand, neither appointment letter, if any, has been placed on record by the petitioner to demonstrate that she was engaged permanently against any regular post nor any material has been placed on record suggestive of the fact that similar situate persons ever came to be regularized under ***"Rajiv Gandhi National Creche Scheme".*** Careful perusal of the judgment rendered by this Court in ***Kumari Meera Thakur and others vs. State of Himachal Pradesh and others (supra)*** clearly suggest

that Kumari Meera Thakur and Smt. Kubja Sharma are /were working as Balwadi Teachers and they had filed the petitions for allowing the revised pay scales to which they were otherwise entitled as per the terms and conditions of the appointment and as such, petitioner, who was working under Central Sponsored Scheme can not claim parity with aforesaid petitioners.

9. No doubt, petitioner rendered her services for 30 yeas as Balsevika(Creche worker) on a meagre honorarium, but since there is no provision, if any, under the scheme, under which petitioner came to be initially appointed to regularize the services of Balsevika/Creche Worker, case of the petitioner as well as other similar situate persons could not be considered in terms of Clause 10 of the R & P Rules famed by the respondent for the recruitment of Balwadi Teacher.

10. Moreover, careful perusal of Recruitment and Promotion Rules(Annexure P-5) placed on record though suggests that Balsevikas appointed on honorarium basis having 10 years service in the Council are entitled to the promotion to the post of Balwadi Teacher in H.P. State Council for child welfare Shimla, but Clause-7 of the Recruitment and Promotion Rules, which otherwise appears to be applicable for appointment of Balwadi Teachers in the State Sponsored Scheme, suggests that person claiming promotion to the post of Balwadi Teacher must have passed matriculation with 2nd Division. Clause-8 of the Recruitment and Promotion Rules clearly provides qualification provided under Clause 7 of the Recruitment and Promotion Rules, as referred above, would also apply to the case of the promotees, meaning thereby Balsevikas appointed on honorarium basis having 10 years service can also claim promotion to the post of Balwadi Teacher subject to their passing matriculation examination with 2nd Division. In the case at hand, it is quite apparent from the matriculation certificate placed on record (Annexure P-1) that petitioner passed matriculation examination in the year, 1971 in third Division. Hence, no benefit , if any, can be claimed by the petitioner while seeking promotion in terms of Recruitment and Promotion Rules.

11. Consequently, in view of the above, the present petition is dismissed alongwith pending applications, if any.

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

Mrs. Kiran Sarin ...Appellant

Versus

Mrs. Meera Varmani & Others ...Respondents

F.A.O. No. 559 of 2016

Date of decision: 29.08.2019

Code of Civil Procedure, 1908 - Order XXII Rule 10 A – Death of party – Duty of pleader – Held, pleader of party which has died during pendency of lis has duty to inform the fact to the court provided the pleader had knowledge about the said fact –Period of limitation for bringing on record legal representatives of deceased party in such circumstances would start from date when said fact is brought to the notice of opposite party by the counsel representing the deceased party. (Para 15 & 21)

Cases referred:

P. Jesaya (Dead) by Lrs.- Vs. Sub Collector and another, (2004) 13 SCC 431 Page 8

Mithailal Dalsangar Singh and others-Vs. Annabadi Devraran Kini and others, (2330) 10 SCC 691

Jodhpur-Vs- Gokul Narain and another, AIR 1996 SC 1819 (Page 14)

P. Jesaya (Dead) By LRs Versus Sub-Collector and Another (2004) 13 SCC 431

Urban Improvement Trust, Jodhpur Versus Gokul Narain (Dead) By LRs and Another (1996) 4 SCC 178

Perumon Bhagvathy Devaswom, Perinadu Village Versus Bhargavi Amma (Dead) by LRs and Others (2008) 8 SCC 321

P. Jesaya (Dead) by Lrs.- Vs. Sub Collector and another (2004) 13 SCC 431 Page 8

Urban Improvement Trust, Jodhpur Versus Gokul Narain (Dead) By LRs and Another (1996) 4 SCC 178

Perumon Bhagvathy Devaswom, Perinadu Village Versus Bhargavi Amma (Dead) by LRs and Others (2008) 8 SCC 321

For the appellant	Mr. Neeraj Maniktala, Advocate.
For respondents	Mr. Ashok Sood, Sr. Advocate, with Mr. Abhishek Sood, Advocate, for respondents No.2 to 14, 15 (a), 15(b) and 18. Respondents No.16 and 17 are stated to have died. Mr. Pranay Pratap Singh, Advocate, for proposed legal representative No.16 (a).

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

This appeal is directed against order dated 10.09.2016, passed by the Court of learned Additional District Judge (III), Kangra at Dharamshala in CMA No.69-P/2016 in C.A. No.83-P/xiii/2013/2008, titled Mrs Kiran Sarin Versus Mrs. Meera Varmani and others, vide which an application filed by the present appellant under Order 22, Rule 4, 9, 10A read with Section 151 of the Code of Civil Procedure, for bringing on record the legal representatives of Smt. Bimla Devi (respondent No.17 in appeal), who died during the pendency of the appeal, was dismissed.

2. Brief facts necessary for the adjudication of the present appeal are as under:-

Appellant filed a suit for declaration and permanent prohibitory injunction against 18 defendants including Smt. Bimla Devi, who was impleaded as defendant No.17. The suit was dismissed with costs by the Court of learned Civil Judge (Senior Division), Palampur, District Kangra, H.P., vide judgment and decree dated 01.12.2007.

3. Feeling aggrieved, appellant/ plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure.

4. During the pendency of the said appeal, defendant Bimla Devi, who was respondent No.17 in the appeal, died on 04.09.2014.

5. Appellant/ applicant filed an application dated 14.07.2015 under Order 22, Rule 4, 9, 10A read with Section 151 of the Code of Civil Procedure, to bring on record the legal representatives of deceased respondent No.17 Bimla Devi. Averments made in the application are reproduced hereinunder:-

" Sir,

The applicant/ appellant submits as under:-

1. That the above titled appeal is pending before this Hon'ble Court and the same is fixed for 14.7.2015.

2. That it was revealed on the last date of hearing that Smt. Bimla Devi, respondent No.17 had expired and on enquiries, it transpired that Smt. Bimla Devi, respondent No.17 had expired on 04.09.2014 leaving behind the following legal representatives:-

(a) Smt. Sukesh.

(b) Km. Samriti, daughters.

(c) Shri Rakesh Kumar son of Bimla Devi, resident of House No.3416, Sector 23-D, Chandigarh-UT. Copy of death certificate is attached.

3. That the respondent No.17 was being represented through a counsel Shri Gaurav Pathania in the case and the said counsel never informed about the death of respondent No.17 and as such, the contract between the pleader and the deceased (Bimla Devi) shall be deemed to subsist.

4. That there are good and sufficient grounds to set aside the abatement, if any. There are no other legal representatives of the deceased except those mentioned in para No.2 above.

An affidavit duly attested is attached.

It is, therefore, prayed that the application may kindly be allowed in the interest of justice and fair play".

6. This application has been dismissed vide impugned order by the learned Appellate Court. It held that there was nothing on record to demonstrate that counsel representing deceased respondent (wrongly referred to as respondent No.15 in the impugned order) on any date of hearing had informed learned counsel for the appellant about the death of the said respondent. On 16.07.2015, learned counsel for the appellant had informed that respondent No.17 had expired, but, there was nothing on record as to why the appellant was not previously having knowledge of death of deceased respondent No.17. It held that sufficient grounds were not mentioned in the application to set aside abatement.

7. Learned Appellate Court relying upon the judgment of Hon'ble Supreme Court in ***P. Jesaya (Dead) by Lrs.***- Vs. ***Sub Collector and another*** reported in ***(2004) 13 SCC 431 Page 8,*** and ***Mithailal Dalsangar Singh and others***-Vs. ***Annabadi Devraran Kini and others*** reported in ***(2330) 10 SCC 691, (Para-11)*** and ***Jodhpur-Vs- Gokul Narain and another,*** reported in ***AIR 1996 SC 1819 (Page 14)***, held that it was settled law that sufficient ground of delay has to be specifically pleaded and delay of each day has to be explained. Learned Appellate Court dismissed the application and ordered the appeal to have abated by holding that in the absence of specific mention of reason or cause of delay in filing the application, there was no occasion to consider the cause of delay for the Court.

8. Feeling aggrieved, appellant/ plaintiff has filed the present appeal.

9. Learned Counsel for the appellant has vehemently argued that impugned order is not sustainable in the eyes of law as while dismissing the application filed by the appellant, learned Appellate Court erred in not correctly appreciating the provisions of Order 22, Rule 4 of the Code of Civil Procedure as also the intent and scope of Order 22, Rule 10A of the Code. He argued that the appellant was not supposed to keep a track of all the respondents and duty was cast upon the counsel representing the respondents that in the eventuality of death of either of the respondent, they ought to have had informed the learned Court about the demise of the respondent in terms of Order 22, Rule 10A of the Code of Civil Procedure.

10. As per learned counsel for the appellant, only after information of death of respondent is given by his pleader to the Court, the other side has to take steps to bring on record legal representatives of deceased party. According to him, as no such intimation was given to the Court or the appellant by the pleader representing respondent No.17, about the death of said respondent, the application which was filed by appellant to bring on record legal representatives of deceased respondent No.17, was deemed to have been filed within limitation, nor there was any abatement in terms of the provisions of Order 22, Rule 4 of the

Code of Civil Procedure. He has relied upon the following judgments of Hon'ble Supreme Court to further his case i.e. ***P. Jesaya (Dead) By LRs*** Versus ***Sub-Collector and Another (2004) 13 SCC 431; Urban Improvement Trust, Jodhpur*** Versus ***Gokul Narain (Dead) By LRs and Another (1996) 4 SCC 178; Perumon Bhagvathy Devaswom, Perinadu Village*** Versus ***Bhargavi Amma (Dead) by LRs and Others (2008) 8 SCC 321***. He also relied upon the judgment of the Hon'ble Coordinate Bench of this Court in ***Civil Revision No.115/ 2009 titled as Smt. Shanta Kapila*** Versus ***Smt. Sharda and another, decided on 12.08.2011.*** On the strength of the said judgments, he has argued that the impugned order is perverse and not sustainable in the eyes of law and therefore, the same be set aside and the application filed by the appellant before the learned Appellate Court be allowed and the appeal be ordered to be thereafter, heard on merit.

11. On the other hand, learned Senior Counsel appearing for the respondents, has argued that there was no perversity in the order passed by the learned Court below, as it had rightly dismissed the application filed by the appellant under Order 22, Rule 4, 9, 10A read with Section 151 of the Code of Civil Procedure, because sufficient reasons were not mentioned in the application as to why application to bring on record the legal representatives of deceased respondent No.17 was not filed by the appellant either within the period of limitation or within some reasonable time, thereafter. Learned Senior Counsel for the respondents also argued that the averments made in the application were on the border of falsehood as what was contained in para 2 of the application was not relatable to the record of the case. As per learned Senior Counsel, record of the case did not disclose that on any date, pleader of respondent No.17 had mentioned before the Court about the death of respondent No.17 and in fact the application which was filed by appellant to bring on record legal representatives of deceased respondent No.17, was based upon her personal knowledge. In these circumstances, it was incumbent upon the applicant to have disclosed in the application itself as to from what source it acquired the knowledge of the death of respondent No.17 and delay in filing the application ought to have been sufficiently mentioned and explained in the application itself. He has further argued that as admittedly, application to bring on record the legal representatives of deceased respondent No.17 was not filed within the period of limitation and the appeal automatically abated in terms of provisions of Order 22, Rule 4 of the Code of Civil Procedure, it was incumbent upon the applicant to also have had filed an application under Section 5 of the Limitation Act, praying for condonation of delay and in the absence of there being any such application, simplicitor application filed under Order 22, Rule 4, 9, 10A read with Section 151 of the Code of Civil Procedure, was not maintainable. On these grounds, he has argued that as there was no infirmity in the impugned order, appeal being devoid of merit, be dismissed.

12. I have heard learned counsel for the parties and have also gone through the impugned order as well as relevant documents appended with the present appeal.

13. Order 22, Rule 4 of the Code of Civil Procedure *inter alia*, provides that where one or two or more defendants dies and the right to sue does not survive against the surviving defendants or defendant alone, or sole defendant or sole surviving defendant died and right to sue survives, the Court on an application made in that behalf shall call legal representatives of deceased defendant be made a party and shall proceed with the suit.

14. Sub-clause (5) of Order 22, Rule 4 of the Code of Civil Procedure Code further provides that where plaintiff was ignorant about the death of defendant and could not for that reason make an application for the substitution of legal representatives of defendant under the rule within the period specified in Limitation Act, 1963 and the suit has in-consequences abated and the plaintiff applies after expiry of the period specified therefor in the Limitation Act for setting aside the abatement and also for admission of that application under Section 5 of the Act on the ground that he had by reason for such ignorance sufficient cause for not making application within the period specified in the said Act, the Court shall in considering

the application under the said Section 5 of the Act and due regard to the fact of such ignorance.

15. At this stage, I will also refer to the provisions of Order 22, Rule 10A of the Code of Civil Procedure. Said provision provides that whereever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it and the Court shall thereupon give notice of such death to the other party and for this purpose the contract between the pleader and the deceased party shall be deemed to subsist. Thus, one thing which is apparent from the bare reading of the provisions of Order 22, Rule 10A of the Code of Civil Procedure is that, but obvious, onus is cast upon the pleader of the party which has died during the pendency of the lis, to inform about the said fact to the Court, provided the pleader has the knowledge of the said fact. Keeping this in mind, I will now proceed with the matter further.

16. In ***P. Jesaya (Dead) by Lrs.***- Vs. ***Sub Collector and another*** reported in ***(2004) 13 SCC 431 Page 8***, Hon'ble Supreme Court was dealing with situation where a respondent in appeal before the High Court died during the pendency of the appeal and it was contended that as heirs of the deceased respondent were not brought on record before the High Court, therefore, the appeal before the High Court had abated and the judgment delivered by the High Court was non-est and could not be enforced. In this background, Hon'ble Supreme Court held that though the argument was attractive, but one has to keep in mind the provisions of Order 22, Rule 10A of the Code of Civil Procedure, wherein it was obligatory on the pleader of the deceased to inform the Court and the other side about the factum of the death of the party. Hon'ble Supreme Court further held that no intimation was given to the Court or to the other side that the respondent had died and on the contrary, counsel continued to appear on behalf of the deceased person and also argued the matter. On the said factual matrix, Hon'ble Supreme Court observed that it was clear that attempt was to see whether a favourable order could be obtained and it was clear that intention was that it ordered against them, then thereafter, this would be made a ground for having that order set aside. In this factual background, Hon'ble Supreme Court further held that attempt was not just to take the other side, but also the Court for a right and these sort of tactics could not be permitted to prevail.

17. In ***Urban Improvement Trust, Jodhpur*** Versus ***Gokul Narain (Dead) By LRs and Another (1996) 4 SCC 178***, Hon'ble Supreme Court in para 4 thereof held that under Order 22, Rule 10A of the Code of Civil Procedure, whenever, a pleader appearing for a party to the suit comes to know of the death of the party, he has to inform about it and the Court thereupon has to give notice of such death to the other party and for this purpose the contract between the pleader and the deceased party is deemed to subsist. Hon'ble Supreme Court further held the limitation for filing application has to be so construed from the said date of knowledge.

18. In ***Perumon Bhagvathy Devaswom, Perinadu Village*** Versus ***Bhargavi Amma (Dead) by LRs and Others (2008) 8 SCC 321***, Hon'ble Supreme Court in para 13 of the said judgment, has laid down the principles applicable in considering applications for setting aside abatement, which are as under:-

> " (i) *The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words `sufficient cause' in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of the appellant.*

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(v) Want of `diligence' or `inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

19. In para 17 of the same judgment, Hon'ble Supreme Court further held taking into consideration the provisions of Order 22, Rule 10A of the Code of Civil Procedure when the death is reported and recorded in the order sheet/proceedings and the appellant is notified, the appellant has knowledge of the death and there is duty on the part of the appellant to take steps to bring the legal representative of the deceased on record, in place of the deceased. The need for diligence commences from the date of such knowledge. If the appellant pleads ignorance even after the court notifies him about the death of the respondent that may be an indication of negligence or want of diligence.

20. In ***Smt. Shanta Kapila*** Versus ***Smt. Sharda and another*** (supra), a Coordinate Bench of this Court after relying upon the judgments of Hon'ble Supreme Court, reiterated that duty is cast under Order 22, Rule 10A of the Code that whenever an Advocate appearing for the party to the suit comes to the knowledge of the death of the party, he has to inform it to the Court and thereupon give notice of such death to the other party and for this purpose the contract between the counsel and the deceased party shall be deemed to subsist.

21. Now, one thing which is apparent and evident from the judgments which have been quoted hereinabove is that Hon'ble Supreme Court as also the Coordinate Bench of this Court were dealing with the moot question as to the date which has to be construed as the date of knowledge for the purposes of limitation. Hon'ble Supreme Court held that because onus is upon the counsel who was representing the party, to make a disclosure under Order 22, Rule 10A of the Code about the factum of the death of the party in case the pleader is aware of the said fact then but obvious, limitation will start running from the date when said fact is brought into the notice of the opposite party by the counsel representing the deceased party.

22. In the present case, factually this is not the situation. Though in the application, which was filed under Order 22, Rule 4, 9, 10A read with Section 151 of the Code of Civil Procedure, for bringing on record legal representatives of respondent No.17 Bimla Devi, it was mentioned that it was revealed that on the last date of hearing that Smt. Bimla Devi had expired, however, a perusal of the previous orders passed by the said Court which are on record, demonstrate that no such information was either disclosed by the counsel earlier representing deceased respondent No.17 nor any such information was was recorded in the order sheet.

23. The application was filed in the Court on 16.07.2015 and the last two orders previous to order dated 16.07.2015, passed by the learned Appellate Court read as under:-

"13.07.2015.

Present:- Sh. Ravi Kumar, Adv. Vice counsel of Sh. Rahul Gupta. Sh. Gaurav Pathania, Adv. Ld. vice counsel of Sh. J.C. Katoch, Adv. for respondents No.2 to 14, 16 to 18 and LRs of deceased respondent No.15.

Be brought on record on application U/O 22, Rule 4 CPC.

As prayed for. Be listed for arguments on 14.07.2015.

ADJ-III
Kangra at Dharamshala.

14.7.2015:- Present: Ms. Anjali Sharma, Adv. Vice counsel Sh. Rahul Gupta, Adv. for the Appellant.
Ms. Himali Thapa Adv. ld. vice counsel Shri J.C. Katoch, Adv. for respondents No.2 to 14, 16 to 18 and LRs of deceased respondent No.15.
None for Respondent No.1.

As per notice issued by this Court for the service of respondent No.1 Mrs. Meera Varmani through her GPA Shri Gaggan Varmani received back unserved with the report that GPA Gaggan Varmani has shifted at Chandigarh and the whereabout/ address is not kown. In view of the report it shows that respondent No.1 not served despite service of summons and the present case pertains to the year 2008 being old case, therefore, respondent No.1 is hereby proceeded against ex-parte. Be listed for further orders on 16.7.2015.

Addl. District Judge (III),
Kangra at Dharamshala".

24. Thus, a comparison between the averments made in the application so filed by the appellant and the previous order sheets of the Court demonstrates that the averments made in the application were incorrect. I again reiterate that in my considered view, the onus to make a disclosure as is contemplated under Order 22, Rule 10A of the Code of Civil Procedure upon the pleader, but obvious, is only when the pleader is aware of the said fact. One cannot presume that in each and every case, learned counsel who is representing a party, shall be having the knowledge of the fact as to whether the party is alive or not.

25. As in this case, pleader earlier representing respondent No.17 did not disclose the factum of the death of the said respondent before the learned Appellate Court, therefore, but natural, the application to bring on record legal representatives of deceased respondent No.17 was filed by the appellant/ plaintiff on the basis of her personal knowledge.

26. In this background, when one again peruses the averments made in the application, a perusal thereof demonstrates that the application was cryptic and vague and there is no mention made in the application as to when the applicant came to know about the death of deceased respondent No.17, from what source, and why previously said fact was not in her knowledge. This I say for the reason because as already mentioned hereinabove, the averments made by applicant that she gained knowledge about the death of respondent No.17 pursuant to the disclosure made by counsel representing respondent No.17, have been proved to be incorrect and wrong. Rather than approaching the Court with clean hands by way of the application under Order 22, Rule 4 of the Code of Civil Procedure, alongwith an application under Section 5 of the Limitation Act for bringing on record legal representatives of deceased respondent No.17 by way of condonation of delay in filing the application, appellant approached the Court by filing an application containing incorrect and wrong averments.

27. In fact, it was incumbent upon the applicant to have had complied with the provisions of sub-clause (5) of Order 22, Rule 4 of the Code of Civil Procedure. It is not in dispute that ordinarily, an application to bring on record legal representatives of deceased defendant/ respondent has to be filed within 90 days of the death. If no steps are taken within 90 days then abatement is automatic. Thereafter, onus is upon the plaintiff/applicant to move an appropriate application before the Court not only praying for the substitution of the deceased party with his or her legal representatives, but also for setting aside abatement and condonation of delay in filing the application. This the appellant failed to do.

28. I have quoted in detail the provisions of Clause (5) of Order 22, Rule 4 of the Code of Civil Procedure, as per which whenever a party applies to bring on record legal representatives of deceased deceased/respondent after the expiry of limitation and after the proceedings stand abated, then an application has to be filed under Section 5 of the Limitation Act, praying for condonation of delay by mentioning cogent reasons therein as to why there was delay in filing the application and the Court can in such circumstances, consider the application under Section 5 of the Limitation Act having due regard to the fact of such ignorance, if proved. In the present case, admittedly no application under Section 5 of the Limitation Act was filed for condonation of delay in filing the application under Order 22, Rule 4, 9, 10A read with Section 151 of the Code of Civil Procedure. As I have already mentioned hereinabove, contention of the appellant/ applicant that it was on the previous date as from the date when the application was filed that the knowledge of the death of respondent No.17 was gained on account of a disclosure made by the counsel representing respondent No.17 is incorrect and wrong.

29. In these circumstances, this Court does not finds any perversity with the order which stands impugned by way of this appeal. Further, as this court does not finds any merit in this appeal, the same is accordingly dismissed. Pending miscellaneous application(s), if any, stand disposed of. Interim order, if any, also stands vacated.

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

Sh. Gulzari Lal ...Appellant.

Versus

Sh. Prem Chand and others ....Respondents.

RSA No. 504 of 2005
Reserved on : 27.8.2019.

Decided on : 30.8.2019

Indian Easements Act, 1882 – Section 13 – Right of way by necessity - Alternative path – Relevancy – Held, when alternative path can not be used as a way and is practically inaccessible for the purpose for which easement is claimed by the dominant owner then plea of existence of alternative path can not be taken to defeat easement of necessity through servient tenement. (Para 9)

For the Appellant:	Mr. Ramakant Sharma, Sr. Advocate with Ms. Soma Thakur, Advocate.
For the Respondents:	Mr. Karan Singh Kanwar, Advocate, for respondents No. 2(a) to 2 (c).

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed, against, the verdict recorded by the learned District Judge, Sirmaur, District at Nahan, upon, Civil Appeal No. 59-CA/13 of 2004, wherethrough, the verdict, hence, dismissing, the, suit bearing No. 84/1 of 2002 ,of the plaintiffs'/respondent No.1, and, of, the LRs of respondent No.2 herein (for short 'the plaintiffs"), as, made by the learned Civil Judge (Jr. Div) Court No.2, Paonta Sahib, Sirmaur, H.P., stood reversed, and, the defendant/appellant herein (for short "the defendant"), through, the impugned order, was, directed, to, remove, the, obstruction, including the wooden poles, and, grass cutting machine, from the disputed path. Site plan, borne in Ex. PW-2/A, was, also directed, to, form part and parcel of the decree.

2. The brief facts of the case, are, that the plaintiffs, are, permanent residents of village Kishanpura, Tehsil Paonta Sahib, having their abadi, in, Khasra No. 16, Khata Khatauni No. 43 min/69. As per them, there is a 15 wide path, as, shown in red colour in the site plan borne in Ex.PW-2/A (referred to as "suit path"), for, ingressing and egressing, and, the said path is also being used, for, plying bullock carts and tractors, which exists on khasra No. 17, which connects their houses with the main road since the time of their ancestors. The grievance of the plaintiffs is that on 14.12.2001, the defendant, who is one of the residents of abode in khasra No. 1, has forcibly obstructed the path, by erecting the wooden poles, and, placing heaps of wood. Consequently the plaintiffs filed an application under Section 133 Cr.P.C, on, 15.12.2001, before, the SDM concerned, praying therein that the afore obstructions be removed, but, still on 7.8.2002, the, defendant has installed a grass cutter machine. It is further alleged by the plaintiffs that the suit path is used since the time immemorial, by the people, for, their ingress and egress, and, to carry their bullock carts and tractors from their houses to the main road, therefore, the plaintiff have acquired right, to, use the disputed path, by way of easement. As such, the plaintiffs filed a suit, wherethrough, they pray for, a mandatory injunction, directing the defendant, to, remove the wooden poles and grass cutting machine, and, also pray for a decree of permanent injunction.

3. The defendant contested the suit by taking preliminary objections qua locus-standee, maintainability, estoppal, non-joiner, and, cause of action. On merits, he denies the existence of disputed path. It is also averred that the plaintiffs have vacant land adjacent to the land under dispute, but they are trying to take a new approach from the courtyard of the defendant.

4. The plaintiffs filed replication, in, which they have reasserted and reiterated the averments made in the plaint.

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

1. Whether the plaintiffs are entitled for mandatory injunction, as prayed? OPP
2. Whether the suit is not maintainable as alleged? OPD
3. Whether the suit is hit by order 2 Rule 2 CPC? OPD
4. Whether the suit is bad for non-joiner of necessary parties, as alleged? OPD

5. Whether the plaintiffs have no locus-standi to file present suit as alleged ?OPD

6. Whether the plaintiffs are stopped by his own act, conduct and acquiescence, as alleged? OPD

7. Whether the plaintiffs have no cause of action, as alleged? OPD

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, dismissed the suit of the plaintiffs. In an appeal, preferred therefrom, by the plaintiffs, before the learned First Appellate Court, the latter Court, while reversing the judgment rendered by the learned trial Court, allowed, the appeal preferred by the plaintiffs.

7. Now the defendant has instituted the instant Regular Second Appeal before this Court, wherein, he assails the findings recorded, in the impugned verdict, hence by the learned first appellate Court. When the appeal, came up, for admission, on 29.9.2005, this Court, admitted the appeal, on the hereinafter extracted substantial question, of law:-

a) whether the learned first appellate Court erred in reversing the judgment of the trial Court and holding that the plaintiffs/respondents have a path through the land in question without considering the provisions of Sections 15 and 20 of the Easements Act and coy of Mesabi Ex. D-1?

b) Whether the learned first Appellate Court failed to consider the material evidence on record, particularly the document Ex.PW-2/A and statement of PW-2 which if considered would have led to the opposite result?

Substantial questions of law:-

8. The plaintiffs' suit, is, anchored, upon, an bereavement cast therein, vis-a-vis, theirs holding, an, easement of necessity, to, trudge upon the suit path, hence, for his ingressing into or egressing from his abode, and, also, is, anviled, upon, qua thereon, alike them, their bullock-carts also being plied, from, the house of the plaintiffs, up, to the main road.

9. Though, the entire bedrock of the afore bereavement, vis-a-vis, the plaintiffs, holding, for their personal use, (a) an easement, of, necessity, right to trudge over the suit path, for, the afore purpose, is, diminished, by, an acquiescence made, by PW-3 (Shri Geeta Ram), in his cross-examination, (b) qua the plaintiffs rather using the vacant land owned and possessed by them, hence for, the relevant purpose, (c) however the nullification effect, of, the afore acquiescence, made by PW-3, hence, in his cross-examination, vis-a-vis, the requisite propagation of the plaintiffs, does not, to the fullest negate, the further claim of the plaintiffs, qua, the suit path being also used by them, for, theirs enabling theirs bullock carts being plied thereon, (d) for, hence theirs being carried, from, their houses up to the main road, given, no apposite suggestions qua therewith being meted to PWs nor any apt affirmative answers being meted thereto, by, the PWs concerned. An aggravated momentum to the afore inference is garnered, from, the testifications of the afore, as, embodied in their respective examinations-in-chief, making echoings, vis-a-vis, bullock carts owned by them being plied on the suit path, and also each of the plaintiff's witnesses', making the afore testifications, with the fullest inter-se corroboration, and, when their respective testifications, remained unrebutted, vis-a-vis, their vigor, even during the course, of, their respective cross-examinations (a) thereupon, reiteratedly, even though the plaintiffs, may be holding, an alternate path, for, the relevant purpose, (b) yet, when the alternate path, is, not imminently demonstrated, to be holding a sufficient width, for, enabling the plying thereon, of the bullock carts, and, tractors owned by the plaintiffs, and, (c) thereupon, the mere existence of an alternate path, may minimally erode the efficacy, of, averments, and, also efficacy, of, testifications, rendered by the plaintiffs, qua, theirs holding, an, indefeasible right of easement, of, necessity, to, personally use the suit path, (d) nonetheless when averments are also cast in the plaint, and, also when firm evidence exists, vis-a-vis, the suit path, also, existing as an easement of necessity, for, enabling the plying(s) thereon, of, bullock carts, and, tractors of the plaintiffs, (e) thereupon, the afore requisite pleaded easement of necessity, and, also with uneroded evidence in concurrence therewith, hence being adduced rather constrains this Court to record a finding qua the plaintiffs establishing the pleaded factum, qua the requisite easement of necessity, vis-a-vis, the plying(s), of bullock carts, and, of their tractors, upon the suit path begetting cogently established.

10. In view of the above, there is no merit in the appeal, and, the same is accordingly dismissed alongwith all pending applications. The impugned verdict is maintained, and, affirmed. Substantial questions of law are answered accordingly. No costs. Records be sent back.

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

Shri Karam Chand and another ...Appellants.

Versus

Shri Prakash Chand and Others ....Respondents.

RSA No. 440 of 2005
Reserved on: 21.8.2019
Decided on : 30.8.2019

Himachal Pradesh Tenancy & Land Reforms Act, 1972 (Act) – Section 45 – Succession to tenancy – Held, Act being a special statute, succession to tenancy would govern by it and not by general principles of Hindu Succession Act. (Para 11).

Himachal Pradesh Tenancy & Land Reforms Act, 1972 (Act) - Section 104 (3) – Vestment of proprietary rights – Date of - Held, tenant would not acquire proprietary rights qua tenancy land during pendency of resumption proceedings before the revenue authorities. (Paras 13 & 14)

For the Appellants:	Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate.
For the Respondents:	Mr. Anand Sharma, Sr. Advocate with Mr. Karan Sharma, Advocate, for respondent No.1. Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate, for respondents No.2 to 4. Respondent No. 7 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, is, directed against the impugned verdict recorded, upon, Civil Suit No. 83 of 1999, by the learned Civil Judge (Sr. Div) Chamba, on, 15.3.2004, and, which stands affirmed in appeal, before the learned Additional District Judge, Fast Track Court, Chamba in Civil appeal No. 12/05/04, (a) wherethrough the suit of the plaintiff/respondent No.1 herein (for short "plaintiff"), for, rendition of a declaratory decree, vis-a-vis, his becoming owner in possession, alongwith Nand Lal, hence stood decreed, and, also wherethrough, the espoused decree for permanent prohibitory inunction, vis-a-vis, the suit land, and, against the defendants therein, also stood rendered.

2. Necessarily, hence, the aggrieved therefrom, defendants/appellants herein (for short "defendants"), through, instituting the instant appeal, before this Court, hence strived to beget its reversal.

3. The brief facts of the case are that the land comprised in Khasra Nos. 137, 168, 200, 249, 317 and 331 measuring 9 bighas and 5 biswas (for short the suit land) is owned and possessed by the plaintiff. It is further averred by the plaintiff that the suit land was earlier owned by the predecessor-in-interest of proforma defendants No. 6 to 8 and he had inducted Rasila and Hardiyal as tenants over the suit land. After coming in force of H.P Tenancy and Land Reforms Act (for short "the Act") Rasila and Hardiyal became owners of the suit land, though, entries continued describing them to be tenants. Defendants No. 6 to 8 moved an application for resumption of the land bearing khasra No. 168 measuring 1-7 Bighas and Khasra No. 331/1 measruing 7 biswas, which was ordered to be resumedby them by the Land Reforms Officer (for short "LRO") vide order of 29.6.1976, however the resumption proceedings are still not finalized, therefore, the entires in the record of right are still continuing wherein the land has been shown under the tenancy of late Rasila and Hardiyal, whereas in fact in view of the afore order they had become owners of the suit land to the extent of 7-11 bighas and the possession of the remaining land measuring 1 Bigha and 14 biswas remained with defendants No. 6 to 8. Hardiyal died on 10.6.1984, who was

succeeded by Rasila. The predecessor-in-interest of the plaintiff, who was the only brother left at that time and other brother Shiv Charan and Babugir having already died. Thereafter Rasila continued to cultivate the land as owner. The afore Rasila has only one daughter namely Naro, and, the plaintiff Parkash Chand is son of Naro. The deceased Rasila executed a valid will in favour of the plaintiff, and then the plaintiff succeeded to the estate left by Rasila. The afore deceased Rasila also gifted three biswas of land out of the suti land to defendant No.3 Nand Lal and mutation No. 242 was also attested in favour of Nand Lal. However, in the year 1997, the revenue agency got mutation attested in favour of the defendants No.1 to 5 qua the half share of the suit land, and, on the basis of which, the afore entered upon the suit land, as, such, the plaintiff was forced to file the present suit. Hence, the suit.

3. The defendants No. 1 to 5, by filing the written-statement, have contested the suit of the plaintiffs, and, have taken preliminary objections of maintainability, locus standi, estoppel and non-joinder of necessary parties. On merits, they admitted qua late Shri Rasila being the material grandfather of the plaintiff, who expired on 1.5.1999 and not on 28.3.1999. It is further alleged by them that late Sh. Hardiyal and Rasila were recorded tenants on the suit land, however after the death of Hardiyal, the suit land was being cultivated by defendants No. 1 to 5, as, tenants because Rasila was not in a position to cultivate the suit land, and, his share in the suit was also being cultivated by defendants No. 1 to 5. They also alleged that no resumption took place, as, the defendants No. 6 to 8 were not entitled to resume the tenancy land under the law, and, if any wrong order has been passed by the LRO concerned on 29.6.1976, is, illegal and not binding upon the defendants. They have also denied the execution of any will in favour of the plaintiff by Shri Rasila.

4. Defendants No. 6 to 8 despite service, neither appeared in Court, hence, were proceeded against ex-pare.

5. In the replication, the plaintiff has reiterated and reasserted the contents the facts enumerated in the plaint and has controverted that of the written-statement.

6. From the pleadings of the parties, the following issues were framed by the learned trial Court:-

1. Whether Shri Rasila had inherited tenancy rights qua the suit land on the death of Hardial as alleged? OPP

2. Whether the plaintiff is exclusive owner in possession of the suit land, as alleged? OPP

3. Whether mutation No. 254 attested in favour of defendants is illegal as alleged? OPP

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

5. Whether the plaintiff has no locus standi to file the present suit? OPD

6. Whether the plaintiff is estopped from filing he suit by his act and conduct? OPD

7. Whether the suit is bad for non-joinder of necessary parties? OPD

8. Whether the defendants No.1 to 5 are in possession of the suit land, as tenants, as alleged? OPD

8.A Whether the defendants No. 6 to 8 had resumed the land comprising Khasra No. 168 measuring 1-7 bighas and 331/1 measuring 7 biswas as per orders dated 29.6.1976 of LRO Chamba, if so its effect? OPD

8 B Whether the deceased Rasila has executed a valid will in favour of the plaintiff on 1.1.1996 as alleged, OPP

9. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, decreed the suit of the plaintiff. In an appeal, preferred therefrom, by the aggrieved defendants, before the learned First Appellate Court, the latter Court, hence, affirmed the findings recorded by the learned trial Court.

8. Now the defendants have instituted the instant Regular Second Appeal before this Court, wherein, they assail the findings recorded, in the impugned verdicts, hence by both the learned Courts below. When the appeal came up for admission, on 29.8.2005 this Court, admitted the appeal, on the hereinafter extracted substantial question, of law:-

"1. When the proceedings for resumption of land filed by the land owners did not attain the finality, are not the findings of both the courts below illegal, erroneous and perverse in holding that the tenants namely Shri Hardyal and Shri Raseela automatically became owner of the suit land by virtue of the provision of H.P Tenancy and Land Reforms Act?

5. Whether both the Courts below upholding the validity of the WILL are contrary to the facts proved on record and opposed to the Provisions of Section 63 of Indian Succession Act, 1968 of Evidence Act."

Substantial questions of law:-

9. Significantly, the stand points, wherefrom, the, lis engaging the parties at contest, can come to be rested, (i) are comprised in the pedigree table, table whereof stands extracted hereinafter, wherein reflections are cast, vis-a-vis, Hardayal, Shiv Charan, Rasila and Babugeer, all deriving their respective parentages',from, Bherogir, and, also reflections are cast therein qua the afore siblings, except one Hardayal, leaving behind their respective successors. In addition, the hereinafter extracted pedigree table also shows, vis-a-vis, Hardayal predeceasing Rasila.

BHEROGIR

Shiv Charan	Rasila	Hardayal	Babugir
Died (5/5/82)	(28/3/99)	(10/6/84)	
1. Chunni Lal	Naro		Kali
2. Karam Chand	(Daughter)		
3. Nand Lal			
4. Ashok Kumar			
5. Inderjeet	Prakash Chand(plaintiff).		

10. However, mutation borne in Exhibit P-9, upon, demise, of, Hardiyal, wherethrough the tenancy rights, in, the suit land, as held, during his life time, by the afore Hardiyal, hence, stood attested, vis-a-vis, Rasila, and, also, vis-a-vis defendants No. 1 to 5. Since the afore Rasila, during, his life time, executed a testamentary disposition, hence bequeathing the suit land, vis-a-vis, the plaintiff herein, thereupon, hence therethrough also the plaintiff acquire right, title and interest, as, tenants in, the suit land.

11. Nonetheless, an acerbic contest has erupted, inter-se, the contesting litigants, and, is, confined to the, validity, of, attestation, of, mutation, upon, demise of Hardiyal, qua, Rasila. Obviously, the learned Courts, upon, applying the general rules, of, succession, as, embodied in Section 8 of Hindu Succession Act, concluded that with the afore Hardiyal dying intestate, and, upon his demise, and, upon hence his estate opening for succession, thereupon in consonance, with, the mandate of Section 8, of, the Hindu Succession Act, Rasila being entitled to appositely succeed, to, the entire share of the afore rather in the suit land. However, the afore findings, are, in gross detraction, of, the special mandate, as, stands encapsulated, in, a special statute, nomenclatured, as, Himachal Pradesh Tenancy and Land Reforms Act, 1972, (i) wherein in Section 45 thereof, rather (a) prescription is carried, vis-a-vis, the manner of succession, vis-a-vis, the tenancy of, the, deceased concerned, and, thereupon, the, apt specific contemplation, borne in a special statute, and, appertaining to the afore factum probandum, rather prevails vis-a-vis, the provisions borne in Section 8 of Hindu Succession Act, (b) thereupon any dependence placed, hence by the learned courts below, upon, the afore general rules, of, succession, borne in the succession Act, for, rather invalidating the mutation attested, vis-a-vis, Rasila, upon, demise of his brother Hardayal, is, misplaced.

12. A perusal, of, the apt and relevant provisions of Section 45, of, the Himachal Pradesh Tenancy and Land Reforms Act, which stand extracted hereinafter, discloses, qua, upon, upon a tenant dying intestate, thereupon the right, of, succession to his tenancy rights, devolving, upon, his male linear descendants, (i) since Hardiyal predeceased Rasila, and, the line of succession, to his estate, becoming or commencing thereafter, or the line of succession ensuing, vis-a-vis, male linear descendants, (ii) thereupon with the afore pedigree table hence making depictions qua apart, from, Rasila, Shiv Ram and Babugeer also being siblings, of, the deceased Hardiyal, (iii) and, yet when Shiv Charan, predeceased Hardiyal, and, the date of demise, of, Babugeer is not mentioned, thereupon, assumingly, if, Shiv

Charan also predeceased Hardiyal, and, when he is survived by Kali, who , though, is, not the appropriate recipient, of, devolution of tenancy rights, (iv) yet when Shiv Charan though predeceased Hardiyal, nonetheless with his being succeeded by male descendants, thereupon alongwith Rasila, the, LRs of the afore Shiv Charan, were, also entitled to be bestowed, with, the afore status, in, the suit land, as, made in the mutation comprised in Ex. P-9. However, the effect, of, lacunae, if any, in, the order, of, the mutation, is, overridden by the factum qua legally empowered Raseela, rather executing a testamentary disposition, vis-a-vis the plaintiff, (i) and, when in consonance, with the statutory parameters, of, Section 63 of Indian Evidence Act, a marginal witness thereto, one Naresh deposes qua deceased testator Rasila, after being readover the contents of the will, his, in his presence, and, in the presence, of the other marginal witnesses, signaturing it, (ii) and, thereafter his deposing, qua, his alongwith the other marginal witnesses, and, in the presence, of, the deceased testator, doing likewise, (iii) thereupon, the, will propounded by the plaintiff, to, hence succeed, to, the estate of Rasila, is, to be concluded, to be proven, to, stand duly executed hence within the ambit, of, section 63, of, the Indian Evidence Act.

> "45. Succession to right of tenancy – When a tenant in any land dos, the right shall devolve- (a) on his male linear descendants, if any, in the male line of descent."

13. Be that as it may, both the Courts below also declared the plaintiffs, to, acquire statutory vestment, of, proprietary rights, vis-a-vis, the suit land. The making, of, the afore declaratory decree is contested, before this Court, and, the learned counsel for the aggrieved, has, contended, that, with pleadings existing in the records, of, the learned trial Court, and, appertaining, vis-a-vis, the L.R.O concerned, ordering, for resumption of land comprised in Khasra No. 168, measuring 1.7 Bighas, (i) and, also qua land comprised in Khasra No. 331/1, measuring 7 biswas, out of the suit land, vis-a-vis, defendants No. 6 to 8, (ii) and, after, the, making, of, the afore order, the proceedings, continuing before the LRO concerned, (iii) thereupon, he contends that the mandate enshrined in subsection (3) of Section 104, of, the Himachal Pradesh Tenancy and Land Reforms Act, provisions whereof, stand extracted hereinafter, beget their apt attraction, and, thereupon the afore declaratory decree, rather warranting interference by this Court.

> "(3) All rights, title and interest (Including a contingent interest, if any) of a landowner, other than a landowner entitled to resume land under sub-section (i) shall be extinguished and all such rights, title and interest shall with effect from the date to be notified by the State Government in the official gazette vest in the tenant free from all encumbrances" provided that if a tenancy is created after the commencement of this act, the provisions of this sub-section shall apply immediately after the creation of such tenancy."

14. A perusal of the afore extracted provisions, of, the Himachal Pradesh Tenancy, and, Land Reforms Act, does unveil, qua all rights title and interest, of, the landowner, other than, the, entitlement, of, the landowner to hence resume land, under, sub Section (i) suffering extinguishment, and, such rights, title and interest, thereafter vesting in the tenant hence free, from, all encumbrances. The afore statutory exception bestowed, upon, the land owner, and, appertaining to his entitlement to resume lands, and, qua wherewith proceedings are pending before the LRO concerned, (a) hence, when the afore sub judice proceedings, appertaining, to, the statutory entitlement, of, the land owner, for, resuming land, as, occupied by the tenants, also, do concomitantly save hence free, from, encumbrances rather vestment(s), of, right title and interest qua therewith, upon, apposite tenants, (b) thereupon when the afore pleadings are meted apt deference, and, hence, on application thereto, of, the afore excepting statutory, mandate, borne in sub section (3) of the Section 104, of, Himachal Pradesh Tenancy and Land Reforms Act, it was insagacious, for, both the Courts below, to, pronounce, qua, the tenants, being entitled to a decree qua theirs acquiring statutory proprietary rights, vis-a-vis, the suit land, dehors, the valid execution of will, by Rasila, vis-a-vis, the plaintiff, and it only vests tenancy rights, vis-a-vis, the suit land, and, upon, the plaintiff.

15. In view of the above, the appeal is partly allowed, and, the declaratory decree of both the learned Courts below bestowing statutory vestment of propriety rights, vis-a-vis, the suit land, upon, the plaintiff is quashed and set aside. Substantial questions of law are answered accordingly. No costs. All pending applications stand disposed of accordingly.

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

Parvesh Soni ....Petitioner.
Versus
State of H.P and another ....Respondents.

Cr. Revision No. 327 of 2018
Reserved on: 27.8.2019
Decided on : 30.8.2019

Negotiable Instruments Act, 1881 – Section 139 – Presumption of consideration – Held, holder of a negotiable instrument shall presumed to be holding it towards discharge of legally enforceable debt or other legal liability subsisting between him and its drawer. (Para 2)

For the Petitioner: Mr. N.K Tomar, Advocate.
For the Respondents: Mr. Hemant Vaid, Mr. Hemanshu Mishra, Additional Advocate Generals with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel, Deputy Advocate Generals, for respondent No.1.
Mr. Dalip K Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, is, directed against the concurrently recorded verdict(s), against, the appellant herein (for short" the accused"), by both the Courts below i.e learned Additional Chief Judicial Magistrate, Kasauli, District Solan, H.P, in, complaint No. 12/3 of 2017, and, learned Additional Sessions Judge-II, Solan, in, Criminal Appeal No. 18ASJ-II/10 of 2018, (a) wherethrough he stood convicted, for, a charge under section 138 of the Negotiable Instruments Act, and, also consequentially, stood sentenced, to, undergo simple imprisonment, for, a period of six months, and, also stood directed to pay compensation borne, in, a sum of Rs.6,00,000/-, and, in breach of payment of compensation, he stood further sentenced, to, undergo simple imprisonment, for, a period of one month.

2. Two negotiable instruments, each carrying a sum of Rs.3,00,000/-, and, respectively borne in Ex. C-3 and, in Ex. C-4, were issued by the accused, vis-a-vis, respondent No.2 herein/complainant (for short "the complainant'), (i) and, upon the latter presenting the afores' before the banker concerned, both, through memorandums, comprised in Ex. C-5, and, Ex. C-6, rather stood declined to be honored, (ii) obviously, for, insufficient funds, in, contemporaneity, vis-a-vis, their presentation, before the banker concerned, hence existing, in, the accounts of the accused, (iii) necessarily, the, holder of the afore negotiable instruments, in as much, as, the complainant, is leveraged, with, the statutory presumption, embodied in section 139 of the Negotiable Instruments Act, and, provisions whereof stand extracted hereinafter, (iv) and, when in his holding the afore negotiable instruments, he is to be statutorily concluded to be, holding it, in, discharge of, a, legally enforceable debt, or, other legal liability, subsisting inter-se both, (v) and, though the afore presumption, is, rebuttable, nonetheless for the reasons, to be ascribed hereinafter, the afore statutory leverage, working, vis-a-vis, the complainant, acquires both tenacity or force, (vi) reiteratedly also, upon, its remaining unrebutted, given non-adduction, of, apposite discharging evidence, hence by the accused, whereupon this Court, is, constrained, to, affirm the concurrently recorded verdicts made, upon, the accused.

> "139. Presumption in favour of holder-It shall be presumed, unless the contrary is proved that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debtor other liability."

3. The accused, had, for discharging the onus of adducing firm rebuttal evidence, for, eroding the effect, of, the afore statutory presumption, hence, meted suggestion(s), to, the complainant, rather holding echoings qua his wife (DW-2 Poonam Soni) running committees, alongwith the complainant, (i) and, hers investing money(s) therein, besides also echoings, qua, in consequence of the afore joint business, operated, by the

complainant, and, the wife, the latter issuing signed blank cheques, cheques whereof rather coming to be misused by the complainant, (ii) and, thereupon, an, espousal is made qua the amount(s) borne, in the negotiable instrument not working towards any legally enforceable debt or other liability validly subsisting, inter-se, the complainant, and, the accused. However, all the afore suggestions, stood denied, by the complainant.

4. Be that as it may, the afore espousal, is, eroded, vis-a-vis, its vigor, given DW-2, wife of the accused, in, her cross-examination, acquiescing to a suggestion meted to her, qua hers not being employed, and, thereafter rather, with hers' voluntarily deposing qua hers making earnings, from, tuitioning children, (i) thereupon also, when she failed to adduce firm documentary evidence, vis-a-vis, hers investing money alongwith the complainant, in, the afore joint business, as, conducted by them, (ii) and, predominantly, when, the signatures and all scribings, made, on the dishonored negotiable instruments, are, not contested by the accused, (iii) thereupon, the effect(s) of all the afore unfoldings borne in the records, is qua, the accused, being disabled, to, make any address, before this Court, qua his issuing blank cheques to the complainant, (iv) and, nor he can make any submission before this Court, qua sums of money borne therein, being suo motu scribed by the complainant, besides obviously, he cannot make any espousal before this Court, qua, the afore dishonored instruments being either misused, or, being merely issued as security, (v) and, obviously also he cannot contend qua the statutory presumption, vis-a-vis, the holder of the cheques qua his hence holding them, in discharge, of, a legally enforceable debt, subsisting, or, existing, inter-se, both, hence, coming to be rebutted.

5. In view of the above, there is no merit in the petition, and, the same is accordingly dismissed. The impugned verdicts of conviction, and, the order of sentence, are, maintained and affirmed. However amount, if any, deposited by the accused, either before the Courts below, or, before this Court, be adjusted against the compensation amount imposed upon him. Records be sent back.

All pending applications stand disposed of accordingly.

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

Ram Pal and others ....Appellants.
Versus
Naresh Kumar and Others ....Respondents.

RSA No. 231 of 2007
Reserved on: 27.8.2019
Decided on : 30.8.2019

Specific Relief Act, 1963 – Section 38 – Permanent prohibitory injunction - Grant of - Plaintiff alleging interference in his possession over suit land from defendants – Held, when settled possession of plaintiff over disputed land is not probablised on basis of order of Naib Tehsildar (Settlement) as well as report of Local commissioner, he is not entitled for a decree of permanent prohibitory injunction against defendants. (Paras 9 & 10).

For the Appellants: Mr. N.K Sood, Sr. Advocate with Mr. Aman Sood, Advocate, for the appellants No. 1,2,4 and LRs No.3 (a) to 3 (e).

For the Respondents: Mr. Ajay Sharma, Sr. Advocate with Mr. Ajay Thakur, Advocate, for respondents No.1 to 3 and 6 to 9 and LRs No. 7(a), 7(b) and 7(e).
Mr. Hemant Vaid and Mr. Hemanshu Mishra, Additional AGs with Mr. Vikrant Chandel and Mr. Y.S Thakur, Dy.AGs for respondent No. 10.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed, against, the concurrently recorded verdicts, by both the Courts below, wherethrough(s), the suit preferred by Sh. Roshan Lal, the

predecessor-in-interest of the plaintiffs/appellants herein (for short "the plaintiff"), for, rendition of a declaratory decree, for, possession, and, for, rendition, of, a decree, of, permanent prohibitory injunction, vis-a-vis, the suit land, and, against the defendants/respondents herein (for short "the defendants"), stood hence dismissed.

2. The aggrieved plaintiffs/appellants herein through, the instant Regular Second Appeal, cast before this Court, hence strive, to, beget the reversal of the afore verdicts, pronounced against them.

3. The brief facts of the case are, that, the land comprised in Khewat No. 901 min, Khatauni No. 4625 min, Khasra Nos. 433, 562 measuring 4 kanals 15 marlas, situated in village Badehrar Alias Dehlan, Tehsil and District Una, H.P. (for short" the suit land") is alleged by the plaintiffs, to be Shamlat Deh, and, the defendants No. 1 to 3, were recorded in the column of cultivation in Hissedari Possession of it, whereas in the column of ownership there was an entry of panchayat and later on after 1974 the State is recorded as owner. Defendants No. 1 to 3 expressed their willingness to sell the suit land to the plaintiffs. The plaintiffs, in the month of April, 1973, agreed to purchase the suit land at the rate of Rs. 800/- per kanal and paid Rs. 3800/- in advance, as, sale consideration, and, earnest money, in the presence of the Pradhan of village Badehar alias Dehlan Sh. Wattan Ram, and, others in part performance of the contract and defendants No.1 to 3 delivered the possession of the suit land. The plaintiff constructed abadies both residential and commercial and cow-shed over the suit land in May, 1973, and, brought the other land under cultivation. He planted fruit bearing and other trees over this land. Defendants No. 1 to 3 had agreed, to, execute the sale deed in favour of the plaintiff, within, a, year, however, they did not do so and kept on assuring the plaintiff, that they will execute the sale deed in his favour after getting their names incorporated in the revenue records, in the column of ownership. Later on, instead of executing the sale deed, the afore defendants tries to dispossess the plaintiff, from, the possession of the suit land, which forced the plaintiff to approach the revenue authorities, for, correction of revenue entries in his favour, in, their records. On this, defendants No.1 to 3, filed a suit bearing No. 91 of 1989, before the Court of Sub Judge, Una, for, permanent injunction against the plaintiff, which remained pending, till, 17.1.1990, and, thereafter they got it dismissed in default. Not only this, the defendants No. 1 to 3, vide registered sale deed of 24.10.1989, sold the suit land, to, the defendants No. 4 to 7, despite, having full knowledge of agreement to sell, and, possession of the plaintiff, upon, the suit land. This sale deed dated 24.10.1989, is the result of collusion, and, connivance, inter-se, defendants No. 1 to 3, and, 4 to 7. The plaintiff approached the defendants, to, admit his right, and, to execute the sale deed in his favour, however, they refused to do so. The plaintiff has already been ready and willing, to, perform his part of the contract, therefore he issued a legal notice of dated 7.12.1989, upon, the defendants, but of no avail. Hence, he filed a suit for decree of possession of the suit land by way of specific performance of contract, and, declaration and injunction.

4. The suit was contested by the defendants No. 1 to 7, on, the legal grounds of maintainability, locus standi, cause of action, and, limitation. On merits, it is alleged by these defendants, that, defendants No. 1 to 3 never agreed to sell the suit land to the plaintiff, as, alleged, and therefore there arises no question of receipt of payment of Rs. 3800/- by them. It is further alleged that the defendants No.1 to 3 never delivered the possession of the suit land to the plaintiff, nor, the plaintiff raised any construction over it. It has also been denied by the defendants that the plaintiff planted trees upon the suit land. They further pleaded that defendants No.1 to 3, were, in actual physical possession of the suit land, which, was sold by them to the defendants No. 4 to 7, for, a consideration of Rs.38000/- vide registered sale deed of 24.10.1989, and, now defendants No. 4 to 7, are, owners in possession of the suit land and they are bonafide purchaser.

5(A). The plaintiff filed replication, in, which he has reasserted, and, reiterated the averments, made in the plaint.

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

1. Whether the plaintiff is entitled for the relief of specific performance of contract of sale regarding land measuring 4 kanalas 15 marlas for consideration of Rs. 3800/- after declaring the sale deed dated 24.10.1989 by defendants No.1 to 3 in favour of defendants No. 4 to 7, as alleged? OPP

2. Whether the plaintiff is entitled for the relief of permanent injunction restraining defendants No. 1 to 7 from interfering in the possession of the plaintiff as alleged? OPP

3. If issue No.1 is not proved, whether the plaintiff is entitled for recovery of Rs.7000/- alongwith interest as alleged? OPP

4. Whether defendants No. 4 to 7 are owners in possession of the suit land and suit is not maintainable? OPD

5. Whether the plaintiff has no cause of action? OPD

6. Whether the suit is not within time? OPD

7. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, dismissed the suit of the plaintiff. In an appeal, preferred therefrom, by the aggrieved plaintiff, before the learned First Appellate Court, the latter Court, hence, dismissed the appeal.

7. Now the appellants have instituted the instant Regular Second Appeal before this Court, wherein, they assail the findings concurrently recorded, in their impugned verdicts, hence by both the learned Courts below. When the appeal came up for admission, on 4.7.2008, this Court, admitted the appeal, on the hereinafter extracted substantial question, of law:-

"1. Whether judgment and decree of the Courts below suffer from misconstruction and mis appreciation of Exhibit PW-4/A (Report of Local Commissioner), Exhibit P-10 (order of Naib Tehsildar) and Exhibit P-9 order on injunction application in earlier suit, which has vitiated the findings?

2. Whether presumption of truth attached to the revenue record qua possession over the suit land in favour of the respondents stood cogently lawfully and conclusively rebutted by documents exhibit PW-4/A, P-10 and the oral statements of PW-3, PW-4, PW-5 and PW-6?

4. Whether dehors the entitlement of the plaintiff for relief of specific performance, decree of permanent prohibitory injunction should have been passed against the defendants to protect the long and settled possession of the plaintiff.

5. Whether findings on issue No. 6 of the learned trial Court attained finality and in the absence of any independent challenge by the defendants/respondents to such findings at the appellate stage, the appellate Court was precluded from reversing such findings?

8. The learned counsel appearing for the aggrieved plaintiff, does not contest, the validity of the concurrent findings returned, upon the issue appertaining, to the, plaintiff being not entitled, for, rendition, of, a decree of specific performance, of, the oral contract of sale made, vis-a-vis, the suit land. However, he contends that dehors, his not contesting the returning of findings, against the plaintiff, upon, the afore issue, (i) the plaintiff being yet entitled, for, rendition of a decree of permanent prohibitory injunction, vis-a-vis the suit land (ii) as, the trite rubric appertaining therewith, is, comprised in the litigant, holding evident possession, vis-a-vis, the suit land, and, (iii) rubric whereof being established, by PW-4/A, the report of the Local Commissioner concerned, and, through Ex.P-9, exhibit whereof embodies, an, order of interim injunction rendered, by the learned Court concerned, during, the pendency of the apposite suit, wherethrough defendants were temporarily restrained from making any interference, vis-a-vis, the suit land (iv) and also therethrough he espouses qua the presumption, of, truth enjoyed by the reflections, as, occur in the revenue records, qua, the defendants holding possession, vis-a-vis, the suit land, rather also coming, to be rebutted.

9. For the reasons to be ascribed hereinafter, this Court, is not coaxed, to accept the afore contention, addressed by the learned counsel for the aggrieved plaintiff, (i) as, a perusal of Ex. P-10, exhibit whereof, is, an order made by the Naib Tehsildar settlement, in the proceedings drawn, inter-se, the predecessor-in-interest, of, defendants No. 1 to 3, and, the predecessor-in-interest of the plaintiffs, and, wherein the afore were respectively arrayed, as, non-applicants and applicants, though unfolding qua an order being made, vis-a-vis, the predecessor-in-interest, of, the plaintiff, for, hence the latter being incorporated, in, the column of possession, of, the revenue records appertaining, to, the suit land. However,

thereafter there is no implementation of the afore order, as, made by the Revenue Officer concerned, (i) and, further thereonwards, though, there are reflections cast therein, qua in the proceedings earlier thereto, drawn, by the authority concerned, rather the predecessor-in-interest of the defendants No. 1 to 3, being served, and, also though reflections, are, also borne therein, qua despite theirs being granted opportunities, to, adduce evidence, for, rebutting the evidence adduced, by the predecessor-in-interest of the plaintiff, theirs not availing them. However, any purported presumption of truth, as, attached, vis-a-vis, the afore recitals borne in Ex.P-10 is, eroded, given the defendants contesting the validity, of, the afore order, and, also when they contest qua amenability, of, any reliance being placed thereon, hence it was enjoined, upon, the plaintiff, rather for, stripping the effect of the afore contest(s), as, reared by the defendants, hence ensure the placing, on record, of, all the proceedings, drawn prior, to the making of Ex. P-10, (i) and, theirs carrying reflections qua the predecessor-in-interest, of, the defendants concerned being served, and, the latter thereafter appearing, before the authority concerned, (ii) and, also reflections qua theirs being permitted, to, avail all opportunities, to, make a valid contest, vis-a-vis, the propagations, as, raised by the predecessor-in-interest, of, the plaintiff (iii) however, apparently with all the afore record remaining un-adduced, thereupon, the effect of the afore omission, is, qua hence, all the afore reflections cast therein rather losing force, and, validity, (iv) and, it also being construable qua Ex.P-10 being rendered, beyond the ambit, and, scope, of, the principle(s) of audi artem partem, or, it emanating behind the back of the predecessor-in-interest of the defendants, and, hence no reliance being meteable thereon.

10. Be that as it may, the learned counsel for the aggrieved plaintiff, has also relied, upon, the report of the Local Commissioner, as, stood tendered, before the learned Civil Judge concerned, and, stood prepared, by the counsel appointed, as, local commissioner, for, visiting the relevant site, for, his determining, whether the plaintiff or the defendants concerned, extantly holding possession, vis-a-vis, the suit land, (i) and, he submits qua with the afore report being relied, upon, by the Civil Judge concerned, in, his making an affirmative order, upon, an application, cast under the provisions of Order 39 Rule 1 and 2 CPC, thereupon the report of the local commissioner, embodied in Ex. PW-4/A, being amenable, for, reliance being meted thereon. However the afore submission, cannot prevail, upon, this Court, as, its clout is waned by the learned counsel, for the plaintiff, omitting to, place on record, the final verdict rendered, upon, the civil suit concerned, during, pendency of proceedings whereof, rather the afore order, of, ad-interim injunction was rendered, by the Civil Judge concerned (a) whereas it comprising, the firmest, and, the most formidable evidence, emphatically qua hence, upon, the afore verdict acquiring binding, and, conclusive effect, hence, the afore order of ad-interim injunction, made upon, the application, cast under the provisions of Order 39 Rule 1 and 2 CPC, emerging thereinto, and, hence concomitantly, the recitals, borne in the report of Local Commissioner comprised in Ex. PW-4/A acquiring likewise binding, and, conclusive effect. Contrarily, the effects of the afore omission, to place on record, the afore conclusive verdict, made upon, the apposite civil Suit, hence by the plaintiff, hence rendering Ex. PW-4/A, being construable, to, be rather holding no legal efficacy, (a) moreso when its preparation, is not made, at the instance of the revenue officer concerned, rather is prepared, by an advocate appointed, as, a local commissioner, who, obviously was neither possessed of the relevant records nor was capacitated, to, make candid and clear determination(s), vis-a-vis, the plaintiff or the defendants holding possession, of, the suit land.

11. In view of the above, I find no merit in this appeal, and, the same is accordingly dismissed, alongwith all pending applications. The impugned judgment(s) is/are maintained and affirmed. Substantial questions of law are answered accordingly No costs. Records be sent back.

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

Ramesh Chand .....Petitioner

Versus

The Chairman/Manager M/s The Kangra District Wholesale Co-operative Consumer and Marketing Federation Ltd. ....Respondent.

CWP No. 6240 of 2012
Reserved on : 20.8.2019

Decided on : 30.08.2019

Constitution of India, 1950 – Article 14 – Equality before law – Institution/department not promoting petitioner on ground of his misconduct – Petition against –Held - Service record of petitioner not showing any money recoverable from him – No inquiry initiated against petitioner qua misconduct on his part – Officers junior to petitioner promoted by department/ institution – Petitioner can not be denied promotion – Petition allowed. (Para 4).

For the Petitioner: Mr. Rahul Mahajan, Advocate.
For the Respondent: Ms. Anjali Soni Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The hereinafter extracted reference has been, under, the impugned award, hence answered against the petitioner.

> "Whether action of the employer i.e. the Chairman/Manager, M/S the Kangra District Wholesale co-operative Consumer and Marketing Federation Ltd. Dharamshala, Distt. Kangra, H.P. to not regularize Sh. Ramesh Chand S/o Sh. Dalip Singh as Sales-Man in the regular pay-scale of Rs. 400-600/- from the date when Sh. Krishan Chand, Junior to him was regularized, is proper and justified? If not, what relief of service benefits, compensation and arrear of back wages the above worker is entitled to?"

2. The petitioner being aggrieved therefrom, hence, has preferred the instant petition, before this Court.

3. Even though, a reading of the affidavit comprised in Ex.RW-/A, tendered into evidence, during, the course, of, the examination-in-chief by RW-1 (Brahan Kumar), (i) makes clear depictions therein qua the services of one Krishan Chand being regularized, (ii) given, his satisfactorily performing the avocations of his employment, (iii) and, he has further communicated therein, qua, the services of the petitioner, and, of Ashok Kumar, and, of Sarwan Kumar, not, being regularized, given, all of them being found to be not satisfactorily performing, the, callings of their respective evocations. The afore echoings are anvilled upon the petitioner, in the year(s) referred in paragraph 3 of Ex.RW-1/A, making embezzlements of money(s) comprised, in, a sum of Rs.72212.09/-.

4. On the afore anvil, the learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, H.P (for short, "the Tribunal) hence answered the reference against the petitioner. However, the meteing, of, a dis-affirmative answer, upon, the afore reference, and, against the petitioner, is, not amenable for validation, (i) as, during the course of cross-examination of RW-1, the latter acquiesces to a suggestion, vis-a-vis, in the records appertaining to the services rendered by the petitioner, no echoings being borne therein, vis-a-vis, any sums of money being recoverable from the petitioner, (ii) his also acquiescing to a suggestion, vis-a-vis, no inquiry qua therewith hence standing initiated against the petitioner, (iii) and, when he also acquiesces qua the afore Krishan Chand being junior to the petitioner, (iv) thereupon, the effects of all the afore acquiescences made, by RW-1, during, the course of his cross-examination, hence blunts the effect, of, communication(s) made in paragraph 3, of, Ex.RW-1/A, thereupon it was insagacious for the learned Tribunal, to, on anvil of the afore communication, and, despite one Krishan Chand, being junior to the petitioner, rather proceed to decline the relief, vis-a-vis, the petitioner, (v) also, it was not appropriate, for, the learned tribunal, to, answer the reference against the petitioner, (vi) conspicuously when meteing, of, any imputation of credence, vis-a-vis, the communication, as, borne in paragraph 3 of Ex. RW-1/A, is beyond the scope of reference, and, also when reiteratedly, the afore purported misconduct, remained unenquired into, and, also when the records appertaining to the services of the petitioner, failed to make disclosures, vis-a-vis, the afore purported misconduct, hence, holding any aura of tenacity.

5. In view of the above, the instant petition is allowed, and the reference, is, answered in favour of the petitioner, alongwith, all consequential benefits. All pending applications stand disposed of accordingly.

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

State of Himachal Pradesh .....Appellant
Versus
Purshottam Dass .....Respondent.

Cr. Appeal No. 348 of 2009
Reserved On : 20.8.2019
Decided on: 30.08.2019

Indian Evidence Act, 1872 – Sections 3 & 45 – Expert evidence vis a vis ocular evidence- Appreciation of – Held, account of an eye witness if credible, will prevail upon expert medical evidence as to the cause of injuries on victim. (Para 13).

For the Appellant: Mr. Hemant Vaid, Additional Advocate General with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel,Dy.A.Gs.
For the Respondent: Mr. Ajay Sharma, Sr. Advocate with Mr. Ajay Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed, against, the impugned judgment, of, 19.2.2009, rendered by the learned Judicial Magistrate, Ist Class, Barsar, District Hamirpur, H.P, upon, Criminal Case No. 29-II-2006, wherethrough, the accused/respondent herein (for short "the accused") stands acquitted, for, the commission of offence punishable, under, Sections 325, 323 readwith Section 34, of, the Indian Penal Code (for short "IPC"). Co-accused Tilak Raj, was reported to be dead, during the pendency of the instant appeal, before this Court, hence his name was ordered to be deleted.

2. The brief facts of the case are that the complainant Kewal Singh lodged a Rapat, comprised in Ex. PW-8/A alleging, therein that he is resident of village Sulhari, and, he had constructed his shops near Kulehra School, where he had kept concrete, upon, the Government land adjacent to his shop. It is further alleged that 4-5 days back, accused had kept bricks, upon, the concrete, and, on 21.1.2006, at about 12 noon, he asked accused Purshotam Chand, to, remove his bricks from the concrete. The accused got annoyed, and, refused to remove the bricks from there, and, when the complainant himself tried to remove his bricks from the concrete, son of accused came there, and, gave fist blow upon his mouth and his two teeth were broken and blood started oozing out from his Mouth. It is further reported qua the accused also giving fist blows on the mouth of the complainant. One Bhagi Rath and Sita Ram came on the spot and rescued him from the clutches of the accused. An FIR was registered and, investigation into the matter was commenced. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused, challan was prepared and filed in the Court.

3. The accused and his son Tilak Raj, stood charged, by the learned trial Court, for theirs committing offence(s) punishable, under Sections 325, 323 readwith Section 34 of IPC, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused, and, of accused Tilak Raj, under, Section 313 of the Code of Criminal Procedure stood recorded, wherein, they pleaded innocence, and, claimed false implication. However, they chose to lead defence evidence, and hence examined two witnesses.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal, upon, the accused.

6. The learned Additional Advocate General has, concertedly and vigorously contended, qua the findings of acquittal, recorded by the learned trial Court, standing, not based, on a proper appreciation of evidence on record, rather theirs standing sequelled by gross mis-appreciation, by it, of the relevant material on record. Hence, he contends qua the findings of acquittal, warranting reversal by this Court, in the, exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

7. The learned counsel for the accused, has, with considerable force, and, vigour contended, qua, the findings of acquittal, recorded by the Court below, standing based, on a mature and balanced appreciation, of, evidence on record, and, theirs not necessitating interference rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel, on either side, has with studied care and incision, evaluated the entire evidence on record.

9. The learned trial Magistrate, anvilled, his verdict of acquittal, qua, the deposition of PW-4 one Bhagi Rath, an, ocular witness to the occurrence, being not amenable, for, meteing credence, given, (a) though his making a testification qua his being present at the relevant time, yet his being, an, interested witnesses, (b) inference whereof, engendering from his making an admission in his cross-examination, qua both, he and one Veena Devi, filing a case against the accused, for, his encroaching, upon, government land, and, concomitantly thereupon, he concluded qua with the defence, proving his inimicality with the accused, hence his deposition being incredible.

10. The learned trial Magistrate also had disimputed credence, vis-a-vis, the testification qua the genesis of the occurrence, as, rendered by PW-3 (Kewal Singh), given, his in a rapat, borne in Ex. PW-8/A, not mentioning the names of Veena Devi, Sushil Kumar and Prem Nath, as, eye witnesses to the occurrence, (i) yet the prosecution proceeding, to, ensure the stepping, into, the witness box, of Prem Nath, and, of Sushil Kumar, (ii) hence the testification rendered by the latter, qua, the genesis of the prosecution case also warranting apt discardings. Be that as it may assuming, the afore disimputation of credence, vis-a-vis, the testification, qua the occurrence, as, rendered by PW-3, one Prem Nath, and, by one Susheel Kumar being not amenable, for, assigning tenacity thereto, (i) nonetheless the effects thereof, and, also the effects of disimputation, of, credence by the learned trial Magistrate, qua the testification rendered, vis-a-vis, the genesis of the prosecution case, rather by PW-3, the complainant, is, for the reasons assigned hereinafter unmeritworthy.

11. PW-4 in his examination-in- chief, lends the completest succor, vis-a-vis, the genesis of the prosecution case, yet, during the course of his being subjected to cross-examination, an apposite suggestion stands meted to him by the learned defence counsel, with clear echoings, that, at the relevant time, of the scuffle, hence taking place, rather at the relevant site of occurrence, his alongwith others proceeding, to the site of occurrence, and, whereto, PW-4 makes an affirmative answer, (a) and, also his during the course of his being subjected to cross-examination, being hence meted a suggestion, by the learned defence Counsel, with, clear and candid echoings therein, vis-a-vis, his being present at the site, in contemporaneity, vis-a-vis, demarcation of the spot, and, whereto, also he meted an, affirmative answer, (b) whereupon, obviously he is to be concluded to also acquiesce qua the site plan being also prepared in his presence. The concomitant ensuing inference therefrom, is, that the defence acquiescing, vis-a-vis, PW-4 hence being an ocular witness, to the occurrence, and, also thereupon the defence, is, inferred, to, acquiesce, vis-a-vis, the testification, of, the afore witness(s), as, comprised in his, examination-in-chief, obviously, garnering an aura of truth, (a) and, obviously, a, further inference, is, also derivable qua thereupon, his testification embodied in his examination- in-chief, wherethrough, he lends succor to the genesis, of, the prosecution case, being truthful, meritworthy, and, also credible.

12. The site plan comprised in Ex. PW-7/A, when for, the afore reasons, is, acquiesced by PW-4, to be, prepared in his presence, and, when therein, the, site of occurrence is reflected, and, when PW-4 has been acquiesced by the defence, to be, an eye witness to the occurrence, (i) and, when the investigating Officer, who, tendered into evidence, the site plan rather remained uncross-examined, vis-a-vis, its not comprising the relevant site, nor, PW-4 being cross-examined, qua, his being incapacitated, to, witness the occurrence, as happened at the spot depicted, in, the site plan, (ii) thereupon, hence the credible eye witness account, vis-a-vis, the occurrence, rendered by PW-4, does benumb, the afore dis-imputation, of, credence by the learned trial Court, vis-a-vis, the testification rendered by PW-3.

13. Be that as it may, since credible eye witness account, prevails upon medical evidence, and, hence any dichotomy, as, exists, inter-se, the depositions, of, expert witnesses', in as much, as inter-se PW-1 Dr. H.R Kalia, and, PW-2 Dr. V.K Singh, and, appertaining to the cause of injuries, obviously, is, concomitantly blunted, and, subsumed.

14. In view of the above, this Court deems it fit, and, appropriate, that, the findings of acquittal recorded by the learned trial Court, hence, warrant interference. Consequently, I find merit in this appeal, which is accordingly allowed, and, the impugned judgment is quashed and set aside. Now the matter be listed on 17.09.2019, on which date the accused be produced before this Court, for, his being heard on quantum of sentence. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh .....Appellant
Versus
Sainj Ram .....Respondent.

Cr. Appeal No. 338 of 2009
Reserved On : 21.8.2019
Decided on: 30.08.2019

Indian Penal Code, 1860 – Sections 279, 304 A & 338 – Rash and negligent driving – Proof – Appeal against acquittal of trial court – Held, on facts, 'SR' an eye witness to occurrence of accident not supporting case during trial - Offending vehicle found not being driven on the wrong side of road as claimed by injured- Site plan contradicting injured witness as to manner of accident – Skid marks not present on the road – Case of rash driving not proved on record- Acquittal upheld – Appeal dismissed. (Paras 9 to 11)

For the Appellant: Mr. Hemant Vaid, Additional Advocate General with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel,Dy.A.Gs.
For the Respondent: Mr. Naresh Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed, against, the impugned judgment, of, 17.1.2009, rendered by the learned Chief Judicial Magistrate, Kinnaur District Camp at Rampur Bushehar, H.P, upon, Police Challan No. 192-2 of 2006, wherethrough, vis-a-vis, notice of accusation qua the accused put under Sections 279 and 304-A of the Indian Penal Code (for short "IPC"), an order of acquittal stood pronounced, upon, the respondent herein (for short "accused").

2. The brief facts of the case are that on 6.5.2006, Vivek Mehta and Pankaj Gupta, were coming on scooter bearing registration No. HP-07-6117, from Chuhabag to Rampur. When the afore, were, reached near Petrol Pump, the scooter was hit by a jeep, jeep whereof was being driven by the accused at a high speed. As a result of the afore collision, the afore Vivek Mehta and Pankaj Gupta fell down from the scooter, and, sustained injuries on their person, and, they were rushed to the hospital. However, owing to rash and negligent driving of the accused, injured Vivek Mehta died. The matter was reported to the Police. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused, challan was prepared and filed in the Court.

3. Notice of accusation was put to the accused, by the learned trial Court, for his committing offence(s) punishable, under Sections 279, 337, 338, and, under Section 304-A of IPC, and, under Section 187 of the Motor Vehicles Act, whereto, which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 6 witnesses. On closure of prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure was recorded, wherein, he pleaded innocence, and, claimed false implication. He chose not to lead defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal, upon, the accused.

6. The learned Additional Advocate General has, concertedly and vigorously contended, qua the findings of acquittal, recorded by the learned trial Court, standing, not

based, on a proper appreciation of evidence on record, rather theirs standing sequelled by gross mis-appreciation, by it, of the relevant material on record. Hence, he contends qua the findings of acquittal, warranting reversal by this Court, in the, exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

7. The learned counsel for the accused, has, with considerable force, and, vigour contended, qua, the findings of acquittal, recorded by the Court below, standing based, on a mature and balanced appreciation, of, evidence on record, and, theirs not necessitating interference rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel, on either side, has with studied care and incision, evaluated the entire evidence on record.

9. The accusation against the accused would, stand concluded, to be formidably proven, upon, credible ocular account, vis-a-vis, the relevant occurrence, being testified by the ocular witnesses' thereto. However, one amongst the two ocular witnesses, to the occurrence, in as much as, PW-1, one Surat Ram, during, the course of his examination-in-chief, has reneged from his previous statement recorded in writing, and, obviously hence did not lend any succor to the genesis, of, the prosecution case, (a) and, also when thereafter, with the permission of the Court, upon, his standing declared hostile, and, his being subjected to the ordeal, of, a rigorous cross-examination, by the learned APP, rather his omitting to make any bespeakings, hence, for succoring the charge, thereupon, therethrough the prosecution, has, failed to sustain, the, charge against the accused.

10. Even the other ocular witness to the occurrence, PW-6 one Pankaj Gupta, though, has rendered a deposition, vis-a-vis, a collision occurring, inter-se, the offending vehicle, and, the scooter, whereon one Vivek Mehta, and, he were both astride, (i) yet he has voiced qua the offending jeep being driven rashly, or, at a high speed. However, on anvil, of, the afore echoings made by him, no conclusion can be made, qua, the accused driving the offending vehicle, in, detraction, of, the cannons, of, due care and caution, (i) comprised in the offending vehicle being driven, on, the inappropriate side, of, the road. Significantly, hence the mere brazen or excessive speed, at which, the offending vehicle, was driven, hence by the accused, and, dehors, no credible echoings standing bespoken by PW-6, vis-a-vis, it being driven, on, the, inappropriate side of the road, reiteratedly, would not, constrain this Court, to, conclude qua the notice of accusation put against the accused, hence, standing cogently proved.

11. Further more, the site map borne in Ex. PW-4/A, does not, reflect qua the offending vehicle rather occupying the inappropriate side of the road, (i) conspicuously with PW-4 SI Keshav Singh, in, his cross-examination, hence making echoings, qua, the non-existence, of skid marks, at the relevant site of occurrence, (ii) consequently, for want of occurrence of skid marks, at, the relevant site of occurrence, no conclusion can be formed, qua, the offending hence occupying the inappropriate side of the road.

12. In view of the above, this Court does not deem it fit and appropriate, that, the findings of acquittal recorded by the learned trial Court, hence, warranting any interference. Consequently, I find no merit in this appeal, which is accordingly dismissed, and, the impugned judgment is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

Ms. Santosh Negi ..... Petitioner.

Versus

State of H.P. and others ..... Respondents.

CWP No.477 of 2017

Reserved on: 08.08.2019.

Date of decision: 02.09.2019

Himachal Pradesh Judicial Officers (Pay, Allowances & Conditions of Service) Act, 2003 – Notification dated 29.8.2008 – Item No 16 (vii)- Domestic Help Allowance – Condition of minimum qualifying service – Constitutional validity & applicability vis-a-vis family pensioners of deceased judicial officer – Held, though condition of minimum five years of

qualifying service for grant of Domestic Help Allowance to retired judicial officer is constitutionally valid yet analogy of mandatory completion of 5 years service by him/her can not be extended to an incumbent who dies in harness before completion of five years of service – Retirement from service before five years is a voluntary act of an employee - Death within five years of service is not a voluntary act unless it is a case of suicide- Doctrine of election is not attracted in a case of death. (Paras 23 & 24).

For the petitioner Mr. Devender K. Sharma, Advocate.

For the respondents Mr. Amit Kumar Dhumal, Ms.Divya Sood, Deputy Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General, for respondents No.1 to 3-State.

Mr. Vinod Chauhan, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

Husband of the petitioner joined the service of respondents as Additional District & Sessions Judge w.e.f. 01.03.1990. After rendering 4 years 7 months and 11 days of service, he died in harness on 11.10.1994 while serving as District & Sessions Judge, Solan, District Solan, H.P.

2. Governor of Himachal Pradesh in exercise of powers conferred under Section 3 read with Section 4 of the Himachal Pradesh Judicial Officers (pay allowances and conditions of services) 2003, issued a Notification dated 29.08.2008 Annexure P-1, vide which allowances/ facilities and benefits mentioned therein were extended to Judicial Officers w.e.f. 01.11.1999.

3. Item-16 of the said Notification dealt with retiral benefits and the same provided as under:-

> "(i) The Revised Pension of the Retired Judicial Officers shall be 50% of the pay of the post held as revised from time to time, at the time of retirement.
>
> (ii) The condition of the qualifying service of 33 years for earning full pension will not be applicable to the Judicial Officers.
>
> (iii) The Judicial Officers will not be governed by the C.P.F. Rules.
>
> (iv) All the retired Judicial Officers shall be given a fixed monthly medical allowance of ₹100/-.
>
> (v) All the medical facilities that have been recommended to serving Judicial Officers with regard to treatment and reimbursement of expenditure etc., shall be applicable to retired Judicial Officers.
>
> (vi) The medical reimbursement bills submitted by the retired Judicial Officers shall be processed and paid by the office of the Principal District Judge of the place where the retiree has opted to settle.
>
> (vii) The retired Judicial Officer retiring shall be entitled for reimbursement of domestic help @ ₹1250/- P.M. w.e.f. 1,11.99. A retired Judicial Officers shall be entitled for the reimbursement only in case such Judicial Officer has served at least for five years".

4. This was followed by Notification dated 17.03.2012 (Annexure P-12) which reads as under:-

> "In compliance of orders dated 26.07.2010 of Hon'ble Supreme Court of India in I.A. No.244 in Writ Petition (C) No.1022/1989 titled All India Judges Association & Ors. Vs. Union of India & Ors, the Governor of Himachal Pradesh is pleased to enhance/ grant the following allowances to the retired Judicial Officers and family pensioners with immediate effect:-

1. Domestic Help Allowance to retired Judicial Officers is enhanced from ₹1250/- per month to ₹2,500/- per month.

2. Domestic Help Allowance is granted to family pensioners @ ₹1000/- per month".

5. Vide Annexure P-3, Registrar General of the High Court of Himachal Pradesh forwarded a copy of Notification, dated 03.10.2012, to the petitioner. Said Notification which is appended with the petition as Annexure P-4, provided as under:-

"'NOTIFICATION'

In continuation of this department notification of even number dated 17th March, 2012, the Governor of Himachal Pradesh is pleased to grant the domestic help allowance to retired Judicial Officers and family pensioners of Himachal Pradesh w.e.f. 01.01.2006".

6. On receipt of the communication from the Registrar of the High Court of Himachal Pradesh, petitioner made a representation to respondent No.4 dated 24.11.2012 (Annexure P-5), in which it was mentioned that in terms of the Notifications dated 17.03.2012 and 03.10.2012, petitioner be released Domestic Help Allowance w.e.f. 01.01.2006, as she was a family pensioner being wife of deceased Shri R.S. Negi, who died while serving in the cadre of District/ Additional District Judges.

7. Request of petitioner has been rejected, as is borne out from Annexure P-7 (communication dated 28.03.2013) and Annexure P-8 (communication dated 18.04.2013), on the ground that petitioner was not entitled for Domestic Help Allowance as per Item No.16 (vii) of the Himachal Pradesh Government Notification dated 29.08.2008, as her husband had not served for a period of 5 years and the condition of 5 years service for being eligible for Domestic Help Allowance was also applicable to the family pensioners.

8. Subsequent request made by petitioner for consideration of the grant of Domestic Help Allowance to her was also rejected by respondents/ State, vide Annexure P-17 i.e. communication dated 29.10.2016, vide which the Government reiterated its earlier decision conveyed vide Department Letter dated 28.03.2013 (Annexure P-7).

9. Feeling aggrieved, petitioner has filed the present Petition *inter alia*, praying for quashing of Annexure P-7 (communication dated 28.03.2013), as also Annexure P-16 (communication dated 29.10.2016), with the prayer that respondents be directed to grant Domestic Help Allowance to her in terms of Notifications dated 17.03.2012 and 03.10.2012, w.e.f. 01.01.2006 at the rate of 12%, for delayed payment.

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

11. A perusal of the reply filed to the petition by respondents No.1 to 3/ State, demonstrates that the reason as to why Domestic Help Allowance has been declined to the petitioner, is that in terms of Notification dated 29.08.2008, only those Judicial Officers are eligible for grant of Domestic Help Allowance, who had served for at lease 5 years and this includes "Judicial Officers whether expired or alive".

12. Vide notification dated 29.08.2008 (Annexure P-1), entitlement for reimbursement of domestic help was extended to retired Judicial Officers, provided he had served at least for five years.

13. Vide Notification dated 03.10.2012 (Annexure P-4), grant of Domestic Help Allowance was extended both to the retired Judicial Officers as also family pensioners of Himachal Pradesh w.e.f. 01.01.2006.

14. It is not in dispute that petitioner is a family pensioner of Himachal Pradesh in her capacity as the wife of deceased Judicial Officer, who died in harness.

15. The moot issue, which this Court has to decide is, as to whether the eligibility of minimum 5 years service for being entitled for Domestic Help Allowance in the case of a family pensioner of a deceased Judicial Officer meets the touch stone of Article 14 of the Constitution or not?.

16. When the Government issued Notification dated 29.08.2008, it in its prudence decided that entitlement for reimbursement of domestic help to a retired Judicial Officer shall be extended only in case such Judicial Officer had served for at least 5 years. One cannot find any fault with the decision so taken by the Government, because the Government decided and rightly so that if a Judicial Officer has not served for 5 years, then he shall not be entitled for reimbursement of domestic help.

17. This Court can take Judicial note of the fact that maximum age for being recruited as a Judicial Officer, leaves more five years for an appointed Judicial Officer to serve. Meaning thereby that only those Judicial Officers would be having a term of less than 5 years, who voluntarily give up the job.

18. In service jurisprudence, once a person is appointed as a regular employee against a post then his services are governed by the Rules so framed by employer in this regard. There is an age of superannuation. Once employee attains the age of superannuation, he retires from service. However, before attaining the age of superannuation also, employee can voluntarily give up the service either by tendering his resignation or by seeking voluntarily retirement, in case employee fulfills the criteria laid down by employer for voluntarily retirement. In all probabilities, it is in the backdrop of what has been discussed above, that the Government in its wisdom while issuing Notification dated 29.08.2008 Annexure P-1, decided that a retired Judicial Officer shall be entitled for reimbursement of domestic help only if he has served for at least 5 years.

19. Now, incidently, family pensioners were not included in Notification dated 29.08.2008, as far as grant of retiral benefits are concerned. Family pensioners were included subsequently vide Notification dated 17.03.2012, in compliance to the orders of Hon'ble Supreme Court dated 26.07.2010 in I.A. No.244 in Writ Petition (c) No.1022/1989, titled all India Judges Association & Ors. Vs. Union of India & Ors.

20. As mentioned earlier, vide Notification dated 03.10.2012, the Government granted Domestic Help Allowance to retired Judicial Officers and family pensioners of Himachal Pradesh w.e.f. 01.01.2006.

21. In the present case, it is an admitted fact that husband of the petitioner died before completing 5 years of service as Additional/ District & Sessions Judge. He had rendered 4 years 7 months and 11 days of service as on the date when he died.

22. During the course of arguments, learned Additional Advocate General, on instructions, clearly and categorically stated that had the late husband of petitioner completed 5 years service as on the date of his death, then petitioner would have been entitled for Domestic Help Allowance in her capacity as family pensioner.

23. In my considered view, in the peculiar facts of the case where husband of the petitioner died 5 months short from completion of 5 years of service, denial of benefit of Domestic Help Allowance to her on the analogy of mandatory completion of 5 years of service by a retired Judicial Officer to be eligible to get said benefit is highly arbitrary. By no stretch of imagination, an incumbent, who voluntarily decides to resign from the job before completion of 5 years of service, can be compared to an incumbent, who dies in harness before completion of 5 years of service. The decision of an employee to resign from services before completion of 5 years, is a voluntary act of an employee. However, by no stretch of imagination, it can be said (except in a case of suicide) that in case an employee dies within five years of his joining the service, the same is also a voluntary act.

24. By no stretch of imagination, the doctrine of election can be associated with death except may be in those rare cases where a person choses to take his life. In this case, husband of the petitioner died a natural death. Therefore, simply because as on the date of his death, he had not completed five years of service, the same cannot be a reason to deny his widow who is a family pensioner, benefit of Notification dated 17.03.2012 Annexure P-2 and Notification dated 03.10.2012 Annexure P-4. Denial of the said benefit by the State on account of reasons mentioned in communication dated 28.03.2013 Annexure P-7 and communication dated 29.10.2016 Annexure P-16, is arbitrary and violative of Article 14 of the Constitution of India.

25. Under Article 14 of the Constitution of India, a classification is sustainable in law, provided the classification is based on intelligible differentia and it has some nexus with the object to be achieved. In the case of former Judicial Officers, the classification made between those officers, who have served for less than five years as compared to those who have served for more than five years, for the grant of Domestic Help Allowance, can be said to be a valid classification, as there is an intelligible differentia between two categories based upon the length of service and nexus of the said classification with the object to be achieved is that only those former Judicial Officers are entitled for grant of Domestic Help Allowance, who have served at least as such for five years. Thus, grant of this benefit is an impetus to a Judicial Officer, who has served for more than five years as compared to one who has not done so. However, this classification cannot be imported while considering family pensioners for grant of Domestic Help Allowance of a deceased employee, because death is one of the biggest uncertainty of life and it cannot be said that a Judicial Officer, who unfortunately dies before completion of five years of service (may be except in a case of suicide) elected to die.

26. In view of the discussion held hereinabove, this petition is allowed. Notification dated 17.03.2012 Annexure P-2 and Notification dated 03.10.2012 Annexure P-4 are quashed and set aside being arbitrary and being violative of provisions of Article 14 of the Constitution of India. Petitioner is held entitled for grant of Domestic Help Allowance w.e.f. 01.01.2006 and decision of the respondents/ State, denying the same to her on the ground of her husband not having completed 5 years of service as a Judicial Officer as on the date of his death is heldto be arbitrary and bad, being violative of Article 14 of the Constitution of India. Respondents are directed forthwith to commence paying to the petitioner, Domestic Help Allowance, in her capacity as a family pensioner. As far as arrears are concerned, keeping in view the peculiar facts of the case, it is directed that in case arrears of Domestic Help Allowance w.e.f. 01.01.2006 till the month of August, 2019, are paid by the respondents to the petitioner on or before 30.11.2019, then no interest shall be payable on the same. However, in case arrears are not paid before 30.11.2019, then simple interest at the rate of 6% shall be payable on the arrears as from the date of this judgment. Petition stands disposed of in above terms. No order as to costs. Miscellaneous applications, if any, stand disposed of.

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

Baldev Singh ...Petitioner.

Versus

H.P. State Transport Appellate Tribunal & others ...Respondents.

CMPMO No. 394 of 2019
Decided on: 03.09.2019

Quasi-Judicial Authorities – Need of judicial discipline – Held, quasi–judicial authorities are to abide by principle of judicial discipline – Time stipulated by superior authority in its order for the adjudication of matter must be adhered to by quasi – judicial authority. (Para 3).

For the petitioner: Mr. Surinder Saklani, Advocate.
For the respondents: Mr. Dinesh Thakur, Additional Advocate General with Ms.Divya Sood, Deputy Advocate General and Mr. Sunny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge. *(Oral)*

On 26.08.2019, *dasti* notice was issued for the service of respondent No.3. The notice stands received back with the report that respondent No.3 has refused to accept the said notice. In these circumstances, as there is a valid service of notice upon respondent No.3 and yet he has not chosen to appear before the Court, he is ordered to be proceeded against *ex-parte*.

2. The limited grievance of the petitioner in the present petition is that respondent No.2 is not complying with the directions issued by the H.P. State Transport Appellate Tribunal, vide Annexure P-2, passed in Revision Petition No.01 of 2017, titled as Baldev Singh Versus Regional Transport Officer, Una & another, decided on 19.01.2019, vide which, learned Appellate Authority has directed respondent No.2 herein to decide the case afresh by passing a speaking order within three months from the date of passing of said order, post remand of the matter to respondent No.2.

3. Having heard learned counsel for the petitiner as also learned Additional Advocate General, this petition is disposed of with the direction that respondent No.2 shall decide the case pending before it, post remand, positively on or before 31.10.2019. It is clarified that the time so granted by this Court is sacrosant and no extension whatsoever shall be granted to the Authority to adjudicate upon the matter pending before it. This stop order is being passed by the Court because though respondent No.1 had granted three months time to the said Authority to decide the case after remand vide order dated 19.01.2019, but despite 7 months having elapsed as from the date of passing of the said order by respondent No.1, no decision has been taken in the matter by respondent No.2. This Court impresses upon respondent No.2, who happens to be a Quasi Judicial Authority, to abide by the principle of Judicial Discipline, which commands and demands that orders passed by the Superior Authority, are to be given due respect and whenever directions are passed by the Superior Authority for adjudication of a matter to a Quasi Judicial Authority within a time bound period, then said time limit has to be adhered to by the said Authority and in case there is any difficulty faced by it in not deciding the case within the time, so allowed by the Superior Authority, then it has to approach the Superior Authority for extension of time. The Authority cannot sit over the matter and takeages to decide the cases. This Court further observes that in case it is noticed in future that Quasi Judicial Authorities are not deciding the cases expeditiously and there is no justification as to why the same is not being done, then this Court will not hesitate from withdrawing Quasi Judicial Powers from the erring officers. Petition stands disposed of as also, pending miscellaneous applications, if any.

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

Smt. Jayotsna Saklani ...Petitioner.

Versus

State of Himachal Pradesh through Secretary (Social Justice and Empowerment) to the State of H.P.& others ...Respondents.

CWP No.680 of 2017
Decided on: 03.09.2019

Constitution of India, 1950 – Article 226 – Appointment as Anganwari helper – Setting aside of by Appellate Authority on ground of appointment obtained by furnishing wrong income certificate – Challenge thereto – Held, inquiry report of Tehsildar reveals that income certificate of petitioner was incorrect – She had concealed income of her family – As per actual income, she did not fall in the income criteria – Her appointment was rightly cancelled by Appellate Authority – Petition dismissed. (Paras 3 to 5)

For the petitioner:	Mr. Surinder Saklani, Advocate.
For the respondents:	Mr. Dinesh Thakur, Additional Advocate General with Ms.Divya Sood, Deputy Advocate General and Mr. Sunny Dhatwalia, Assistant Advocate General, for respondents No.1 to 6.
	Mr. Sanjeev Kuthiala, Sr. Advocate, with Ms. Kamlesh Kumari, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge. *(Oral)*

By way of this petition, petitioner has challenged order passed by the Appellate Authority vide per para 12 of the Guidelines for the appointment of Anganwari Worker/ Helper under the ICDS Scheme/programme, in an appeal filed under Clause-12 thereof, by Smt. Kalpana Devi (respondent No.7), against the appointment of present petitioner as an Anganwari Worker in Anganwari Centre Baga, Tehsil Chachiot, District Mandi, H.P., decided by learned Appellate Authority on 30.03.2017, vide which, learned Appellate Authority while accepting the appeal, set aside the appointment of petitioner as Anganwari Worker in the above mentioned Anganwari Centre and has directed Child Development Project Officer to appoint a candidate who is 3rd in the merit as per the Waiting List, against the post in issue, after holding that petitioner as also the candidate who was at number are in the Waiting List, were ineligible for appointment to the post in issue.

2. I have heard learned counsel for the parties and have also gone through the impugned order as well as record of the case. Record demonstrates that after filing of the appeal against the appointment of the petitioner, an enquiry was ordered into the veracity of the Income Certificate submitted by the candidates concerned and outcome of the enquiry, which was so conducted by Tehsildar concerned, revealed that the Income Certificate which was filed by the petitioner, was an incorrect Income Certificate, in which she had concealed the actual income of the family. It is also borne out from the impugned order that report of Tehsildar, Gohar, revealed after re-verification of the income of the parties that income of present petitioner was ₹37,000/- per annum, which was much beyond the criteria i.e. ₹20,000/- per annum and her income Certificate No.0611TE/ 2230/2014 dated 01.12.2015, produced at the time of interview for the post of Anganwari Worker, stood cancelled vide order No.TDR-Reader/7576-78, dated 24th December, 2016 and as a result thereof, the petitioner had become ineligible to be selected for the post in issue.

3. During the course of arguments, these factual averments, as are contained in order passed by the Appellate Authority, have not been disputed. Though, learned counsel for the petitioner has submitted that petitioner was not aware of the cancellation of her Income Certificate and she came to know about said fact only during the pendency of the appeal, but fact of the matter still remains that it is not in dispute that the Income Certificate, on the basis of which, petitioner was engaged as an Anganwari Worker, has been cancelled by the Authority concerned.

4. For record it is clarified further that the Income Certificate, on the basis of which petitioner had gained employment was earlier also held to be bad in law, on the basis of an enquiry, so held by Tehsildar, Chachiot, vide report/ order dated 08.04.2016, in which Tehsildar held that income of petitioner was not ₹17,000/-, but ₹37,000/-. Appeal preferred by present petitioner against said order before the Sub-Divisional Magistrate, was allowed on 17.09.2016, with a further direction to Tehsildar, to pass a speaking order. Subsequent order on re-verification, which was passed by Tehsildar, dated 24.12.2016, is an outcome of the direction so issued in appeal by the Sub-Divisional Magistrate.

5. It is not in dispute that order so passed by Tehsildar has attained finality, as the same has not been assailed by petitioner. Therefore, as the genesis of the adjudication in appeal by the learned Appellate Authority, is the factum of the Income Certificate issued in favour of petitioner having been rendered non-est being cancelled pursuant to the order passed by Tehsildar dated 24.12.2016, in my considered view, the Appellate Authority rightly allowed the appeal and set aside the appointment of petitioner. Petitioner could not have been permitted to continue even after it was found that she had gained employment by concealing the correct income of her family which was in excess of the maximum provided in the guidelines for appointment.

6. In this view of the matter, the impugned order, in my considered view, does not calls for any interference. Petition is accordingly dismissed. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, also stands vacated.

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

Joginder Dutt ..... Petitioner.

Versus

The State of Himachal Pradesh through its Secretary (Revenue)
& others ..... Respondents.

CWP No.1227 of 2018

Date of decision: 09.09.2019

Himachal Pradesh Land Revenue Act, 1954 – Sections 16 & 17 - Review jurisdiction – Nature of – Held, right to review is a stationary right and court of law or quasi – judicial authority has no right to review its order unless the statute confers upon it the power of review. (Para 17).

Himachal Pradesh Land Revenue Act, 1954 – Sections 14, 17 & 18 – Attestation of mutation – Held, the question whether Will was validly executed or not and whether testator had the power to bequeath, lies in domain of civil court – Revenue authority has no jurisdiction to decide such issues. (Para 18)

For the petitioner : Mr. V.D. Khidtta, Advocate.

For the respondents : Mr. Dinesh Thakur, Additional Advocate General with Mr. Amit Kumar Dhumal, Ms.Divya Sood, Deputy Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge. (Oral)

By way of this Petition, petitioner has prayed for following relief:-

"(i) That writ in the nature of certiorari may kindly be issued and the impugned order dated 30.11.2013 (Annexure P-3), Order dated 30.06.2014

(Annexure P-5), order dated 28.03.2016 (Annexure P-6) and order dated 17.11.2017 (Annexure P-8), may kindly be quashed and set aside.

(ii) That the respondents 1 to 5 may kindly be directed to produced the entire records pertaining to the case of the petitioner.

(iii) That the respondents 6 and 7 may kindly be burdened with the cost of this petition.

(iv) Any other order which are deemed just and proper in the fact and circumstances of the case, may kindly be passed in favour of the petitioner and against the respondents."

2. Brief facts necessary for the adjudication of the present petition are that pursuant to the death of one Shri Devi Dutt, some of his legal representatives approached the Revenue Authorities for attestation of mutation in their favour with regard to the propriety of deceased.

3. Vide Annexure P-1, the application so filed was rejected by the Revenue Authorities *inter alia* on the objection taken by present petitioner that there was a Civil Suit pending in the Court of learned Civil Judge (Junior Division), Court No.II, Rohru, pertaining to the inheritance of the propriety of Shri Devi Dutt, i.e. Civil Suit No. 40-6/2013, in which there was an interim order passed by the Court, whereby it was ordered by the Court that the parties were to maintain status-quo, qua the suit land. A perusal of Annexure P-1 demonstrates that the Revenue Authority dismissed the application on the ground that as the matter was sub judice, therefore, till the adjudication of the lis by the Civil Court, it was dismissing the application.

4. This order was assailed by contesting respondent Shashi Bhushan Bhardwaj, by way of an appeal before the Court of learned Collector, Rohru. Vide Annexure P-2, the appeal so filed was withdrawn by respondent No.6 herein on 28.11.2013, by stating that he did not want to pursue the appeal any further.

5. Thereafter, respondents No.6 and 7 again approached the Revenue Authority for attestation of mutation of the estate of deceased Shri Devi Dutt, on the basis of a Will executed by him dated 16.02.2009 and mutation was attested by the Authority concerned on the basis of said Will vide Annexure P-3 after hearing all the parties.

6. Feeling aggrieved, said mutation was assailed by petitioner Joginder Dutt Bhardwaj, under Section 14 of H.P. Land Revenue Act, before Sub-Divisional Collector, Rohru, which appeal was dismissed on 30.06.2014. The order passed by the Appellate Authority was, thereafter, challenged by way of a Revision Petition before Divisional Commissioner, Shimla, H.P. under Section 17 of the H.P. Land Revenue Act. This Revision Petition No. 34/2015 was also dismissed by the Revisional Authority on 28.03.2016. The order so passed by the Revisional Authority was assailed again under Section 17 of the H.P. Land Revenue Act before the Financial Commissioner (Appeals), Shimla, by way of Revision Petition No. 134 of 2016. Learned Financial Commissioner while reiterating the order, passed both by the Appellate Authority and the 1st Revisional Authority, dismissed said appeal also vide order dated 17.11.2017 vide Annexure P-8.

7. Feeling aggrieved, petitioner has filed the present petition.

8. Learned counsel for the petitioner has argued that impugned orders passed by the Authorities below are not sustainable in the eyes of law, as the Authorities below have erred in not appreciating that order dated 30.11.2013, Annexure P-3, so passed by Assistant Collector, 1st Grade, could not have been passed by said Authority, as when the said Authority had already earlier dismissed an application filed for mutation of the property of late Shri Devi Dutt, then it had no power to review its earlier order.

9. In the alternative, learned counsel for the petitioner has argued that assuming that the Authority was having the jurisdiction to decide subsequent application filed by the

parties for attesting mutation of the property of deceased Devi Dutt, then also the impugned order passed by the Assistant Collector, 2nd Grade was bad in law as said Authority erred in not appreciating that no mutation could have been attested on the basis of the Will of late Shri Devi Dutt, as the executor of the Will had no authority in law to make a Will of property other than his self acquired property or his share in ancestral property. No other point was urged.

10. On the other hand, learned counsel for the respondents has argued that there was neither any illegality nor any perversity with the impugned orders as order dated 30.11.2013 passed by the Authority dated 30.11.2013 by no stretch of imagination could be termed to be a review of order dated 30.11.2013. He has further argued that as far as the alternative submission of learned counsel for the petitioner is concerned, qua that a Civil Suit was pending before appropriate Court of Law and even otherwise it was not for the Revenue Authorities to go into the validity of a Will.

11. I have heard learned counsel for the parties and have also gone through the impugned orders as well as the record of the case.

12. It is a matter of record that earlier an application filed by some of the legal representatives of deceased Shri Devi Dutt for attesting mutation of the estate of the deceased was rejected by the concerned Revenue Officer vide Annexure P-1 on 03.05.2013 for reasons already mentioned by him hereinabove. It is also a matter of record that an appeal filed against said order by Shri Shashi Bhushan Bhardwaj was withdrawn by him on 28.11.2013. However, it is not as learned counsel for the petitioner wants this Court to believe that despite having passed Annexure P-1, the Authority concerned illegally, reviewed its earlier order and passed impugned order dated 30.11.2013 with regard to attestation of mutation qua the property of Shri Devi Dutt.

13. As is borne out from the record in fact what happened was that the Court of learned Civil Judge (Junior Division), Court No.II, Rohru, in a miscelaneous application filed by present petitioner i.e. CMP No.105-6/13, filed in Civil Suit No.26-1/13, vide order dated 03.07.2013, while dismissing said application, passed the following order:-

> "there is no need to restrain the revenue authority from doing there statutory duty, which is mandatory in nature and in the interest of public policy to update the revenue record, and have no presumptive value nor create any title, so even no need to insert in relief clause".

14. It was, thereafter, when contesting respondents i.e. respondents No.6 and 7 approached the Revenue Authorities afresh for attestation of mutation that order dated 30.11.2013, Annexure P-3 was passed. This is clearly borne out from the order passed by the learned Financial Commissioner dated 17.11.2017 (Annexure P-8).

15. Therefore, it is not a case wherein the earlier order was reviewed by the Revenue Officer as has been submitted by learned counsel on behalf of petitioner.

16. The contention of learned counsel for the petitioner that Annexure P-3 is a gross violation of the provisions of Sections 16 and 17 of the H.P. Land Revenue Act, in my considered view, also has no merit. It is reiterated that it is not as if vide Annexure P-3, earlier order passed vide Annexure P-1 was reviewed by the Revenue officer. In fact, the Revenue Officer vide Annexure P-1 had passed no order on merit. It had simply dismissed the application filed before him for attestation of mutation on the grounds already mentioned hereinabove.

17. At the cost of repetition, I state that after the application filed by petitioner for interim relief in the Civil Suit, stood dismissed and a fresh application for attestation of mutation was filed by present respondents No. 6 and 7, thereafter, a fresh order and that too of hearing all the parties including present petitioner was passed by the Revenue Officer, vide Annexure P-3. Therefore, there is no merit in the contention of learned counsel for petitioner

that Annexure P-3 is bad in law. This Court is not oblivious to the fact that right to review, is a statutory right and not a common right and a Quasi Judicial Authority or a Court of Law has no right to review its order unless the statute confers upon it the right to review. However, in the present case as I have already held above, the Authority concerned did not review its earlier order while passing order dated 30.11.2013, Annexure P-3.

18. As far as the alternative submission of learned counsel for the petitioner is concerned, in my considered view, the same also has no force. As legality of the Will in issue is already sub judice before the learned Civil Court, but obvious, orders which have been passed by the Revenue Authority, shall abide by the outcome of the same. Suffice it to say that submission of learned counsel that Assistant Collector should have gone into validity of the Will, in my considered view, is without any merit. Whether or not, a Will is validly executed or not, which obviously would include the factum of the power of executor to bequeath the properties mentioned therein, has to be decided by a Civil Court and this is not the domain of Revenue Authority.

19. In the course of the adjudication of present petition, this Court is exercising its power of Judicial Review. It is settled law that in exercise of its power of Judicial Review, the High Court is not to lightly interfere with the findings returned by the QuasiJudicial Authorities below, until and unless the findings returned are so blatantly and palpably perverse that they shock the Judicial conscious of the Court.

20. A careful perusal of the orders which stand impugned by way of this petition, demonstrate that in this case, it cannot be said that the findings returned by the Courts below are perverse and not born out from the record. It is not the case of petitioner that the Authorities below have flouted the principle of natural justice. Therefore, also this Court finds no reason to interfere with the orders impugned. It is again clarified that because a Civil Suit has been filed by petitioner wherein the veracity of the Will stands challenged, it is but obvious that orders passed by the Revenue Authorities shall have to abide by the outcome of the said Civil Suit. It is further clarified that the observations which have been made by this Court while disposing of this petition, only relate to the validity of orders which have been passed by the Quasi Judicial Authorities and the Civil Suit which is pending before the Court of learned Civil Judge (Junior Division) shall be decided by the Court on the basis of pleadings before it and evidence adduced by the parties before it and the Court shall not be influenced by any observation which had been made by this Court in this order. Petition stands disposed of, so also pending miscellaneous applications if any. Interim order, if any, also stands vacated.

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

Sanjay Prem & others .....Petitioners

Versus

Keshav Ram & others .....Respondents.

CMPMO No. 448 of 2019

Decided on : 11.9.2019

Code of Civil Procedure, 1908 – Order XXIII Rule 1 (3) – Formal defect – what is ? Held, any defect in suit which can be rectified by effecting necessary amendment is not a formal defect - Mere mentioning of wrong khasra numbers in plaint is not a formal defect – Suit can not be permitted to be withdrawn with liberty to file fresh one on account of such alleged defect (Paras 2 to 4).

For the petitioners: Mr. Maan Singh, Advocate.

For the respondent: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Since, a, disaffirmative order, stands, rendered, by the learned trial Judge concerned, upon, the plaintiffs' application, cast, under the provisions, of, Order 23 Rule 1 (3), read with Section 151, Code of Civil Procedure, (i) wherethrough, they strived, to, withdraw Civil Suit No. 182 of 2015, with, liberty reserved to institute, a, fresh suit, vis-a-vis, the suit khasra numbers, (ii) given, a, formal defect, arising, from, the, suit khasra numbers, being erroneously mentioned, in the plaint, to, fall within Phati, Jagatsukh, whereas, the relevant khasra numbers, rather falling, in, Phati Nasogi.

2. The afore application warrants its being dismissed, as earlier thereto, an alike motion stood cast, before the learned trial Judge concerned, motion whereof, stood dismissed, as withdrawn, (i) and, hence the order, of, dismissal as withdrawn, as made, upon, an alike hereat earlier motion, renders hence, the, extant petition made before the learned trial Judge concerned, to, beget attractions thereon, of, the, barring principle, of, estoppel, (ii) whereupon, a, latter/subsequent motion, warranted, its, dismissal, as, aptly done,hence, hence by the learned trial Judge.

3. Be that as it may, without going into the factum, that, the afore espoused, formal defect, hence holding any aura of tenacity, (a) yet, when through recoursing, the provisions, of, Order 6 Rule 17 CPC hence the plaintiffs/applicants, may make good or cure the afore defect, and, also when they may therein also include all their properties, as, occur in Phati Nasogi, hence, for obviating, the, attraction(s), of, the principle of estoppel, vis-a-vis, the subsequent thereto instituted suit arising from non inclusion(s) thereof, in, the extant suit, (b) whereupon, the plaintiff will not be entailed with any prejudice, upon, the extant application, ordered, to, be being dismissed.

4. In view of the above observations, and, without interfering, with the impugned verdict, the instant petition, is, disposed of, and, the petitioners, are, directed to make a motion, under Order 6 Rule 17 CPC, before the learned trial Judge concerned, and, the latter is directed, to make, within four weeks thereafter make, a, decision thereon, hence in accordance with law,. All pending applications, if any, also stand disposed of.

5. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case, and, the learned the trial judge concerned, shall decide, the matter uninfluenced, by any observation, made hereinabove.

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

Dev Raj Duggal ....Petitioner

Versus

Harish Kumar ....Respondent.

CMPMO No. 290 of 2018
Reserved on : 4.9.2019
Date of decision 12.9.2019

Himachal Pradesh Urban Rent Control Act, 1987 (Act) – Section 14 – **Code of Civil Procedure 1908, (Code)** – Order VII Rule 11(d) – Rejection of eviction petition for want of cause of action – Whether permissible? Held, Act does not vest any jurisdiction with Rent Controller to reject eviction petition on grounds mentioned in Order VII Rule 11 of Code – In absence of these provisions specifically having been made applicable to proceedings under the Act, these can not be invoked for seeking rejection of eviction petition. (Para 3).

For the petitioner: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.

For the respondent: Mr. Sanjeev Kuthiala, Sr. Advocate with Ms. Anaida Kuthiala, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The tenant, during the pendency, of, Rent Petition No. 24-2 of 2017, before the learned Rent Controller concerned, instituted an application, cast, under the provisions of Order 7 Rule 11 CPC, casting therein averments, qua, (a) the demised premises being unamenable, for, being statutorily espoused qua theirs' being bonafidely required by the wife of the petitioner, for, enabling the latter to, upon, an order of eviction, being passed, upon, the afore petition, hers establishing therein, any, commercial enterprise(s), (b) and also espoused qua the afore ground, remaining ungrooved, in, apposite therewith statutorily facilitative apt ground(s), (c) false averments being cast in the petition, for, sustaining the imperative statutory requirement qua, from, five years since, the, institution of the petition, for, eviction, the landlord, not vacating, any, commercial premises or seeking eviction therefrom, of, tenants' housed therein, (d) as, within the afore period hence in the month, of, February, 2017, rather premises occurring, in, the apt building, wherein also the demised premises also occur, hence standing leased, to M/s Sandeep jewelers, and, also within the afore period, and, in the year 2013, another premises occurring, in, the same building, being let out, to M/s Sai Hand Looms. Upon the afore motion a, disaffirmative order, stood pronounced, hence by the learned Rent Controller, and, the petitioner standing aggrieved therefrom, has, hence cast a challenge thereon, by instituting the instant petition, before this Court.

2. The learned counsel appearing for the petitioner, has, made a vehement, (a) contention before this Court, qua, the apt statutory provisions, borne in the H.P. Rent Control Act, 1987, visibly not vesting any leverage, in the landlord, to, hence, on behalf of his wife, seek eviction of the tenant, from, the demised premises, (b) nor he can thereafter make any valid statutory espousal qua his wife, requiring the demised premises, for, enabling her, to, upon an order of eviction, being rendered, to operate, a, commercial enterprises therein. Consequently, he contends, that, rather within the ambit of Order 7 Rule 11 CPC, and, more specifically, within, the ambit of clause (a), and, clause (d), thereupon an, empowerment, being, vested, in, the learned Rent Controller, to, reject the plaint, imminently, for, non-disclosure, of, valid cause(s) of action, or, for, the plaint being hence barred, by law (e) and, he further contends qua the afore lack of statutory enablements in the landlord, to, on behalf, his wife, hence seek, on, the aforestated grounds, an, order, of, eviction being pronounced qua the demised premises, hence his constructing any valid cause of action, and, thereupon the rent petition being barred to be maintained, and, rather it warranting, its, dismissal, at, the initial stage.

3. However, the afore grounds, are, rather discountenanced, by this Court, (i) as, a thorough perusal, of, the statutory provisions, borne, in, the, H.P. Urban Rent Control Act, 1987, unfold theirs, not explicitly either vesting jurisdiction, in the learned Rent Controller, to apply, upon, the rent petition, the mandate of Order 7 Rule 11 CPC, (ii) nor, also any apt specific contemplation, stands, borne in Civil Procedure Code, hence making, the, afore, mandate applicable, vis-a-vis, a rent petition, (iii) reiteratedly, for, want, of, explicit applicability, of, the strived provisions, as, encapsulated in the CPC, vis-a-vis, a rent petition, for, therethrough(s), alike the trial, of, the civil suit, hence by the learned civil court, being hence enabled also hence also trial being made, of, a, rent petition, hence by the learned Rent Controller concerned, (iv) thereupon the afore explicit wants, do constrain, this Court to conclude, qua the application, whereon a dis-affirmative order, was, pronounced, being mis-constituted, and, also the application, being outside, the ambit, of, the, apposite specific

legislation, hence governing, and, appertaining to the trial(s) of, an, eviction petition, rather by the learned Rent Controller concerned.

4. Furthermore, dehors lack of any apt specific contemplation, in the applicable hereat special legislation, and appertaining, vis-a-vis, allthe afore(s) frontiers, (i) even Rule 12 borne in the H.P. Urban Rent Control, Rules 1990, does not, also with any explicit cast hence any injunction, upon, the Rent Controller concerned, to, upon his standing seized with, a, rent petition, his recoursing the mandate, borne in the strived provisions, of, the CPC, hence appertaining, to, adoption, of, the requisite procedure, as, appertains, to, trial of, a, civil suit, hence, by the civil court concerned, (ii) rather with sub Rule (2) of rule 12, making, a, specific contemplation, qua, the Rent Controller concerned, being enjoined, to, ensure the, affording, of, a reasonable opportunity, to the contesting litigants, to, state their case, and also his being empowered, to, ensure recording of the evidence, of, the contesting litigants, and, (ii) further there onwards, with, a, specific provision, being also cast qua, vis-a-vis, the, ground of adjournment(s), and, vis-a-vis, upon, dismissal of application for default, thereupon, for sufficient reasons, the, learned Rent Controller concerned, being enjoined, to mete compliance, with, apposite therewith, provisions, as, cast in the CPC,

5. In aftermath, with, the afore explicit empowerment(s) hence, appertaining, to, only, the, afore mandate(s), of, the CPC, being available, for, recoursing, rather, by the Rent controller concerned, upon, his standing seized, with, a rent petition, (i) thereupon, with only the afore being explicitly enumerated therein, hence renders, the, afores, to, be the only ones, as, enumerated thereunder, and, the, unenumerated therewithin(s) hence, the, mandate(s), of, the, strived hereat provisions, of, the CPC, are, deemed, to, be specifically excluded, and, nor, are recoursable hence by the learned Rent Controller concerned. Reiteratedly, since even Rule 12, of the H.P. Urban Rent Control Rules 1990, does not, empower, the learned Rent Controller, to, entertain, or, make an adjudication, upon, an application, cast, under the provisions of Order 7 Rule 11 CPC, and, hence, the, impugned order, yet, does not warrant any interference, being made by this Court.

6. Be that as it may, rather all the afore forestallings , yet, cannot prejudice, the, tenant, to, canvass, the, afore lack, of, statutory enablement(s), vis-a-vis, the apt strivings, of, the respondent herein, as upon, cogent documentary evidence, standing adduced, vis-a-vis, the relevant issues, thereupon, the, learned Rent Controller, may be constrained, to, make inferences qua him.

7. Dehors the above, the further ground(s), as, encapsulated, in the apt petition, qua, the, rent petition acquiring, the, taint, of, malafide(s), and, it being a colourable ground, is, also, not, a sufficient ground, to, conclude, that, either the rent petition, does not, at, an, incipient stage, hence disclose, any, valid accruable cause(s) of action, or, it infracts the consonant therewith, provisions, cast in the H.P. Urban Rent Control Act, (i) conspicuously, given, this Court rendering, the, afore enablement(s), vis-a-vis, the petitioner herein. Concomitantly, also qua, the, secondary ground, though, the tenant, is, disabled to recourse, the, mandate of Order 7 Rule 11 CPC, yet the afore disablement, is, mitigated, upon, emergence, of, apt contentious issues, vis-a-vis, therewith, and, when thereafter, upon, his being permitted, to, adduce his evidence thereon(s), (ii) for, hence thereafter facilitating the learned Rent Controller concerned, to, return findings thereon, thereupon it would be premature, at, this stage, to, conclude that the afore ground, is, sufficient/ meritworthy, to, make a conclusion, qua, the rent petition warranting dismissal, hence, at the incipient stage.

8. For the forgoing reasons, there is no merit in the instant petition, and, it is dismissed. The impugned order is maintained and affirmed. Records be sent back forthwith. All pending applications, if any, also stand disposed of.

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

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

Jaswant Singh & another .....Appellant

Versus

Prem Lal & another .....Respondents

RSA No. 258 of 2011

Date of decision: 12.09.2019

Code of Civil Procedure, 1908 – Order 1 Rule10 – Alinee lis - pendens– Joining of – Held, alinee lis- pendens if is a proper or necessary party for adjudication of case, then he can be ordered to be impleaded in the case (Paras 1 & 2)

For the Appellant : Mr. Sanjeev Kuthiala, Advocate.

For the respondents: Mr. Sandeep K. Sharma, Advocate, for respondent No. 1(a.)

Mr. Rajneesh K. Lal, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge *(Oral)*

During the pendency of the instant appeal, before this Court, the learned Counsel for, the, proforma respondent, has moved, an application, cast under the provisions of Order 1 Rule 10 CPC, seeking there through the leave of this Court, to, implead, hence, the alienee lis pendens in the array, of, co-defendants/respondents, in, Civil Suit No. 29 of 2003, and in the instant RSA, (i) given the afore, during the pendency of Civil Suit No. 29 of 2003, through, a registered Deed of Conveyance executed inter-se him, and, the predecessors, of, the contesting defendants, hence acquiring right, title or interest, in a part of the suit property. Since, the impleadment of the afore, alienee lis pendens, even though, was recourseable, before, the learned trial Judge concerned, (ii) however, the afore omission, would not constrain this Court, to not to allow, the, instant application, as, the, afore alienee lis pendens, is both a proper and necessary party to the lis, *(ii)* and, when also for ensuring that ,the, apposite alienee lis pendens, is not faced, with the consequence, of, any decree being pronounced, in his absence, against the co-defendant, whereupon his right, title or interest, in, the suit property, will become severally prejudiced, (iii) also only upon his impleadment, he would be able to rear the apposite statutory espousal qua his acquisition, being validated, rather through, the, statutory principle, of, ostensible ownership. Hence, the application, is, allowed, and applicant is ordered to be impleaded, as, a co-respondent, in, the array, of, respondents, in the memo, of, parties in the instant appeal. However, the impleadment, in the array, of, co-respondents in the memo, of, parties in the instant appeal, of, the alienee lis pendens, would not also constrain, this Court to amend the memo of parties, in, the civil suit, (iv) given, qua, the, afore empowerment being solitarily vested in the learned Sub Judge concerned. Memo of parties, in, the instant appeal is directed to be corrected, by, the Registry of this Court.

2. Since, for ensuring the completest adjudication of the lis, inter-se, the, alienee lis pendens, and, also, amongst, the, other contesting litigants, and, when, the afore alienee lis pendens, is both a necessary and proper party to the lis, (a) besides, for, enabling the requisite recoursings, for, his impleadment, in, the array of, the, contestants, being made, before the learned Trial Judge, (b) given the latter being solitarily competent to make an order thereupon (c) in aftermath, this Court is constrained, to, for facilitating the afore purposes, hence remand the lis, to, the learned Trial Judge concerned. However, since after the occurrence, of impleadment of the alienee lis pendens, the latter would be, empowered to plead qua his acquisition of right, title or interest in the suit property, becoming validated,

through, the statutory principle, of, ostensible ownership, (d) and when striking of consequent therewith issue, is, imperative and also, evidence is required to be adduced, thereon, by the litigants concerned, (e) hence, for completing the afore exercise, this Court deems it fit to quash the impugned judgment. Since, the afore vital defect is directly and insegregatebly inter-connected with the other issues, whereupon, findings are already returned, and, also, when the latter struck afore issue(s), would require findings being returned, alongwith fresh findings, being returned, upon connected therewith issues, as already framed or struck by the learned Trial Judge, hence, this Court deems it fit to remand, the, entire lis to the learned Trial Judge, and, the learned Trial Judge, is, directed to, hence, complete an adjudication, but, after, making compliance viz-a-viz, the afore observations, upon, Civil Suit No. 29 of 2003, before nine months, hereinafter. The parties are directed to appear before the learned Trial Judge, on, **16.10.2019.**

3. The appeal is disposed of alongwith pending application(s) if any.

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

Oriental Insurance Co. Ltd. ....Appellant

Versus

Kunta Devi & others. ....Respondents.

FAO No. 147 of 2019
Reserved on : 2.9.2019
Date of decision: 12.9.2019

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application – Compensation qua 'future prospects' – Grant of - Held, claimants are entitled for requisite hikes or accretions towards 'future prospects' vis a vis per mensem income of deceased as per the ratio of National Insurance Company Ltd vs. Pranay Sethi & others 2017 of ACJ 2700 (Para 7)

Case referred:

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the appellant: Mr. Lalit Kumar Sharma, Advocate.

For the respondents: Mr. Rakesh Thakur, Advocate, for respondents No. 1 to 5.
Mr. Y.P. S. Dhaulta, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal, is, directed against the award, pronounced by the learned Motor Accident Claims Tribunal, Fast Track Court, Solan, District Solan, H.P., upon, Petition No. 11 FTC/2 of 05/06/08, wherethrough, compensation amount, borne in a sum of Rs. 14,32,760/-, stood assessed, vis-a-vis, the successors-in-interest, of, one Ram Gopal, and, thereon interest at the rate of 6% per annum, hence stood levied, and, was ordered, to, commence from the date of filing the petition, till its deposit or realization. The learned Tribunal, also, through, recoursing, the, mechanism, of, pay and recover, and, hence initially saddled, the apposite indemnificatory liability, upon, the insurer of the offending vehicle (Tipper) bearing registration No. HR-37A-1708, however, obviously, with, a, right bestowed, upon, the insurer, to, hence recover, in accordance with law, the afore compensation amount, from, respondents No. 1 and 2.

2. The registered owner of the offending vehicle, has not contested, the afore adoption, made hence by the learned Tribunal, in, the initially saddling, of, the apposite indemnificatory liability, upon, it. Consequently, hence the, saddling of the apposite

indemnificatory liability rather initially, upon, the insurer of the offending vehicle, and, thereafter, the latter, being permitted, to, recourse the apt legal remedies, to realize the compensation amount, from, respondents No. 1 and 2, acquires conclusivity, and, finality.

3. The learned counsel, appearing for the aggrieved appellant, has challenged the returning, of, affirmative findings upon issue No.1, appertaining to the ill-fated collision, being a sequel of rash and negligent manner of driving, of, the offending vehicle, by respondent No.2, and, has also cast a challenge, vis-a-vis, the returning of dis-affirmataive findings, upon issue No.4, appertaining to, the, ill-fated collision, being a sequel, of, rash, and, negligent manner, of, driving, of, the Scooter, bearing No. PB-12E-2801, hence by its driver.

4. In his casting, the afore challenge, the learned counsel, for the aggrieved insurer, has, submitted before this Court, qua no credence being meteable, to, the deposition of PW-5, a purported ocular witness, to the occurrence, (a) given his not rendering, a, credible version, vis-a-vis, the relevant occurrence, (b) however, the afore submission, is both imaginary, and, flimsy, as it is not firmly rested, upon, his thoroughly reading, the, entire deposition, of, the afore, whereas, a wholesome perusal, of, his testification, as, embodied in his examination-in-chief, comprised in Ext. PW-5/A, and, in his cross-examination, unfolds (a) qua hence emerging candid, and, pointed ascription(s), qua commission, of, tort, of, negligence, rather, by, respondent No.2, (b) ascriptions whereof, are, comprised in the offending truck, occurring on, the inappropriate side of the road, whereas, the driver of the scooter hence maneuvering the, scooter onto, the appropriate side of the road, (c) and when the afore echoings, borne in Ext. PW-5/A, also remained unshattered, vis-a-vis, their apt vigors, even, during, the, course, of, cross-examination wheretowhich, he stood subjected, to, (d) thereupon, the testimony of PW-5, is construable, to be a credible ocular account, vis-a-vis, the relevant mishap. Consequently, the afore submission, made before this Court, by the learned counsel, for, the insurer is rejected.

5. Be that as it may, the afore wholesome manner, of, readings by, this Court, of, the afore deposition of, PW-5, also, constrains it to conclude qua neither, the insurer of the scooter being required to be impleaded, in the array of respondents, (i) nor, the adoption, of, the afore mechanism, in the impugned award qua the insurer, of, the offending vehicle, being amenable, for, making initial deposit, of, the compensation amount, and, thereafter, the apt reservation, of, a right, vis-a-vis, it, to, through recoursing the legal mechanism, hence recover it, from, the owner and driver of the offending vehicle, hence suffers, from, any gross legal fallibility.

6. Moreover, even though, the successors-in-interest, of, deceased, Ram Gopal, who, uncontrovertedly, in sequel, of, happening, of, the ill-fated collision, inter-se the offending truck, and, the scooter, though omitted to cast a challenge, vis-a-vis, the compensation amount, determined under the impugned award, (i) nonetheless, the afore omission of the claimants, to, hence recourse, the afore mechanism, would not bar them, to receive the benefits, of, Pranay Sethi's case, conspicuously, (ii) appertaining, to, meteings, of, apt hikes, and, escalations, vis-a-vis, the last drawn salary of deceased, comprised, in a sum of Rs. 10,930/-.

7. Since, the learned tribunal, has not granted, the, requisite hikes or accretions towards future prospects, vis-a-vis, the per mensem income, of, the deceased, hence in 50% per centum thereof rather thereon, thereupon it, has committed, a, gross legal fallacy(ies), given the law laid down by the Hon'ble Apex Court, and, encapsulated in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.61, extracted hereinafter, hence, permitting, the, meteings, of, afore hikes, vis-a-vis the afore last drawn per mensem, of, the deceased:-

> "61. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been

stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years. ”

thereupon, and, in consonance therewith the afore deceased Ram Gopal, is entitled for meteing(s), of, 50% increase(s), in his apposite per mensem income, as, borne in a sum of Rs. 10,930/-, increases whereof, are, computed to stand borne, in a sum of Rs. 16,395/-. Significantly, the number of dependents, of, the deceased, are, 5, hence, 1/4th deduction, is, to be visited, upon, a sum of Rs. 16,395/-, hence, after making, the, aforesaid apt deduction, vis-a-vis, the afore sum, the per mensem dependency, hence comes to Rs. 12,296/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is computed, at Rs. 12,296/- x 12= Rs.1,47,552/-. After applying thereto, the apposite multiplier of 16, thereupon, the total compensation amount, is assessed in a sum of Rs. 1,47,552/- x 16 = Rs.23,60,832/- (Rs. Twenty three lacs, sixty thousand, eight hundred and thirty two only).

8. Furthermore, the quantification, of damages, by the learned Tribunal, vis-a-vis, the widow of the deceased, and, the other claimants (i) under the head, “loss of consortium”, “Loss of love and affection”, “loss of estate” and “funeral expenses” is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that, reasonable figures, under conventional heads, namely, loss to estate, loss of consortium only, vis-a-vis, the widow of the deceased, and, funeral expenses rather being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Consequently, the award, of, the learned tribunal is interfered, to the extent aforesaid, of, its determining not, in, consonance therewith, the, compensation, under, the aforesaid heads, vis-a-vis, the widow of the deceased, as also, vis-a-vis, the other claimants. Accordingly, in addition to the aforesaid amount of Rs.23,60,832/-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium, only, vis-a-

vis, the widow of the deceased, and, funeral expenses, sums of Rs.15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively, whereupon, the total compensation wheretowhich, the respondents/claimants, are, entitled to, comes to Rs.23,60,832 + Rs.15,000/- + Rs.40,000/- + Rs.15,000/- = Rs.24,30,832 (Twenty four lacs, thirty thousand, eight hundred and thirty two only).

9. For the foregoing reasons, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants are held entitled, to, a total compensation amount of Rs.24,30,832 (Twenty four lacs, thirty thousand, eight hundred and thirty two only) along with interest, at the rate of 6% per annum, from, the date of filing of the petition, till its realization.

10. The indemnificatory liability, vis-a-vis, the afore compensation amount, shall be, vis-a-vis, insurer of the offending vehicle, i.e. appellant herein, with liberty reserved to it, to thereafter, through recoursings, of, apt legal mechanism(s), hence recover the compensation amount, from, respondents No. 6 and 7 herein. The amount of interim compensation, if already awarded, be adjusted in the aforesaid compensation amount, at, the time of final payment. The aforesaid amount of compensation, be apportioned, in the manner, as ordered by the learned tribunal. The shares of the minor children, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable, vis-a-vis, their mother, only when she explains, of, its being required, for, the upkeep, and, benefit of her minor children. All pending applications also stand disposed of. Records be sent back forthwith.

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

Parshotam ...Appellant

Versus

State of H.P. ...Respondent.

Cr. Appeal No. 449 of 2008
Reserved on : 5.9.2019
Date of decision 12.9./2019

Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 20 –Recovery of 'charas' – Proof of - Appeal against conviction – Held, parcels containing bulk as well as sample contraband containing signatures of accused and independent witnesses – FSL report confirming analyzed sample as of 'charas' – Version of official witnesses consistent and corroborating prosecution case – Case property duly identified during trial in the court – Minimal discrepancies in deposition of witnesses - Non-supporting of prosecution case by the independent witnesses inconsequential – No ground to interfere with judgment of conviction – Appeal dismissed. (Paras 8,10 & 12)

For the appellant: Mr. N. K. Thakur, Sr. Advocate with Mr. Anubhav Chopra, Advocate.

For the respondents: Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel Dy. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal, stands directed, by the appellant, against the judgment of conviction pronounced, on 23.7.2008, by the learned Special Judge Chamba Division, Chamba, H.P, in, Session Trial No. 13 of 2008, wherethrough, findings, of conviction, were returned upon the appellant, for his committing offence(s) punishable, under Section 20, of the Narcotic Drugs and Psychotropic Substance Act, 1985, (i) and, also therethrough, the,

accused/appellant, stood sentenced, to undergo rigorous imprisonment for 4 years, and, to pay, a, fine of Rs. 25,000/-, for, the commission, of, an offence, punishable under Section 20 of the NDPS Act, and, in default of payment of fine, he stood further sentenced, to, undergo simple imprisonment, for, six months.

2. The facts relevant to the case, are, that on 1.2.2008 at about 5.30 PM at Chanju bridge, the police party headed by ASI Ashok Kumar was present in connection with patrolling duty. The police had put a picketing there at Chanju bridge. At that time, one person came there from Kuparigala side who was having a blue coloured bag on his left shoulder. On seeing the police party, the said person at once got frightened and tried to flee away. The said person was nabbed by ASI Ashok Kumar with the help of other police officials. His name and parantage was ascertained, who disclosed his name as Parshotam, son of Hari Singh. The bag which the accused was holding was checked in which pant, T-shirt and a polythene evelope of light gree colour were recovered. The polythene envelope on opening was found containing charas in the shape of sticks which on weighment found 1 kg 650 gms. Complying with the formalities, the I.O. separated two samples of 25 gms each. The bulk and the sample parcels were sealed with seal 'K'. Thereafter, the other codal formalities were also completed and the accused was arrested. After completion of the investigation and after receipt of the FSL report, the charge-sheet was filed against the accused for having committed the offence under section 20 of the Act.

3. The accused was charged for committing an offence punishable under Section 20 of the ND & PS Act. In proof of the prosecution case, the prosecution examined 14 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 Cr.P.C. stood recorded by the trial Court, wherein, he made disclosures qua his false implication. However, he did not lead any defence evidence.

4. On an appraisal of evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

5. The accused/appellant, is, aggrieved by the judgment of conviction recorded, by the learned trial Court. The learned Counsel appearing, for the accused/ appellant has concertedly, and, vigorously hence contended qua the findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction, being reversed, by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced, by, findings of acquittal.

6. On the other hand, the learned Additional Advocate General, has, with compatible force, and, vigor, also contended that the findings of conviction, as, recorded by the learned Court below, rather standing based, on a mature, and, balanced appreciation, "by it", of evidence on record, and, theirs not necessitating, an, interference, rather theirs meriting vindication.

7. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

8. The recovery of the relevant item, of contraband, was made, from the conscious and exclusive possession of the accused, through memo, borne in Ext. PW10/A, (i) whereon, the uncontested signatures of accused, stand borne, and, hence the estopping statutory principles, engrafted in the provisions of Section 91 and 92 of the Indian Evidence Act, bar the accused to contest the voicing(s), borne therein, unless, the hereinafter alluded apt interconnectivities, do not emerge, at the stage of production of the case property in Court, (a) AND in contemporaneity, vis-à-vis, the afore seizure, standing effectuated, by the Investigating Officer concerned, from, the conscious and exclusive possession of the accused, rather NCB form, borne in Ext. PA, stood also drawn, (b) wherein reflections are cast, vis-à-vis, 6 seal impressions each, on the bulk, and, the sample parcels, hence carrying English alphabet "A", rather standing embossed thereon, and, thereon(s) also the uncontested

signatures of the accused, stand borne, and, hence the estopping statutory principles, engrafted in the provisions of Section 91 and 92 of the Indian Evidence Act, bar the accused to contest the voicing(s), borne therein, unless the hereinafter alluded apt interconnectivities, do not emerge, at the stage of production of the case property in Court c) the Station House Officer concerned, upon receiving the seized contraband, at the police station concerned, also embossed thereon six re-sealing(s) seal impressions rather carrying English alphabet "K" and "A'. The afore seizure(s) was/were, deposited, through Ext. PW6/A, in the Mallkhana concerned. Subsequent thereto, under road certificate, borne in Ext. PW10/C, the seized contraband, stood dispatched, to the FSL concerned, for, the latter hence making an opinion thereon. All the afore exhibits, carry narratives therein, vis-à-vis, the description, and, number(s), of the seal impressions, embossed, respectively upon the bulk, and, upon the sample parcels, and, all the afore visibly carry interse compatibility(ies), and, synonymity(ies). Furthermore, the FSL concerned, upon receiving, the case property, has, in its report, embodied, in Ext. PW9/A, made echoing(s) therein rather bearing compatibility, vis-à-vis, the afore facet(s), as stand narrated, in the afore-referred exhibits, (d) and has also rendered, an opinion, qua the parcel, as, sent to it, for analysis, carrying therein rather all the ingredients, of, Charas, (e) and thereafter, echoing(s) are also borne therein, qua the FSL concerned, after extracting, the ingredients/contents, as stood carried, in the sample parcel, as stood, sent to it, for analysis, and, thereafter upon its making an opinion thereon, rather, it subsequent thereto, re-inserting the ingredient(s), in, the cloth parcel, and, it embossing thereon, the, seal impression(s), of, the FSL. The charge would be concluded to be efficaciously hence proven by the prosecution, (f) upon each of the prosecution witnesses concerned, wheretowhom, the case property(ies), stood shown in Court, hence in their respective testification(s), making clear/candid echoing(s), qua the relevant congruities, and, similarities, interse, the number(s), and, description(s) of the seal impressions, as stand echoed, in the afore exhibits, also existing, upon, the case property, rather upon, its production in Court. However, at the time of production, of the case property in Court, and, thereat its being shown, to the prosecution witnesses concerned, though, as aforestated, the relevant connectivities, stand echoed, by the prosecution witnesses concerned, (g) and when thereat, the accused persons stood also represented, by the defence counsel, (h) hence when the learned defence counsel, rather thereat held the opportune moment, to, on sighting the case property, hence make therethrough(s) decipherment(s), and, discerning(s), vis-à-vis, the afore congruities, or compatibilities, being amiss therein (i) or not, rather, visibly even at the afore stage, the learned defence counsel, did not, either object to the production, or exhibition, of the case property in Court, (j) nor thereafter proceeded to make any strivings, to elicit, from the prosecution witnesses concerned, any echoing(s), qua the relevant connectivities, (k) not existing(s), nor the learned defence counsel endeavored, to, hence ensure qua the Court hence making any observation, during, the course of recording, of the testification(s), of the prosecution witnesses', concerned, qua the aforestated relevant compatibilities, and, interconnectivities, interse the bulk, and, seal parcels, and, appertaining to the number(s), and, description(s), of, six seal impressions, carrying English alphabet, "K", narrated in Ext.PW10/A , (i) rather not emerging, at the stage of production, of the case property in Court. In sequel to the afore, an inference is sparked, qua the learned defence counsel, rather acquiescing qua the relevant apposite congruities, and, connectivities, emerging inter-se, the, number(s) and description(s), of the seal impressions, carrying therein English alphabet "A", and, as stood embossed, on the samples, and, bulk parcels, and, qua wherewith, a synonymous narrative, is, carried in Ext. PW-1, hence at the imperative stage, of, "production of case property" in Court.

9. In summa, the emergence of clinching and potent evidence, vis-à-vis, the afore apt connectivities, hence surfacing, thereupon the effect, if any, of any minimal discrepancies, improvements or embellishments, vis-à-vis their previous statements recorded in writing or any minimal interse or any intrase contradiction, if any, occurring in the deposition(s), of the prosecution witnesses concerned, naturally, and, logically all get subsumed, and, subsided.

10. Nowat, the effect of an independent witness, to recovery memo Ext. PW10/A, rather reneging from his previously recorded statement in writing, is, to stand construed alongwith the factum, of his, in his cross-examinations, to which he stood subjected, to, by the learned Public Prosecutor "upon" his standing declared hostile, hence admitting the factum, of, his authentic signatures occurring thereon. Conspicuously, when, upon, his admitting the occurrence, of, his signatures, on the relevant memo(s), (a) thereupon the mandate of Sections 91 and 92 of the Indian Evidence Act, whereupon, he "on" admitting, the occurrence of his authentic signatures thereon, hence stood statutorily estopped, to hence, renege from the recitals, borne thereon, (b) stands rather attracted (c) whereupon the effect of his orally deposing, in variance or in detraction vis-à-vis, the recitals hence occurring therein, gets statutorily belittled (d) rather when he naturally and emphatically hence statutorily, proves the recitals, comprised in the apposite memo(s), thereupon his orally reneging from the recitals borne thereon "holds no evidentiary clout" (e) nor it holds any legal weight, to hence countervail the creditworthiness, of the testimony(ies) of the official witnesses, qua the recovery of contraband, made under recovery memo Ext. PW10/A, hence standing effectuated therethrough, from the conscious, and, exclusive possession, of, the accused. Contrarily the uncontroverted factum, of, his authentic signatures, occurring in the relevant exhibits, concomitantly renders the apposite recitals, borne therein, rather, to hold a grave probative worth. The ensuing sequel thereof, is that with the principle, of, statutory estoppel, hence constituted in Sections 91 and 92, of the Indian Evidence Act, rather barring an independent witness, to orally resile, from the contents of Ext. PW10/A, (f) especially when he admits qua his apposite signatures occurring thereon, (g) thereupon renders unworthwhile besides insignificant, the factum, qua his orally deposing in variance vis-à-vis, its recorded recitals, (h) per se whereupon an inference stands enhanced qua dehors, his reneging from his previous statement(s) recorded in writing, a deduction(s) standing capitalized, qua thereupon, his proving the genesis, of the prosecution case, and, also strengthens, the reason assigned, by the learned Special Judge, for his thereupon, accepting the recitals occurring, in, Ext. PW10/A,

11. Be that as it may, the vigour of the aforesaid conclusion, would stand benumbed, only upon hence evidence existing on record, with respect to the independent witnesses concerned, standing pressurized or coerced by the Investigating Officer concerned "to" emboss his/their authentic signatures, upon, seizure memo, borne in Ext.PW10/A. However, the independent witness concerned, though, in his testification, makes an attempt, to communicate qua his signatures, as, occur thereon standing obtained, despite, contents thereof being not readover, to him, and, upon his being pressurized, (a) yet the aforesaid communication "is bereft of any vigor" especially, when he, "does not", make any further unveilings in his testification, that, in the Investigating Officer concerned, purportedly omitting, to, read over to him, the contents of the aforesaid exhibits, "besides" hence, his obviously without purportedly understanding, their contents rather his appending his signatures thereon, (b) thereupon, upon, construing, the afore omission(s), in entwinement, with his further omission, to record, a, complaint with the Officer(s) superior, to the Investigating Officer concerned, rather (d) begets, an, inference, qua the effect, if, any, of the aforesaid communications, hence occurring in the testification(s), of, the independent witness concerned, dehors, the afore bespeakings not standing borne therein, rather not belittling, the, hereinabove drawn inference, anvilled upon, attraction "upon" the admitted factum, of, his authentic signatures, occurring, on Ext. PW10/A,, hence "the" mandate of Section 91 and 92, of, the Indian Evidence Act, (c) thereupon dehors his making the aforesaid, frail attempt(s), for, belying the recitals borne, in Ext. PW10/A, his rather hence statutorily proving all the recitals, as, occur therein.

12. Even though, the learned counsel appearing, for the appellant, has contended with much vigor, before this Court, that since PW-1, an independent witness, to the relevant proceedings, has, rendered, an, acquiescing, answer, to, a court query, qua his being pressurized, to, make his signatures, on the relevant memo, (i) thereupon his acquiescing,

qua, the, occurrence, of, his uncontested signatures, on, the relevant memo, and, parcels hence rather not rendering, the vigor, of, the prosecution case rather being enhanced. However, the afore ground, is rudderless, as during, the course of his cross-examination, wheretowhich, he stood subjected, to, by the learned Public Prosecutor concerned, upon, his being declared hostile, (ii) his making acquiescing therein, qua his signatures occurring, on, the relevant memo, and, on the relevant parcels, (iii) the effects whereof(s), when stand entwined with, vis-a-vis, PW-2, rather the defence, not endeavoring, to, mete any suggestion to him, qua the latters' signatures being also obtained, upon, pressure standing exerted, upon, him hence by the Investigating Officer, (iv) and, when therewith also stand(s) coagulated, the, factum, vis-a-vis the Investigating Officer also remaining unmeted, any apt thereto suggestion, rather begetting a conclusion qua the afore disaffirmative answer(s) meted, by PW-2, to, the court query, qua, the Investigating Officer obtaining his signatures, upon, the relevant memo, and, parcels, upon, his exerting pressure upon him, rather being vulnerable, to, skepticism, (v) moreso, when he has meted, a, disaffirmative answer, vis-a-vis, a court query qua his making a complaint qua thereofs, vis-a-vis, the superiors, of, the Investigating Officer. Furthermore, upon PW-3 being subjected, to cross-examination, and, his making a testification, vis-a-vis, the independent witness' arriving hence at spot, rather by chance, hence it appears, qua, the defence acquiescing, vis-a-vis, the, appending/ making, of, signatures, both by PW-1, and, by PW-2, on the relevant memo, and, on the parcels, being acquiesced, by both, to be hence made thereon, rather at the relevant site of occurrence, (vi) and, thereupon a conclusion is recorded qua the signatures, as are made thereon, being acquiesced by them, to be not made, on blank memos, (vii) and, also it appears qua an inference, of, acquiescing, being engendered, qua both making their signatures, upon, the relevant cloth parcels, emphatically upon, the latter(s) thereat enveloping therewithin, hence, the, recovered charas. The effect of the afore discussion is qua, when, independent witnesses, stood associated, by the Investigating Officer, in the relevant proceedings, and, when they rather turned hostile, vis-a-vis, the prosecution, (viii) thereupon they are not construable, to be interested in, the, success, of, the prosecution case, and, also qua theirs being not inimical nor holding any prejudice, vis-a-vis, the accused, also hence it appears, qua it, being not enjoined, upon, the Investigating Officer, to join, other independent witnesses, though, holding hence abodes, in, proximity, to, the relevant site of occurrence.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis of the material on record by the learned trial Court, does not, suffer from any gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record. Consequently, there is no merit in the instant appeal, hence, it is dismissed, and, the impugned verdict, is, affirmed, and, maintained. Records be sent back forthwith.

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

FAO No. 352 of 2017 along with FAO No. 419 of 2017.

Reserved on: 4th September, 2019.

Decided on : 12th September, 2019

Motor Vehicles Act, 1988 – Section 147(2) – Liability of insurer in case of 'Act only' policy – Held, deceased was a gratuitous passenger in the vehicle – He was not a third party qua insurer – Policy obtained by insured was 'Act only' policy – Insurer can not be directed to indemnify the award in such cases – Nor it can be asked to pay first and recover the paid amount from from the insured. (Paras 2 & 3)

1. FAO No. 352 of 2017.

Rahul Sood .....Appellant.

Versus

Smt. Bimla and others ....Respondents.

2. FAO No.419 of 2017.

United India Insurance Co. Ltd. .....Appellant.

Versus

Smt. Bimla & Others ....Respondents.

Case referred:

National Insurance Co. Ltd. V. Balakrishnan, and, another, 2013, ACJ, 199

FAO No. 352 of 2017.

For the Appellant(s): Mr. Divya Raj Singh, Advocate.

For Respondents No. 1 to 5: Mr. Inder K. Sharma, Advocate.

For Respondent No.6: Mr. Ashwani K. Sharma, Advocate, with Mr. Mayank Sharma, Advocate.

FAO No. 419 of 2017.

For the Appellant: Mr. Ashwani K. Sharma, Advocate, with Mr. Mayank Sharma, Advocate

For Respondents No.1 to 5: Mr. Inder K. Sharma, Advocate.

For Respondent No.6: Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

FAO No. 352 of 2017, and, FAO No. 419 of 2017, are respectively, reared by the registered owner, of, the offending vehicle, and, by the insurer of the offending vehicle, against, the award rendered by the learned Motor Accident Claims Tribunal-II, Sirmaur at Nahan, H.P., upon, MACP No. 189-N/2 of 2013, (i) wherethrough, compensation amount, borne in a sum of Rs.13,63, 296/-, stood assessed, vis-a-vis, the claimants, and, thereon interest, at, the rate of 7.5% per annum also stood levied, and, it was ordered to commence, from, the date of petition till realization, of, the compensation amount.

2. Succinctly, the submission, of, the learned counsel appearing, for, the aggrieved insurer, of, the offending vehicle, whereuponwhom, the apposite indemnificatory liability, stood fastened, (i) is comprised, in, the, legality, of, adoptions, by the learned tribunal, of, the principle of "pay, and, recover", wherethrough, the, initial disbursing liability, vis-a-vis, the determined compensation amount, was saddled, upon, the insurer, and, thereafter a right was reserved, to it, to, upon, its deposit, and, release(s), vis-a-vis, the claimants concerned, hence seek recovery(ies) thereof, in accordance with law, hence, from the owner, and, driver of the offending vehicle, (ii) and, is, grooved, in the contract of insurance, executed inter se the insurer, and, insured, and, borne in Ex. RW1/A, being, a, "liability only polcy, hence covering, risk, of, driver only, and, its not covering the risk, of, the occupants, of, the offending car, and, when at the relevant time, the deceased hece was travelling, as, a gratuitous passenger, in, the offending vehicle, evidently registered, as, a non passenger vehicle, (iii) rather, upon demise, of, the afore evident gratuitous passenger, hence, travelling, in, the afore category of vehicle, would not, enable the burdening, of, the apposite indementificatory liability, on any front, vis-a-vis, the insurer. The learned counsel appearing for the insurer, has further contended, (iv) that, since the deceased, though, was an occupant of the offending vehicle, and, was not, a third party, and, upon, the afore prime factum, being, coagulated, with, the, other evident fact, that, with the apt policy, standing, evidently, executed inter se the insurer, and, the insured, and, as borne in Ex. RW1/A, rather covering the apt risk(s) of, the, driver-cum-owner, and, its not covering, the, risk of any gratuitous passenger(s) hence carried therein, (v) thereupon, in consonance with the verdict, pronounced by the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. V.***

Balakrishnan, and, another, reported in 2013, ACJ, 199, the relevant paragraph No. 21 whereof stands extracted hereinafter:-

> "21. In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing from a "Comprehensive/Package Policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "Comprehensive/Package Policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a "Comprehensive/Package Policy", the liability would be covered. These aspects were not noticed in the case of Bhagyalakshmi (supra) and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same."

(vi) the insurer of the offending vehicle rather being completely exculpated, vis-a-vis, the fastening, of, the, apposite indemnificatory liability, and, he has also further contended, that, the adoption, of, the principle of "pay and recover" by the learned tribunal, is, also legally frail, (vii) given its recoursing being legally available, only upon, there being, a, fundamental breach, of, the terms, and, conditions, of, insurance policy, (viii) whereas, the contract, of, insurance executed inter se the insurer, and, the insured, limiting the apt risk contractual liability, only, vis-a-vis, the owner-cum-driver, of, the offending vehicle, and, not extending, vis-a-vis, the, risk(s), of, occupants or gratuitous passenger, as, borne in the offending vehicle, (ix) thereupon, with, the, afore contractual ouster(s) obviously not covering any risk, of, the apt gratuitous passenger, hence, aboard the offending vehicle, (x) hence, the contract of insurance, being on, all fronts remaining unattracted, vis-a-vis, the afore category of gratuitous passengers, and, also hence, the afore contractual ouster, being not construable, to, constitute a fundamental breach of the terms, and, conditions of the insurance policy, it, being not included therein, rather it being a policy, hence, not explicitly covering the risks, of, the gratuitous occupants, borne in the offending vehicle, and, reiteratedly, he, contends, that, the adoption, of, the afore mechanism, by the learned tribunal, being unbefitting.

3. The afore submission has immense vigour, and, hence, is accepted, and, in view of the afore, the insurer is completely, and, explicitly, exculpated, vis-a-vis, the fastening, of, the, apposite indemnificatory liability, and, also the principle, of, "pay and recover", is not recourseable nor this Court upholds, the, operative portion of the verdict, recorded by the learned tribunal, wherein, the insurer, is, initially saddled, with, the apposite indemnificatory liability, and, thereafter a right has been preserved, vis-a-vis, it, to, upon its apt release, it, through recoursing apt legal mechanisms, ensure, its being recovered from the registered owner, of, the offending vehicle.

4. In FAO No. 352 of 2017, the learned counsel appearing, for the appellant/owner, of, the offending vehicle, has contended with much vigour, before this Court, (i) that the computation of per diem wages, of, the deceased, hence, by the learned tribunal, rather in a sum of Rs.300/-, and, derived from his hitherto avocation, as a mason, are, in conflict with the then prevailing minimum per diem wages, as, disburseable , vis-a-vis, the afore category, of, workman, (ii) given theirs being therein rather borne in a sum of Rs.200/-. Consequently, he contends that the afore computation, being amenable, for interference, by this Court. However, the afore submission, is grounded, by the evident factum, of, one of the employer(s), of, the deceased workman, while stepping into the witness

box as PW-3, in his deposition, comprised in Ex.PW3/A, rather making a firm echoing, (iii) vis-a-vis, his engaging, the deceased as a mason, and, his defraying wages to him, at, the rate of Rs.300/- per day. The afore deposition, borne in Ex.PW3/A, remains unshattered, vis-a-vis, its vigour, (iv) thereupon, hence credence, is, meteable thereto, (v) and, when the engagement, by, private employers, of, the services, of, a mason do not, enjoin, upon, them, to, liquidate wages, vis-a-vis, them, hence, at par with the minimum wages qua therewith, as, prescribed in the apposite government notification, as, hold force, in, contemporaneity, vis-a-vis, the relevant mishap, rather when, the, normal wages, in private employment, are, usually higher than the one reflected in the apt notification, (vi) thereupon, the assaying made upon, the apt notification relied, upon, by the learned counsel, for the aggrieved registered owner of the offending vehicle, for hence, thereupon, his, striving, to, reduce the per diem wages of the deceased, from his apt avocation, is, a meritless endeavour, and, is rejected.

5. Furthermore, the learned counsel, appearing for the registered owner of the offending vehicle, has also made, a vehement submission before this court, that, with Bimla Devi, in her cross-examination, testifying, vis-a-vis, theirs being not dependent, upon, the income, of, the deceased, (i) thereupon, the computation(s), of, the afore per mensem wages, dehors the factum, qua in the impugned award, no loss, of, dependency being awarded, vis-a-vis, the deceased's purported earnings, from, agriculture, rather also not constituting, the apt, parameter, for, computing, the, loss of annual dependency, hence, being entailed, upon, his successors-in-interest. However, in making the afore submission, the learned counsel, appearing for the registered owner of the offending vehicle, has read, the afore deposition, in a piece meal, manner, and, has strived, to draw, untenable leverage therefrom, (ii) his being grossly unmindful, vis-a-vis, the deceased, from his employment, during his life time, as a mason, drawing, a sum of Rs.300/- per day, (iii) and, when there is no further evidence on record qua the afore derivation of income, hence, by the deceased from his avocation, as a mason, being not added, as, an apt supplement, to the income, if any, derived by his surviving spouse Bimla Devi, from other sources, nor with any evidence, standing, hence, adduced qua the source, of, afore income, and, also qua it, fully working towards, the, upkeep, and, maintenance of his successors-in-interest, (iv) thereupon, the afore echoings made in the cross-examination of Bimla Devi, are, of no consequence, also reiteratedly when there is no further evidence, vis-a-vis, the afore derivation of income, being sufficient, to, cover, all the expenses of their livelihood, and, also for covering the expenses, of, their upkeep, and, maintenance, and, also when, there is no evidence adduced, vis-a-vis, the afore derived income, during, his life time hence by the deceased, not, being any means, of, their livelihood, (v) thereupon, the afore per mensem income of the deceased, as derived, during, his life time, is to be concluded, to be an income, whereupon, his successors-in-interest, rather were dependent.

6. For the foregoing reasons, the appeal filed by the insurance company bearing FAO No.419 of 2017 is allowed, whereas, FAO No. 352 of 2017, instituted by the registered owner of the offending vehicle, is dismissed. Consequently, the award rendered by the learned Motor Accident Claims Tribunal-II, Sirmaur at Nahan, H.P., upon, MACP No. 189-N/2 of 2013, is modified to the extent, that, liability to indemnify the compensation amount, shall be of the registered owner of the offending vehicle i.e. of one Rahul Sood only, and, the, operative portion of the award impugned before this Court, wherein, the learned tribunal, has, adopted the principle of "pay and recover", is, set aside. All pending applications also stand disposed of. Records be sent back forthwith.

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

RFA No. 230 of 2008 along with
Cross Objection No. 319 of 2009
and RFA No. 253 of 2008.

Reserved on : 29th August, 2019.

Decided on :12th September, 2019.

Tort Law – Malicious prosecution – Damages – Grant of – Plaintiff claiming damages for malicious prosecution on ground that defendant No. 2 made trespass in his house and caused him arrested in a false case – Held, defendant No. 2 during course of investigation went to premises of plaintiff to seize timber with respect to which offence under Forest laws was suspected to have been committed by him – Section 165 of Cr. P.C. specifically empowered him to visit a place for recovering any thing necessary for purposes of investigation – He was not required to obtain search warrant from Judicial Magistrate – Timber was actually found stacked in his house – Description of timber given in permit was different from specifications of timber actually found in plaintiff's house – No evidence that such exercise was done by the defendant No. 2 with malice - Search of house of plaintiff was not illegal – Plaintiff not maliciously prosecuted and not entitled for damages – RSA allowed – Suit dismissed. (Paras 4 to 8)

1. RFA No. 230 of 2008 & Cross Objection No. 319 of 2019.

Ramesh Pathania ....Appellant/defendant No.2.

Versus

Surat Singh & another. ....Respondents.

2. RFA No. 253 of 2008.

State of H.P. ....Appellant/Defendant No.1.

Versus

Surat Singh & another ....Respondents.

For the Appellant(s): Mr. Anand Sharma, Sr. Advocate with Mr. Karan Sharma, Advocate in RFA No. 230 of 2008.
Mr. Ashok Sharma, Advocate General with Mr. Hemant Vaid, Addl. .A.G., with Mr. Vikrant Chandel, Deputy A.G. in RFA No. 253 of 2008.

For Respondent No.1/ Cross objector: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate, in both RFAs.

For Respondent No.2: Mr. Ashok Sharma, Advocate General with Mr. Hemant Vaid, Addl. .A.G., with Mr. Vikrant Chandel, Deputy A.G. in RFA No. 230 of 2008.
Mr. Anand Sharma, Sr. Advocate with Mr. Karan Sharma, Advocate in RFA No. 253 of 2008.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, the aforementioned RFAs, as well as, the, cross objections, arise from, a common verdict, pronounced by the learned Addl. District Judge, Solan, H.P., upon, Civil Suit No. 24-S/1 of 1995/94, hence, they are, all amenable for a common verdict, being rendered thereon.

2. Both the afore RFAs bearing RFA No. 230 of 2008, and, RFA No. 253 of 2008, stand directed, against a verdict pronounced by the learned Additional District Judge, Solan, upon, Civil Suit No.24/S/1 of 1995/94, (i) wherethrough, compensation amount, borne in a sum of Rs.2,15,000/- along with costs, stood determined, vis-a-vis, the plaintiff, arising from the defendants, maliciously prosecuting, harassing, humiliating, and, diminishing, his reputation in society, (ii) and, liability for liquidation, of, the afore compensation amount, was, jointly, and, severally fastened upon, defendant No.1, and, upon, defendant No.2. Moreover, through, cross objections, bearing CO No. 319 of 2009, as, stand instituted within RFA No.230 of 2008, hence, therethrough, the cross-objector/plaintiff, seeks enhancement, of,

compensation amount, as, determined, vis-a-vis, him, and, obviously beyond the one, as, is assessed, vis-a-vis, him under, the impugned verdict.

3. The commission of tort, of, malicious prosecution, against the plaintiff, by, co-defendants, (i) is, rested, upon, co-defendant No.2, without any lawful authority, ingressing into the homestead, of, the plaintiff, (ii) and, his making unlawful seizure, of, timber stacked therein, (iii) and, thereafter his unlawfully arresting the accused, and, parading him, in, the bazar, (iv) whereupon, his status being diminished in the society, (v) and, all being preeminently sparked, from, the Investigating Officer concerned, making a proposal, for, closing the investigations, against, the plaintiff, and, the afore proposal also being accepted, by, the learned trial Court concerned, (vi) thereupon, all the afore misfeasance(s), and, malfeasance(s) ascribed, vis-a-vis, co defendant No.2, being ipso facto construable, hence, to be proven, (vii) and, it is further pleaded that hence all the afore misdeeds or misdoings, rather acquiring, the, taints of invention, and, also being ingrained with malafides, hence, the plaintiff being entitled, to, recovery of the averred amount, as, monetary damages, given his being maliciously prosecuted, hence, by the defendants.

4. The entire substratum of the lis, engaging the contesting defendants, is, rested, upon, whether in co-defendant No.2, making, ingressing(s) into the homestead, of, the plaintiff, his holding or not holding, a, validly issued search warrant(s) rather by the Judicial Magistrate concerned. The learned counsel for the plaintiff, contends, that, in the ingressing into the homestead, of the plaintiff, rather by, co-defendant No.2, in purported discharge of his official duties, for his making seizure, of, the purportedly illicit timber, stored, and, stacked therein, his making, a, stark departure, from, the mandate, of, Section 100 of the Cr.P.C., (i) arising, from, co-defendant No.2, despite being enjoined, to, for the relevant purpose, hence hold, the, apt validly issued search warrants, from, the learned Judicial Magistrate concerned, his not, at the relevant time hence holding, it, hence, he was neither competent nor obviously he could make any valid ingress onto the homestead, of, the plaintiff. However, for the reasons, to be, assigned hereinafter, the afore submission, is, rather made falteringly (ii) as it stands generated, from, the counsel for the plaintiff, being unmindful, vis-a-vis, the mandate, of, Section 165 of the Cr.P.C., provisions whereof stand extracted hereinafter:-

> **“165. Search by police officer.**
>
> (1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place with the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.
>
> (2) A police officer proceeding under sub- section (1), shall, if practicable, conduct the search in person.
>
> \(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.
>
> (4) The provisions of this Code as to search- warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section.

> (5) Copies of any record made under sub- section (1) or sub- section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate."

wherein in sub-section (a) thereof, for reasons, to be recorded in writing, the Investigating Officer concerned, is, bestowed rather with statutory empowerments, to enter into the apt homestead hence falling, within, the limit(s) of the jurisdiction, of, the police station concerned, for, his thereafter being facilitated to locate, such incriminatory thing, as, is stacked or stored therein, (b) and, upon scribed valid reasons, unfolding formation, of, an objective opinion, by him, that the afore location, of, incriminatory material or thing, being a dire necessity, and, also given its location/discovery, rather not warranting any undue delay being caused, hence for the relevant purpose, (c) whereupon, his not being debarred, to, even without any validly issued search warrants, to, ingress into the relevant homestead. The afore mandate, is, encapsulated in sub-section (c) of Section 165 of the Cr.P.C., is, an explicit, and, candid statutory exception, to, the mandate borne in Section 100, of, the Cr.P.C., as, sub Section (4) of Section 165 of the Cr.P.C., even though, rather makes applicable all, the, general provisions, appertaining, to search warrants, as are, borne in Section 100 of the Cr.P.C., (d) yeteven when the afore explicit statutory exception, vis-a-vis, the latter provision(s), though, does not prohibit, the, application, of, the apt general provisions, as, borne, in, Section 100 Cr.P.C., nor does oust or exclude them, (e) unless, the apt statutory peremptory condition,hence borne in Section 165 of the Cr.P.C., for, rather dispensing with the mandate, of, Section 100 of the Cr.P.C., is/are not satiated, (f) whereas, the apposite statutory condition, as the ones borne in sub-section (1) of Section 165 of the Cr.P.C., being hereat evidently satiated, hence, (g) thereupon, the explicit mandate borne in sub-section (1) of Section 165, of, the Cr.P.C., upon evident satiation, of, all the requisite ingredients, borne therein, does not, enjoin, upon, the Investigating Officer concerned, to, prior, to his making the search, of, the relevant house rather for his making, the, relevant discoveries, therefrom, to, thereat hence necessarily possess rather, the, apposite valid search warrants, hence issued, by the learned Magistrate concerned. .

5. Since, documentary material, for, ensuring therethrough, the, meteings, of, satiation, vis-a-vis, all the afore requisite ingredients, borne in sub-section (1) of Section 165 of the Cr.P.C., is comprised, in, Ex. Dx, (i) thereupon, the search, of, the homestead of the plaintiff, even though, carried by defendant No.2, and, without, in contemporaneity thereto, his hence holding the search warrants, hence, issued by the learned Judicial Magistrate concerned, does not, either suffer from any legal infirmity, nor is construable to be an invalid search, nor also the plaintiff, can espouse, that qua there being any commission, of, tort, of, malfeasance or misfeasance, hence, by defendant No.2, purportedly comprised, in his untenably ingressing into the homestead of the plaintiff, rather for locating, the, incriminatory illicit wood, hence, stacked or stored therein.

6. Even though, the learned trial Court, had meted credence, to the deposition of PW-3 concerned, and, had proceeded, to conclude, qua misfeasance(s) being committed, by co-defendant No.2, in his discharging, the, apt public duties, (i) yet for the reasons to be assigned hereinafter, the learned trial Court, has not, appropriately rather appraised, the apt entire documentary evidence, and,rather, wherefrom no conclusion, can be erected qua co-defendant No.2, hence in discharge, of, his public duties, and, upon his entering into, the, homstead, of, the plaintiff, his nursing any active malafides, vis-a-vis, the plaintiff, nor any conclusion can be recorded, qua his, inventing or fabricating, the case against the plaintiff, nor also any damage qua his reputation, in, the society being diminished, upon, his being purportedly maliciously prosecuted, hence, by the defendants. The documentary evidence, vis-a-vis, the plaintiff, stacking, the, illicitly felled timber, in his homestead, is, unfolded, by Ex.PW8/A, (i) wherein the descriptions, and, sizes, of, the timber qua wherewith, he held, a, valid authorization, for, storing it, are, rather contradistinct, vis-a-vis, the sizes, and,

measurements, of, timber, as, described in Ex. D-1. However, even if, there is/are hence, emerging, the, apt contradistinctivities, inter se, the measurements, and, sizes of timber qua wherewith, a, valid, permit borne, in Ex. PW8/A stood issued, qua the plaintiff, and, vis-a-vis, the ones depicted in Ex. D-1, (i) yet the afore contradistinctivities, were amenable, for subsidence or would become subsumed, upon, the, plaintiff rendering, an, explanation, to, defendant No.2, and, it emanating in contemporaneity, vis-a-vis, the seizure of timber, borne in Ex. D-1, and, it appertaining qua the afore difference, in, the size(s), and, dimensions, as, unraveled, in the afore exhibits, being, a, sequel of his converting, the, timber, qua wherewith, a valid permit borne in Ex.PW8/A, stood issued, into the sizes depicted, in, Ex. D-1. However, the afore explanation, in, contemporaneity, vis-a-vis, seizure, of, the timber, being made under memo Ex.D-1, is grossly amiss, and, also a perusal, of, bail application, borne in Ex. PW7/C, preferred by the plaintiff, before the learned trial Court concerned, besides a perusal of the application, borne in Ex.PW7/E, wherethrough, he sought the release of the timber, both omit, to make depictions, or, echoings qua the afore contradistinctivities, being sparked, upon, after issuance, of, Ex.PW8/A, vis-a-vis, the plaintiff, the latter proceeding to convert them, into, the sizes, and, measurements, as, embodied, in, Ex. D-1. The effects thereof, lead(s) to a firm conclusion qua the timber seized, through, Ex. D-1, not holding any nexus with Ex.DW8/A, rather the timber seized, through Ex. D-1 being construable, to be hence seizure, of, illicitly felled wood, and, further consequential effects thereof, are, qua (a) the arrest of the accused being neither malafide, nor invented; (b) the seizure made through Ex. D-1 also being construable to be not ingrained with any malafides, and, of, vices of invention(s), (c), and, the afore purported misfeasance, and, malfeasance, of, defendant No.2 rather not acquiring, any, aura of truth, rather co-defendant No.2, upon, a valid information qua the relevant fact, and, also after his, vis-a-vis, the mandate of sub-section (1) of Section 165 of the Cr.P.C., hence ensuring compliance therewith, his, making a lawful ingress into the homestead, of, the plaintiff, and, furthermore, nor the arrest of the plaintiff, arising, from, the seizure, of, the illicit timber, being, construable to be stained, with, any illegality nor any compensation, vis-a-vis, the plaintiff, for his being purportedly maliciously prosecuted, is, hence assessable.

7. Be that as it may, the learned counsel appearing for the cross-objector/plaintiff/respondent, has contended with much vigour, before this Court, that, the omission, on the part of defendant No.2, to ensure, that, at the instance of the plaintiff, his, making identification of the spot, in, the forest, wherefrom the plaintiff rather illicitly felled the seized timber, rather, casting a suspicion, vis-a-vis, the preparation of Ex. D-1, (a) and, he further contends that the afore omission being construable, to tantamount, to, co-defendant No.2, hence, carrying a deep malice, and, his inventing the apposite seizure, of, timber, and, his also malafidely arresting the plaintiff. The afore submission, is, unacceptable to this Court, as, given the preparation of Ex. D-1, occurring in the presence, of, the plaintiff, and, also when in contemporaneity, vis-a-vis, the preparation of Ex. D-1, the, requisite collations, as, appertaining, to, the apposite sizes, and, dimensions, of, timber, respectively borne in Ex. PW8/A, and, in Ex. D-1, rather also occurring, (b) per se thereupon, co-defendant No.2, could aptly bonafidely conclude qua the timber seized, through Ex. D-1 being a sequel of the plaintiff, hence, illicitly felling them, from, the forest concerned, dehors any purported omission, of co-defendant, to, ensure at, the instance, of the, plaintiff, the, identification of the spot, in the forest, wherefrom, the plaintiff had illicitly felled, the, timber qua wherewith Ex. D-1, hence, stood drawn.

8. For the reasons, recorded hereinabove, both the RFAs bearing RFA No. 230 of 2008, and, RFA No. 253 of 2008, are allowed, whereas, Cross-objections No. 319 of 2009, are dismissed. In sequel, the judgment, and, decree, rendered by the learned trial Court, upon, Civil Suit No. 24-S/1 of 1995/94 is set-aside. Consequently, the suit of the plaintiff/respondent No.1 herein, is, dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. Records be sent back forthwith.

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

Smt. Rina Devi .....Petitioner.

Versus

Kundan Singh ....Respondent.

CMPMO No. 92 of 2019.

Reserved on:11.09.2019.

Date of Decision:12th September, 2019.

Code of Civil Procedure, 1908 – Order IX Rule 13 – Ex-parte decree – Setting aside of – Sufficient cause - Proof- Held, wife was personally served in a divorce petition - She recorded appearance in court but did not make any effort to contest it – She chose to be proceeded against ex-parted in proceedings – Pendency of divorce petition was within her knowledge - Sufficient cause for setting aside exparte decree not shown – Petition dismissed. (2 & 3).

For the Petitioner: Mr. Surinder Saklani, Advocate.

For the Respondent: Mr. Surender Verma and Mr. Gambhir Singh Chauhan, Advocates.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

After the respondent's petition, seeking dissolution, of, his marital ties, with, the petitioner herein, standing decreed ex-parte, (i) his spouse one Rina Devi, petitioner herein, through, an application cast, under, the provisions of Order 9, Rule, 13 of the CPC, espoused, for, the setting aside, of, the afore rendered ex-parte decree, of, 16.2.2016, (ii) and, on 3.1.2019, the afore application came to be dismissed by the learned trial Court, hence, the instant petition, is, reared thereagainst, before this Court.

2. The ex-parte decree, stood pronounced, against her, on 16.2.2016, whereas, the afore application, came to be instituted, on 22.4.2016. A perusal of the proceedings maintained in HMA Pet No. 71-N/3 of 2014, unfold(s) that (i) the petitioner herein, after being personally served, through, ordinary mode of service, hers recording, her personal appearance before the learned trial Court, on 26.9.2014, (ii) and, thereafter the learned Court below, in her recorded presence, making an order qua the afore Hindu Marriage Petition, being listed, on, 11.12.2014, (iii) yet on the latter date, the petitioner herein, omitted to record, her personal appearance, before, the learned trial Court, and, hence, the latter was constrained to make an order, for hers being proceeded against ex-parte. Emphatically, when only, upon, hers pleading, and, proving, that, the afore ex-parte order, as, made against her, was ingrained, with, a legal fallacy, (iv) arising from hers not coming to be personally served through ordinary mode of service, her striving(s) would beget success. (v) Contrarily, the afore unfoldings, rather articulating qua hers, after being personally served, through, ordinary mode of service, hers recording, her personal appearance, before, the learned trial Court, on, 26.9.2014, (vi) thereupon, it was incumbent, upon, her, to, on the apt subsequent date, hence, ensure her personal appearance before the learned trial Court, or, to ensure representation being caused on her behalf, by, a duly constituted counsel. However, she, as aforestated, hence omitted to record either her personal appearance, therebefore, and, also omitted to authorize a counsel, to record his appearance, on her behalf, before the learned trial Court, hence, on 11.12.2014, (vii) hence, she is not capacitated, to contend that the afore legal fallacy, hence, ingrains, the afore ex-parte rendition, made, upon, Hindu Marriage Petition No. 71-N/3 of 2014.

3. The effects of hers being personally served through ordinary mode of service, for 26.9.2016, (i) is qua it hence being enjoined, upon, her to therefrom, and, upto the apposite ex-parte, decree being pronounced against her, hence mete, a, valid explication qua hers not, within 90 days computed from 11.12.2014, hence omitting to seek, the, setting aside, of, the order recorded, on 11.12.2014, by the learned trial Court, (ii) wherethrough, it directed qua hers being proceeded against ex-parte. However, the afore explication, is, grossly amiss, rather she avers in the extant application qua hers attending, the, apt proceedings, drawn, before the learned trial Court, on, 11.12.2014, (iii) and, explicates qua hers thereafter omitting, to, cause her personal appearance before the learned trial Court, nor hers engaging a validly constituted counsel, for, defending the lis, rather being sparked, from, on, 11.12.2014, hers encountering, her husband, one Kundan Singh, outside the court premises, (iv) and, his apprising her, that, since the case appertaining, to, grant of maintenance, as, filed under Section 125 Cr.P.C., comprising the apposite pending lis, before the learned Judicial Magistrate concerned, (v) hence, the Hindu Marriage Petition, being finally disposed off, (vi) hence, she contends that the subsequent failure(s) being condonable, and, also contend(s), that, she is not enjoined, to mete, any further explication, from, 11.12.2014, and, upto the ex-parte rendition, being recorded against her, (vii) and, appertaining to the period, of, limitation validly commencing therefrom, and, hers being thereupon hence precluded or deterred, by, the, afore good sufficient cause, to, fail, to, recourse, the, apt legal mechanism(s), for, setting aside the ex-parte rendition, as made, against her, (viii) despite hers failing to cause, her, personal appearance before, the learned trial Court or through her authorised counsel. However, the afore averment in consonance wherewith she has made, a, testification, is, rid of truth, as, in her cross-examination, as, conducted by the counsel for the respondent herein, she has acquiesced, vis-a-vis, hers being completely rather estranged from her husband, for, the last 8 to 9 years, and, during the afore period, hers not holding any communication, with her husband. The further effect thereof, is that, upon, the afore explication, as, made in her application, upon, being entwined with the afore testification, hence rendering, it, to stand underwhelmed, and, the further effects thereof, are, that the ex-parte rendition made against her, in the apposite Hindu Marriage Petition, being unamenable, for its, being set aside.

4. For the foregoing reasons, there is no merit, in the instant petition, and, it is dismissed accordingly. The order impugned before this Court is affirmed, and, maintained. All pending applications also stand disposed of. The records, if received, be sent back forthwith.

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

Sateesh Chander Kuthiala .....Petitioner.

Versus

State of H.P. and another .....Respondents.

Cr.MMO No. 35 of 2018.
Reserved on: 29th August, 2019.
Decided on: 12th September, 2019.

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers – Quashing of FIR pursuant to compromise – Circumstances – Held, dispute inter-se parties pertains to property which resulting in civil as well as criminal proceedings between them – Suit stood compromised and compromise decree passed by court – Continuation of criminal proceedings in a settled civil matter is an abuse of law – Petition allowed – FIR quashed. (Paras 2 to 4).

For the Petitioner: Mr. K.D. Sood, Senior Advocate with Mr. Dushyant Dadwal, Advocate.

For Respondent No.1: Mr. Hemant Vaid, Additional Advocate General.

For Respondent No.2: Mr. Gautam Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through, the instant petition, the petitioner, seeks quashing of FIR bearing No. 167 of 2010, and, of, consequent therewith, case bearing No.89-2 of 2011, titled as State of H.P. vs. Sateesh Chander Kuthiala, carrying therein, offences constituted, under, Sections, 420, 467, 468 & 471, of, the IPC.

2. The offences constituted, in the afore FIR, are, appertaining, to, a property nomenclatured, as, Carling Ford, (i) and, embodies penally inculpable misdemeanors, comprised in forgery of apposite power, of, attorney, being hence made by the petitioner, (ii) and, the further therewith relinquishments, as, made by the petitioner, are, averred, to, be also legally flawed. The afore, became an acerbic contest inter se the petitioner, and, the informant, respondent No.2 herein, one Radha Krishan Kuthiala, in, Civil Suit No. 137 of 2010, and, therein, a, statement stood rendered, on oath by Nidhi Kuthiala, carrying echoings therein, qua hers handing over a sum of Rs.40 lakhs, as a measure towards full, and, final settlement, of, the dispute engaging them, in Civil Suit No.137of 2012, and, FIR No. 167 of 2010, (iii) and, the afore statement, was, visibly accepted, to be made in pursuance, to, a compromise, borne in Ex. C-1, rather also by the learned counsel representing respondent No.2 herein, arrayed, as, co-defendant No.1., in, the afore civil suit, under, his statement made without oath, in the afore civil suit, (iv) thereupon, the conjoint acceptance, by the learned counsel for defendant No.1, arrayed as co-respondent No.2 herein, and, of co-defendant No.2, in civil suit No. 137 of 2012, of, compromise, borne in Ex. C-1, and, when in pursuance therewith, a compromise decree, of, dismissal of the civil suit, was, pronounced, on 24.10.2017, by this Court, (v) besides when, during, the pendency of the proceedings, arising, from the afore FIR, rather before the learned Chief Judicial Magistrate concerned, the learned counsel, for, respondent No.2 herein/complainant, also made a submission therebefore, as, is evident, from, a perusal of the orders recorded, on 6.1.2018, by the learned Judicial Magistrate concerned, qua the dispute involved in FIR No.167/2010, of, 24.7.2010, and, in the civil suit being compromised, (vi) thereupon, all the imminent effects thereof are (vii) when in the afore civil suit also, the, property qua wherewith the plaintiff, and, defendant No.1/respondent No.2 herein, are hence, litigating, is, visibly similar to the property, embodied, in, FIR No.167 of 2010, (viii) and, when a sum of Rs.40 lakhs, is, testified to be accepted by the petitioner herein, from, one Nidhi Kuthiala, and, when the afore acceptance, as embodied, in Ex. C-1, as, appended with the verdict recorded, by this Court in Civil Suit No. 137 of 2012, stood also under a statement recorded, without oath by the counsel, for, respondent No.2 herein, and, arrayed as defendant No.1, in Civil Suit No. 137 of 2012, rather hence accepted, does beget, an, inevitable inference qua despite, the, civil dispute involved in the afore civil suit, being amicably settled, under, a verdict recorded, on 24.10.2017, by this Court, upon, Civil Suit No.137 of 2012. (vi) Necessarily also, with respondent No.2 herein, upon, his acquiescing, to, the making, of, Ex. C-1, thereupon, the, continuation, of the criminal proceedings being construable, to, be a tool, of, wreaking harassment, upon, the petitioner, and, besides, the complainant also, being estopped to make or cast any challenge, upon, the validities, of, power of attorney(ies), (vi) reiteratedly, his, rather accepting qua the power of attorney(ies), carrying an aura, of, authenticity, sparked by, his counsel, making a statement before this Court, in, Civil Suit No. 137 of 2012, whereunder, he accepted the terms and conditions, of, the compromise, borne, in, Ex.C-1.

3. Be that as it may, with the Hon'ble Apex Court in a verdict pronounced, in a case titled, as The ***Commissioner of Police & Ors. vs. Devender Anand and Ors, Criminal Appeal No.834 of 2017,*** and, its therein making expostulation of law qua, vis-a-vis, a civil dispute, hence, criminal proceedings, being unamenable, to be drawn, against the accused concerned, (i) and, also its making further expostulation of law, qua, the drawing of

criminal proceedings, upon, a settlement being arrived, at, in the civil suit, being an abuse of process of law, (ii) thereupon, the afore expostulation(s), of, law, are, with aplomb, vis-a-vis, the extantly prevailing factual scenario, hence, attracted thereon, (iii) as, given the requisite civil suit, for, the reasons aforestated, hence, involving property common, to, both civil suit No.137 of 2012, and, to FIR No. 167 of 2010, hence statements respectively recorded, by co-defendant No.2 one Nidhi Kuthiala, and, by the counsel representing, defendant No.1/respondent No.2 herein, rather being, permitted, to be withdrawn, by the plaintiff/petitioner herein, and, hence in the afore civil suit, and, in consonance therewith, this Court making a verdict, on 24.10.2017.

4. In aftermath, with the apposite civil dispute, hence, involving property similar to the one, as borne, in the afore criminal proceedings, hence, coming to be rested, or finally adjudicated, upon, thereupon, with also there being no pending civil dispute, engaging the property at contest, in these proceedings, (i) thereupon, the continuation, of, criminal proceedings against the petitioner, are rather necessarily construable, to, be a gross abuse, of, process of law. Consequently, the instant petition is allowed, and, in sequel, FIR No. 167 of 2010, and, consequent therewith criminal proceedings, comprised, in, criminal case No. 89-2 of 2011, titled as State of H.P. Vs. Sateesh Chander Kuthiala, are both quashed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Shubham .....Appellant

Versus

Amar Dass & others .....Respondents.

FAO No. 18 of 2018
Reserved on : 2.9.2019
Date of decision: 12.9.2019

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Personal injuries- Compensation – Enhancement – Entitlement – Petitioner, a milk vendor suffering 10% permanent disability in a road side accident – Claiming enhancement in compensation as awarded by Tribunal – Held, medical evidence showing that permanent disability has not rendered the claimant incapable to perform his avocation as milk vendor or from leading an ordinary life – No evidence of loss of future income on account of such disability – Appeal devoid of merits and is dismissed. (Para 3).

For the appellant: Mr. Sanjay Bhardwaj, Advocate, vice counsel.

For the respondents: Mr. Dinesh Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

Through the instant appeal, cast, before this Court, the disabled claimant, seeks, enhancement of compensation amount, determined, by the learned MACT concerned, upon, MAC Petition No. 98-S/2 of 2012. Under the impugned award, compensation amount, borne in a sum of Rs. 71,100/- along with interest, at, the rate of 6%, stood levied, upon the afore determined compensation amount, and, the afore rate of interest, was, ordered to commence from the date of petition, till realization thereof, along with litigation expenses, borne in a sum of Rs. 10,000/-, and, the apposite indemnificatory liability, stood, jointly and severally, burdened upon, the, owner and, the, driver, of, the offending truck, bearing No. HR-68-7872.

2. The learned counsel appearing, for the aggrieved disabled claimant, has, rested his espousal, for, his seeking enhancement of compensation, as, determined, in, the impugned award, upon, (a) the testification rendered by PW-5, and, as, embodied in his affidavit, borne in Ext. PW-5/A, wherein he has made echoings, vis-a-vis, his daily purchasing 10 liters of milk, from, the disabled claimant, and, at the rate of Rs. 25/- per liter, (b) and, also upon his further echoings, carried therein, qua, after the ill-fated occurrence, the disabled claimant, being precluded to engage himself, in, the avocation, of, a milk vendor, (c) therefrom the counsel, for the appellant, contends, that the echoings borne in Ext. PW-5/A meteing corroboration, to, the testification, rendered by the claimant, and, thereafter, he contends that the compensation amount, assessed vis-a-vis, the disabled claimant being, grossly inadequate.

3. However, for the reasons to be assigned hereinafter, the afore submission, is unhinged, by the testification, rendered by PW-3, who, proved the disability certificate, borne in Ext. PW-3/A, (i) and, though Ext. PW-3/A, pronounces, vis-a-vis, a, 10% disability, being entailed, upon, the claimant, however, the afore percentum, of, proven disability, as, encumbered, upon, the apt portion of the body of the claimant, cannot, be construed, to, be perennially, hence barring him, to pursue, his, hitherto avocation, of, a milk vendor, (ii) as, in the cross-examination, of, PW-3, he acquiesces qua an affirmative suggestion, qua, the afore percentum, of, disability, not, precluding, the, disabled claimant, to live a normal life, and, also when the afore neither in his examination-in-chief, nor, in his cross-examination, has made any echoings qua subsequent, to, the afore percentum, of, disability, being, entailed upon him, his being barred, to, pursue his hitherto avocation, of, a milk vendor, (iii) thereupon the afore percentum of disability, has no nexus, vis-a-vis, the claimant, after, his being encumbered, with, the afore disability, his being rendered incapacitated, to, operate his hitherto avocation, of, a milk vendor, nor, also any amount, of, compensation, is, assessable qua him, for, any loss of future income, otherwise, as, derivable thereafter, merely, upon the afore percentum of disability, standing encumbered, upon, him.

4. For the foregoing reasons, there is no merit in the appeal filed, by the claimant, and, is hence dismissed, and, the impugned award, is, maintained, and, affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Roop Lal .....Respondent.

Cr. Appeal No. 137 of 2009.
Reserved on: 11th September, 2019.
Date of Decision: 12th September, 2019.

Punjab Excise Act, 1914 (as applicable to State of H P) – Section 61(1) (a) – Recovery of Country/ IMF Liquor beyond permissible limits without licence –Appeal against acquittal of trial court recorded on ground that complete chain commencing from recovery of liquor till sending of samples to laboratory for analysis, not established – Held, recovery memos coupled with road certificate and Expert's analysis reports clearly show that nips drawn from the recovered bottles were sent to the test laboratory – The substance examined was found to be liquor meant for human consumption – Seizure memos bear signatures of independent witnesses 'SL' and 'PC' – Mere non-supporting of case by them during trial inconsequential – Material on record proves recovery of cartons of liquor from premises of accused – Appeal allowed –Acquittal set aside. (Paras 9 to 13).

For the Appellant: Mr. Hemant Vaid, Additional A.G. with Mr. Y.S. Thakur, Dy. A. G.and Mr. Vikrant Chandel, Dy. A. G.

For the Respondents: Mr. Suneet Goel, and, Ms. Parul Negi, Advocates.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, stands, directed by the State, against, the pronouncement made by the learned Chief Judicial Magistrate, Hamirpur, District Hamirpur, H.P., upon, Criminal Case No. 143-1-07, whereunder, the accused/respondent herein, hence, stood acquitted, for, a charge framed, under, Section 61(1)(a), of, the Punjab Excise Act, as, applicable to the State of H.P.

2. Briefly, stated the facts of the case are that on 6.2.2007, SI Anjani Kumar, ASI Satish Kumar, C. Dinesh Kumar, and, LC Swaran Lata, were present at Swahal, whereat they at about 4.30 p.m., received a secret information that accused had kept liquor in his home without a permit and in case of search; huge quantity of liquor would be recovered. The information was credible and the delay in procuring the search warrant would have led to the destruction of the case property. Witnesses Sohan Lal and Pritam Chand were associated and the search of the house of the accused was conducted in his presence and in the presence of the witnesses during which 8 cardboard boxes were recovered from the house of the accused. These boxes were opened and 7 boxes were found to be containing 12 bottles each of country liquor bearing Mark Una No.1. One box was containing 12 bottles of IMFL bearing Mark Officer's Choice. A permit was demanded for possessing the liquor, however, the accused could not produce any permit. 1 bottle each was taken out from each cardboard box and 1 sample each was taken out of each bottle. Bottles and samples were sealed with seal “SK”. Seal impression Ex.PW8/G were taken separately on piece of cloth and seal was handed over to witness Sohan Lal after its use. Bottles Ex. P-1 to P-96 were seized vide seizure memo Ex.PW7/A. Signatures of witnesses Sohan Lal and Pritam Chand were obtained on the seizure memo. The investigations were conducted by PW-8 SI Anjani Kumar, who prep0ared site plan, and, recorded the statements of the witnesses as per their person. The case property was deposited with PW-4 HC Vijay Prakash, who deposited the same in Malkhana and made the entry in the daily diary. Samples were sent by HC Vijay Prakash to CTL, Kandaghat for chemical analysis vide R.C. No. 255/07, through constable C. Sanjeev Kumar, who deposit the same thereat, and, the receipt was handed over to the MHC. The results of Chemical analyst borne in Ex.PW8/E and Ex.PW8/F were issued in which it was opined that the sample of country liquor contained 50% proof alcohol and samples of IMFL contained 75.1 % proof alcohol.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report, under Section 173 of the Code of Criminal Procedure, was prepared, and, filed before the learned trial Court.

4. The accused/respondent herein, stood charged, by the learned trial Court, for, his committing, an, offence, punishable, under, Sections 61(1) (a), of, the Punjab Excise Act, as, applicable to the State of H.P. In proof of the prosecution case, the prosecution examined 9 witnesses. On conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/ respondent herein.

6. The appellant herein/State, stands aggrieved, by the findings of acquittal, recorded, by the learned trial Court. The Additional Advocate General, has, concertedly, and, vigorously contended, qua the findings of acquittal, recorded by the learned trial Court, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he

contends qua the findings of acquittal warranting reversal by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the respondents, has, with considerable force and vigour, contended qua the findings of acquittal, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating, any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The learned trial Court had concluded, that, the prosecution, had, failed to establish the apposite complete chain, (a) commencing, from the recovery, of, the liquor, (b) the taking of samples, from, the bulk (c) its deposit in the malkhana concerned, (d) and, thereafter upto the samples being carried, to, the CTL, Kandaghat, (d) and, had insisted, upon, the prosecution hence ensuring, the, adduction, of, proof qua, the, afore requisite completest links, in, the apposite chain, rather emerging, through its examining the witnesses, (e) who handled the case property, at various stages, (f) hence, for overruling, any, inference qua it travelling, in, a tampered condition, and, thereafter, it, in the same condition being produced, before, the learned trial Court. Furthermore, for, the afore wants, of, adduced evidence hence by the prosecution, it also made a conclusion, qua the case property being tampered with, and, reiteratedly the afore conclusion was hinged, upon, the official concerned, who drew, the, samples, from, the bulk or the cache of liquor bottles, seized under, seizure memo Ex.PW7/A, failing to make a deposition qua his depositing, the, samples with MHC concerned, and, thereafter also made a conclusion, that, the samples travelling, in, a tampered or in a spoiled condition, upto the CTL concerned, (g) and, also hence, the reports, of, the chemical analyst, borne in Ex.PW8/E, and, in Ex.PW8/F, rather not appertaining, to, the samples collected, from, the sezied bulk or the cache of liquor, as made, through, seizure memo, borne in Ex.PW7/A. However, for the reasons, to be recorded hereinafter, the afore conclusion(s) are meritless, and, warrant, theirs being straightway rejected, (i) as, the sample nips, drawn from the bulk or the cache of liquor bottles, as stood, seized, under, memo Ex.PW7/A, were dispatched, under, road certificate, borne in Ex.PW7/C, to the CTL Kandaghat, (ii) and, the latter, under, Ex.PW8/E, and, under Ex. PW8/F, recorded, a, firm opinion (iii) qua the contents thereof being of liquor manufactured, for, human consumption. Ex.PW8/E, and, Ex.PW8/F, fail to make any echoings, rather bearing concurrence, vis-a-vis, the afore reason, as, meted by the learned Chief Judicial Magistrate concerned, and, ipso facto, thereupon, it is amenable, for this court, to make an unflinching conclusion, that, the afore assigned reasons, hence, by the learned trial Court, are both conjectural, and, imaginary, (iv) and, also, it is apt for this Court, to, record a conclusion qua the samples, whereon, opinions borne in Ex.PW8/E, and, in Ex.PW8/F, stood drawn, hence, by the CTL, Kandaghat, rather appertaining to the cache, of, liquor seized, under, memo Ex.PW7/A, (v) and, also the prosecution establishing, that, the complete chain, since the recovery, of the cache of liquor, and, upto, an, opinion being rendered, upon, the apposite samples, as stood, carried, through, a validly drawn road certificate, borne in Ex.PW4/C, to, the CTL concerned, (vi) obviously, and, naturally hence being cogently established, and, there being no latitude to record any conclusion, that, there were any tamperings, with, the case property, as, stood, carried through Ex.PW4/C, upto, the CTL concerned.

10. The learned trial Court, had also emphasized, upon, the independent witnesses to siezure memo, borne in Ex.PW7/A, one Sohan Lal, and, one Pritam Chand, resiling from their previous statements, recorded in writing, and, thereupon, made a conclusion, that, the prosecution failing to prove, the, charge against the accused. However, with, both, the afore witnesses, to Ex.PW7/A, during, the course of their respective cross-examination, as, conducted by the learned APP, upon, theirs being declared hostile, rather acquiescing, to, their authentic signatures, hence, being borne thereon, (I) whereupon, the

statutory presumption, borne in Sections 91, and, Section 92 of the Indian Evidence Act, interdicts, the, afore independent witnesses to renege, from, the recitals borne, in, seizure memo, as, embodied in Ex.PW7/A, rather, thereupon, the recitals borne therein, are proven.

11. The learned counsel appearing for the respondent/accused, had, contented with vigour, before this Court, that, dehors the afore conclusion, emanating, from the statutory estoppel, borne in Section 91, and, in Section 92, of, the Indian Evidence Act, being visited, upon, the acquiesced admitted signatures, of, the independent witnesses thereto, (i) and, wherethrough, they are interdicted, to renege from the recitals, borne therein, yet rather with the accused, in, the proceedings, drawn, under Section 313 of the Cr.P.C., contesting the existence, of, his signatures, upon, Ex.PW7/A, and, also the recovery, as, made therethrough, (i) hence, it was enjoined, upon, the prosecution to, ensure, the making, of, a comparison, of, his admitted signatures, borne, in proceedings, drawn under Section 313 of the Cr.P.C., before the learned trial Court, with, his disputed signatures, existing, upon, Ex.PW7/A. However, the afore contention, as addressed, before this Court, is, not amenable for acceptance, as, prior to the drawing(s), of, proceedings, under, Section 313 of the Cr.P.C., the accused visibly failing, despite, the, tendering into evidence of Ex.PW7/A, before the learned trial Court, hence, by the learned APP concerned, rather, to, contest the validity, of, his signatures borne thereon, (I) whereupon, he is estopped, to, contrive any subsequent contest qua, the, validity thereof, nor he is empowered to seek, exculpation, of, his penal liability, merely, for want of the prosecution, ensuring the comparison, of, his disputed signatures, borne in seizure memo Ex.PW7/A, vis-a-vis, his admitted signatures, borne in the proceedings, drawn by the learned trial Court, under, Section 313, of, the Cr.P.C.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has not appraised the entire evidence, on record, in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, suffering from gross perversity or absurdity of mis-appreciation, and, non appreciation of, the, germane evidence on record.

13. Consequently, the instant appeal is allowed, and, the judgment rendered by the learned trial Court, upon, Criminal Case No. 143-1-07, is set aside. Consequently, the accused/respondent herein is convicted for his committing an offence punishable under Section 61(1)(a) of the Punjab Excise Act, as, applicable to the State of H.P. He be produced before this Court on 14th October, 2019, for his being heard, on, the quantum of sentence.

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

State of H.P. .....Appellant

Versus

Satish Kumar ....Respondent.

Cr. Appeal No. 319 of 2010 a/w
Cr. Appeal No. 417 of 2010
Reserved on : 2.9.2019
Date of decision 12.9/2019

Indian Penal Code, 1860 – Section 325 – Grievous hurt – Proof – Trial court convicting accused for causing grievous hurt – First appellate court allowing appeal and setting aside conviction of accused – Appeal against – Held, material on record is inherently contradictory – In FIR 'Khukhari' is mentioned as weapon of offence but witnesses saying that the injuries were caused with a knife (Chhuri) – MLC indicating use of blunt weapon as the injury was lacerated one than incised – Medical evidence contradicts the version of victim and eyewitnesses - Acquittal upheld . (Para 5).

Indian Evidence Act, 1872 – Section 27 – Recovery of weapon - Evidentiary value – Held, recovery of weapon of offence at instance of accused not being on his disclosure statement, is not relevant. (Para 6).

For the appellant:	Mr. Himanshu Mishra Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel Dy. A.Gs.
For the respondents:	Mr. Dalip Singh Kaith, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

Since Cr. Appeal No. 319 of 2010, and, Cr. Appeal No. 417 of 2010, are, directed against a common verdict, respectively pronounced, upon, Case No. 24AR/10 of 07/08, and, upon, Case No. 22R/10 of 07/08, wherethrough, the learned First Appellate Court hence pronounced, in, reversal, of, the verdict, of, conviction, rendered, upon, the accused, rather by the learned trial Judge, hence, an order, of, acquittal upon them, hence both the afore appeals, are, amenable, for, a common verdict being pronounced thereon.

2. In the FIR, borne in Ext. PW-1/A, a, narration is encapsulated, vis-a-vis, with user of 'khukhari', hence, injuries pronounced, in Ext. PW-1/A (MLC), being entailed, upon, the victim, injuries whereof, are, extracted hereinafter:-

"(i) thumb- a lacerated wound round shocked, size about 4 cm-6, 4 stitches in retie, painful moment right thumb.

(ii) A abrasion 2 mm x 5 cm on the left hand palm aspect.

(iii) tenderness is present on the right sholder region, no restriction in moment.

(iv) abrasion on theneck anterior side: 2mm x 6 cm."

3. However, the learned Additional Advocate General, contents with much vigor before this Court, that, despite PW-1, proving all the echoings, as, borne in Ext. PW-1/A (MLC), and, also with the ocular version(s), vis-a-vis, the, occurrence, being rendered with the fullest, inter-se corroboration(s), hence by the victim, and, by PW-3, and, by PW-4, (i) and, also with their respective testifications, rather not making any echoing(s), qua theirs' either improving, or, embellishing, upon, their respectively recorded previous statements in writing, thereupon the impugned verdict, hence warrants an interference, from, this Court.

4. However, for the reasons to be ascribed hereinafter, the afore testitifications, though stand rendered, with, the fullest, inter-se corroborations, by, the victim, and, by PW-3, and, by PW-4, yet they are amenable, for, being discarded, (a) in Ext. PW-1/A (FIR) there being candid echoings, vis-a-vis, the relevant weapon, being khokhari, whereas, all the afore proclaim qua the injuries, reflected in Ext. PW-1/A (MLC), being caused by user, of, Chhuri (a sharped edged weapon), rather by the accused, (ii) and also, with there being contradistincvity, in, the size(s), dimensions(s), and measurement(s) of khukhari, and, of knife. Necessarily also, hence this Court aptly conclude(s), qua, the genesis of the prosecution case, embodied in the FIR, not begetting, to the fullest, hence corroboration, either from the deposition of the victim, nor from the corroborative thereto, rather depositions, of, purported ocular witnesses, in as much, as, PW-3, and, PW-4.

5. Be that as it may, the vigor of the afore inferences, is fortified, by PW-1, in his examination-in-chief, hence making echoings, qua the weapon of offence, as used, for causing the apt injuries, as, borne in Ext. PW-1/A (MLC), being blunt, and, though credible ocular testification(s) benumb the vigor, of, medical evidence, yet, with victim, and, also PW-3, and, PW-4, making candid echoings, in their respective testifications, vis-a-vis, the accused rather wielding a sharp edged weapon, and, also with their afore testifications, for all the afore reasons, being inferred, to, be outside the range, of, the echoings, borne, in the FIR, (i) besides when Ext. PW-1/A (MLC), pronounces, vis-a-vis, rather, a, lacerated wound, than an incised wound, being entailed upon the victim, (ii) thereupon also, it is apt to conclude, qua the testified version made by the victim, and, by PW-3 and PW-4, vis-a-vis, the accused at the

relevant time, hence with user, of, sharp edged weapon, causing injuries, upon, the victim, hence loosing apt vigor(s), and, nor hence the ocular evidence predominating rather hence medical evidence, whereupon obviously, the, concomitant effect thereof, is, qua the prosecution rather failing to prove the genesis, of, the occurrence.

6. Furthermore, even though, through Ext. PW-5/A, (Seizure memo), a knife stood recovered, by the Investigating Officer, and, at the purported instance of the accused, (ii) however, when a perusal of the recitals, as, borne, in Ext. PW-5/A, rather making candid unfoldments, qua the accused, handing over the afore weapon of offence, to, the Investigating Officer concerned, (iii) and, obviously when prior thereto, no disclosure statement, was, made by him, to, the Investigating Officer, with apt echoings, borne therein, vis-a-vis, the place, of, hiding, and, camouflaging, of, the afore weapon of offence, (iv) whereas, for, the recovery, as, made through PW-5/A, and, also for its constituting, a, valid incriminatory piece, of evidence, against the accused, rather enjoined him, to, hence preceding therewith, rather scribe, the, afore ordained disclosure statement, hence of the accused, (v) whereas, with the afore factum remaining unspoken, even in Ext. PW-5/A, thereupon the purported incriminatory weapon, of, offence, as, stood recovered, through Ext. PW-5/A, cannot either be construed, to, be any valid discovery, made therethrough, nor is any valid incriminatory confessional statement, hence, falling within the ambit, of, Section 27, of, the Indian Evidence Act, (vi) rather, for, non-compliance vis-a-vis, the mandate, borne in Section 27 of the Indian Evidence Act, hence the, bar, of, the statutory contemplations, embodied in Section 24, of, the Indian Evidence Act, against, any confessional evidence, made, during, custodial interrogation rather being receivable, hence begetting apt attraction. Emphatically, also when there, is, apparent disconcurrence, vis-a-vis, the disclosure(s), in, the FIR, qua the relevant weapon, of, offence, inasmuch, as, it being echoed therein, to, be, a, khokhari, and, vis-a-vis, the recovery, of, a knife, as, made through Ext. PW-5/A, (vii) pre-eminently, also when production of knife, and, its purported recovery, vide Ext. PW-5/A, is, vulnerable, to, an inference qua the Investigating Officer, after purchasing it, from, the bazar, his ensuring, its, fictitious recovery, at the purported instance of the accused, through, his drawing, a, fictitious memo, borne in Ext. PW-5/A.

7. For the reasons which have been recorded hereinabove, this Court holds that the learned First Appellate Court, has appraised the entire evidence, on record, in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, not suffering from any gross perversity or absurdity of mis-appreciation, and, non appreciation of germane evidence on record.

8. Consequently, there is no merit in the instant appeals, and, they are dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. Case property be destroyed after expiry of period of limitation. Personal and surety bonds stand discharged. All pending applications also stand disposed of. Records be sent back forthwith.

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

Sushma Rani & others .....Petitioners/landlords.

Versus

M/s Durga Coal Company .....Respondents/tenants.

Civil Revision No. 13 of 2017.
Reserved on : 10th September, 2019.
Date of Decision: 12th September, 2019.

Himachal Pradesh Urban Rent Control Act, 1987 – Section 14 (3) – Eviction suit from rented open land on ground of 'bonafide requirement' – Proof- Held, rented land was being used by the tenants for running their coal company – Said coal business is no more

undertaken by them – Petitioners are in business and want to expand their commercial activities - Plea that they want to stack building material on that land and sell it to customers from there ,is bonafide as land is connected with road – Landlord alone has the capacity to discern the adequacy and suitability of premises/ land for running business – Tenant can not dictate terms to the landlord in that regard – Petition allowed – Eviction ordered. (Paras 4 & 5)

For the Petitioners: Mr. Sanjeev Bhushan, Sr. Advocate with Mr. Rajesh Kumar, Advocate.

For the Respondents: Mr. R.P. Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant civil revision petition, stands, directed, by the landlord/petitioner herein, against, the concurrently recorded verdicts, upon, Rent Petition (RBT) No. 38/2 of 2015/2012, and, upon, Rent Appeal No. 2-S/13(b) of 2016, hence respectively, by, the learned Rent Controller, Court No.3, Shimla, and, by the learned Appellate Authority-II, Shimla, H.P., (i) wherethrough, the eviction petition constituted against the respondents/tenants, on, the ground of arrears of rent, stood allowed, whereas, it stood dismissed, on, the ground of bonafide requirement, of, the demised rented land, hence, by the petitioners/landlords.

2. The learned Rent Controller concerned, had recorded a firm conclusion, vis-a-vis, the, existence, of, a relationship of landlord, and, tenant, inter se the contesting litigants, and, also, made directions, upon, the respondents/tenants, to, deposit, the, arrears of rent, commencing from April, 2004, uptill, a, decision being recorded, upon, Rent Petition No. 38/2 of 2015/2012. The respondents/ tenants apparently, did not contest, the afore findings, rendered, upon, the afore factum, and, as comprised in theirs not rearing any appeal, thereagainst, hence, before the learned Appellate Authority concerned, and, thereupon, the afore findings, rather acquire both conclusivity, and, binding effect(s).

3. The landlords' petition seeking eviction, of, the tenant, from, the open land, hitherto used by the respondents/tenants, for, operating their coal business, (i) business whereof is averred to be not extantly carried therefrom, and, further the eviction of the respondents/tenants, from, the open plot, was espoused, for facilitating, the landlords, to, stack their building materials, and, thereafter it being enabled, to, be sold therefrom. The landlords/tenants, had, made a forthright, and, candid disclosure, in the eviction petition, qua, petitioner No.2. operationalizing, a, readymade garments' enterprises, run in the name, and, style of M/s AB Lal & sons, and, the afore business being looked after by his wife, petitioner No.3, after, solemnization of their marriage, in the year 2011, and, thereafter, it is contended, that, they intend to expand their commercial enterprise, through, theirs utilising, for the afore purpose, the vacant plot, wherefrom, the respondents/tenants, hitherto operated, the, now defunct coal business. The afore statutory ground averred in the petition, was strived, to beget a taint of colourability, and, also, the, taint of malafides, given the petitioners/landlords rather holding godowning spaces, hence, sufficient ,for, the averred purpose.

4. Both, the learned Rent Controller concerned, as well, as the learned Appellate Authority concerned, had made, concurrent conclusion(s), (i) that, the averment made in the petition, qua the wife of the petitioner No.2, namely, one Nidhi Aggarwal, managing, a, commercial enterprises, run in the name, and, style of M/S A.B. Lal & Sons, since both contracting marriage, in the year 2011, rather standing falsified, given Nidhi Aggarwal, lodging a FIR against her husband, hence, with there occurring acrimony, in their, relations, hence, the afore reared ground, in, the petition becoming redundant. However, the afore meted reason, for dispelling the vigour, of, the afore averred statutory ground, conspicuously,

when concurrent therewith evidence also stood adduced, by the landlords/co-petitioners, and, with conclusivity, being acquired by the findings qua there existing, an undisputed relationship, of landlords, and, tenants, inter se the litigating parties, (i) thereupon, renders the afore meted reason, to, be flimsy, and, also it, not, at all working towards hence diminishing, the, vigour, of, the proven statutory ground(s), appertaining, to, the aspiration of the landlords, to enhance, and, expand their business, (ii) and, also to stack or keep their building material, at the open land in dispute, given, the proximity of its location, vis-a-vis, the main road, hence, it being facilitative, of, theirs rearing, a, handsome profit therefrom, (iii) further it was insagacious, for, both the learned courts below, to rather proceed to dwell, upon, falsity, if any, of the management, of, the business other than the strived to be established/operationalised, reiteratedly, the afore meted reason is unsuitable nor hold(s) any direct nexus, vis-a-vis, the proven, and, pleaded ground, of, eviction, as set forth, in, the eviction petition.

5. Be that as it may, both, the learned Rent Controller concerned, and, the learned Appellate Authority concerned, had proceeded, to, on anvil of their being sufficiencies, of, accommodations, and, sufficiencies of godowning facilities, for, hence, stacking, the, construction material(s), as, aspired to be stacked, on, the demised vacant plot, (a) and, thereafter concluded, that, the afore sufficiencies per se constituting a tenacious reason, for, non-suiting the landlords/co-petitioners, (b) and, also concurrently made conclusions qua the pleaded bonafides rather coming to be tainted, with, colourability(ies), of, malafides. However, in making the afore conclusion, both, learned Rent Controller concerned, and, the learned Appellate Authority concerned, appear to mismaneuver, both law and facts, and, obviously visibly wander astray, from, the settled expostulation of law, (c) qua the landlords alone holding, the, capacity to discern, the, adequacy or sufficiency of accommodation, despite, theirs extantly holding godowning space(s), for, stacking the construction material concerned, (d) and, the respondents/tenants, rather not holding any capacity to mentor or guide the landlords/co-petitioners, nor it being amenable, for, the Rent Controller concerned, to be swayed by the mentorings meted to the landlords or to him, by, the respondents/tenants. The afore imperative tests, of, the landlords/co-petitioners, alone being vested with, the, capacity to adjudge, the requisite suitability, of, the requisite accommodations or the requisite deficiencies or paucities thereof, obviously appears to be both slighted, and, undermined by both, the learned Rent Controller concerned, and, also by the learned Appellate Authority concerned. Moreover, the afore compliant mentorings, of, the respondents/tenants also mislead, both to erroneously conclude qua hence the eviction petition, rather acquiring a taint or colour of malafides. Necessarily, hence, the co-petitioners/landlords, are entitled hence to seek eviction, of, the respondents/tenants, from, the demised vacant land concerned, unless evidence surges, forth, that the imminent statutory ground, for, forestalling, their strivings, and, is comprised in the co-petitioners/landlords, despite, within five years, from, the date of institution of the extant eviction petition, (e) and, hence, theirs ensuring eviction(s), of premises, occurring within, the limits of M.C. Shimla, holding inter se para-materia suitability in location, and, profit yielding capacity, vis-a-vis, the demised vacant land, theirs yet filing the extant eviction petition . However, the afore evidence, is grossly amiss, and, for want of the afore evidence, this Court concludes, that the petitioners/landlords' aspiration, cannot be, thwarted, upon, the afore flimsy, and, pretextual reasons.

6. For the foregoing reasons, the instant Civil Revision Petition, is, allowed, and, orders impugned before this Court, wherethrough, both the learned Rent Controller concerned, and, the learned Appellate Authority concerned, had dismissed the eviction petition of the landlords/co-petitioners, on their ground of bonafide requirement, of the demised vacant land, are set aside. Consequently, the landlords/co-petitioners, are, held to entitled, to, seek, eviction of the respondents/tenants, from, the demised vacant land, on the ground, of, theirs bonafidely requiring it, for their own use, and, occupation. In sequel, the respondents/tenants are directed to within two months, from today, handover the vacant

possession of the demised vacant land, to, the landlords/co-petitioners. All pending applications also stand disposed of. Records be sent back forthwith.

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

Suman Bala ....Petitioner.

Versus

Hindustan Petroleum Corporation Limited and another

....Respondents.

CWP No.4874 of 2012.

Date of decision: 13.09.2019.

Constitution of India, 1950 – Article 226 – Non-selection for LPG dealership – Challenge thereto - Writ jurisdiction – Held, normally in commercial matters, High Court should not exercise its extraordinary jurisdiction conferred by Art. 226 of the Constitution - Advertisement requiring applicant(s) /intended dealer(s) to be owing land of specified area in that locality – Petitioner admittedly not owing any land there – Her ineligibility for dealership can not be said to be wrong – Petition dismissed. (Paras 5, 11 to 14)

Cases referred:

Sanjay Kumar Shukla vs. Bharat Petroleum Corporation Limited and others (2014) 3 SCC 493

Sunil Kumar vs. Indian Oil Corporation Ltd. (IOC) & others, Latest HLJ 2015 (1) (HP) 27

Ram Chander Pathania vs. Hindustan Petroleum Corporation Ltd. and others, 2016 (5) ILR 1749

For the Petitioner : Mr. J.R. Poswal, Advocate.

For the Respondents: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

Aggrieved by the non-selection of the petitioner for distributorship of LPG under 'Rajiv Gandhi Gramin LPG Vitrak Yojna' (for short 'RGGLV'), the petitioner has filed the instant petition for grant of the following substantive reliefs:

> *"a) That the writ in the nature of certiorari quashing the office letter dated 21.04.2012 (**Annexure P-10**) passed by the respondent No.2.*
>
> *b) That the writ in the nature of mandamus directing the respondents No.1 and 2 for issuance of allotment letter for distributor for setting up award of Rajiv Gandhi Gramin LPG located at Gwalthai, Tehsil Shri-Naina-Devi Ji, District Bilaspur, H.P."*

2. An advertisement for selection of distributorship 'RGGLV' was published in 'Dainik Jagran' and 'Dainik Bhaskar' on December, 20, 2011. The petitioner applied for the same, however, during the process of scrutiny and examination of the application form along with documents attached therewith, it was detected that the petitioner did not own and possess any land in her own name or family unit as on or before the date of advertisement as defined in the guidelines. Hence, the candidature of the petitioner was declared ineligible. However, the petitioner thereafter was afforded an opportunity to make representation in compliance of Clause 12.4 of the brochure. The petitioner accordingly submitted her representation in person on 21.03.2012, but the same was replied and rejected vide letter dated 21.04.2012 on the ground that she was "ineligible" as per Clause-9 of the advertisement. It is in this background that the petitioner has filed the instant petition for the reliefs as quoted above.

3. It is vehemently argued by Shri J.R.Poswal, learned counsel for the petitioner that the impugned letter dated 21.04.2012 is wrong, illegal and, therefore, not sustainable in the eyes of law.

4. On the other hand, Shri Rahul Mahajan, learned counsel for the respondents, would contend that since the action of the respondents is strictly in accordance with the provisions as contained in the brochure qua selection of distributorship which essentially may not be to the liking of the petitioner, she cannot make out a ground and try and make out a grievance when there really exists none as the petitioner has failed to supply the documents of ownership of land in terms as required under Clause 9 of the advertisement. Therefore, the petition deserves to be dismissed with costs.

I have heard the learned counsel for the parties at length and have perused the documents available on record.

5. First of all, it has to be examined under what circumstances and conditions, this Court can exercise its extraordinary jurisdiction, especially, in matters relating to the distributorship of LPG. The question is no longer *res integra* in view of the judgment rendered by the Hon'ble Supreme Court in ***Sanjay Kumar Shukla*** *vs.* ***Bharat Petroleum Corporation Limited and others (2014) 3 SCC 493*** wherein the Hon'ble Supreme Court has categorically held that the Court should not ordinarily exercise the extraordinary jurisdiction vested under Article 226 of the Constitution of India in such matters, particularly, when they relate to contractual matters. It shall be apposite to refer to the observations as contained in para Nos. 15 to 19 which read as under:

> *"15. We cannot help observing that in the present case exercise of the extraordinary jurisdiction vested in the High Court by Article 226 of the Constitution has been with a somewhat free hand oblivious of the note of caution struck by this Court with regard to such exercise, particularly, in contractual matters. The present, therefore, may be an appropriate occasion to recall some of the observations of this Court in the above context.*
>
> *16. In Raunaq International Ltd. Vs. I.V.R. Construction Ltd. & Ors. (1999) 1 SCC 492, (paragraphs 9, 10 and 11) this Court had held as follows :- (SCC pp. 500-01)*
>
> > *"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:*
> >
> > *(1) the price at which the other side is willing to do the work;*
> >
> > *(2) whether the goods or services offered are of the requisite specifications;*
> >
> > *(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;*
> >
> > *(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;*
> >
> > *(5) past experience of the tenderer and whether he has successfully completed similar work earlier;*
> >
> > *(6) time which will be taken to deliver the goods or services; and often*
> >
> > *(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.*
> >
> > *Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.*

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in [pic]commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

17. In Air India Ltd. Vs. Cochin International Airport Ltd. & Ors.(2000) 2 SCC 617 there was a further reiteration of the said principle in the following terms:- (SCC pp. 623-24, para 7)

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489,Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India (1981) 1 SCC 568, CCE v. Dunlop India Ltd.(1985) 1 SCC 260, Tata Cellular v. Union of India (1994) 6 SCC 651, Ramniklal N. Bhutta v. State of Maharashtra (1997) 1 SCC 134 and Raunaq International Ltd. v. I.V.R. Construction Ltd.(1999) 1 SCC 492. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is

found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

18. A Similar reiteration is to be found in Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd. & Anr.(2005) 6 SCC 138, Tejas Constructions and Infrastructure Private Limited Vs. Municipal Council, Sendhwa and Another (2012) 6 SCC 464 and several other pronouncements reference to which would only be repetitive and, therefore, is best avoided.

19. We have felt it necessary to reiterate the need of caution sounded by this Court in the decisions referred to hereinabove in view of the serious consequences that the entertainment of a writ petition in contractual matters, unless justified by public interest, can entail. Delay in the judicial process that seems to have become inevitable could work in different ways. Deprivation of the benefit of a service or facility to the public; escalating costs burdening the public exchequer and abandonment of half completed works and projects due to the ground realities in a fast changing economic/market scenario are some of the pitfalls that may occur."

6. Similar reiteration of law can be found in a judgment rendered by a learned Division Bench of this Court in ***Sunil Kumar*** *vs.* ***Indian Oil Corporation Ltd. (IOC) & others***, ***Latest HLJ 2015 (1) (HP) 27*** and another judgment rendered by a learned Single Judge of this Court in ***Ram Chander Pathania*** *vs.* ***Hindustan Petroleum Corporation Ltd. and others, 2016 (5) ILR 1749.***

7. Bearing in mind the aforesaid exposition of law, it would be noticed that the case of the petitioner has been rejected as she failed to meet the requirement of Clause-9 of the advertisement which reads as under:

9.	***Details of land for construction of godown & showroom:- In case applicant does not provide any information, then it will be deemed that applicant does not have required land and hence applicant will be ineligible for RGGLV***	
	Please provide the details of Land as per the format.	*Registered Sale Deed/gift deed/ Mutation and government record etc. The Date of the documents have to be on or before the date of application. Consent from the family member in form of Notorized Affidavit (Appendix-C) is required. If required, certificate from the concerned authority stating that the land is free from live overhead power transmission or telephone lines.*

8. At this stage, it would be necessary to take note of relevant portion of Clause 4(g) of the brochure wherein it has been provided as under:

"(g). Own a suitable land (plot) of minimum 20 metre X 24 metre in dimension at the advertised RGGLV location for construction of LPG cylinder Storage Godown.

Own means having clear ownership title of the property in the name of applicant/family member of the "Family Unit" as defined in multiple dealership/distributorship norm. In case of ownership/co-ownership by family member, consent letter from the family member will be required."

9. The petitioner admittedly on or before the date of application was not having land in her own name or in the name of her family unit and, therefore, no fault can be found in the action of the respondents whereby they have rejected the application of the petitioner.

10. Clause-16 of the brochure provides as under:

"If any information furnished by the applicant is found to be false at any point of time before or after appointment as a RGGLV, the allotment shall be cancelled forthwith and RGGLV terminated in case commissioned."

11. It is vehemently argued by Shri Poswal that the petitioner had already submitted lease deed dated 21.07.2010 and, therefore, there was substantial compliance with the provisions of the brochure as also advertisement and, therefore, her case should not have been rejected. This contention is absolutely fallacious and is outrightly rejected because even in the lease deed submitted by the petitioner, the land is not leased out in her name. This is in addition to the fact that the lease deed was otherwise not admissible and could not be a substitute for a title deed.

12. Shri Poswal would then argue that the petitioner had given a title deed of another piece of land in the name of her husband and the same ought to have been considered by the respondents. Even this contention is equally without merit as the land offered by the petitioner that was standing in the name of her husband was situated in Mauza Dhalet, whereas, RGGLV has been advertised for Kasba/Village Gwalthai.

13. As a last ditch effort, learned counsel for the petitioner would argue that the respondents should have taken into consideration the sale deed dated 19.03.2012 which is in the name of the petitioner. However, even this contention is without merit as the sale deed is for another Khasra No. 122/115/3 and the details of the same have not been mentioned in the application form for the obvious reason that the last date for application along with documents was 20.01.2012, whereas, the sale deed has been executed two months thereafter on 19.03.2012 and, therefore, cannot be considered at this stage as admittedly the petitioner was not owner in possession of any land much less the land mentioned in the sale deed dated 19.03.2012 on the date of submission of the application i.e. 20.01.2012.

14. In view of the aforesaid discussion, there is no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Bishamber Lal, son of Sh. Hari Saran, now deceased through his legal representatives Rajinder Kumar and others ....Appellants.

Vs.

Sh. Amar Sain, son of Sh. Liaq Ram (since deceased) through his legal representatives Smt. Kesharmani and others .....Respondents.

RSA No.: 460 of 2015

Date of Decision: 10.09.2019

Specific Relief Act, 1963 – Section 10 – Specific performance of agreement to sell land, when can be denied ? – Held, document not mentioning khasra number or other particulars of land intended to be sold to plaintiff – Suit land mentioned in plaint is not shown to be relatable to land described in agreement – Plaintiff not entitled for specific performance of agreement in question. (Paras 15 & 20)

For the appellants: Ms. Shashi Kiran, Legal Aid Counsel.

For the respondents: Mr. Romesh Verma, Advocate, for respondents No. 1(a) to 1(d) & 2.
Appeal qua respondents No. 3(a) and 4 to 6 stands abated in terms of orders dated 03.04.2019 and 14.05.2019.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this appeal, the appellants have challenged judgment and decree dated 25.07.2011, passed by the Court of learned Civil Judge (Senior Division), Court No. 1, Rohru in RBT No. 189/1 of 2008/06, vide which, a suit for specific performance of contract and permanent prohibitory injunction filed by the appellants-plaintiffs was dismissed, as well as the judgment and decree dated 08.05.2015, passed by the Court of learned District Judge (II), Shimla, whereby learned Appellate Court upheld the findings so returned by the learned Trial Court in an appeal filed by appellants-plaintiffs.

2. Brief facts necessary for the adjudication of the present appeal are as under:

Predecessor-in-interest of the appellants herein, namely, Sh. Bishamber Lal (hereinafter referred to as 'the plaintiff') filed a suit for specific performance of contract, dated 21.06.2004 against the respondents-defendants (hereinafter referred to as 'the defendants') that the defendants be directed to execute a regular sale deed in favour of the plaintiff of the suit land comprised in Khewat No. 64, Khatauni No. 97, Khasra number new 192, measuring 00-07-02, situated in Chak Pundras, Tehsil Chirgaon, District Shimla, H.P and also for permanent prohibitory injunction restraining the defendants from alienating, creating any charge or interfering in the property of the plaintiffs in any manner. As per the plaintiff, land comprised in Khewat No. 64, Khatauni No. 97, Khasra number new 192, measuring 00-07-02, situated in Chak Pundras, Tehsil Chirgaon, District Shimla, H.P. was possessed by the plaintiff, who has raised an apple orchard over the same in the year 1985 and also constructed a house over the same in the year 1994. Defendant No. 1 executed a sale agreement with the plaintiff for a consideration of Rs.3200/- qua the suit land. On the basis of the said sale agreement, the entire sale consideration stood received by defendant No. 1.He also acknowledged that over the suit land, plaintiff had raised an apple orchard and a house of the plaintiff was also constructed over the same. As per plaintiff, recently he came to know that the suit land stood sold by defendant No. 1 as also proforma defendants No. 3 and 4 in favour of defendant No. 2 by executing a sale deed. Plaintiff on numerous occasions requested defendant No. 1 to execute the sale deed, however, the same was not done. In this background, the suit stood filed by the plaintiff praying for the following reliefs:

> *"It is therefore most respectfully prayed that a decree for specific performance of contract may kindly be passed and the defendants be directed to execute a regular sale in favour of the plaintiffs of the suit land denoted Khewat No. 64, Khatauni No. 97, Khasra No. new 192, measuring 00-07-02, situated in Chak Pundras, Tehsil Chirgaon, District Shimla, H.P. and be restrained by way of permanent prohibitory injunction from alienating, creating charge as well as not to interfere in the property of the plaintiff in any manner."*

3. The suit was resisted by the defendants, who filed a joint written statement. As per them, no sale agreement was ever entered into between the plaintiff and defendant No. 1 qua the suit land. The suit land was never possessed by the plaintiff nor he had raised any orchard over the same or constructed any house over it. Suit land stood sold to defendant No. 2, who was in actual possession of the suit land and the orchard existing upon the suit land belonged to the said defendant. Defendants thus prayed that as the suit was a frivolous one, the same be dismissed.

4. By way of replication, the plaintiff reiterated his claim.

5. On the basis of pleadings of the parties, learned Trial Court framed the following issues:

"1. Whether the plaintiff is entitled to the relief of specific performance of agreement dated 21.06.2004, as prayed for? OPP

2. Whether plaintiff is also entitled to the relief of permanent prohibitory injunction, as prayed for? OPP

3. Whether the suit of the plaintiff is not maintainable? OPD.

4. Whether plaintiff has no locus standi to maintain the present suit? OPD.

5. Whether plaintiff is estopped to file the present suit on account of his acts, conduct, deeds and acquiescence? OPD.

6. Whether suit of the plaintiff is bad for non-joinder and mis-joinder of necessary parties? OPD.

7. Whether suit of the plaintiff is hopelessly time barred? OPD.

8. Whether suit of the plaintiff is vague and ambiguous and effect thereof, as alleged? OPD.

9. Whether plaint lacks material particulars, as alleged and effect thereof? OPD.

10. Whether suit of the plaintiff has not been properly valued for the purpose of Court fee and jurisdiction? OPD.

11. Relief.

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

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*Yes.*
Issue No. 4:	*Yes.*
Issue No. 5:	*No.*
Issue No. 6:	*No.*
Issue No. 7:	*No.*
Issue No. 8:	*No.*
Issue No. 9:	*No.*
Issue No. 10:	*No.*
Issue No. 11:	*(Relief) Suit of the plaintiff dismissed as per operative part of the judgment.*

7. The suit was dismissed by the learned Trial Court by holding that agreement, dated 21.06.2004, Ex. PW3/A was not proved on record in accordance with law and even if it was to be assumed that the same stood proved as per law, then also, the same did not assist the cause of the plaintiff. Learned Trial Court held that perusal of the agreement demonstrated that as per contents thereof, some land was stated to have been sold by defendant No. 1 in favour of plaintiff, situated in Chak Pundras, however, Khasra numbers and area of the land purportedly sold, was not mentioned in the agreement. It held that Ex.PW3/A appeared not to be an agreement to sell, but an unregistered sale deed. It held that as there was no mention in the document about the particulars of the land, therefore, it was difficult to ascertain that the land alleged to have been sold, was the same which was mentioned in the agreement. Learned Court further held that the witness produced by the plaintiff, namely, Surat Singh, to prove the execution of the agreement, had stated that he could not tell as to at which place agreement Ex. PW3/A was prepared. This witness had

further deposed that his signatures were obtained upon the same in a hotel at Chirgaon and except him, none else had signed the document. Learned Court also observed that said witness happened to be the brother of the plaintiff and thus, was an interested witness. With regard to PW-4, scribe of the document, learned Trial Court held that this witness could not state as to where the signatures of the witnesses were obtained on the document and why the execution of the document was not entered in his register. Learned Trial Court held that execution of the document was suspicious and the document could not be relied upon. Learned Court also held that Ex. PW1/A, i.e., Jamabandidemonstrated that defendant No. 1 alongwith other co-sharers, were recorded as joint owners of the suit land, whereas one Jai Karan, was recorded to be in exclusive possession over the suit land. On these bases, learned Court held that no decree qua execution of the sale deed in favour of the plaintiff could be passed. Learned Court further held that purported agreement was stated to have been executed in the year 2004 and if that was so, then nothing had come on record as to what prevented the plaintiff from executing a regular sale deed between two years as from the date of execution of the agreement. Learned Court also held that it had come on record that all the co-sharers had further sold the suit land to defendant No. 2 vide sale deeds Ex. DW1/A and Ex. DW1/C. It reiterated that as plaintiff had failed to prove the execution of agreement to sell, therefore, said sale deeds could not be held to be null and void. Learned Court thus dismissed the suit filed by the plaintiff by holding that plaintiff had failed to connect the suit land with the land mentioned in agreement Ex.PW3/A.

8. Learned Appellate Court vide judgment, dated 08.05.2015, upheld the findings returned by the learned Trial Court. While dismissing the appeal, learned Appellate Court held that plaintiff had prayed for a decree for specific performance of agreement as also for a decree of permanent prohibitory injunction. Perusal of the record demonstrated that suit land stood sold in favour of defendant No. 2 by way of execution of registered sale deed for a sale consideration of Rs.63,000/- vide sale deed executed on 29.08.2006 followed with execution of another sale deed executed on 14.06.2007 for a consideration of Rs.45,000/-. The execution of said sale deeds was never challenged by the plaintiff by amending the plaint. Learned Appellate Court held that suit for cancellation of instrument has to be based on Section 31 of the Specific Relief Act, bare perusal of which demonstrated that when a document is valid, no question arises of its cancellation. Learned Appellate Court further held that in case plaintiff seeks to establish his title over a property, then the same could not have been established by him without getting rid of the obstacle which was in his way, i.e., two sale deeds executed in favour of defendant No. 2. Learned Appellate Court thus dismissed the appeal filed by the plaintiff by holding that learned Trial Court had correctly appreciated the facts as also the evidence on record and as the judgment and decree passed by the learned Trial Court was based on correct appreciation of facts and evidence, the same deserved affirmation.

9. Feeling aggrieved, the plaintiff has filed the present appeal, which was admitted on the following substantial question of law:

> *"Whether on account of misreading, misappreciation and mis construction of the law and facts as well as the oral and documentary evidence available on record, the judgment and decree under challenge in the main appeal being perverse and vitiated is not legally sustainable?*

10. Learned counsel for the appellants has argued that the judgments and decrees passed by the learned Courts below are not sustainable in the eyes of law, as the Courts below have erred in coming to the conclusion that the plaintiff had failed to connect the suit land with Ex.PW3/A, i.e., agreement to sell entered into between the plaintiff and defendant No. 1. She has vehemently argued that a perusal of Ex. PW3/A clearly demonstrated that the land referred to in the said document was the suit land, as it had not come on record that there was any other land belonging to defendant No. 1, qua which the

said agreement could have been entered into between the parties. On these grounds, she has urged that the judgments and decrees passed by the learned Courts below be set aside.

11. No other point was urged.

12. On the other hand, learned counsel for the respondents has vehemently argued that there was no infirmity with the judgments and decrees passed by the learned Courts below, nor there was any misreading or mis-appreciation of Ex.PW3/A, as a perusal of the same leads to only one conclusion that the same, by no stretch of imagination, could be connected with the suit land.

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

14. The moot issue which this Court has to adjudicate upon is as to whether the learned Courts below have mis-read or mis-appreciated Ex.PW3/A so as to come to the conclusion that the same could not be connected with the suit land?

15. Ex. PW3/A is an *Ikrarnama*, purportedly entered into between Sh. Amar Sain (defendant No.1) and Sh. Bishamber Lal (plaintiff). A perusal of the contents of the said Exhibit demonstrates that it is mentioned therein that Sh. Amar Sain on his own accord, had agreed to sell his land situated in Chak Pundras in favour of Sh. Bishamber Lal, son of Sh. Hari Saran for a sale consideration of Rs.3200/-. It is further mentioned in this Exhibit that possession of the land stands handed over by Sh. Amar Sain to Sh. Bishamber Lal. Incidentally, there is no mention in the said Exhibit as to which particular land comprised in Chak Pundras, owned by Amar Sain, was being sold by way of said document by him to Sh. Bishamber Lal. In other words, there is no description whatsoever of the land which Amar Sain intended to sale by way of this document to Sh. Bishamber Lal. It has come on record that Amar Sain was not the sole owner of the suit land. Otherwise also, in view of the fact that there is no mention or description of any land in Ex.PW3/A, it cannot be made out from the perusal of said exhibit that the sale pertains to the suit land. Therefore, it cannot be said that the learned Courts below have either mis-read or mis-appreciated the contents of this document while arriving at the conclusion that the plaintiff had miserably failed to connect the land mentioned in this document with the suit land.

16. To prove the execution of the said agreement, besides himself, plaintiff had examined PW-2 Bhawani Singh, PW-3 Surat Singh and PW-4 Bihari Lal.

17. PW-2, Bhawani Singh is the marginal witness to the execution of agreement to sell. A perusal of examination-in-chief of the said witness, which is there in the form of an affidavit, demonstrates that there is no averment made on affidavit by deponent Bhawani Singh that the Suit land was sold by way of agreement to sell Ex. PW3/A by defendant No. 1 in favour of the plaintiff for a sale consideration, which stood received by defendant No. 1 from the plaintiff. All that is contained in this affidavit is that deponent, i.e., Bhawani Singh was aware of the suit land, which as per him was continuing to be in possession of the plaintiff since many years, upon which, plaintiff had grown an apple orchard as well as constructed a house. Now, coming to his cross-examination, a perusal of the same demonstrates that he has deposed therein that he was not aware either about the suit land or Khasra numbers of the same or the area thereof.

18. Similarly, a perusal of the cross-examination of PW-3 Sh. Surat Singh, who as per the plaintiff was also one of the witnesses to the execution of agreement to sell, demonstrates that this witness stated in the Court that he was not aware as to where Ex.PW3/A was prepared and he was called by the plaintiff in a hotel in Chirgaon, where he appended his signatures upon the said document. He further stated that in his presence none appended his signatures upon the document except him.

19. As far as PW-4 Bihari Lal, Scribe of the sale agreement is concerned, this witness in his cross-examination has stated that whichever document he scribes, he regularly

entered the same in his register, however, Ex. PW3/A was not entered in the register as the parties were in a hurry.

20. Be that as it may, in my considered view, even the statements of these witnesses do not, by any stretch of imagination, prove the factum of an agreement to sell having been entered into between the plaintiff and defendant No. 1 with regard to the suit land. This is evident from the fact that neither PW-2 nor PW-3 have stated about either the description of the suit land or area thereof in their statements and further their statements even otherwise cannot improve the contents of Ex.PW3/A, which did not contain any descriptions of the land purportedly sold by defendant No. 1 to plaintiff in terms thereof. Therefore also, this Court finds no infirmity with the findings returned by the learned Courts below to the effect that the plaintiff had failed to connect Ex. PW3/A with the suit land. Substantial question of law is answered accordingly.

21. In view of the observations made hereinabove, as this Court finds no infirmity with the impugned judgments and decrees passed by the learned Courts below, the appeal being devoid of any merit, is dismissed, so also pending miscellaneous applications, if any. Cost easy.

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

Shiv Kumar ....Petitioner.

Vs.

Kalyan Chand and another ....Respondents.

CMPMO No.: 223 of 2019

Date of Decision: 17.09.2019

Code of Civil Procedure, 1908 –Order VII Rule 14 (3) – Additional documents – Production of – Leave of Court – Held, case is at final stage of arguments – Number of opportunities already taken by plaintiff for addressing arguments – Plea that revenue record sought to be produced, was on the file of appellate court not genuine inasmuch as application for producing additional documents filed after 12 years of disposal of appeal – Petition dismissed. (Para 3 & 4).

For the petitioner: Mr. Pawan K. Sharma, Advocate.

For the respondent: Mr. Pramod Thakur, Advocate, for respondent No. 1.

No notice has been issued to respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has challenged order, dated 08.04.2019, passed by the Court of learned Senior Civil Judge, Court No. 1, Una, H.P., vide which, an application filed under Order VII, Rule 14(3) of the Code of Civil Procedure by the petitioner herein, has been dismissed.

2. Brief facts necessary for the adjudication of the present petition are that a suit for declaration has been filed by the petitioner against respondent No. 1, which is pending adjudication before the Court of learned Senior Civil Judge, Court No. 1, Una, H.P. The suit was filed as far back as in the year 2007. In the year 2019, when the case was at the arguments stage, an application was filed by the petitioner under Order VII, Rule 14(3) of the Code of Civil Procedure, in which, a prayer was made that the petitioner be allowed to produce on record and prove the documents, i.e., list of Khasra numbers of Mauja Raipur, copy of Khasra Paimaish 1868 of Mauja Raipur, Jamabandi for the year 1912-1913, certified copies of Missal *HakiatBandobast* for the year 1912-1913, Jamabandi for the year 1920-1921

in Urdu with Hindi version, *MissalHakiatIstemal* for the year 1964-65, Jamabandi for the year 1972-73, *MissalHakiat* for the year 1986-87, *MissalHakiat* for the year 1988-89, Jamabandi for the year 2002-03 and Jamabandi for the year 2003-2004 by way of additional evidence. The reasons mentioned in the application as to why the documents could not be placed on record earlier, were that the documents in issue were appended alongwith the appeal filed against the order which was passed on the application filed by the petitioner under Order 39, Rules 1 and 2 of the Code of Civil Procedure, which was dismissed by the learned Trial Court on 18.01.2008 and it was only at the time of preparation of arguments that the learned counsel realized that the documents were not on record, which led to the filing of the application. On the query of the Court, learned counsel for the petitioner informs that after the application filed under Order 39, Rules 1 and 2 of the Code was dismissed by the learned Trial Court on 18.01.2008 and the appeal filed against the said order was disposed of by the learned Appellate Court in the year 2008 itself.

3. A perusal of the averments made in the application demonstrates that there is no explanation in the application as to what took the petitioner 11 years to file the application. The reason mentioned therein that the documents were in the appeal record and it is only at the time of arguments that learned counsel realized that they were not on record, in my considered view, cannot be taken to be a reasonable reason. There is a gap of 11 years as between the adjudication of the appeal and filing of the application. But natural, in the interregnum, pleadings were completed, which includes recording of evidence of the plaintiff as also the defendant. There is nothing in the application to substantiate as to why the application was not filed at the time when evidence was being led by the plaintiff or within some reasonable time as from the date when the appeal was disposed of by the Appellate Court, which was filed by the petitioner against the order passed on his application under Order 39, Rules 1 and 2 of the Code. This demonstrates that there was no due diligence on the part of the petitioner in pursuing the suit filed by him.

4. A perusal of the order impugned demonstrates that while dismissing the application, learned Court has observed that filing of the application by the petitioner after 12 years was nothing, but an abuse of the process of law, especially when the application stood filed after number of opportunities were availed by the petitioner/plaintiff for arguing the case. In my considered view, the reasons which have been assigned by the learned Trial Court while dismissing the application, are not perverse. In fact, the reasons assigned by the learned Trial Court for dismissing the application are duly borne out from the record of the case. In these circumstances, this Court sees no reason to interfere with the order impugned, as this Court finds no merit in the present petition. Accordingly, this petition is dismissed. No order as to costs.

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

Firoz Khan ....Petitioner

Versus

The State of Himachal Pradesh ....Respondent

Cr.MPs(M) No. 1701 to 1704 of 2019

Decided on: 18th September, 2019

Code of Criminal Procedure, 1973 – Section 438 – Pre-arrest bail – Grant of - Held, injuries sustained by complainant were grievous in nature – Accused tried to implicate the injured in a false case under NDPS Act by planting contraband in his car – Petitioners initially absconded -Recoveries are to be effected from accused – They are not disclosing names of other culprits and thus not co-operating in investigation – Accused not entitled for pre -arrest bail – Petition dismissed. (Paras 3 & 7)

For the petitioners: Mr. Karan Singh Kanwar, Advocate, with Ms. Neelam Sharma, Advocate.

For the respondent/State: Mr. P.K. Bhatti, Additional Advocate General, with Mr. Raju Ram Rahi, Deputy Advocate General.
ASI Prakash Chand, I.O. Police Station Paonta Sahib, District Sirmour, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail applications have been moved by the petitioners under Section 438 of the Code of Criminal Procedure for releasing them on bail, in the event of their arrest, in case FIR No. 243 of2019, dated 06.08.2019, under Sections 342, 382, 325, 323 IPC read with Section 34 IPC, registered in Police Station Paonta Sahib District Sirmour, H.P.

2. As per the averments made in the petitions, the petitioners are innocent and have been falsely implicated in the present case. They are residents of the place and neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so they may be released on bail.

3. Police report stands filed. As per the prosecution story, on 06.08.2019, at about 06:50 a.m. Shri Manoj Kumar (complainant) got his statement recorded with the police under Section 154 Cr.P.C. The complainant contended that on 05.08.2019, at about 04:00 p.m., he alongwith Shri Vipin Tandon and Shri Vicky Sharma was going for some work towards Barhal in vehicle, having registration No. HP17C-1729. *En route* they stopped at a *dhabha* for tea, but as Shri Vicky Sharma received a telephonic call, so they, without taking tea, came back hurriedly. The complainant has further contended that Shri Vipin Tandon and Shri Vicky Sharma alighted from the vehicle mid way. Thereafter, at about 6-6:30 p.m., the complainant received a telephonic call from the *dhaba* owner, where they went to take tea, and he asked to meet him. Subsequently, a boy, whom he recognized by face, alongwith one Bittu Sandhu came at his residence and took him in a car. As per the complainant, Bittu Sandhu alongwith others thrashed him and also snatched his mobile, key of car and also took his money. Bittu Sandhu alongwith others continuously gave beatings to him with sticks and also uprooted his hair. Thereafter, they took him a kilometer away from Barhal barrier and threw him, where his vehicle was parked and its dickey was kept open. The dickey had two white bags, so he suspected that for falsely implicating him these two bags have been kept. On hearing this, Bittu Sandhu and others again started beating him, but he managed to run towards the barrier and shouted for help. Thereafter, he fell down and the police personnel rescued him and he divulged the incident to the police personnel. On the basis of the statement of the complainant recorded under Section 154 Cr.P.C., a case was registered and the investigation ensued. The complainant was medically examined and a police team went to the Barhal barrier. Police formed a raiding party and found vehicle, having registration No. HP 17C-1729 (vehicle of the complainant), parked approximately a kilometer away from Barhal barrier and its front side was towards Barhal. Key of the vehicle was found inserted in the key hole of the vehicle and the vehicle's dickey had two plastic bags. The bags were checked and found containing poppy husk (*bhukki*). On weighment, the contraband was found to be 53.720 kilo grams. Police prepared a *rukka* and sent the same to police station, whereupon a case was registered. The Medical Officer opined the injured sustained by the complainant to be grievous in nature. Police, on the identification of the complainant, prepared a site plan and also recorded the statements of the witnesses. During the course of investigation, police found that the narrative given by the complainant was true. The complainant was severely thrashed by Bittu Sandhu and other co-accused and they also tried to falsely implicate him in a case of narcotic. In order to evade their arrest, the

petitioners absconded and only on 10.09.2019 they joined the investigation. The petitioners are not giving true portrayal of the incidence, recovery of Rs.1500/- is yet to be effected and vehicles used in commission of the crime are also yet to be recovered. As per the police 2/3 more persons were involved in the incidence and the petitioners are not disclosing about them. Lastly, it is prayed that the bail applications of the petitioners may be dismissed, as they are not co-operating in the investigation, recoveries are yet to be effected from them and rest of the accused persons are also yet to be interrogation. The petitioners are turning topsy-turvy and not disclosing the true facts. In case the petitioners, at this stage, enlarged on bail, they may tamper with the prosecution evidence and may also flee from justice.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the respondent/State and gone through the record, including the status report, carefully.

5. The learned Counsel for the petitioner has argued that the petitioners are innocent and they are neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, as they are residents of the place. He has further argued that petitioners are ready and willing to abide by the terms and conditions of bail, if in the event of their arrest, they are enlarged on bail. So, the bail applications be allowed and the petitioners be enlarged on bail. Conversely, learned Additional Advocate General, has argued that the petitioners were found involved in serious crime. Initially, the petitioners evaded their arrest and now when they joined the investigation they are not co-operating in it. Recoveries are yet to be effected from them and rest of the accused persons are also to be interrogated, but the petitioners are not divulging about there whereabouts. He has argued that in case the petitioners are enlarged on bail, they may tamper with the prosecution evidence and may also flee from justice, so the bail applications be dismissed.

6. In rebuttal the learned counsel for the petitioner has argued that the petitioners are ready and willing to abide by the terms and conditions of bail, if so granted, they are joining the investigation and co-operating in it. The petitioners are neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, as they are residents of the place. He has argued that the custodial interrogation of the petitioners is not at all required, so the bail applications may be allowed and the petitioners be enlarged on bail.

7. At this stage, considering the manner in which the offence is alleged to have been committed by the petitioners, the fact that initially the petitioners absconded, considering the nature of injuries sustained by the complainant, which are grievous, the fact that recoveries are yet to be effected by the police, the petitioners are not disclosing about the whereabouts of the persons who were involved in the incidence, and all other ancillary material, which has come on record and without discussing the same at this stage, this Court finds that the present is not a fit case where the judicial discretion to admit the petitioners on bail is required to be exercised in their favour.

8. In view of the above, the petitions, which are devoid of merits, deserve dismissal and are accordingly dismissed.

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

Manjeet Singh ....Petitioner

Versus

Central Bureau of Investigation ....Respondent

Cr.MP(M) No. 1620 of 2019

Decided on: 18th September, 2019

Code of Criminal Procedure, 1973 – Section 438 – Pre-arrest bail – Grant of - Held, petitioner in connivance with police officials, was involved in foisting a false case under NDPS Act on 'RK' & 'RZ' – Petitioner was demanding Rs. 20 lakh from father of 'RK' for not implicating him in the said case – Allegations found correct during preliminary inquiry of CBI – Petitioner also involved in many other cases – If enlarged on bail, he may lead to tampering of evidence- Petition dismissed. (Para 8)

For the petitioner:	Mr. Peeyush Verma and Mr. Ajay Kumar, Advocates.
For the respondent/CBI:	Mr. Anshul Bansal, Advocate, with Mr. Anshul Attri, Advocate. Mr. R.D. Sharma, Deputy Superintendent of Police, ACB, CBI, Shimla, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been moved by the petitioner under Section 438 of the Code of Criminal Procedure for releasing him on bail, in the event of his arrest, in case FIR No. RC0962017A0008 of 2017, dated 15.12.2017, under Sections 167, 193, 195, 347, 389, 384 and 511 IPC with Section 120B IPC and Sections 7, 13(2) and 13(1)(D) of the Prevention of Corruption Act and Section 58 of the ND & PS Act, registered with Police Station CBI, ACB, Shimla, H.P.

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

3. Police report stands filed. As per the prosecution story, precisely the allegations against the petitioner are that he, through corrupt and illegal means, with the help of police personnel tried to extort Rs. 20,00,000/- from one Shri Ravi Kumar. The petitioner alongwith his accomplices threatened Shri Ravi Kumar and his father that in case they fail to pay Rs. 20,00,000/-, they would be falsely implicated in a case of narcotics. With the above vignette of allegations against the accused CBI (respondent herein) investigated the matter and found that the petitioner is deeply involved in the matter alongwith his accomplices. As per the CBI, in case the petitioner is released on bail, there is possibility that he may influence the witnesses by threatening or inducing them and also try to dissuade the prosecution witnesses from disclosing the facts to CBI. On the above premises, CBI sought dismissal of the bail application of the petitioner.

4. Tersely, the facts giving rise to the present petition can be summarized as under:

A Co-ordinate Bench of this Court, vide its order dated 12th May, 2017, passed in Cr.M.P(M) No. 407 of 2017, directed the respondent (State of Himachal Pradesh) to conduct an inquiry into different complaints, one of which was filed by Shri Ravi Kumar, who has been indicted in FIR No. 21 of 2016, registered at Police Station Mandi. Cr.MP(M) No. 407 of 2017 was filed by Shri Ravi Kumar under Section 439 Cr.P.C. seeking bail. Said Shri Ravi Kumar was booked under Sections 21, 60 and 85 of the ND&PS Act and under Section 181 of the Motor Vehicles Act. During the hearing of bail petition moved by Shri Ravi Kumar, the Hon'ble Co-ordinate Bench directed the respondent/Sate to conduct an inquiry into the allegations leveled by Shri Ravi Kumar and his father. Thereafter, a preliminary inquiry was conducted and a case was registered by CBI, ACB, Shimla against the petitioner and co-accused Ram Lal, the then ASI, Pradeep Kumar, the then Constable, and Jai Lal, the then SI, PS Sadar, Mandi, H.P. On 01.12.2017, status report was filed in the Hon'ble Co-ordinate Bench of this Court and it was accepted. The Hon'ble Court ordered to convert the case into regular case under various Sections of IPC and Section 58 of the ND&PS Act. So, a case was

registered against the present petitioner and other accused persons. Central Bureau of Investigation is opposing the bail application of the petitioner chiefly on the grounds that the present petitioner is the main bigwig and he connived with other accused persons. The petitioner alongwith his accomplices falsely implicated Shri Ravi Kumar and Shri Roshan Lal in narcotics case. Central Bureau of Investigation investigated the matter and found that Shri Ravi Kumar and Shri Roshan Lal have been falsely implicated in a case. The petitioner alongwith others demanded Rs.20,00,000/- lac from Shri Ravi Kumar and Shri Roshan Lal and threatened them that in case they fail to pay the money a case of smuggling would be foisted on them. As per the status report, so filed by the CBI, Shri Ravi Kumar and Roshan Lal were perfidiously roped in a false case of narcotics, as they failed to pay the money. The CBI has filed an exhaustive and elaborative status report, which depicts that the petitioner alongwith others committed the crime. Lastly, it is prayed that the bail application of the petitioner be dismissed, as he is the main bigwig, in case at this stage he is enlarged on bail, he may influence the witnesses by threatening or inducing them and will try to dissuade the prosecution witnesses from disclosing the facts to the CBI. There is possibility that the petitioner may flee from justice. The bail application has also been opposed on the ground that the petitioner is habitual criminal and many cases have been lodged against him. The CBI sought the dismissal of the bail of the petitioner on the above enumerated factual matrix and grounds.

5. I have heard the learned Counsel for the petitioner, learned Counsel for the CBI and gone through the record, including the status report, carefully.

6. The learned Counsel for the petitioner has argued that the petitioner is innocent and he is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. He has further argued that petitioner is ready and willing to abide by the terms and conditions of bail, if in the event of his arrest, he is enlarged on bail. He has argued that co-accused Ram Lal has already been enlarged on bail by this Hon'ble Court, so the learned counsel for the petitioner sought that on the ground of parity, the petitioner may also be enlarged on bail. Conversely, learned Counsel for the CBI has argued that the petitioner was found involved in a felonious act of trying to extort money. He has further argued that the petitioner is the bigwig in the present case and in case he is enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice. He has argued that the some more cases have been registered against the petitioner and there is possibility that in case he is enlarged on bail, he may thwart justice. The petitioner is resident of Punjab and is habitual offender, so the bail application may be dismissed.

7. In rebuttal the learned counsel for the petitioner has argued that the petitioner is ready and willing to abide by the terms and conditions of bail, if so granted, he is joining the investigation and co-operating in it. The petitioner is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. He has further argued that co-accused Ram Lal has already been enlarged on bail by this Hon'ble Court, so on the basis of principle of parity, the petitioner may also be enlarged on bail and the petition be allowed.

8. Indeed, the principle of parity has exceptions and these exceptions are far and wide. The available record reveals that in the instant case the petitioner is the main bigwig and he played a key role in falsely getting Shri Ravi Kumar and Shri Roshan Lal roped in a case of narcotics. The investigation conducted by the CBI shows that the petitioner was deeply involved in the crime. The facts emerging out of the investigation got lateral support of the witnesses, while their statements were recorded under Section 164 Cr.P.C. This Court has meticulously examined the material, which has come on record, considered the fact that the petitioner is resident of Punjab, involved in many other cases, the manner in which the alleged offence has been committed by the petitioner, the fact that there is possibility that in case the petitioner is enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice, keeping in view his role in the alleged offence and also considering all

the ancillary material, which has come on record, and without ornately discussing the same, at this stage, finds that the petitioner cannot be treated with the yardstick of principle of parity. The benefit of principle of parity cannot be extended to the petitioner.

9. In view of what has been discussed hereinabove, the petition, which sans merits, deserves dismissal and is accordingly dismissed.

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

Collector Land Acquisition HP. PWD & another ...Appellants.

Versus

Prem Chand ...Respondent.

RFA No. 166 of 2012-B

Date of Decision: September 18, 2019

Land Acquisition Act, 1894 – Sections 18 & 23 – Acquisition of houses etc. for public purpose – Market value – Determination – Held, Collector had assessed the valuation of houses on basis of report of HP, PWD – HP, PWD had estimated the value by applying H.P. S.R of 1999 - However, acquisition of houses was made in 2005 – There was hike in wages and cost of construction material in between 1999 -2005 – Therefore, reference court was justified in granting 40% increase on valuation done by HP,PWD- Appeal dismissed. (Para 3)

Case referred:

Union of India vs. Savjiram and another, (2004) 9 SCC 312

For the Appellants: Mr. Desh Raj Thakur, Additional Advocate General, with M/s R.P. Singh, Kamal Kishore and Kamal Kant, Deputy Advocate Generals.

For the Respondents: Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (Oral).

Instant appeal has been preferred by the appellants-State against the impugned Award dated 28.08.2010, passed by learned Additional District Judge, Fast Track, Kullu (hereinafter referred to as the 'Reference Court'), in Reference Petition No.37 of 2009, titled as *Prem Chand vs. Collector Land Acquisition (Central Zone) HP.PWD & another,* whereby the Reference Court has enhanced the value of the houses assessed by the Land Acquisition Collector by 40%, on the ground that the assessment by the Land Acquisition Collector, was made on the basis of HP Scheduled Rates 1999, whereas the acquisition of the houses, was undertaken in the year 2005.

2. It is an admitted fact that two houses of respondent-claimant alongwith land were acquired for public purpose i.e. construction of Sainj Bye Pass road in Phatti Dhangi, by invoking the provisions of Land Acquisition Act (hereinafter referred to as the Act) after issuing notification dated 02.04.2005 under Section 4 of the Act, which was lastly published in Raj Patra on 13.06.2005. Land Acquisition Collector had determined the value of the land by passing Award No.1/2006 dated 27.05.2006, whereas houses and structures belonging to some landowners, including respondent-claimant, were not included therein due to non-receipt of the assessment of the acquired houses/structures from the Himachal Pradesh Public Works Department (hereinafter referred to as 'HP.PWD'). After receiving the assessment of value of the acquired houses/structures, Land Acquisition Collector had announced Award No.2 dated 12.01.2007, whereby valuation of two houses of respondent-landowner was estimated as Rs.3,76,441/- and Rs.16,02,370/- vide valuation reports Ex.RW.1/A- and Ex.RW.1/G respectively by applying H.P.S.R. 1999 of HP.PWD.

3. Reference Court, after referring judgments passed by this High Court, has allowed addition of 40% of the value of the houses determined by the appellants on the ground that valuation, by appellants, was made on the basis of cost of wages and material

prevailing in the year 1999, whereas the acquisition of the houses in Reference was undertaken in the year 2005. There is a gap of five-six years between the years 1999 to 2005 and even if five years' gap is taken into consideration and hike @ 10% of the cost of wages and material is considered, then also, up to the year 2004 there would have been enhancement of more than 60% of the value arrived at on the basis of H.P.S.R. 1999 as if valuation in 1999 is taken as 100 then after adding 10% in cost of first year, value in second year will be Rs.110/- and 10% thereof to be added therein for value in third year will be 11 and accordingly 10% of third year would be 12.1 which will give value in four year 133.1 and 10% thereof will be 13.31 and this value in fourth year i.e. in 2003 as Rs.146.41 and by adding 10% thereof i.e. 14.64 in it value in fifth year i.e. in 2004 would be 161.05 which comes 61.05% higher than basic value of the year 1999. Whereas, Reference Court has only enhanced 40% of the value, which comes to yearly enhancement of about 7% and it appears to be genuine and reasonable. Therefore, on this count, no interference is warranted.

4. Another ground for assailing the impugned Award is that houses/structures keep on deteriorating and therefore, value of of houses constructed in the year 2002 shall be lesser in the subsequent years, particularly after three years. This ground was also agitated before the Reference Court, which was rejected by it, after referring the judgment of the Apex Court passed in ***Union of India vs. Savjiram and another, (2004) 9 SCC 312.*** In this case, compensation amount of the houses was disbursed by the Land Acquisition Officer, after deducting 5% towards depreciation. The said deduction was disallowed by the High Court. Union of India claiming this deduction to be lawful had approached the Apex Court. The Apex Court in its judgment in paragraphs 10 to 15, after discussing the meaning of "depreciation", had rejected the claim of Union of India to deduct the depreciation from the total valuation of the houses, relevant observations of which are as under:-

> "10. Generally speaking, depreciation is an allowance for the diminution in the value due to wear and tear of capital asset employed by an assessee in his business. *Black's Law Dictionary* (5th Edn.) defines depreciation to mean, inter alia:
>
> > "A fall in value; reduction of worth. The deterioration, or the loss or lessening in value, arising from age, use and improvements, due to better methods. A decline in value of property caused by wear or obsolescence and is usually measured by a set formula which reflects these elements over a given period of useful life of property. Consistent, gradual process of estimating and allocating cost of capital investments over estimated useful life of asset in order to match cost against earnings."
>
> 11. Parks in *Principles and Practice of Valuation* (5th Edn., at p. 323) states that as for building, depreciation is the measurement of wearing out through consumption, or use, or effluxion of time. Paton has in his *Account's Handbook* (3rd Edn.) observed that depreciation is an out-of-pocket cost as any other costs. He has further observed that the depreciation charge is merely the periodic operating aspect of fixed-asset costs.
>
> 12. The above position was noted in *Mysore Minerals Ltd. v. CIT, (1999) 7 SCC 106.*
>
> 13. According to *Webster's New Word Dictionary,* "depreciation" means "a decrease in value of property through wear, deterioration or obsolescence; the allowance made for this in bookkeeping, accounting etc."
>
> 14. To put it differently, depreciation is the measure of the effective life of an asset owing to use or obsolescence during a given period.
>
> 15. Therefore, the stand of the appellant Union with regard to depreciation has no substance."

5. As the Apex Court has disallowed deduction on the basis of depreciation from compensation for the houses, Reference Court has decided this issue rightly and on this count also, appeal must fail.

6. In view of aforesaid discussion, I find no ground for interference in the impugned Award passed by the Reference Court and accordingly, appeal is dismissed. No order as to costs. Record be sent back.

Pending application(s), if any, also stand disposed of in the aforesaid terms.

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

Sunil Kumar ....Petitioner.

Vs.

Lajwanti (now deceased) and others ....Respondents.

CMPMO No.: 276 of 2019

Date of Decision: 18.09.2019

Code of Civil Procedure, 1908 – Order VII Rule 14(3) – Additional documents – Production of - Leave of court – Held, plaintiff must give reasons as why documents were not filed at the time of filing of suit or within reasonable period thereafter – These provisions can not be permitted to be used as a tool to fill up lacunae in the case – Provisions exist to take care of a situation where party bonafidely was not in a position to place certain documents on record – Application filed after several years of filing of suit for production of documents which were already with plaintiff not bonafide – Petition dismissed. (Paras 9 & 10).

Case referred:

Braham Dass Vs. Onkar Chand and another, 2009(1) Shim. LC 339

For the petitioner: Mr. Dheeraj K. Vashisht, Advocate.

For the respondents: Mr. Y.P.S. Dhaulta, Advocate, for respondents No. 2 and 3.
No notice has been issued to other respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has challenged order, dated 18.04.2019 (Annexure P-5), passed by the Court of learned Civil Judge-II, Amb, District Una, H.P. in CMA No. 111/2019 in Civil Suit No. 89/2012, vide which, an application filed under Order VII, Rule 14(3) of the Code of Civil Procedure by the petitioner to place on record certain documents has been dismissed.

2. Brief facts necessary for the adjudication of the present petition are that petitioner has filed a suit for declaration against the contesting respondents to the effect that plaintiffs, defendants No. 2, 3 and proforma defendants No. 4 to 10 are successors-in-interest of Shri Mehar Chand (deceased) and Shri Mangat Ram (deceased), being brothers, sons and daughters qua the suit land and Will dated 14.05.1986, allegedly executed by Shri Mehar Chand in favour of defendant No. 1, registered on 06.07.2005 vide *Vasika* No. 218 and Will dated 15.01.1989, allegedly executed by Mangat Ram in favour defendant No. 1, registered on 06.07.2005 vide *Vasika* No. 219 were forged Wills, a result of fraud played by defendants No. 2 and 3 in connivance with the scribe of the Wills as also the marginal witnesses. This suit was filed in the year 2012. At the stage of leading of evidence of the plaintiffs before the learned Trial Court, an application was filed by the plaintiffs under Order VII, Rule 14(3) of the Code of Civil Procedure, copy of which is appended with the present petition as Annexure P-3, praying for grant of permission to place on record certified copies of sale deeds executed by Shri Mehar Chand, dated 14.03.1980. It was mentioned in the application that plaintiffs had filed a suit for declaration, whereby they had challenged the Will of Shri Mehar Chand, as the same was thumb marked, whereas Mehar Chand during his life time, always signed the documents. It was further mentioned in the application that this was evident from the certified copies of sale deeds vide *Vasika* Nos. 207 and 208, dated 14.03.1980, executed by

deceased Mehar Chand, which need to be proved. Inadvertently, certified copies of sale deeds could not be earlier placed on record, as though the plaintiffs had left the said documents in the brief, but "*yesterday the applicants in the office of their counsel for preparing the affidavit, then they came to know that the above said documents are essential and require to be proved before this Hon'ble Court."*

3. The application was resisted by the contesting defendants.

4. Vide order dated 18.04.2019, which is impugned by way of present petition, the application was dismissed by the learned Court below by holding that there was no reference to the documents either in the plaint or replication and thus filing of the application was done with an ulterior motive. Learned Court also held that fact regarding signing capacity of Shri Mehar Chand was never alleged by the plaintiffs in the plaint and the plaintiffs could not be permitted to raise a new plea. On these basis, the application was dismissed.

5. Leaned counsel for the petitioner has argued that the impugned order is not sustainable in the eyes of law, as learned Trial Court erred in not appreciating that there was no delay in filing the application, as the suit was at initial stage itself, as evidence of the plaintiffs was being recorded. He has further argued that learned Court has erred in not appreciating that placing said documents on record was necessary for the plaintiffs to prove their case and as the plaintiffs had prudently supplied the certified copies of the sale deeds to their counsel, they cannot be made to suffer for the acts of omission and commission of the counsel, because it was the counsel who failed to place the said documents on record. He has relied upon the judgment of this Court in ***Braham Dass*** Vs. ***Onkar Chand and another***, 2009(1) Shim. LC 339 to press home the fact that the provisions of Order VII, Rule 14(3) of the Code of Civil Procedure have to be interpreted liberally and endeavour should be to allow the evidence which a party intends to place on record.

6. On the other hand, learned counsel for the contesting respondents has argued that there was no infirmity with the order passed by the learned Trial Court as filing of the application was nothing but an abuse of the process of law, because the intent of the plaintiffs was to fill up lacunae. He has further argued that Order VII, Rule 14 of the Code is not meant to allow the parties to fill up lacunae and liberal interpretation of said provision cannot be at the cost of the rights of the other contesting side. Mr. Dhaulta has further argued that the suit was filed in the year 2012 and the application to place on record the documents was preferred by the plaintiffs after a lapse of almost seven years in the month of January, 2019. According to him, simply because the case was at the stage of recording the statements of the plaintiffs' witnesses, it could not be said that the same was at the threshold stage, as there was no explanation whatsoever contained in the application as to what took the plaintiffs seven years to move the application. He thus prayed that the petition be dismissed with cost.

7. I have heard learned counsel for the parties and have also gone through the impugned order as well as other documents appended with the petition.

8. It is a matter of record that the suit was filed by the plaintiffs before the learned Trial Court in the month of April, 2012. The application under Order VII, Rule 14 of the Code to bring on record the documents mentioned therein had been filed in the month of January, 2019. A perusal of the application demonstrates that there is no explanation given therein as to why the documents could either not be placed on record at the time of filing of the suit or within some reasonable time thereafter. It is not the case of the plaintiffs that the documents which they intend to place on record came into existence after the filing of the suit. In fact, all that is mentioned in the application is that the documents which the plaintiffs intend to place on record could not earlier be placed on record, as the plaintiffs had left the said documents in the brief, but a day before filing of the application when they went to the office of their counsel for preparing an affidavit, they came to know that the said documents were essential and required to be proved in the Court. The averments made in the application

in fact fly at the face of the argument of the learned counsel for the petitioner that the documents could not be placed on record because of the omission of the counsel in the Trial Court. There is no such averment made in the application. On the contrary, the averments are to the effect that it was on a day before the filing of the application that the plaintiffs realized that the filing of the said documents was necessary for proving their case.

9. A Coordinate Bench of this Court in ***Braham Dass*** Vs. ***Onkar Chand and another,*** 2009(1) Shim. LC 339 has held that when an application is filed under Order VII, Rule 14(3) of the Code of Civil Procedure to place on record documents, then whether the documents are relevant or not is not to be decided by the Court at the stage of consideration of the application and this question has to be determined at the stage of arguments. Endeavour of the Court must be to adjudicate the *lis* effectively and if certain documents could not be filed with the plaint, until and unless serious prejudice is caused to the other side, the same must be permitted to be produced on record. It has been further held that it is settled principle that opportunity should be afforded to the parties to produce their evidence and state their case before the Court and the Court has to exercise the jurisdiction in favour of the production of the evidence instead of scuttling it, but the Court should not permit the parties to indulge in dilatory tactics to stall the proceedings. Whether or not such application can be allowed, is to be decided in each case in the light of the particular circumstances therein. This judgment does not helps the petitioner for following reasons:

(A) As I have already mentioned above, there is no explanation worth its name in the application as to why the documents could not be placed on record by the plaintiffs in the interregnum of seven years since the filing of the suit and the filing of the application.

(B) The provisions of Order VII, Rule 14(3) of the Code, though are to be interpreted liberally, however, said provisions cannot be permitted to be used as a tool by either of the parties to fill up lacunae in their case.

(C) Provisions of Order VII, Rule 14(3) of the Code exist to take care of a situation where a party *bonafidely* was not in a position to place certain documents on record and in these circumstances, the Court has to exercise its discretion to ensure that justice is delivered to the parties concerned.

(D) Whenever the Court is called upon to exercise its discretion, then before exercising said discretion, the Court has to weigh the rights of the parties and exercise discretion where such exercise is must for adjudication of the *lis* and same does not gravely prejudices the other party.

10. In the facts of the present case, as it is clearly borne out from the record that despite the documents being available with the plaintiffs, they failed to place the same on record for almost seven years as from the date of filing of the suit, which demonstrates that there was no *due diligence* exercised by the plaintiffs, this Court finds no infirmity with the order impugned and further as this Court finds no merit in the petition, the same is dismissed. Miscellaneous applications, if any, also stand disposed of.

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

Mahesh Kumar ....Petitioner.

Vs.

H.P. State Civil Supplies Corporation and others ....Respondents.

CMPMO No.: 191 of 2017

Date of Decision: 19.09.2019

Constitution of India, 1950 - Article 226 – Supervisory jurisdiction – Nature and scope – Held, in exercise of its powers under Article 227 of Constitution, High Court is not to sit as an appellate court over the orders of lower courts – It will interfere only if orders either shock

the judicial conscience of court or are so perverse that in case same are permitted to remain on record, it would result in great injustice to either party. (Para 7)

For the petitioner:	Mr. Adarsh K. Vashista, Advocate.
For the respondent:	Mr. Raj Kumar Salwan, Advocate, vice Mr. Navlesh Verma, Advocate, for respondent No. 1. Ms. Divya Pathania, Advocate, vice Mr. Rajesh Sharma, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has challenged order, dated 02.12.2016, passed by the Court of learned Civil Judge (Senior Division), Court No. 1, Shimla, H.P. in CMP No. 125/6/2016 in Civil Suit No. 20/1 of 14/10, vide which, an application filed under Order VI, Rule 17 of the Code of Civil Procedure by respondent No. 1/plaintiff, has been allowed.

2. Brief facts necessary for the adjudication of the present petition are that a suit has been filed by respondent No. 1 herein for recovery of an amount of Rs.17,96,595/- alongwith interest against the defendants. During the pendency of the suit, an application was filed by the plaintiff under Order VI, Rule 17 of the Code of Civil Procedure praying for amendment in the plaint to the extent that liability be held joint and several of the defendants to pay the amount due to plaintiff.

3. Vide impugned order, the amendment so sought by the plaintiff-Corporation has been allowed. Feeling aggrieved, the petitioner has filed this petition under Article 227 of the Constitution of India.

4. I have heard learned counsel for the parties and have also gone through the impugned order and the documents appended with the petition.

5. A perusal of the impugned order demonstrates that the same is a reasoned and speaking order and the learned Court below has assigned reasons as to why the application filed under Order VI, Rule 17 of the Code of Civil Procedure for amendment of the plaint found favour with it. Learned Court while allowing the application has returned categorical findings that the proposed amendments were not going to change the nature of the suit and further the same were only clarificatory in nature. It also held that the amendments were necessary. Learned Court further held that the reasons mentioned in the application filed under Order VI, Rule 17 of the Code, explaining as to why the proposed amendments could not be earlier incorporated in the plaint appeared to be justifiable, especially keeping in view the fact that the amendments were only clarificatory in nature and no prejudice was going to be caused to the defendants, who would be given opportunity to lead evidence. Learned Court also granted cost to the defendants in lieu of allowing the said application.

6. Under Order VI, Rule 17 of the Code of Civil Procedure, the Court can permit parties to amend the pleadings at any stage of the case which are necessary, provided the party seeking amendment satisfies the Court that despite due diligence, the proposed amendment could not be earlier incorporated in the pleadings. In this case, said condition has been satisfied by the plaintiff, as is clearly borne out from the impugned order. During the course of arguments, learned counsel for the petitioner could not demonstrate that the findings so returned by the learned Trial Court were perverse and not borne out from the record of the case.

7. In exercise of its power of superintendence under Article 227 of the Constitution of India, this Court is not to sit as an appellate Court over the orders passed by the learned Courts below, but has to interfere with orders only if the orders either shock the

judicial conscious of the Court or are so perverse that in case the same are permitted to remain on record, it would result in great injustice to either party.

8. In the present case, neither it can be said the the impugned order is so perverse that it shocks the judicial conscious of the Court nor the said order, if permitted to remain on record, would cause great prejudice to the parties.

9. One more fact which is necessary to be mentioned at this stage is this that by way of the impugned order, the amendment which has been allowed by the learned Trial Court, in fact, affects defendants No. 2 and 3, who stand impleaded as proforma respondents No. 2 and 3 in the present petition. They have not filed any petition against the said order, meaning thereby that they are not aggrieved by the order, which has been passed by the learned Trial Court. In these circumstances, in my considered view, the present petition even otherwise is not maintainable, because the petitioner perhaps does not has any *locus standi* to assail the order passed bylearned Trial Court, as the same does not affects the petitioner.

10. In view of the above discussions, as this Court finds no merit in the present petition, the same is dismissed. Miscellaneous applications, if any, also stand disposed of.

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IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No. 1694 of 2019
Decided on: 09.09.2019

Keshav Ram ...Petitioner

Versus

State of H.P. & Others ...Respondents

Constitution of India, 1950 – Article 226 – Transfer on D.O.Note of an elected representative – Challenge thereto – Held, any proposal of transfer of an employee from any elected representative cannot be straightway implemented - The Administrative Head is required to examine the proposal impartially and has to take an independent decision on the merits of same in accordance with law and as per transfer policy.(Para 2).

Coram:
Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.
Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.
Whether approved for reporting?[4] *Yes.*

For the petitioner : Mr. Ajit Saklani, Advocate.

For the respondents : Mr. Ashok Sharma, Advocate General with M/s Ritta Goswami, Adarsh Sharma & Mr. Ashwani Sharma, Additional Advocate Generals, for respondents No. 1 to 3.
Mr. S.K. Banyal, Advocate, for respondent No.4.

Jyotsna Rewal Dua, J.

Petitioner (Principal School Cadre) has challenged his transfer order dated 25.07.2019 (Annexue P-1) vide which, he has been transferred from Govt. Sr. Secondary School, Brang, District Mandi to Govt. Sr. Secondary School, Shadiyar, District Sirmaur.

2(i) The transfer order has been challenged on the grounds that:- The petitioner joined as Principal in Govt. Sr. Secondary School, Brang, District Mandi on 15.03.2017 and had not completed his normal tenure there as prescribed in the Transfer Policy; the transfer order has been issued only to accommodate respondent No.4 in Govt. Sr. Secondary School, Brang, District Mandi; transfer of the petitioner has been effected without

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[4] **Whether reports of Local Papers may be allowed to see the judgment?**

TTA and joining time, whereas, petitioner had never requested for his transfer; wife of the petitioner was recently posted at a station within 3 KMs from Govt. Sr. Secondary School, Brang being a couple case; transfer of the petitioner was neither in public interest nor in administrative exigency; petitioner has been transferred on the basis of a U.O. Note No. 144778, dated 04.07.2019.

2(ii) In ***Sanjay Kumar*** *vs.* ***State of Himachal Pradesh and others (2013) 3 Shim.L.C 1373; Amir Chand*** *vs.* ***State of Himachal Pradeh, 2013(2) Him.L.R. (DB) 648 and in Ashok Kumar Attri*** *vs.* ***Himachal Pradesh Power Corporation Limited, 2013 (3) Shim.LC 159,*** it has been held that any proposal of transfer of an employee from any elected representative cannot be straightway implemented. The Administrative Head is required to examine the proposal impartially and has to take an independent decision on the merits of same in accordance with law and as per transfer policy.

3(i) Considering the allegations levelled in the writ petition regarding the petitioner having been transferred on the basis of a D.O. Note, we had called for and seen the record pertaining to transfer of the petitioner. The record shows that proposal to transfer the incumbents figuring in impugned transfer order dated 25.07.2019(Annexure P-1) originated and was approved by the Education Minister on 20.07.2019.

3(ii) While considering this proposal, the departmental remarks in respect of petitioner were that Shri Keshav Ram, Principal (DOB, 20.09.1967) was working at GSSS Brang District Mandi since 09.03.2017 and had short stay. Previous details of his postings were also provided viz:- (1) S/S Gaonsari (SML) 21-06-2011 to 11.07.2012; (2) S/S Kamlah-Fort (MND) 12-07-2012 to 23.09.2013; (3) S/S Cholthara 23.09.2013 to 08.03.2017. It was also mentioned in the remarks that 'Moreover, there is no complaint received in this office with the transfer proposal in r/o Sh. Keshav Ram, Principal on administrative grounds'.

Even though, the petitioner had not completed his normal tenure at Govt. Sr. Secondary School, Brang, District Mandi as per Transfer Policy, yet, he was ordered to be transferred vide impugned transfer order (Annexure P-1).

3(iii) During hearing of the case, written instructions imparted from the office of the Principal Secretary (Education) to the Government of Himachal Pradesh, to the Learned Additional Advocate General dated 31.08.2019, were placed on the record to the effect that a complaint was received against the petitioner and, therefore, his transfer was effected after prior approval of the competent authority. However, the record examined by us, in particular the departmental remarks given on the file on 22.07.2019 are categoric that no complaint was received by the department against the petitioner at least till 22.07.2019. Date of receipt of the undated complaint as mentioned on the complaint is 30.08.2019, whereas transfer was approved on 20.07.2019 and impugned transfer order was issued on 25.07.2019. Otherwise also, the transfer of an employee cannot be ordered on the basis of complaint by way of penalty without holding enquiry into the allegations therein and affording opportunity of being heard to him/her.

We are not commenting upon the complaint. However, the fact remains that the transfer has been effected straightway on the basis of proposals of the elected representative without due application of mind by the Administrative Head either to the proposal or to the alleged complaint or the justifiability of such transfer as per transfer policy.

4. Hence, impugned transfer order Annexure P-1, dated 25.07.2019, having been issued in violation of the law laid down by this Court as well as in violation of Transfer Policy, is quashed and set aside. We, however, leave it open to the respondents to consider the case afresh in accordance with Transfer Policy and in accordance with law laid down. The writ petition is disposed of accordingly, so also the pending application(s), if any.

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

Rattan Chand (deceased) through his LRs & Anr. .....Appellants.

Versus

Rishi Kesh & Anr. .....Respondents.

RSA No. 233 of 2007
Reserved on 22.08.2019
Date of decision: 27th August, 2019.

Code of Civil Procedure, 1908 – Section 100 – Regular second appeal – Scope – Held, mixed questions of law and facts can not be permitted to be raised for first time in the second appeal. (Para 11)

Indian Registration Act, 1908 (Act) – Section 17 – **Indian Stamp Act, 1899** – Section – 3 - Family settlement – Whether requires registration? - Held, family settlement deed does not require either to be registered under Act or stamped under provisions of Indian stamp Act. (Para 12)

Family Settlement - Effect- Held, family settlement between members of family should generally be given sanctity and party should be bound by the same. (Para 13).

Family Settlement - Effect – Held, family settlement duly acted upon, operates as a complete estoppel as between parties to it. (Para 15).

Revenue Entries- Evidentiary value – Held, revenue entries are only for fiscal purposes and can not be relied upon to determine question of title. (Para 17)

Cases referred:

Banarasi Dass & Ors. vs. Kansi Ram & Ors., AIR 1963 SC 1165

Kale and Ors. vs. Deputy Director of Consolidation & Ors., AIR 1976 SC 807

Manish Mohan Sharma & Ors. vs. Ram Bahadur Thakur Ltd. & Ors., (2006) 4 SCC 416

Hari Shankar Singhania and Ors. vs. Gaur Hari Singhania & Ors., (2006) 4 SCC 658

Sita Ram Bhama vs. Ramvatar Bhama (2018) 15 SCC 130

For the Appellants : Mr. N. S. Chandel, Sr. Advocate with Mr. Vinod Kumar Gupta, Advocate.

For the Respondents : Mr. Anand Sharma, Sr. Advocate with Mr. Karan Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Plaintiffs are the appellants who having lost before both the Courts below have filed the instant second appeal.

The parties hereinafter shall be referred to as the "plaintiffs" and the "defendants".

2. The plaintiffs filed a suit for permanent prohibitory injunction on the allegations that they alongwith defendant and other co-sharers are joint owners in possession of the suit land comprised in Khata No. 529, Khatauni No. 595 bearing Khasra Nos. 5836, 5862, 5863, 5864, Mohal Chamba Town-II, H.B. No. 176, Pargna Panjla, Tehsil and District Chamba and the suit land is still unpartitioned between the parties, but the defendant without prior consent of the plaintiffs and other co-sharers started digging the foundations with a clear motive to raise new construction of his house over the best portion of the land in suit and despite requests not to raise any construction, was insisting for the same. Hence, this suit.

3. The defendant resisted and contested the suit by filing written statement-cum-counter claim, *inter alia*, raising preliminary objections like estoppel and maintainability etc. On merits, it was contended that the revenue entries regarding Khasra Nos. 5836, 5862, 5863, 5864, 5865 measuring 580-2 sq. yards, showing the land in suit to be still joint between the parties are wrong and illegal and the defendant was exclusive owner in possession thereof vide partition deed dated 13.05.1958, which was effected by Shri Narotam, grand-father of the parties. Shri Narotam had two sons, namely, Harua and Parmanand and

one daughter Mugti and in the family partition the property/house comprising Khasra Nos. 5893, 5894 was given to Parmanand and after his death the father of the plaintiffs had disposed of the property comprising Khasra Nos. 5893, 5894 in favour of Narain Dass with the consent of Smt. Mugti and Harua, father of the defendant for a sale consideration of Rs.2800/- received by Shri Parmanand out of which Parmanand had purchased another house adjoining house of the defendant. It was further averred that the construction over this land in suit was already completed by the defendant in the year 1991-92 to the knowledge of the plaintiffs and the defendant neither dismantled the old structure nor raised any structure over the same. It was further contended that the notice issued to the defendant was illegal and suit of the plaintiffs was not maintainable as no cause of action arose to them and prayed that the counter claim of the defendant be decreed while the suit of the plaintiff be dismissed.

4. In the replication, the plaintiffs controverted the assertions made in the written statement and reiterated and re-affirmed the averments of the plaint. Likewise the defendant in replication filed to the written statement to the written statement-cum-counter claim denied the assertions made in the said written statement and re-affirmed and reiterated the averments made in his written statement-cum-counter claim.

5. From the pleadings of the parties the learned Trial Court on 15.03.1999 framed the following issues:-

1. Whether the suit property is jointly owned and possessed by the parties as alleged?OPP

2. Whether the plaintiffs have a cause of action to file the present suit?OPD

3. Whether the plaintiff are estopped from filing the present suit by their own act and conduct?OPD

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

5. Whether the revenue entries are wrong and illegal as alleged?OPD

6. Whether the defendants have a cause of action for the counter claim?OPD

7. Relief.

6. After recording evidence and evaluating the same, the learned trial Court dismissed the suit of the plaintiffs constraining them to file an appeal before the learned first Appellate Court, which too, vide judgment and decree dated 28.02.2007 dismissed the appeal so filed. It is against both these judgments and decrees that the plaintiffs have filed the instant appeal.

7. During the pendency of the appeal, plaintiff No. 1 Rattan Chand died and consequently his LRs were ordered to be brought on record.

8. The appeal came up for consideration on 25.04.2008 and was admitted on the following substantial questions of law.

1. Whether Ext. PW4/A (the partition deed) later on translated and marked as Ext. DW5/A was required to be ignored from consideration for want of registration as required under Section 17 of the Registration Act, 1908 and also for want of payment of required Stamp Duty under Stamp Act?

2. Whether documents Ext.DW4/A (Partition deed), Ext. D-1 (sale deed) could not have been relied for want of required proof of their execution as required under Section 69 of the Indian Evidence Act, 1872?

3. Whether on the basis of evidence and other material available on record more especially jamabandi Ext.P-3 to P-9, admission of DW-4 Duni Chand and the statements of the witnesses of the plaintiffs/appellants it stood conclusively proved that the suit property is in joint ownership and findings to the contrary in favour of the defendant are unsustainable and illegal?

Substantial Questions No. 1 to 3

9. All these questions are intrinsically interlinked and interconnected, therefore, they are taken up together for consideration and are being disposed of by way of a common reasoning.

10. The records reveal that the questions raised in this appeal had, in fact, never been agitated either before the learned Trial Court or before the learned first Appellate Court.

11. The questions being mixed questions of law and facts cannot be permitted to be raised for the first time in the second appeal. In taking this view, I am fortified by the judgment of the Hon'ble Four Judges of the Hon'ble Supreme Court in ***Banarasi Dass & Ors. vs. Kansi Ram & Ors., AIR 1963 SC 1165***.

12. That apart, even if the partition deed Ext. DW5/A is seen, it is in the nature of family settlement and the same, therefore, does not require to be either registered or stamped under the provisions of the Indian Registration Act or Indian Stamp Act. This was so held by the Hon'ble Supreme Court in ***Kale and Ors. vs. Deputy Director of Consolidation & Ors., AIR 1976 SC 807***, wherein it was observed as under:-

> *25. It would be seen that when the name of the appellant No. 1 Kale was mutated in respect of the Khatas by the Naib Tahsildar by his order dated December 5, 1955 which is mentioned at p. 4 of the Paper Book respondents 4 and 5 filed an application for setting aside that order on the ground that they had no knowledge of the proceedings. Subsequently a compromise was entered into between the parties a reference to which was made in the compromise petition filed before the Revenue Court on August 7, 1956. A perusal of this compromise petition which appears at pp. 15 to 18 of the Paper Book would clearly show two things - (1) that the petition clearly and explicitly mentioned that a compromise had already been made earlier; and (2) that after the allotment of the Khatas to the respective parties the parties shall be permanent owners thereof. The opening words of the petition may be extracted thus:*
>
> *"It is submitted that in the above suit a compromise has been made mutually between the parties."*
>
> *It would appear from the order of the Assistant Commissioner, Ist Class, being Annexure 4 in Writ Petition before the High Court, appearing at page 19 of the Paper Book that the parties sought adjournment from the Court on the ground that a compromise was being made. In this connection the Assistant Commissioner, Ist Class, observed as follows:*
>
> *"On 11th January 1956 Mst. Har Piari and Ram Piari gave an application for restoration in the court of Naib Tahsildar on the ground that they were not informed of the case and they were aggrieved of his order passed on 5th December 1955. On this application he summoned the parties and an objection was filed against the restoration application. The parties sought adjournment on the ground that a compromise was being made. The parties filed compromise before the Naib Tahsildar according to which two lists were drawn, one of these is to be entered in the name of Kale and the other in the name of Har Piari and Ram Piari."*
>
> *This shows that even before the petition was filed before the Assistant Commissioner informing him that a compromise was being made, the parties had a clear compromise or a family arrangement in contemplation for which purpose an adjournment was taken. These facts coupled together unmistakably show that the compromise or family arrangement must have taken place orally before the petition was filed before the Assistant Commissioner for mutation of the names of the parties in pursuance of the compromise. The facts of the present case are therefore clearly covered by the authorities of this Court and the other High Courts which laid down that a document which is in the nature of*

a memorandum of an earlier family arrangement and which is filed before the Court for its information for mutation of names is not compulsorily registrable and therefore can be used in evidence of the family arrangement and is final and binding on the parties. The Deputy Director of Consolidation respondent No. 1 as also the High Court were, therefore, wrong in taking the view that in absence of registration the family arrangement could not be sustained. We might mention here that in taking this view, the High Court of Allahabad completely overlooked its own previous decisions on this point which were definitely binding on it. This, therefore, disposes of the first contention of the learned counsel for the respondents that as the family arrangement having been reduced into the form of a document which was presented before the Assistant Commissioner was unregistered it is not admissible and should be excluded from consideration.

13. It was otherwise settled law that a settlement between the members of the family should generally be given sanctity and the party should be bound by the same. Reference may be made to the judgment of the Hon'ble Supreme Court in ***Kale's case (supra)***, which has consistently been followed by the Hon'ble Supreme Court in ***Manish Mohan Sharma & Ors. vs. Ram Bahadur Thakur Ltd. & Ors., (2006) 4 SCC 416 and Hari Shankar Singhania and Ors. vs. Gaur Hari Singhania & Ors., (2006) 4 SCC 658***.

14. In ***Hari Shankar's case (supra)***, the Hon'ble Supreme Court after referring to the various judgments on the issue observed as under:-

42. Another fact that assumes importance at this stage is that, a family settlement is treated differently from any other formal commercial settlement as such settlement in the eyes of law ensures peace and goodwill among the family members. Such family settlements generally meet with approval of the courts. Such settlements are governed by a special equity principle where the terms are fair and bona fide, taking into account the well being of a family.

43. The concept of 'family arrangement or settlement' and the present one in hand, in our opinion, should be treated differently. Technicalities of limitation etc should not be put at risk of the implementation of a settlement drawn by a family, which is essential for maintaining peace and harmony in a family. Also it can be seen from decided cases of this Court that, any such arrangement would be upheld if family settlements were entered into ally disputes existing or apprehended and even any dispute or difference apart, if it was entered into bona fide to maintain peace or to bring about harmony in the family. Even a semblance of a claim or some other ground, as say affection, may suffice as observed by this Court in the case of Ram charan v. Girja Nandini.

44. In Lala Khunni Lal v. Kunwar Gobind krishna Narain, the Privy Council examined that it is the duty of the courts to uphold and give full effect to a family arrangement.

45. In Sahu Madho Das and Ors. v. Pandit mukand Ram and Anr. [vivian Bose jagannadhadas and BP Sinha JJ.] placing reliance on Clifton v. Cockburn and William v. William, this Court held that a family arrangement can, as a matter of law, be implied from a long course of dealings between the parties. It was held that ". so strongly do the courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all, that we have no hesitation in taking the next step (fraud apart) and upholding an arrangement. "

46. The real question in this case as framed by the court was whether the appellant/plaintiff assented to the family arrangement. The court examined that "the family arrangement was one composite whole in which the several dispositions formed parts of the same transaction"

47. In Ram Charan Das v. Girja Nandini devi, (supra) , this Court observed as follows:

"Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family- the consideration for such a settlement will result in establishing or ensuring amity and good will amongst persons bearing relationship with one another. "

48. In Maturi Pullaiah v. Maturi narasimham, this Court held that:

"[T[though conflict of legal claims in praesenti or in future is generally a condition for the validity of family arrangements, it is not necessarily so. Even bona fide disputes, present or possible,which may not involve legal claims, will suffice. Members of a joint hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular case, courts will more readily give assent to such an arrangement than to avoid it. "

49. Further in Krishna Biharilal v gulabchand, this Court reiterated the approach of courts to lean strongly in favour of family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes which might ruin them all. This approach was again re-emphasised in S. Shanmugam

Filial v. K. Shanmugam pillai where it was declared that this Court will be reluctant to disturb a family arrangement.

50. In Kale and Ors. v. Deputy Director of consolidation and Ors. [vr Krishna Iyer, R. S. Sarkaria and S Murtaza Fazal Ali, JJ.] this court examined the effect and value of family arrangements entered into between the parties with a view to resolving disputes for all. This Court observed that:

"By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made the object of the arrangement is to protect the family from long drawn litigation or perpetual strives which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and therefore, of the entire country, is the prime need of the hour….. the courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement. . The law in England on this point is almost the same. " (emphasis supplied)

51. The valuable treatise Kerr on Fraud at p. 364 explains the position of law:

"The principles which apply to the case of ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity

peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend. "

Halsbury's Laws of England, Vol. 17, third edition at pp. 215-216.

52. In KK Modi v. KN Modi and Ors. , [sujata Manohar and DP Wadhwa, JJ.], it was held that the true intent and purport of the arbitration agreement must be examined - [para 21] Further the Court examined that:

"A family settlement which settles disputes within the family should not be lightly interfered with especially when the settlement has been already acted upon by some members of the family. In the present case, from 1989 to 1995 the Memorandum of understanding has been substantially acted upon and hence the parties must be held liable to the settlement which is in the interest of the family and which avoids disputes between the members of the family. Such settlements have to be viewed a little differently from ordinary contracts and their internal mechanism for working out the settlement should not be lightly disturbed. "

53. Therefore, in our opinion, technical considerations should give way to peace and harmony in enforcement of family arrangements or settlements.

15. It was further held that even if the family settlement was not registered, it would operate as complete estoppel against the original plaintiff, who is a party to such family settlement.

16. In ***Sita Ram Bhama vs. Ramvatar Bhama (2018) 15 SCC 130***, the Hon'ble Supreme Court while referring to ***Kale's case (supra)***, observed as under:-

11. Pertaining to family settlement, a memorandum of family settlement and its necessity of registration, the law has been settled by this Court. It is sufficient to refer to the judgment of this Court in Kale and others vs. Deputy Director of Consolidation and others, 1976 3 SCC 119. The propositions with regard to family settlement, its registration were laid down by this Court in paragraphs 10 and 11:

"10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is

acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

11. The principles indicated above have been clearly enunciated and adroitly adumbrated in a long course of decisions of this Court as also those of the Privy Council and other High Courts, which we shall discuss presently."

17. As regards the revenue entries, it is more than settled that these entries are only for fiscal purpose and cannot be relied upon to determine the question of title.

18. Now, adverting to the so called admission made by DW4 and the statements of the witnesses of the plaintiffs, these statements nowhere suggest that the suit land is still joint amongst the parties, rather the sale deed Ext.D1, which had been executed after the partition deed, also clearly proves that the property being sold was given in partition to the predecessor of the plaintiffs.

19. All the substantial questions of law are answered against the appellants by holding that the family settlement was not required to be either registered or stamped under the law.

20. In view of the aforesaid discussion, there is no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs.

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

Smt. Jogindra .....Appellant/Plaintiff

Versus

Ram Lal (since deceased) through his LRs. .....Respondents/defendants

RSA No. 670 of 2008
Reserved on: 04.09.2019
Date of decision: 09.09.2019.

Tort Law – Joint-tort-feasors - Who are and extent of their liability? – Held, two or more persons become joint-tortfeasors by either committing a tort in concert or by the principle of vicarious liability – Joint -tortfeasors are jointly and severally liable for whole of the damages. (Para 9)

Tort Law – Joint tort-feasors – Suit for damages – Whether all joint -torfeasors need to be joined in a suit?- Held, where liability is joint and several, the person aggrieved has the choice of suing either of joint -tortfeasors or both or all of them (Para 9)

Case referred:

Khenyei vs. New India Assurance Company Ltd and Ors. (2015) 9 SCC 273

For the Appellant/ Plaintiff: Ms. Seema K. Guleria, Advocate

For the Respondents/ defendants: Mr. Bhupender Singh Kanwar, Advocate, for respondents No. 1(b) to 1(d).

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Plaintiff is the appellant, who aggrieved by the judgment and decree passed by the learned first Appellate Court whereby the suit was ordered to be dismissed by setting aside the judgment and decree of the learned Trial Court, has filed the instant appeal.

The parties hereinafter shall be referred to as the "plaintiff" and the "defendants".

2. The brief facts of the case are that the plaintiff was residing alone at her residence at village Neri Dhar. On 22.05.2000 at about 2:00 P.M. the defendant came to her house and started abusing her and also started hurling stones at her as a result whereof arm of the plaintiff was fractured and the matter was reported to the police. The defendant was prosecuted before the criminal court. It was alleged that on account of the plaster, the plaintiff could not work for 45 days and it was her husband, who was working as mason had to abandon his work to do the household work. She also claimed to have incurred expenditure on medical treatment. It was lastly averred that because of the acts of the defendant, she had suffered physical and mental pain and also financial loss as such she was entitled to recover a sum of Rs.70,000/- as damages from the defendant.

3. The defendant contested the suit by filing written statement wherein he raised various preliminary objections and have also averred that he had not pelted stones upon the plaintiff nor he abused and prayed for the dismissal of the suit.

4. From the pleadings of the parties, following issues were framed by the learned Trial Court on 16.01.2002:-

1. Whether the plaintiff is entitled to recover Rs.70,000/- on account of damages as alleged?OPP

2. Whether this suit is not maintainable?OPD

3. Whether the suit is bad for mis-joinder of party?OPD

4. Relief.

5. After recording evidence and evaluating the same, the learned trial Court decreed the suit of the plaintiff for Rs.50,000/- with future interest at the rate 6% constraining the defendant to file an appeal before the learned first Appellate Court, which came to be allowed vide judgment and decree passed to this effect on 14.10.2008.

6. Aggrieved by the judgment and decree passed by the learned first Appellate Court, the plaintiff has filed the instant appeal, which was admitted by this Court on 12.12.2008 on the following substantial questions of law:-

1. Whether the learned first Appellate Court has committed an error by adopting an erroneous approach to the suit by setting aside decree passed by learned trial Court on the ground that there is no cause of action and non-joinder of parties when the plaintiff/appellant had cause of action against the wrong doers/tort feasers severally or jointly?

2. Whether it is necessary for the appellant, who is the claimant in suit, to implead every person guilty of tort/wrong so long as the party against whom the suit is pressed is one of the tort feasers acting in concert?

3. Whether a complete and effective relief granted by learned Trial Court which has no possibility of the decree becoming in executable or infructuous can be set aside merely on the ground of non-joinder of party of some of the wrong doers who are family members as son and wife of respondent/defendant and had committed the illegal act of causing injury to the appellant/plaintiff in concert?

Questions No. 1 to 3

7. Since, all these questions are intrinsically interlinked and interconnected, therefore, they are taken up together for consideration and are being disposed of by way of a common reasoning.

8. It is vehemently argued by Ms. Seema K. Guleria, learned counsel for the plaintiff that since the defendant was one amongst the joint tortfeasors, therefore, the suit as filed against him was very much maintainable. Therefore, it is necessary to understand the meaning of "*tortfeasors*":

9. Two or more persons become joint tortfeasors (wrongdoers) by either committing a tort in concert or by the principle of vicarious liability (as in the case of master and servant or principal and agent). Under the Law of Torts, joining wrongdoers are jointly and severally liable for the whole of the damages. Where the liability is joint and several, the person aggrieved has the choice of suing either of the joint tortfeasors or both of them. But, where only one of the tortfeasors (master) is sued, not on the ground that he committed any wrong, but on the ground that he is vicariously liable for the tort committed by the other tortfeasor (servant), then to make the master liable, it is necessary to prove that the servant (who is not sued) acted in the course of employment and acted negligently.

10. Salmond in his Treatise on torts, states thus (18th Edition, page 417 et sequens):

> *"Where the same damage is caused to a person by two or more wrongdoers, those wrong doers may be either joint or independent tortfeasors. Persons are to be deemed joint tortfeasors within the meaning of this rule whenever they are responsible for the same tort—that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once. This happens in at least three classes of cases namely, agency, vicarious liability and common action.... In order to be joint tortfeasors they must in fact or in law, have committed the same wrongful act... The injuria as well as the damnum must be the same."*
>
> *"Joint wrongdoers are jointly and severally responsible for the whole damage. That is to say, the person injured may sue any of them separately for the full amount of the loss; or he may sue all of them jointly in the same action, and even in this latter case the judgment so obtained against all of them may be executed in full against any of them."*

11. In Black's Dictionary, 'Joint and several liability' is defined as follows:

> *"A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together, at his opinion".*

12. In Shawcross on Motor Insurance (2nd Edition), it is observed thus:

> *"Joint tortfeasors, that is, those persons who together incur responsibility in respect of the same wrongful act, whether by way of vicarious responsibility or by way of common action in a wrongful activity were at common law jointly and severally responsible for the whole of the damages sustained by the injured party. At common law, this gave the latter the right to choose whether he should seek to take one or all of the joint wrongdoers liable in an action, but once he had obtained judgment against those sued he could not proceed against the others...."*

13. Joint tortfeasors, as per 10th Edn. Of Charlesworth & Percy on Negligence, have been described as under:

> *Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them is the same, namely, that the same evidence would support an action against them individually... Accordingly, they will be jointly liable for a tort which they both commit or for which they are responsible because the law imputes the commission of the same*

wrongful act to two or more persons at the same time. This occurs in case of (a) agency; (b) vicarious liability; and (c) where a tort is committed in the course of a joint act, whilst pursuing a common purpose agreed between them."

14. The precise question came up before the Hon'ble Supreme Court in ***Khenyei vs. New India Assurance Company Ltd and Ors. (2015) 9 SCC 273,*** wherein after relying upon the definition of joint tortfeasors in *Charlesworth & Percy* on negligence, the Hon'ble Supreme Court enumerated the possibility regarding the fixation of liability of concert tortfeasors, which reads thus:-

22. What emerges from the aforesaid discussion is as follows:

22.1 In the case of composite negligence, the plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

22.2 In the case of composite negligence, apportionment of compensation between two tortfeasors vis-a-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

22.3 In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/Tribunal to determine inter se extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of the payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/Tribunal, in the main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

22.4 It would not be appropriate for the court/Tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.

15. However, the moot question is whether the claim of the plaintiff is, in fact, against a joint tortfeasors or is individually directed against the defendant alone. For deciding this question it would be necessary to take a look at the pleadings in the suit.

16. It would be necessary to advert to paras 3, 4 and 7 of the plaint which reads thus:-

3. That on 22.05.2000 at about 2:00 PM while plaintiff was alone at her residence at village Neri Dhar defendant without reasonable and sufficient cause threw stones upon her and abused her in filthy language. This was caused by the defendant due to old enmity with the family of Shri Bhag Mal. Similarly in the year 1995 the defendant alongwith his wife Smt. Kaushalya Devi and his son Shri Rajinder on 30.11.1995 at about 8:30 AM entered in the house of plaintiff and gave sever beatings to her and her husband and the matter was reported to the local police and police sent a case to Sub Divisional Magistrate (Rural), Shimla under the provisions of Section 107, 151 Cr.P.C. which was decided on 07.04.1997 and the Sub Divisional Magistrate directed the defendant to keep peace and harmony in the locality.

4. That due to throwing of stones plaintiff suffered serious injuries in her body including arm fracture. Defendant also threw a big stone upon the head of plaintiff but it struck against her right arm and it resulted in a big bone fracture. Defendant also threw stones over the lintel of the house of plaintiff and threatened plaintiff and other members of family including her father-in-law to threw away from the property in dispute. In fact, defendant is acting on the

instance and guidance of one Shri Ram Krishan son of Shri Deep Ram who is in litigation with father-in-law of plaintiff. Immediately after the incident the plaintiff reported the matter to the police at Police Station, Dhalli and police got examined plaintiff from the Doctor who has issued Medico-Legal-Certificate. The doctor also put a plaster on the arm of plaintiff for a period of 45 days. Due to this fracture the plaintiff was prevented from doing her routine duties towards the family members and also to do other family affairs. The husband of the plaintiff Shri Sukh Dev is working as Mason/Carpenter and is getting Rs.200/- per day as wages. Due to fracture in the arm of plaintiff her husband could not attend his work from 22.05.2000 onwards for a period of about two months. He was looking after plaintiff and her family members. Plaintiff has suffered physically, monetarily and mentally. Defendant after the said incident and matter being reported to the local police has still giving threats to the plaintiff and her family members and threatened that they will suffer in case they take any legal action against him. In fact, the defendant want to threw away the plaintiff and her husband from the property of her father-in-law and he intend to occupy the same and he is being helped in this work by Shri Ram Krishan. Defendant is giving threats to the children of plaintiff who are school going while coming back from the school. Plaintiff apprehends danger to her life and lives of her family members and property.

7. That the cause of action arose to the plaintiff against the defendant on 22.05.2000.

17. A perusal of the relevant portion of the plaint extracted above, leave no matter of doubt that the plea of the plaintiff is not founded against the action of joint tortfeasors or wrongdoers but is founded against an individual action of the defendant alone.

18. Proceeding further, it would be noticed that the foundation of the plaintiff is the FIR Ext.PW6/A & B, however, in case the FIR is minutely scrutinized, it would be revealed that there are no allegations against the defendant therein and rather it has been specifically alleged in the FIR that one Paramjit had hurled stone at the plaintiff.

19. That apart, it would be noticed that when the trial of the FIR culminated into a charge-sheet, it was then that the defendant was also arraigned as an accused and after full-fledged trial, the defendant was acquitted of the case.

20. Even though the learned counsel for the plaintiff would vehemently argue that the contents of the FIR or the final judgment cannot be taken into consideration, however, I really do not find any substance in such contention. It was the plaintiff, who herself had placed strong reliance on the FIR in the trial whereof the defendant was ultimately acquitted. No doubt, the FIR of its own cannot be taken into consideration as a substantive piece of evidence, however, once it is relied upon by the plaintiff to support the case, then the FIR cannot be ignored and likewise even the outcome of the FIR can be ignored.

21. Apart from above, no doubt the learned Trial Court awarded damages to the tune of Rs. 50,000/- to the plaintiff but there was no virtual material on the basis of which the learned Trial Court could have done so. There was no proof or document produced by the plaintiff to prove the injury, no prescription slip, no bills and only one cash memo that too of the year 1995 was produced, whereas the incident in question alleged to have taken place in May, 2000.

22. Lastly, it would be noticed that the FIR in question was against the wife and the son of the defendant and defendant, in fact, was arraigned as an accused at a later stage.

23. As regards substantial question No. 3 it needs to be noticed that the learned first Appellate Court has not at all dismissed the suit for non-joinder of party as claimed by the plaintiff rather the suit has been dismissed on merits.

The substantial questions of law are answered accordingly.

24. In view of the aforesaid discussion, there is no merit in this appeal, consequently, the same is accordingly dismissed. Pending application, if any, also stands disposed of.

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

United India Insurance Co. Ltd. .....Appellant

Versus

Smt. Kumta Devi & Ors. .....Respondents

FAO No. 39 of 2010
Reserved on: 06.09.2010
Date of decision: 10.09.2019

Workmen Compensation Act, 1923 – Sections 3 & 4 - Murder of driver during course of employment - Whether legal representatives entitled for compensation under the Act ? – Held, workman was engaged in the vehicle as a driver – He was present at spot where his murder was committed – His presence there was only because of his employment – His murder took place during the course of employment and his legal representatives are entitled for compensation under the Act. (Para 14)

Contract of Insurance – Dishonour of premium cheque – Effect – Held, insurance policy was valid on the date of accident – It was cancelled subsequently on ground of dishonour of premium cheque – Insurance company can not avoid its liability. (Para 17)

Cases referred:

United India Insurance Company Ltd. Vs. Sh. Talaru Ram & Ors., 2017 ACJ 425

Rita Devi (Smt.) and others versus New India Assurance Col. Ltd. and another, (2000) 5 SCC 113

New India Assurance Company Ltd. vs. Rula and others, AIR 2000 SC 1082,

Deddapa and others vs. The Branch Manager, National Insurance Co. Ltd. 2007 AIR SCW 7948

United Indian Insurance Co. Ltd. vs. Laxmamma and others, 2012 AIR SCW 2657

National Insurance Co. Ltd. vs. Rukshana and others, 2015 (2) SLC 753

For the Appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Deepak, Advocate.

For the Respondents: Mr. B. N. Sharma, Advocate, for respondents No. 2 and 3.
Mr. Sanjay Sharma, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This appeal at the instance of Insurance Company is directed against the award dated 20.10.2009 passed by the learned Commissioner under Workmen's Compensation Act (for short the 'Act') whereby he awarded a sum of Rs.6,27,486/- in favour of the respondents/claimants No. 1 to 4.

2. The brief facts of the case are that late Shri Santosh Kumar was employed as a driver by Shri Vinod Kumar in his vehicle No. HP-02-0190. On 21.08.2004, the vehicle was hired by one Shri Dharam Paul and at that time deceased Santosh Kumar was driving the vehicle on the way to Narkanda from Kingal. But unfortunately both of them were murdered and their dead bodies were found lying in Thachru Nallah. FIR No. 76/2004 came to be registered and was stated to be pending investigation. Since, the murder took place during

the course of employment of Santosh Kumar, therefore, the claimants had filed the claim petition under Section 22 of the Act.

3. The owner contested the petition by filing reply wherein preliminary objections raised to the effect that the application was vague, incomplete, illegally framed, not according to the law and rules of Workmen's Compensation or the Motor Vehicles Act, therefore, the same deserved to be dismissed. On merits, it was admitted that the vehicle in question was being driven by Santosh Kumar who was murdered and perhaps the murder may have taken place due to some enmity.

4. The appellant-Insurance Company filed a separate reply wherein it raised preliminary objections to the effect that the application was not maintainable as the death of Santosh Kumar had not taken place due to any accident during the course of employment, rather he was murdered by someone due to some old enmity outside the vehicle. In addition thereto, objection regarding maintainability of the petition on account of there being no legal valid agreement of insurance between the owner and the Insurance Company. In addition thereto, various other preliminary objections regarding jurisdiction and authority of the Tribunal to decide the case were also raised.

5. However, learned Tribunal after framing issues and recording evidence, allowed the petition as aforesaid, constraining the Insurance Company to file the instant appeal.

6. On 16.11.2010, the appeal came to be admitted on the following substantial questions of law:-

> *1. Whether in spite of the clear case set up by the claimants that deceased Shri Santosh Kumar while employed as driver was murdered and since his death was not resultant to any accident arising out of or in the course of the employment, the claim was covered within the provisions of Section 3 of the Workmen's Compensation Act and the claimants were entitled to claim any compensation?*
>
> *2. Whether due to bouncing of the premium cheque, since premium amount was not credited in the account of insurer and the policy of insurance stood cancelled from the date of its inception, any liability for payment of compensation money, by indemnification of owner of vehicle could be foisted on the insurer?*

Question No. 1

7. Before proceeding to decide this question, it has to be borne in mind that the Workmen's Compensation Act now substituted with Employees' Compensation Act is a socially welfare legislation meant to benefit the workers and their dependents, in case of death of workmen due to accident caused during and in the course of employment.

8. Adverting to the facts, it is not in dispute that not only the driver Santosh Kumar but even the hirer of the vehicle i.e. Shri Dharam Paul had both been murdered. The legal representatives of Dharam Paul had filed petition under Section 163 of the Motor Vehicles Act and was awarded compensation. The award passed by the learned MACT was assailed by the Insurance Company i.e. appellant herein by way of FAO No. 537 of 2008 on the same and similar ground as taken in the instant appeal, however, the appeal was dismissed vide a detailed judgment dated 18.12.2015, titled as ***United India Insurance Company Ltd. Vs. Sh. Talaru Ram & Ors., reported in 2017 ACJ 425***. The insurance Company assailed this Judgment before the Hon'ble Supreme Court, however, the same also came to be dismissed.

9. Therefore, I see no reason as to why the LRs of Santosh Kumar, who are similar situate as to the LRs of Dharam Paul, should be denied compensation or else it would be a case of invidious discrimination. After all, the objects of both the enactments i.e. Workmen's Compensation Act and Motor Vehicles Act are beneficial enactments operating in

the same field and, hence the judicially accepted interpretation of the word death in the Workmen's Compensation Act is fully applicable to the interpretation of the word death in the Motor Vehicles Act, as was held by the Hon'ble Supreme Court in ***Rita Devi (Smt.) and others versus New India Assurance Col. Ltd. and another, (2000) 5 SCC 113***, as would be evident from para 15, which reads as under:-

> *"15.Learned Counsel for the respondents contended before us that since the Motor Vehicles Act has not defined the word death and the legal interpretations relied upon by us are with reference to the definition of the word death in the Workmens Compensation Act the same will not be applicable while interpreting the word death in the Motor Vehicles Act, because according to her, the objects of the two Acts are entirely different. She also contends that on the facts of this case no proximity could be presumed between the murder of the driver and the stealing of the auto-rickshaw. We are unable to accept this contention advanced on behalf of the respondents. We do not see how the object of the two Acts, namely, the Motor Vehicles Act and the Workmen's Compensation Act are in any way different. In our opinion, the relevant object of both the Acts is to provide compensation to the victims of accidents. The only difference between the two enactments is that so far as the Workmen's Compensation Act is concerned, it is confined to workmen as defined under that Act while the relief provided under Chapter X to XII of the Motor Vehicles Act is available to all the victims of accidents involving a motor vehicle. In this conclusion of ours, we are supported by Sec. 167 of the Motor Vehicles Act as per which provision, it is open to the claimants either to proceed to claim compensation under the Workmen's Compensation Act or under the Motor Vehicles Act. A perusal of the objects of the two enactments clearly establishes that both the enactments are beneficial enactments operating in the same field, hence the judicially accepted interpretation of the word death in the Workmen's Compensation Act is, in our opinion, applicable to the interpretation of the word death in the Motor Vehicles Act also."*

10. That apart, whether the murder of the deceased was an accident arising out of and during the course of his employment is no longer *res integra* in view of the judgment of the Hon'ble Supreme Court in ***Rita Devi's*** *case (supra).* The Hon'ble Supreme Court therein drew distinction between a "*murder*", which is not an accident and "*murder*", which is an accident. The Hon'ble Supreme Court laid down that if the dominant intention of the felonious act as to kill any person, then such killing is not accidental murder but a murder simpliciter. However, if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act, then such murder is an accidental murder. Para-10 of the Judgment is relevant and is reproduced here under:-

> *"10. The question, therefore is, can a murder be an accident in any given case? There is no doubt that murder, as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a murder which is not an accident and a murder which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the act of felony is to kill any particular person, then such killing is not an accidental murder, but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act, then such murder is an accidental murder."*

11. The facts in ***Rita Devi's*** *case (supra)* were that the deceased was employed as a driver in autorickshaw for ferrying passengers on hire. On the fateful day, autorickshaw

was parked in the rickshaw stand at Dimapur where some unknown persons hired the rickshaw for journey. As to what happened on that day is not known. It is only on the next day that the police was able to recover the body of the deceased but the autorickshaw was never traced out. The owner of the autorickshaw claimed compensation from the Insurance Company for the loss of autorickshaw. The heirs of the deceased claimed compensation for the death of the driver on the ground that the death occurred on account of accident arising out of the use of motor vehicle. The Hon'ble Supreme Court held the murder to be accidental murder as is evident from para – 14 of the judgment, which reads as under:-

> *"14. Applying the principles Laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the auto-rickshaw, was duty bound to have accepted the demand of fare-paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the auto-rickshaw and in the course of achieving the said object of stealing the auto-rickshaw, they had to eliminate the driver of the auto-rickshaw then it cannot but be said that the death so caused to the driver of the auto-rickshaw was an accidental murder. The stealing of the auto-rickshaw was the object of the felony and the murder that was caused in the said process of stealing the auto-rickshaw is only incidental to the act of stealing of the auto-rickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing theft of the auto-rickshaw."*

12. However, learned Senior Counsel for the appellant would still argue that it was on account of enmity that the driver Santosh Kumar was murdered and Dharam Paul only paid the price on account of he being an hirer of the taxi, therefore, the case of the claimants is not covered by the judgment in ***Rita Devi's*** *case (supra).*

13. I find no merit in this contention as a purposive interpretation has to be given to the provisions of the Workmen's Compensation Act.

14. The workmen in this case was present at the spot and his death occurred only because of his employment. It is only in the course of his employment that he alongwith Dharam Paul had been travelling to Narkanda from Kingal and was murdered at Narkanda. Therefore, his presence at the spot is arising out of and in the course of employment only. Since, he died at the spot, this Court is of the opinion that in this case, the manner of his death whether it is by a murder or an accident is really immaterial.

15. In addition thereto, neither the owner nor the Insurance Company have led any evidence regarding the murder of Santosh Kumar on account of enmity.

16. Lastly and more importantly, it would be noticed that in the instant case, not only Santosh Kumar and Dharam Pal were murdered, but even the vehicle was stolen, which in itself is a clear indicator that perhaps both these persons had been murdered in order to steal the vehicle. Once that be so, then the question raised in this petition is squarely covered by the judgment of the Hon'ble Supreme Court in ***Rita Devi's*** *case (supra)* because the cause of murder originally was not intended and appears to have been caused in furtherance of the felonious act of stealing the vehicle, and, thus is an accidental murder.

The substantial question No. 1 is accordingly answered against the appellant.

Question No. 2

17. It is vehemently contended by Shri Ashwani K. Sharma, learned Senior Advocate that Insurance Company could not be fasten with the liability as the cheque issued by the owner was dishonoured and, therefore, no valid contract of insurance came into existence. However, I find no merit in this contention. Record reveals that the Insurance Policy Cover Note No. 191116 was issued by the Insurance Company and vehicle No. HP-02-

0190 was insured by them. However, such insurance was cancelled on 23.09.2004 but as the accident already took place on 21.08.2004. Therefore, since the Insurance Policy was valid on the date of accident, therefore, the appellant-Insurance Company cannot avoid its liability only on the ground that the policy so issued had been subsequently cancelled on account of dishonour of cheque.

18. In taking this view, I am fortified by the judgment of the Hon'ble Supreme Court in ***New India Assurance Company Ltd. vs. Rula and others, AIR 2000 SC 1082***, wherein it was held that the insurer has to intimate the owner by way of notice about the cancellation of Insurance Policy and if the accident occurred between the period till the cancellation is conveyed it is the insurer, who is liable.

19. It shall be apposite to reproduce para-11 of the judgment, which reads as under:-

> *"11. This decision, which is 3-judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."*

20. The issue again came up for consideration before the Hon'ble Supreme Court in ***Deddapa and others vs. The Branch Manager, National Insurance Co. Ltd. 2007 AIR SCW 7948***, wherein the same principles as the above were laid down, as would be evident from paras 26 to 28, which read as under:-

> *"26. We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.*
>
> *27. A beneficial legislation as is well known should not be construed in such a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries [AIR 1985 SC 278], this Court held :*
>
> > *"We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial .legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."*
>
> *We, therefore, agree with the opinion of the High Court.*
>
> *28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extra-ordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No.1 to pay the amount of claim to the appellants herein and recover the same from* the owner of the vehicle viz., Respondent No.2,

particularly in view of the fact that no appeal was preferred by him. We direct accordingly."

21. Similar reiteration of law can be found in a subsequent judgment of the Hon'ble Supreme Court in case title ***United Indian Insurance Co. Ltd. vs. Laxmamma and others, 2012 AIR SCW 2657***, wherein the Hon'ble Supreme Court after discussing the law in issue in detail held that if cancellation order is not made or if the accident occurred till the cancellation order is made and conveyed, the insurer would be liable.

22. It shall be apposite to reproduce para – 19 of the Judgment, which reads as under:-

"19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."

23. The aforesaid judgments, in turn, have been followed by this Court in ***National Insurance Co. Ltd. vs. Rukshana and others, 2015 (2) SLC 753.***

This substantial question of law is accordingly decided against the appellant.

24. In view of the aforesaid discussion, there is no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs.

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

Gian Chand .....Petitioner

Versus

Parshotam Lal & others ....Respondents.

CMPMO No. 471 of 2019

Decided on : 19.9.2019

Code of Civil Procedure, 1908 – Order XVII Rule 1 - Adjournment – Closure of evidence – Justification – Held, examination of Local Commissioner qua objections raised to his report by the defendant, was necessary – Closure of evidence of defendant for not taking steps on very first hearing is not justified – Petition allowed – Order set aside (Paras 1 to 3).

For the petitioner: Mr. Dheeraj K. Vashishat, Advocate.

For the respondents: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The learned trial Judge, made, an order on 11.6.2019, wherethrough, after his making an objective assessment, vis-a-vis, the necessity of the Local Commissioner concerned, being called, in person, for, hence enabling the defendant, to, on 5.8.2019, mete,

suggestions to him, during, the course of his cross-examination, hence bearing concurrence, to, the objections, raised by the defendant, to his report, (i) he also, at the end of the order, and, for the afore purpose, ordered the taking, of, requisite steps, by, the defendant. However, on 5.8.2019, the learned trial Judge, summarily, made an order, (a) qua for want, of, steps being taken by the counsel for the defendant, even though, the, afore steps were omitted to be taken, only, at, the, apposite incipient/initial opportunity, (b) rather, proceeded, to, for want of any plausible reasons, being meted, hence order for closure evidence, of, the defendants' evidence. However, the afore reason is deprecated, as, upon the learned trial Judge concerned, coming to a conclusion, qua the necessity of the defendants' hence cross-examining, the Local Commissioner, (c) and, when hence, the, afore cross-examination, would facilitate, the, learned trial Judge concerned, to, after application, of, judicial mind, vis-a-vis, the report of the Local Commissioner, and, vis-a-vis, his cross-examination, qua, hence it being tenable or not, (d) and, also when thereafter, he would be facilitated, to, defermine, vis-a-vis, any encroachment, if any, being, made or not being made, upon, the suit khasra numbers, (e) thereupon in his making, the, impugned order he has, rather, visibly abandoned, and, has also foregone, the, afore apt necessity.

2. Consequently, the impugned order is quashed, and, set aside, and, the learned trial Judge concerned, is, directed, to, be cautious, in, future, in making summary orders, of, closure, of, the litigants' evidence, conspicuously, when only an apposite incipient/initial opportunity, is, granted, and, is unavailed, and, is also, directed to hereafter ensure, that, he shall bear in mind, the, entire conspectus of the lis, and, the necessity, of, adduction, of, the relevant evidence, and, its facilitations, to, him, for, his resting the entire gamut, of, the lis. He is further directed to ensure, that, all the orders are neatly typed or are in legible writing, and, they are not illegibly scribed, by, the ministerial staff, of, his Court.

3. In view of the above observations, the petition, is, disposed of. All pending applications, if any, also stand disposed of. The parties are directed to appear before the learned trial Court concerned, on, **25.9.2019**.

4. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case, and, the learned trial judge concerned, shall decide, the matter uninfluenced, by any observation made hereinabove.

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

Dr. Sidharth Sood .....Petitioner.

Versus

State of H.P. and others .....Respondents.

CWP No. 1773 of 2019.
Reserved on: 09.09.2019
Date of decision: 17.09.2019

Constitution of India, 1950 – Articles 14 & 16 – Government notification dated 22.6.2019 – Clause 7.2.4 - Selection of Senior Resident – Selection criteria – Challenge thereto – Notification dated 22.06.2019 providing selection of Senior Resident on basis of marks obtained in MBBS and PG course together with marks for publication – Petitioner contending criteria as being arbitrary and unreasonable on ground that selection should be made on basis of Rules as prevalent on date of advertisement dated 27.2.2019 – Held, there is no vested right of promotion but only a right to be considered for promotion in accordance with Rules which prevail on the date on which consideration for promotion takes place – There is no rule of universal application that vacancies must be filled on basis of law which existed on date when they arose – Petitioner has no right to claim that selection should be made on basis of old criteria of 2012 since it was applicable on date of advertisement dated 27.02.2019– Petition dismissed (Paras 18 & 19)

Cases referred:

Dr. K. Ramulu and another vs. Dr. S. Suryaprakash Rao and others (1997) 3 SCC 59
Deepak Agarwal and another vs. State of Uttar Pradesh and others (2011) 6 SCC 725
State of M.P. and others vs. Raghuveer Singh Yadav and others, (1994) 6 SCC 151
Union of India and others vs. K.V. Vijeesh (1996) 3 SCC 139
Rajasthan Public Service Commission vs. Chanan Ram and another, (1998) 4 SCC 202
State of Tripura and others vs. Nikhil Ranjan Chakraborty and others (2017) 3 SCC 646
Union of India and others vs. Krishna Kumar and others (2019) 4 SCC 319
State of Orissa and another vs. Dhirendra Sundar Das and others (2019) 6 SCC 270

For the Petitioner : Mr. B. Nandan Vasishta and Mr. S.S. Sood, Advocates.
For the Respondents : Mr. Ajay Vaidya, Senior Additional Advocate General, with Mr. Vinod Thakur, Addl. Advocate General, Mr. Bhupinder Thakur, Deputy Advocate General and Mr. Ram Lal Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Aggrieved by the action of the respondents whereby it has decided to conduct the selection of Senior Resident on the basis of the notification dated 22.6.2019 (Annexure P-8) instead of notification dated 25.9.2012 as was initially advertised, the petitioner has filed the instant petition for the grant of following substantive reliefs:

> *"I. To quash notification dated 22.6.2019 (Annexure P-8) qua the clause 7.2.4 being arbitrary, discriminatory, irrational and unjustified as it provides for selection to the post of Senior Resident solely on the basis of marks obtained in the MBBS and PG Course together with marks of publication whereas the selection criteria in all other reputed institutions like AIIMS, PGIMER and Safdarjung Hospital is by way of fresh written test and interview in order to ensure impartiality and transparency with further prayer to issue directions to the respondents to fill up the posts of Senior Resident by conducting written test as was prevailing before notification dated 25.9.2012.*
>
> *II. In the alternative, quash advertisement (Annexure P-9) issued by respondent No.3 seeking fresh applications for the post of Senior Resident under the changed criteria by putting on hold the previous selection process initiated through previous advertisement dated 27.2.2019 (Annexure P-3) with further prayer to issue directions to respondents No.1 and 4 to complete the said previous selection process (put on hold by Annexure P - and P-) as per the prevailing selection criteria vide notification dated 25.9.2012 out of the number of applications received on the cut off date of earlier advertisement (Annexure P-3)."*

2. The petitioner is a Post Graduate in Orthopaedics and is thus eligible for the post of Senior Resident. On 27.2.2019, the respondents published advertisement regarding walk-in-interview of Senior Residents in various departments of Indira Gandhi Medical College (for short 'IGMC'), Shimla to be held on 22.3.2019, the petitioner being eligible accordingly applied for the same. However, the said interview was postponed and thereafter fixed for 19.6.2019. Even on that date, the interviews were not held and were ordered to be postponed till further orders due to administrative reasons/decision. A notice to this effect was issued on 7.6.2019 wherein it was mentioned that the next date, if any, as well as changes in the aforesaid advertisement/vacancies of Senior Residents will be intimated/communicated through website of the Institute.

3. On 22.6.2019, the respondents issued a notification (Annexure P-8) which was in supersession of all the previous notifications whereby it notified 'Resident Doctor Policy' for regulating the appointments of Senior/ Junior Residents in the Department of Medical Education. Thereafter, the respondents issued advertisement (Annexure P-9) whereby it notified that the applications from eligible candidates for the posts of Senior Residents and this time not only the posts available at IGMC, Shimla were sought to be filled up, but the posts lying in other hospitals like Dr. R.P. Govt. Medical College, Kangra at Tanda etc. were also sought to be filled up.

4. It is urged by the petitioner that once the selection process had been commenced vide advertisement dated 27.2.2019 (Annexure P-3) for filling up of the posts of Senior Residents through walk-in-interview notified in terms of the notification dated 25.9.2012, the respondents could not have changed the Rules of the game by amending the selection criteria and thereafter issue a fresh notification (Annexure P-9) for filling up of the posts in question.

5. On the other hand, Mr. Ajay Vaidya, learned Senior Additional Advocate General, would argue that since the process of selection as commenced vide advertisement dated 27.2.2019 (Annexure P-3) for filling up of the posts of Senior Residents had not even commenced, therefore, the State was well within its right to amend the criteria of selection and thereafter fill the posts in accordance with the amended criteria.

6. Therefore, in the given facts and circumstances of the case, the only moot question is whether the rules of the game/criteria for selection i.e. mode of selection has been changed midway as claimed by the petitioner.

7. The learned counsel for the petitioner would argue that the issue in question is no longer *res integra* as it is squarely covered by the judgment rendered by this Court in ***CWP No. 1436 of 2014, titled Jai Singh vs. State of H.P. and others***, decided on 16.6.2014 and another judgment of a Co-ordinate Bench of this Court (Justice Rajiv Sharma, J.) in CWP No. 4039 of 2011. Whereas, on the other hand, learned Senior Additional Advocate General would argue that the issue in question is squarely covered by the judgment of a Co-ordinate Bench of this Court (Justice Rajiv Sharma, J.) in ***CWP No.5266 of 2012, titled Jitender Singh vs. State of H.P. and others***.

8. Adverting to the judgment rendered by this Court in ***Jai Singh's*** case (supra), it would be noticed that the petitioners therein had sought their appointment to the post of TGT on the basis of old rules, but the State had amended these Rules wherein the condition of promotion of JBT teachers as TGT was extended from two years to five years and thereafter further a condition of minimum 50% marks in graduation was inserted. Yet again, on 31.5.2012, the rules were amended, wherein the condition of Teacher Eligibility Test (TET) was also made compulsory for promotion as TGT (Medical).

9. It was not in dispute that there was a backlog of 359 posts of teachers lying vacant with the respondent- department and, therefore, the only question was whether the criteria for filling up the vacant posts which had accrued after the last D.P.C. and before the amendment in the rules could be filled up on the basis of the amended rules and it was in this background that action of the State in filling up the posts on the basis of the amended rules was quashed.

10. When the matter came up before this Court in ***Jai Singh's*** case (supra), learned counsel for the respondents therein relied upon the judgment in ***Dr. K. Ramulu and another*** vs. ***Dr. S. Suryaprakash Rao and others (1997) 3 SCC 59*** and another judgment of the Hon'ble Supreme Court in ***Deepak Agarwal and another*** vs. ***State of Uttar Pradesh and others (2011) 6 SCC 725***, to contend that the State was well within its right to fill up the posts on the basis of the amended rules. Both the judgments were held to be not applicable to the facts of the case and it was observed as under:

*"12. In **Dr. K. Ramulu's** case (supra), the specific stand of the State Government was that it did not intend to fill up the posts as per the existing rules and contemplated to fill up all the posts in terms of its revised policy of appointment. However, the Tribunal still gave directions contrary to the policy decision taken by the government necessitating the exposition of law by the Hon'ble Supreme Court in this factual backdrop of the case. This is not the fact situation obtaining in the present case, as it is nowhere the case of the State-respondent that it proposes to fill up the posts between July 2009 to 22.10.2009 on the basis of the amended rules or does not propose to fill up the same at all. Moreover, as would be clear from a bare reading of paragraph-12 of the judgment in **Dr. K. Ramulu's** case (supra), the legal position laid down in **Y.V. Rangaiah's** case has not been doubted and the only reason for its non-applicability has been given in later part of paragraph-12 in the following terms:-*

> *"..... In none of these decisions, a situation which has arisen in the present case had come up for consideration. Even Rule 3 of the General Rules is not of any help to the respondent for the reason that Rule 3 contemplates making of an appointment in accordance with the existing Rules."*

*It is also clear from paragraph- 13 of the judgement in **Dr.K. Ramulu's** case that government therein had taken a conscious decision not to make any appointment till the amendment of the Rules.*

*13. Now, in so far as the judgment in **Deepak Agarwal's** case (supra), is concerned the ratio laid down in **Y.V. Rangaiah's** case was distinguished only on the ground that there was no statutory duty cast upon the respondent therein to prepare year-wise panel of the eligible candidates or of the selected candidates for promotion and therefore, it was concluded that in no event had, any accrued or vested right of the appellants therein, been taken away by the amendment.*

*14. In none of the judgments relied upon by Sh. Dilip Sharma, learned Senior Counsel, was ever the ratio of **Y.V. Rangaiah's** judgment doubted and the judgments have been rendered in the peculiar facts of those cases. While, in the present case the respondent- State has not taken any decision either not to fill up the posts in accordance with the old rules or taken a positive decision to fill up the posts on the basis of the amended rules. Rather tone and tenor of reply suggests that the State has chosen to abide by the directions passed in CWP No.4039 of 2011 (supra). Therefore, present cases are fully covered by the ratio of **Y.V. Rangaiah's** case (supra) and the decisions relied upon by Sh. Dilip Sharma, learned Senior Counsel have no application to the fact situation obtaining in the present case."*

11. It would be noticed that this Court while distinguishing the judgment in **Dr. K. Ramulu's** case (supra) and **Deepak Agarwal's** case (supra), had categorically held that it was nowhere the case of the State-respondent that it proposes to fill up the posts on the basis of the amended rules or does not proposes to fill up the same at all. In fact, in **Dr. K. Ramulu's** case, the Government therein had taken a conscious decision not to make any appointment till the amendment of the Rules.

12. Similar issue had been raised by the aggrieved party in CWP No. 4039 of 2011 and the Court after applying the "old vacancy – old rules" upheld the contentions of the petitioners.

13. Adverting to the facts of the present case, the State has taken a conscious decision though belatedly on 5.9.2019 to fill up the posts on the basis of the new policy and

the reasons for the same communicated to the learned Senior Additional Advocate General vide communication dated 5.9.2019 are as under:

> *"1. The State Government had notified Resident Doctor Policy dated 22.06.2019 for regulating the appointments of Senior/Junior Residents in the Department of Medical Education in the State, wherein the condition of mandatory one year field posting is required to all the candidates to become eligible for Senior Residency as per clause 7.3.5 and 7.3.6 of the present policy. As per old Senior Resident Policy, the mandatory field posting of 2 years has now been relaxed to 1 year in tune with the PG/Super-specialty policy notified vide notification No. HFW-B(F)4-9/2017-II dated 27.02.2019.*
>
> *2. The marks allotted for the assessment of candidates were rationalized and fixed keeping in view various court orders, giving higher score for the candidates having done more research work and also higher weightage for the candidates having served the State for longer periods.*
>
> *3. There were certain operating gaps in the pre-existing policy such as issue pertaining to NOC and difficulty in differentiations of GDOs versus Direct Candidates for which clear stipulations have been made in the new policy.*
>
> *4. Large numbers of amendments were carried out in the old Senior Resident policy of the State from time to time resulting in confusion which necessitated the need for frame the new Resident Doctor Policy.*
>
> *5. Under the old Senior Resident policy, each Government Medical College of the State used to invite the applications/conduct the interview at their own level for Senior Resident, now the Doctor, Medical Education & Research, Himachal Pradesh has been authorised to invite the applications for all the Government Medical College of the State which will ensure availability of Senior Residents/ Junior Residents in all the Government Medical Colleges eliminating unnecessary effort at college level.*
>
> *6. In addition to above, in the old SR policy, there were two court cases (O.A.No. 90/2019 & 92/2019) regarding Maternity leave, so in order to remove this discrepancy clause 7.5.3 was introduced in the new Resident Doctor Policy dated 22.06.2019."*

14. Once a conscious decision has been taken by the respondents not to fill up the posts on the basis of old Rules, then the issue in question is squarely covered by the judgment rendered by a co-ordinate Bench of this Court in ***Jitender Singh's*** case (supra) wherein the Court after placing reliance upon the judgment of the Hon'ble Supreme Court in ***State of M.P. and others*** vs**.** ***Raghuveer Singh Yadav and others***, (1994) 6 SCC 151, ***Dr. K. Ramulu's*** case (supra), ***Union of India and others*** vs**.** ***K.V. Vijeesh*** (1996) 3 SCC 139, ***Rajasthan Public Service Commission*** vs. ***Chanan Ram and another,*** (1998) 4 SCC 202 and ***Deepak Agarwal's*** case (supra), held that the principle of old rules for old vacancies would not be applicable when the posts are to be filled up by way of promotion and not by way of direct recruitment.

15. Noticeably, all the judgments of this Court as relied upon by the respective parties were rendered much prior to the judgment of the Hon'ble Supreme Court in ***State of Tripura and others*** vs. ***Nikhil Ranjan Chakraborty and others (2017) 3 SCC 646***, wherein the Hon'ble Supreme Court categorically held that the law is clear that a candidate only has right to be considered in light of the existing rules, namely "rules in force on the date" the consideration takes place and that there is no rule of absolute application that vacancies must invariably be filled by law existing on date when they arose.

16. Similar issue came up for consideration before the Hon'ble Supreme Court in ***Union of India and others*** vs. ***Krishna Kumar and others*** (2019) 4 SCC 319 wherein

reiterating the ratio as laid down in ***Nikhil Ranjan Chakraborty's*** case (supra), it was observed as under:

> *" 10. In considering the rival submissions, it must, at the outset, be noted that it is well-settled that there is no vested right to promotion, but a right be considered for promotion in accordance with the Rules which prevail on the date on which consideration for promotion takes place. This Court has held that there is no rule of universal application to the effect that vacancies must necessarily be filled in on the basis of the law which existed on the date when they arose. The decision of this Court in Y.V. Rangaiah Vs. Sreenivasa Rao (1983) 3 SCC 284 has been construed in subsequent decisions as a case where the applicable Rules required the process of promotion or selection to be completed within a stipulated time frame. Hence, it has been held in H.S. Grewal Vs. Union of India (1997) 11 SCC 758 that the creation of an intermediate post would not amount to an interference with the vested right to promotion. A two-Judge Bench of this Court held thus: (SCC p. 769, para 13.)*
>
> > *"13.....Such an introduction of an intermediate post does not, in our opinion, amount to interfering with any vested rights cannot be interfered with, is to be accepted as correct. What all has happened here is that an intermediate post has been created prospectively for future promotions from Group- B Class-II to Group-A Class-I. If, before these Rules of 1981 came into force, these officers were eligible to be directly promoted as Commandant under the 1974 Rules but before they got any such promotions, the 1981 Rules came in obliging them to go through an intermediate post, this does not amount to interfering with any vested rights."*
>
> *11. In Deepak Agarwal Vs. State of Uttar Pradesh (2011) 6 SCC 725, this Court observed thus: (SCC p.735, para 26-27)*
>
> > *"26. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the `Rules in force' on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in Y.V. Rangaiah's case (supra) lays down any particular time frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any accrued or vested right of the appellants have been taken away by the amendment.*
> >
> > *27. The judgments cited by learned counsel for the appellants namely B.L. Gupta Vs. MCD (1998) 9 SCC 223, P. Ganeshwar Rao Vs. State of Andhra Pradesh 1988 Supp.SCC 740, and N.T. Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors (1990) 3 SCC 157 are reiterations of a principle laid down in Y.V. Rangaiah's case (supra)."*
>
> *12. Recently, in State of Tripura Vs. Nikhil Ranjan Chakraborty (2017) 3 SCC 646 another two-Judge Bench of this Court held thus: (SCC pp. 650-51, para 9)*
>
> > *"9. The law is thus clear that a candidate has the right to be considered in the light of the existing rules, namely, "rules in force on the date" the consideration takes place and that there is no rule of absolute application that vacancies must invariably be filled by the law existing on the date when they arose. As against the case of total exclusion and absolute deprivation of a chance to be considered as in the case of*

Deepak Agarwal (supra), in the instant case certain additional posts have been included in the feeder cadre, thereby expanding the zone of consideration. It is not as if the writ petitioners or similarly situated candidates were totally excluded. At best, they now had to compete with some more candidates. In any case, since there was no accrued right nor was there any mandate that vacancies must be filled invariably by the law existing on the date when the vacancy arose, the State was well within its rights to stipulate that the vacancies be filled in accordance with the Rules as amended. Secondly, the process to amend the Rules had also begun well before the Notification dated 24.11.2011."

13. In view of this statement of the law, it is evident that once the structure of Assam Rifles underwent a change following the creation of the intermediate post of Warrant Officer, persons holding the post of Havildar would be considered for promotion to the post of Warrant Officer. The intermediate post of Warrant Officer was created as a result of the restructuring exercise. The High Court was, in our view, in error in postulating that vacancies which arose prior to the amendment of the Recruitment Rules would necessarily be governed by the Rules which existed at the time of the occurrence of the vacancies. As the decided cases noted earlier indicate, there is no such rule of absolute or universal application. The entire basis of the decision of the High Court was that those who were recruited prior to the restructuring exercise and were holding the post of Havildars had acquired a vested right of promotion to the post of Naib Subedar. This does not reflect the correct position in law. The right is to be considered for promotion in accordance with the Rules as they exist when the exercise is carried out for promotion."

17. Similar issue came up recently before the Hon'ble Supreme Court in ***State of Orissa and another*** vs. ***Dhirendra Sundar Das and others*** (2019) 6 SCC 270, wherein again the ratio laid down in ***Nikhil Ranjan Chakraborty's*** case (supra) was reiterated.

18. In view of the law expounded by the Hon'ble Supreme Court in the judgments, referred to above, it can now be taken to be well settled that there is no vested right of promotion, but only a right to be considered for promotion in accordance with the Rules which prevail on the date on which the consideration for promotion takes place. There is no rule of universal application to the effect that vacancies must necessarily be filled in on the basis of the law which existed on the date when they arose. (Referred to ***Krishna Kumar's*** judgment, para 10).

19. In the instant case, the game i.e. the selection is yet to commence and the mere fact that the petitioner has applied pursuant to the advertisement cannot by itself confer any right upon the petitioner to claim that the selection should be conducted only on the basis of old notification of 2012 and not as per the policy decision taken vide Annexure P-8.

20. In view of the law expounded by the Hon'ble Supreme Court, the petitioner has no vested right of being selected as a Senior Resident, but only a right to be considered in accordance with the Rules which prevail on the date on which consideration takes place.

21. As observed, the consideration in this case is yet to take place and obviously that will have to take place in accordance with the amended policy.

22. In view of the aforesaid discussion, there is no merit in the instant petition and consequently, the same is dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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

Vikram Singh ...Petitioner.

Versus

The Managing Director, H.P. Tourism Development Corporation and another.

...Respondents.

CWP No. 1364 of 2017
Reserved on: 18.09.2019
Date of decision: 24.09.2019

Industrial Disputes Act, 1947 - Section 25-F - Termination of service – Reinstatement – Held, appointment limited by time does not confer any right to the post – On expiry of time limit, appointment ceases automatically – Person holding such post can not have a right to continue on such post – Petitioner was appointed purely on contract basis – After expiry of contractual period, he has no right in such post – Petition dismissed. (Paras 2, 4 & 8)

Cases referred:

State of U.P. and another vs. Kaushal Kishore Shukla, 1991 (1) SCC 691

Director, Institute of Management Development, U.P. vs. Smt. Pushpa Srivastava, AIR 1992 SC 2070

State of Haryana vs. Surinder Kumar and others (1997) 3 SCC 633

State of Haryana vs. Charanjit Singh (2006) 9 SCC 321

For the Petitioner : Mr. V. D. Khidtta, Advocate.

For the Respondents : Mr. Shivank Singh Panta, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Aggrieved by the dismissal of the Reference Petition by the learned Labour Court-cum-Industrial Tribunal, Shimla, the petitioner has filed the instant petition for the grant of following relief:

> *"(i)That writ in the nature of certiorari be issued and the impugned award dated 28.04.2017 (Annexure P-3) may kindly be quashed and set-aside. Further the claim filed by the petitioner may kindly be allowed termination of the petitioner may kindly held illegal and petitioner may kindly be ordered to be reinstated in service with all consequential benefits including back wages."*

2. It is not in dispute that the petitioner was purely appointed on contract basis by the respondents w.e.f. 4.5.2012 – 31.7.2012, thereafter on 10.9.2012 – 31.12.2012 and lastly w.e.f. 20.4.2013 to 15.7.2013.

3. Now, the moot question is whether the appointment limited by contract can confer any right to the post after the expiry of the time and limit of the contract.

4. The issue is no longer *res integra* in view of the judgment of the Hon'ble Supreme Court in ***State of U.P. and another*** vs**. *Kaushal Kishore Shukla, 1991 (1) SCC 691*** *and* ***Director, Institute of Management Development, U.P.*** vs. ***Smt. Pushpa Srivastava, AIR 1992 SC 2070***, wherein the Hon'ble Supreme Court held that appointment limited by time does not confer any right to the post and on expiry of time limit, the appointment ceased automatically and the person holding such post can have no right to continue in such post.

5. In ***State of Haryana vs. Surinder Kumar and others (1997) 3 SCC 633***, the respondents therein were appointed as Clerks on contract basis. They filed a writ petition in the High Court for their regularisation, which was allowed and direction was issued for payment of wages on the principle of 'equal pay for equal work' and also regularisation of their services. In appeal, the Hon'ble Supreme Court reversed the judgment of the High Court holding that as the respondents recruitment was not made in accordance with the Rules and they were appointed on contract basis on daily wages, they cannot have any right to a post as such until they are duly selected and appointed.

6. This decision in turn was followed by Hon'ble three Judges Bench of the Hon'ble Supreme Court in ***State of Haryana*** vs**. *Charanjit Singh (2006) 9 SCC 321*** and it was held that where a person is employed under a contract, it is the contract which will govern the terms and conditions of service and not the rules framed under Article 309 of the Constitution of India governing condition of service to the post on which he is employed. It is, therefore, clear that the petitioner did not have any right to continue after expiry of his term for which he had been appointed.

7. Similar issue has been considered in detail by me in a recent judgment bearing ***CWP No. 2680 of 2015, titled Kunal Brahma vs. The Board of Trustees of IRMT & others, decided on 09.07.2019***, the petitioner therein was appointed as Administrator with the respondents trust purely on contract basis and thereafter his services were ordered to be terminated. It was then the petitioner approached this Court complaining that the termination of his services was illegal, violative of the principles of the Constitution of India, more particularly, Articles 14, 16, 19 and 21. While rejecting the said contention, this Court observed as under:-

> ***7.*** *A careful reading of the letter of appointment leaves no manner of doubt that the appointment offered to the petitioner was a limited one. The respondents at the given time had never offered to the petitioner that he would continue in service or that his services would be regularized. It is not even the case of the petitioner that there was any uncertainty or ambiguity in the appointment made by the respondents as to the tenure on the post on which he had been appointed.*
>
> ***8.*** *There is a clear distinction between public employment governed by the statutory rules and private employment governed purely by contract. No doubt with the development of law, there has been a paradigm shift with regard to judicial review of administrative action whereby the writ court can examine the validity of termination order passed by the public authority and it is no longer open to the authority passing the order to argue that the action in the realm of contract is not open to judicial review. However, the scope of interference of judicial review is confined and limited in its scope. The writ court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract.*
>
> ***9.*** *However, judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the administrator to decide whether more reasonable decision or course of action could have been taken in the circumstances. (Refer Gridco Ltd. & Another vs. Sadananda Doloi & Ors, AIR 2012 SC 729).*
>
> ***10.*** *The petitioner has failed to place before this Court any material to show that the action of the respondents is either unreasonable or unfair or perverse or irrational. As observed earlier, the service conditions of the petitioner makes it abundantly clear that petitioner had been appointed on contractual basis, that too, on a non-statutory scheme.*
>
> ***11.*** *It may be noticed that the petitioner had voluntarily accepted the appointment granted to him subject to the conditions clearly stipulated in the scheme. The appointment subject to the conditions has been accepted with his eyes wide open, therefore, now the petitioner cannot turn around claiming higher rights ignoring the conditions subject to which the appointment had been accepted.*

8. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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

Ravinder Kaur ....Petitioner

Versus

State of Himachal Pradesh ....Respondent

Cr.MP(M) No. 1732 of 2019

Decided on: 25th September, 2019

Code of Criminal Procedure, 1973 – Section 439 – Regular Bail – Grant of – Held, petitioner is accused only of receiving property which was subject matter of dacoity etc. – Chargesheet stands filed in the court – Petitioner is a lady and she is in the jail for the last about one year – Her close relatives are already in jail – There is no chance of fleeing away of petitioner – Petition allowed and she is admitted on regular bail. (Para 7).

For the petitioner: Mr. O.C. Sharma, Advocate.

For the respondent/State: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. Raju Ram Rahi and Mr. Gaurav Sharma, Deputy Advocates General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 206 of2018, dated 13.08.2018, under Sections 452, 396, 307, 323, 324, 326, 212, 412, 201 and 120B IPC, registered in Police Station Nalagarh, District Solan, H.P.

2. As per the averments made in the petition, the petitioner is innocent and has been falsely implicated in the present case. Allegations against the petitioner are only under Sections 412 and 201 IPC, viz., dishonestly receiving property stolen in the commission of a dacoity and causing disappearance of evidence of offence or giving false information to screen the offender. It is further alleged in the petition that the petitioner is poor lady and nothing stood recovered from her. She is behind the bars for the last more than one year and no fruitful purpose will be served by keeping her behind the bars for an unlimited period, so she be released on bail.

3. Police report stands filed. As per the prosecution story, on 13.08.2018 police received telephonic information from CHC, Nalagarh, that some persons have been brought there for treatment, as they received injuries in a quarrel. So, a police team rushed to CHC, Nalagarh, and found injured Shri. Bhagat Ram Saini, Smt. Navjot Saini and Shri Gaurav Saini admitted there. Injured Shri Gaurav Saini got his statement recorded under Section 154 Cr.P.C. wherein he stated that his younger sister studies in NIT, Hamirpur, and he used to live with his parents at home. His father used to run Shivalik Senior Secondary Public School, in their own residence. On 12.08.2018 when they were sleeping, at about 3/3:30 a.m., he heard the screams of his parents, so he woke up and saw 4-5 persons, who have draped their faces with clothes, and they caught hold of him and pointed pistol at him. These persons tied him and muffled his face with a piece of cloth. A person, who pointed pistol on him, kept on guarding him and rest of the persons started searching the room. They took his silver bracelet, gold chain and mobile phone. The complainant has further stated that these persons went to the room of his father and asked for money and when his parents asked as to why they are doing so, they injured them with sharp edged weapons and shouted *'tum media mein hamarey khilaaf jayada boltey ho'* (you speak much against us in media) and ultimately managed to take his mobile phone, bracelet, gold chain and coins and other valuable articles. Thereafter, the complainant while sitting dragged himself and reached the upper floor and managed to wake up Shri Kapil Thakur and Shri Tarsem, who work in their staff. Shri Kapil

Thakur and Shri Tarsem untied him and then he divulged the occurrence to them. Thereafter, they went inside the rooms of his parents and saw his injured parents lying in pool of blood. The parents of the complainant were rushed to CHC, Nalagarh, and police were informed. As per the complainant, his mother was referred to PGI, Chandigarh, and his father was declared dead. Upon the statement of the complainant, police registered a case and the investigation ensued. Police visited the spot, prepared the spot map and clicked photographs. Postmortem was conducted on the dead body of the deceased and the dead body was sent to IGMC, Shimla, for expert forensic opinion and it was opined that the deceased died as a result of gross hemorrhagic shock as a result of multiple gross injuries to head. A forensic team visited the spot to collect scientific samples. Forensic team collected numerous scientific evidence. Police recorded the statements of the witnesses and recovered some valuable articles, including cash from the room of the deceased. During the course of investigation, the CCTV footage of the CCTV camera installed on the first floor of school building revealed that on 13.08.2018, at about 01:40 a.m., the accused persons reached there, through scooty, and at about 02:15 a.m. they cut open the lock of the gate. At about 05:02 a.m. three accused persons were spotted going out with the goods and at about 05:15 a.m. rest of the two accused persons were seen going out. Police also analyzed the dump data of Airtel company and found that both the teams of the accused persons were in contact with each other. Police managed to zero down the mobile numbers which were active at the relevant time there and through them calls were made or received. Ultimately, mobile No. 84273-47078, which was in operation at the time of the occurrence was last found active on 12.08.2018 and its location was found at Khera, which was within the area of Kharuni (the place of occurrence). On the basis of analysis of mobile dump data, and police records one Gurdev Singh was called by the police for interrogation. During interrogation, he divulged that accused Gurminder Singh, Harpreet @ Happy alongwith his friends, prior to occurrence, were made to stay in a gym by him and thereafter he, in his own vehicle, took them out of Nalagarh after the occurrence. On 18.08.2018 accused Jaswinder singh @ Goldy was arrested and divulged that he accompanied accused Harpreet Singh, Gurminder Singh and Gurdev Singh in a car and they purchased a gas cylinder and a gas cutter. Thereafter, they came to Baddi, Nalagarh and *en route* they met a *sardar,* who also accompanied them. When they reached near the resident of the complainant, Narender Singh pointed out to Gurminder Singh the residence of the Principal and then they were taken behind the school and and exist was shown to them. Narender told to abort the plan as they were less in number, so he went to his home. Thereafter, accused Gurdev took them to a gym where accused Harpreet Singh @ Happy and Gurminder Singh stayed and accused Gurdev left to his home. On the subsequent day, accused Hapreet called one Raju and asked for more men and at about 5/5:30 p.m. three more persons came and one of them was being called as Raju by accused Harpeet. They had their dinner and at about 11/11:30 p.m. went towards Baddi in Indica car, scooty and motor cycles. *En route* accused Gurminder parked the car and after taking out items from it, he sat on the motor cycle. Thereafter, they reached Kharuni Shivalik Science School. Accused Jaswinder Singh further disclosed that when he asked accused Harpeet, he told that they will commit theft in Shivalik School and when he refrained, he was threatened and asked to keep a vigil on the road. As per accused Jaswinder, thereafter, accused Harpreet, Gurminder Singh, Raju, Chinda and Gurdass stealthily went inside the premises and after some time accused Gurdev, who was standing on the road, fled away. He remained in a rain-shelter, as it was raining and afterwards came, on foot, to a junction from where road diverts to Chandigarh. He telephoned Mandeep and asked to come and take him on motorcycle, but he refused. Police arrested accused Raju Singh on 19.08.2018 and accused Gurdaas Singh @ Pappu on 20.08.2018. On 22.08.2018, accused Amandeep singh @ Chinda made a disclosure statement to the police and got identified the jungle/bushes and a stone, under which, in a handkerchief, something was kept. On checking, the handkerchief Rs. 1,50,000/- was recovered. On 22.08.2018 accused Raju singh and made disclosure statement and got recovered Rs. 1,72,740/- from his accommodation. Likewise, accused

Gurdaas Singh got recovered Rs.1,65,000/-. Police prepared the spot maps of all the places of recovery and the recorded the statements of the witnesses. On 23.08.2018 accused Amandeep Singh @ Chinda made a disclosure statement and got recovered a bag, which contained clothes. In addition to this accused persons got recovered various other articles allegedly used in the commission of the offence. They got recovered the vehicles allegedly used in the commission of the offence. On 01.09.2018 accused Gurwinder Singh made a disclosure statement and got recovered Rs. 15,960/-. On 02.09.2018 accused Gurminder Singh made a disclosure statement and got recovered a gas cylinder, regulator, pipe (rubber), a gas cutter, three pistols and a *darat.* All these articles were taken into possession by the police and the spot maps of the places of recovery were prepared. Accused Gurminder and Harpreet disclosed that when they went to Goa with their wives, they gave the bag containing cash and ornaments to Ravinder Kaur (petitioner herein). When the petitioner was inquired about the said bag she disclosed that when the police raided her premises she put the same in a *bada* (cowbarn) and now it has been stolen. Thus, a case under Section 412 IPC was registered against the petitioner. Later on, the petitioner got her statement recorded under Section 27 of the Indian Evidence Act and disclosed that out of the bag she had hidden some money, which she could get recovered. The petitioner got recovered a polythene bag, which contained Rs. 1,38,000/-. As per the medical examination of the injured Smt. Navjot Kaur (mother of the complainant) injuries sustained by her are life threatening. As per the police, petitioner intentionally took into possession the bag containing stolen articles and kept it with her. On 16.02.2019 polygraphy test was conducted on the petitioner, but she is not disclosing the truth. *Challan* stands presented in the learned Trial Court and on 08.11.2019 the case is listed for evidence. There is anger in the local area qua this crime. Lastly, it is prayed that keeping in view the seriousness of the crime, the manner in which the crime was committed and also the fact that there is anger in the society qua the crime and in the case the petitioner at this stage is enlarged on bail, she may tamper with the prosecution evidence and may also flee from justice, the present bail application be dismissed.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the record, including the police report, carefully.

5. The learned Counsel for the petitioner has argued that the petitioner has been falsely implicated in the present case. He has further argued that the keeping in view the role of the petitioner in the alleged crime, the fact that she is behind the bars for the last more than one year, she is lady and had no direct role in the alleged offence, she is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so the present bail application be allowed and the petitioner be enlarged on bail. Conversely, the learned Additional Advocate General has argued that the petitioner intentionally kept the bag containing ornaments and cash with her and did not let the police recover the same. So, the petitioner was directly involved in the present case. He has further argued that keeping in view the seriousness of the offence and the manner in which the same was committed, the fact that the petitioner in case enlarged on bail may tamper with the prosecution evidence and may also flee from justice, as she is resident of Ludhiana, Punjab, the bail application be dismissed.

6. In rebuttal the learned Counsel for the petitioner has argued that the petitioner cannot be kept behind the bars for an unlimited period, especially keeping in view the role of the petitioner in the present case, the fact that she is behind the bars for the last more than one year and also the fact that she cannot be kept behind the bars for an unlimited period, so the application be allowed and the petitioner be enlarged on bail.

7. At this stage, considering the age of the petitioner, who is 52 years of age, the role of the petitioner in the alleged offence, the *challan* stands presented in the Court, the fact that allegations against the petitioner are only under Sections 412 and 201 IPC and also considering the maximum punishment provided under the above two Sections, the fact that

the petitioner is behind the bars for more than a year, she is a lady and now nothing is to be recovered from her, the near relatives of the petitioner are behind the bars in the main case and so the petitioner is not likely to flee from justice, she is also not in a position to tamper with the prosecution evidence, custody of the petitioner is not at all required by the police and also considering the overall facts of the case, which have come on record, and without discussing the same at this stage and also the fact that the petitioner cannot be kept behind the bars for an unlimited period, so this Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in her favour. Accordingly, the petition is allowed and it is ordered that the petitioner, who has been arrested by the police, in case FIR No. 206 of 2018, dated 13.08.2018, under Sections 452, 396, 307, 323, 324, 326, 212, 412, 201 and 120B IPC, registered in Police Station Nalagarh, District Solan, H.P., shall be released on bail forthwith in this case, subject to her furnishing personal bond in the sum of `50,000/- (rupees fifty thousand) with one surety in the like amount to the satisfaction of the learned Trial Court. The bail is granted subject to the following conditions:

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

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

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

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

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

State of Himachal Pradesh ...Appellant.

Versus

Kalyan Chand ...Respondent.

Cr.Appeal No. 450 of 2009
Reserved on 25.9.2019
Date of decision: 26.9.2019

Indian Penal Code, 1860 - Sections 279 , 338 & 304-A – Rash and negligent driving – Identity of driver – Proof – Accused denying of his being the driver of offending vehicle at relevant time – Prosecution alleging that accused fled away from spot immediately after accident – Held, vehicle rolled down some 90 meters downhill - Two bodies were recovered from accidental vehicle whereas three other had received injuries - Driver side of vehicle was badly damaged and its door was unopenable – Witnesses had immediately reached the spot on hearing sound of falling vehicle – No injury found on person of accused – Highly improbable that accused could have gone unhurt in said accident – Identity of accused as a driver of offending vehicle doubtful - Appeal dismissed. (Paras 2 & 21 to 25).

For the appellant: M/s. Narinder Guleria, Ashwani K. Sharma and Nand Lal Thakur, Additional Advocate Generals.

For the respondent: Mr. R.K. Gautam, Sr. Advocate, with Mr. Atul Verma and Ms. Megha Kapoor Gautam, Advocates.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

Challenging the judgment of acquittal passed by Judicial Magistrate 1st Class, Palampur, District Kangra, HP, acquitting the driver of Maruti Van, who was driving at a high speed on a hilly road, could not maneuver the turn and lost control of his vehicle, which went down the road, killing two of its occupants on the spot and injuring other three, the State has come up before this Court in Appeal, seeking conviction of the driver of the Van for the commission of offences punishable under Sections, 279, 337 and 304A of IPC.

2. The facts apposite to adjudicate the present appeal trace their origin to the statement under Section 154 of CrPC of Sh. Ram Kumar (PW-1), recorded by the police of Police Station, Palampur, District Kangra, HP. In the said statement of Ram Kumar, who at that time was Vice President (Up-Pradhan) of Gram Panchayat, Giya was present at a place known as 'TIKA DAYALA' and he noticed the aforesaid Van in which there were five occupants and they were going towards Gopalpur side. The time was 8:00 p.m. and the moment the Van crossed the turn/curve of the road, then he heard a huge noise, apparently which was coming because of the impact of rolling of some object down the hill. On this, he along with his companions, went there and found the Van lying in the shrubs around 90 meters below the road. Then they went downhill and rescued three occupants of the Van, whose names were later on revealed as Anoop, Sonu Kumar (PW-7) and Himanshu Awasthy (PW-6). However, in the Van there were two more persons, who were succumbed to their injuries. These people took the injured to PHC, Gopalpur. These people also heard that the driver of the Van had run away from the spot.

3. On this information, FIR No. 146 of 2000, dated 5.6.2000 under Sections 279, 337 and 304A IPC was registered in the file of Police Station, Palampur, District Kangra, HP. The police got conducted post mortem examination of both the deceased, namely, Raj Kumar and Sanjeev Dogra, through Doctor Vinay Mahajan, who opined the cause of death of both these persons relating to 'shock' and 'head injuries'. Thus the cause of death of both these persons was due to the accident. The police also took photographs of the accidental van.

4. The police conducted the investigation from the occupants of the vehicle and it transpired that overall there were six occupants in the Van, one of whom was driver, Kalyan Chand, and others were injured, namely, Anoop Kumar (not examined) Himanshu Awasthy (PW6) and Sonu Kumar (PW7) and two were deceased, namely, Raj Kumar (deceased) and Sanjeev Dogra. It further transpired that five persons had hired the Van, which was being driven by accused Kalyan Chand and they had gone to visit Power House during the day time. While returning, at around 8:00 p.m., the accident took place.

5. After completion of investigation, the SHO of the concerned Police Station filed a report under Section 73 of CrPC in the Court of Additional Chief Judicial Magistrate, Palampur.

6. Vide order dated 25th February, 2005, Judicial Magistrate 1st Class, Palampur to whom the case was assigned by Chief Judicial Magistrate, issued notice of accusation to the accused-respondent for commission of offence punishable under Sections 279, 337 and 304-A IPC, to which accused pleaded not guilty and claimed to be tried.

7. The prosecution examined two occupants of the car, namely, Himanshu Awasthy (PW-6) and Sonu Kumar (PW-7) and the prosecution also examined Vice President, Ram Kumar, who appeared as PW1. Apart from these, the prosecution examined mechanic, who had inspected the Van after its accident, the Doctor to prove the death by accident, and the Investigating Officer.

8. In the statement recorded under Section 313 of CrPC, the accused took a specific stand that he was not driving the vehicle and before the accident one of the occupant, namely,

Raj Kumar had forcibly taken the vehicle from him and had started driving the same, and it was he who had met the vehicle with an accident. However, the accused did not testify the witness under Section 315 of CrPC nor examined anyone as his witness.

9. I have heard M/s. Narinder Guleria, Ashwani K. Sharma and Nand Lal Thakur, learned Additional Advocate Generals for the appellant and Mr. R.K. Gautam, Sr. Advocate, assisted by Mr. Atul Verma and Ms. Megha Kapoor Gautam, Advocates for the respondent and have also waded through the evidence file of the Trial Court.

REASONING

10. The first burden to prove the offence under Section 304-A IPC is on the prosecution to establish that the death was due to an accident and nothing else. The prosecution has successfully discharged this burden by examining PW-11, Dr. Vinay Mahajan, who had conducted the post-mortem of the deceased. He testified that the cause of death was due to 'shock' and 'head injuries'. The police had recovered the dead bodies from the accidental Van and the dead bodies are also noticed by the Vice President (PW-1), who was the first to reach the site of the accident, as such the prosecution has successfully proved that the cause of death was result of an accident.

11. To prove the offence under Section 337 IPC, the prosecution is again under an obligation to prove that the hurt was caused by doing an act so rashly or negligently that it endangers human life or personal safety of others. To prove this fact, the injured themselves testified two of the injured, namely, Himanshu Awasthy (PW-6) and Sonu Kumar (PW-7), who testified that they had received injuries due to accident. The prosecution has also examined Dr. S.K. Sood, (PW-10), who had given them first aid and noticed the injuries on these persons, and opined those as a result of the accident. Resultantly, the prosecution also discharges this initial burden.

12. Thirdly to prove the offence under Section 279 IPC, the prosecution is again under an initial burden to prove that the driver of the vehicle was driving the vehicle on public way in a manner so rashly and negligently that it endangered human life or cause hurt or injuries to any other person. The answer to this burden is only possible by appreciating the entire evidence, because the findings would be interlinked and interconnected with the findings of other two offences.

13. There are two sets of evidences in this case. The first set is the statement of Vice President (PW-1) Ram Kumar. Although he had seen the Maruti Van crossing the place where he was standing, but he did not notice the Maruti Van going down the hill, because the Van had gone down the hill beyond the curve, which was not visible to this witness. He reached the spot only after hearing the sound due to impact of falling vehicle.

14. The second set of evidence is the occupants of the vehicle, who had also rolled down along with the Van and fortunately survived. All these three injured persons namely, Anoop, Sonu Kumar and Himanshu Awasthy, were rescued by PW-1 and his companions. To prove that the deaths and injuries were due to rash or negligent act of the driver of the vehicle, the prosecution had examined Vice President, Ram Kumar as PW-1 and two other occupants of the Van, who were also injured in the said accident.

15. PW-6, Himanshu Awasthy, in his examination-in-chief stated that the accident took place when the accused was driving the vehicle and the accident had taken place because the driver had lost his control over the vehicle. He also stated that at the time of accident, the vehicle was being driven in a high speed, because of which, the driver could not control the same and it fell downhill. He further stated that the accident took place because of the carelessness and negligence on the part of the driver.

16. The other occupant of the Van was examined as PW-7 Sonu Kumar. He did not corroborate the statement of PW-6 Himanshu Awasthy, and rather contradicted the same. He was declared hostile and even when the leading questions were put to him by the Public

Prosecutor, he did not budge and stuck to his stand that the accused was not driving the vehicle at the time when it rolled down the road.

17. The defence set up by accused is very specific. According to the accused he had taken all these passengers to Power House, where they had also taken alcohol as well as other intoxication i.e. "BHANG". On return the occupants of the Van had forcibly taken away the van by snatching the keys and Raju (deceased) drove it away and after driving for some distance, they had met with an accident.

18. The defence of the accused is very simple that at the time of accident he was not driving the Van because the Van had already been snatched by the passengers and in fact he was outside the Van. This stand has been supported by one of the occupant of the car, namely, PW-7 Sonu Kumar, who categorically stated that Raju had snatched the Van from accused-Kalyan Chand and when the accident took place, accused-Kalyan Chand was not driving the vehicle.

19. Learned Additional Advocate General submits that this witness is telling lie, because the possibility of his being won over cannot be ruled out. Therefore, this Court has ventured into the other evidence to look for corroboration to the statement of hostile witness i.e. PW-7 Sonu Kumar and to find the truthfulness of the prosecution.

20. The earliest version of the incident finds mention in the statement recorded under Section 154 CrPC which is exhibited as PW13/C. This statement was recorded by PW-1 Ram Kumar. He stated that he had come to know from people that after the accident the driver of the Van had run away. This statement is clear that the driver had not run away in his presence nor he did notice him running away. Such information comes under the mischief of hearsay, and is not admissible in these facts and circumstances. The most important aspect of the statement under Section 154 CrPC is that Ram Kumar had specifically stated that when he was present on the road, then at that time the Van had crossed him and it was going towards Gopalpur side. He further stated at that time five persons were sitting in the Van. At that point of time, there was a least possibility of this witness intentionally mentioning five persons instead of six, because there was neither any opportunity nor the time to do so.

21. Now this witness states that when he reached near the Van there were five occupants and out of them three were injured and two were dead. So impliedly the 6th person is the driver Kalyan Chand. This proved fact corroborates the stand of the defence that Kalyan Chand was not in the Van when it had met with an accident. The five occupants whom PW1 Ram Kumar had noticed were all found present in the Van, out of whom two were dead and three were injured.

22. PW-6 Himanshu Awasthy who had rolled down with the Van stated that the front portion of the Van had collapsed and caved in and was fully damaged. He further admitted that the door towards driver side got locked and even the handle etc. were totally damaged and were pressed with the metal. This witness had supported the case of the prosecution on material particulars regarding the accused being driver of the Van and in cross-examination admitted that the door of the driver side got jammed because of the impact of the accident. A look at the photographs of the Van also corroborate the statement of PW6 Himanshu Awasthy, wherein it is visible that the door of the driver side is in an unopenable condition, fully damaged, and appears to have been pressed with the body. Even the hinges of the door appears to have been damaged, which would make it immovable. Now it leads to an inference that if accused-Kalyan Chand was the driver of the Van, then where was the occasion for him to escape from the accidental Van, because the front portion of the Van had badly damaged due to impact of accident. It leads to an inference that Accused Kalyan Singh was not the driver of the Van.

23. Surprisingly, all the five occupants of the Van had received injuries. There is no evidence that accused Kalyan Chand also sustained any injury. If he was present in the

van, then it was quite possible that when all five occupants have received injuries, two of whom died and the driver on whose side the impact of the accident was maximum, then the accused would have received injuries and shock and in such a state it would be extremely difficult to climb 300 feet and run away. This is highly improbable.

24. Even an independent appreciation of evidence, irrespective of the findings given by Trial Court, leads to the same conclusion that the prosecution has failed to connect the accused as the driver of the ill-fated Van, at the time it met with the accident.

25. Consequently, there is no merit in this appeal, and the same is dismissed, along with the pending application(s), if any. Bail bonds are discharged. Registry to return the records to the concerned Court.

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

Ram Lok ....Appellant.
Vs.
Smt. Bimla Devi and another .....Respondents.

RSA No.: 32 of 2019
Date of Decision: 11.09.2019

Code of Civil Procedure, 1908 – Section 100 – Regular second appeal – Maintainability - Held , if no substantial question of law is involved, then regular second appeal is not maintainable – Concurrent findings of lower courts not shown to be perverse or erroneous - RSA dismissed. (Paras 10 & 11).

For the appellant: Mr. Saneev Kuthiala, Senior Advocate, with Ms. Sonia Saini, Advocate.
For the respondents: Mr. Sanket Sankhyan, Advocate, for respondent No. 1.
Respondent No. 2 is *ex parte.*

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge(Oral):

By way of this appeal, the appellant has prayed for the following reliefs:

"It is, therefore, most humbly and respectfully prayed that the present appeal may kindly be allowed and calls for the record of the case and after examining the legality and propriety, the impugned judgment and decree dated 12.12.2018 passed by the Ld. District Judge, Bilaspur, District Bilaspur, H.P. in Civil Appeal No. 21/13 of 2018, in Civil Appeal titled as Ram Lok Vs. Smt. Bimla Devi & another, whereby the Ld. District Judge, Bilaspur, District Bilaspur, H.P. has affirmed the findings of the Ld. Civil Judge (Senior Division), Bilaspur, District Bilaspur, H.P. dated 28.02.2018, passed in Civil Suit No. 116/1 of 2011, titled as Smt. Bimla Devi Vs. Ram Lok & Another be pleased to set aside the impugned judgment and decree of the Courts below and consequently allow the present appeal and dismissed the suit of the respondent/plaintiff. Any other further orders which this Hon'ble Court may deem fit, in the facts and circumstances of the case may kindly be passed in favour of the appellant and against the respondent."

2. Brief facts necessary for the adjudication of the present appeal are as under:

Respondent No. 1-Bimla Devi filed a suit for permanent prohibitory injunction and in the alternative for a decree for possession against the defendants, on the ground that

the plaintiff was owner in possession of the suit land comprised in Khasra No. 389/294, Khewat No. 111, Khatauni No. 115, measuring 2.00 bighas, situated in Village Jamthal, Pargana and Tehsil Sadar, District Bilaspur, H.P. As per the plaintiff, defendants were threatening to dispossess the plaintiff from the suit land forcibly, as they intended to carry out construction over the suit land by cutting trees and if they were not restrained from interfering in the suit land, they would forcibly dispossess the plaintiff. Alternatively, the plaintiff contended that if it was found that the plaintiff was not in possession of the suit land, then a decree of possession on the basis of title be passed in favour of the plaintiff.

3. Defendants denied the claim of the plaintiff, *inter alia,* on the ground that the suit for injunction was not maintainable as plaintiff was not in possession of the suit land. As per the defendants, they were in possession of the suit land and since an application for correction of revenue entries was filed by the defendants, the plaintiff had filed the suit to defeat their said right.

4. On the basis of pleadings of the parties, learned Trial Court framed the following issues:

> *"1. Whether the plaintiff is entitled for permanent prohibitory injunctions as claimed? OPP*
>
> *2. In alternatively, whether the plaintiff is entitled for a decree of possession in case she is dispossessed or is not found in possession as alleged? OPP*
>
> *3. Whether the suit is not maintainable? OPD*
>
> *4. Whether the plaintiff has concealed the material facts as alleged? OPD.*
>
> *5. Whether the defendants have become proprietors by operation of law in view of The Himachal Pradesh Tenancy and Land Reforms Act, 1972 as alleged? OPD*
>
> *6. Whether the suit is liable to be stayed because of pendency of an application filed by defendants before Land Reforms Officer as alleged? OPD*
>
> *7. Whether the plaintiff has no cause of action to file the present suit? OPD*
>
> *8. Relief.*

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

"Issue No. 1:	*Yes.*
Issue No. 2:	*Yes.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*No.*
Issue No. 6:	*No.*
Issue No. 7:	*No.*
Relief:	*The suit of the plaintiff is decree as per operative part of the judgment."*

6. Learned Trial Court dismissed the suit by holding that as per the revenue record, the plaintiff was owner in possession as was evident from Jamabandi Ex. PW1/F. It held that *KhasraGirdawari* pertaining to the suit land Ex. PW1/G also described the possession over the suit land to be that of the plaintiff. Learned Trial Court further held that there was no specific evidence to prove that there was an agreement of tenancy between the plaintiff and defendants and thus, possession of the defendants over the suit land by way of cultivation was merely interference and encroachment over the suit land. Learned Court also

held that defendants had failed to establish any right to remain in possession over the suit land and hence plaintiff being owner in possession, had a right to restrain the defendants from interfering in any manner over the suit land. Learned Court also held that as plaintiff was not residing at the village where the suit land was situated, it was easy for defendants to cultivate the suit land in her absence and in fact report of the Kanungo was also obtained in her absence. It thus held that plaintiff being owner qua the suit land, was entitled for possession of the same. Learned Court also held that there was no evidence of tenancy or any agreement or rent receipts, therefore, the plea of the defendants that they had become owners of the suit land by operation of the Himachal Pradesh Tenancy and Land Reforms Act, 1972, could not be accepted. Learned Court also held that as the report prepared by the Kanungo demonstrated that the same was prepared without following the procedure, as is prescribed in Himachal Pradesh Tenancy and Land Reforms Act, therefore, the Civil Court was having jurisdiction to adjudicate upon the suit. Accordingly, the suit filed by the plaintiff was decreed by the learned Trial Court in the following terms:

> *"17. In view of my findings on issues No. 1 to 7 above, the suit of the plaintiff is decreed and defendants are restrained by way of permanent prohibitory injunction from causing interference, cutting trees, changing the nature of the suit land and plaintiff is also entitled to the vacant possession of the suit land. Suit is decreed with costs. Decree sheet be prepared accordingly. File after its due completion, be consigned to the record room."*

7. In appeal, the findings of the learned Trial Court have been upheld by the learned Appellate Court with part modification. Learned Appellate Court held that revenue record clearly demonstrated that Bimla Devi, daughter of Moti Ram was exclusive owner in possession of the suit land. It held that in the copy of *Khasra Girdawari* in the column of possession, the possession of Smt. Bimla Devi was duly recorded and she was reflected to be in cultivating possession of the suit land. Name of defendants was not reflected either in the column of ownership or possession as per the revenue record placed on record. Learned Appellate Court also held that earlier there was litigation filed by Shri Jeet Ram, son of Shri Sukh Ram, i.e., the father of the defendants and a perusal of the judgment passed in the said case, certified copy of which was on record as Ex. Pw1/B (Civil Suit No. 79/1 of 2001, instituted on 27.06.2001, decided on 31.07.2004, titled as Jeet Ram Vs. Smt. Bohri etc.) demonstrated that Jeet Ram had filed a suit for declaration against Smt. Bohri, widow of Sh. Moti Ram, Smt. Bimla Devi, wife of Shri Shankar, Shri Sewa Dass, son of Shri Moti, Smt. Shankuntla, wife of Shri Dhani Ram and Smt. Roshani, wife of Shri Kirpa Ram. Jeet Ram had claimed the suit land as well as other land on the basis of adverse possession and whereas the said suit filed by Jeet Ram was dismissed, Counter claim filed by the defendants therein was decreed, whereby Jeet Ram was restrained from interfering with the possession of defendants No. 2 to 5 from the suit land qua their share in the suit land. Learned Appellate Court held that appeal filed by Jeet Ram was dismissed and the judgment passed by the Appellate Court was also on record as Ex. PW1/D. Learned Appellate Court further held that in the case in hand, defendants had claimed tenancy over the suit land and thus, plea of theirs was totally contrary to the plea taken by their father in the earlier litigation. Learned Appellate Court took note of the fact that in the case filed by Jeet Ram, he had not taken any plea of alleged tenancy over the suit land. Learned Appellate Court also held that there was no evidence on record to demonstrate that defendants were tenants over the suit land and as tenancy was not proved on record, there was no question of defendants acquiring title of confirmation of proprietary rights by efflux of law. Learned Appellate Court further held that as plaintiff was found to be owner in possession of the suit land, findings returned by the learned Trial Court qua Issue No. 2 were not sustainable in the eyes of law and the same were accordingly set aside in view of the earlier litigation. The appeal was accordingly dismissed and the decree granted to the plaintiff was re-constructed in the following manner:

> *"The suit of the plaintiff is decreed and defendants are restrained by way of permanent prohibitory injunction from causing interference, cutting trees and*

changing the nature of the suit land comprised in Khasra No. 389/294, Khewat No. 111, Khatauni No. 115, land measuring 2-00 bighas, situated in Village Jamthal, Pargana and Tehsil Sadar, District Bilaspur, H.P."

8. Feeling aggrieved, the appellant/defendant filed this appeal.

9. I have heard learned counsel for the parties and have also gone through the judgments and decrees passed by the learned Courts below.

10. In the present case, there are concurrent findings of fact returned in favour of the plaintiff and against the defendants by the learned Courts below to the effect that the plaintiff is owner in possession of the suit land. There are also concurrent findings of facts returned by the learned Courts below against the defendants that they had failed to prove their tenancy over the suit land and therefore, it could not be held that they had acquired proprietorship over the suit land. Learned Courts below have also held that the plea of tenancy taken by the defendants was not tenable in the eyes of law as the same was totally contrary to the plea taken by their father qua the same suit land against the same owners of the suit land, including the plaintiff in this case, wherein the father of the defendants had unsuccessfully taken the plea that he had become owner of the suit land by way of adverse possession. Both the leaned Courts below have also held concurrently against the plaintiff and in favour of the defendants that in the previous *lis*, the father of the present defendants had not taken alternative plea of tenancy. Therefore, what is borne out from the judgments passed by both the learned Courts below is that it is the plaintiff who is owner in possession of the suit land. Defendants are strangers to the suit land. Revenue records reflect plaintiff to be owner in possession of the suit land. Defendants are causing interference over the suit land and as defendants are strangers as far as the suit land is concerned, they had no right to interfere in the peaceful possession over the suit land. Learned Senior Counsel for the appellant could not demonstrate that these findings were perverse and contrary to record. Therefore, all these factors as they stand determined by the learned Courts below lead to only one conclusion that in this appeal, there is no question of law involved, leave aside any substantial question of law.

11. In this view of the matter, as this Court does not find any substantial question of law involved in the appeal, the same is dismissed, so also pending miscellaneous applications, if any. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Laxmi Devi ...Petitioner
Versus
State of H.P. & Others ...Respondents

CWP No. 2404 of 2019
Decided on: 18.09.2019

Limitation Act, 1963 – Section 5 – **Guidelines for engagement of Anganwari workers/ helpers, 2007** – Clause 12 – Delay in filing appeal before Appellate Authority (Divisional Commissioner) – Whether can be condoned? – Appellate Authority dismissing appeal against order of Additional District Magistrate setting aside appointment of petitioner as Anganwari helper on ground of its being time barred – Petition against – Held, Section 5 of Act is applicable only to proceedings pending in courts alone and not before quasi-judicial authorities like the Appellate Authority – In the guidelines/ scheme there is no provision for condonation of delay – Petitioner can not invoke Section 5 of Act for seeking condonation of delay. (Para 3).

For the petitioner : Mr. Vinod Chauhan, Advocate.

For the respondents : M/s Vikas Rathore, Additional Advocate General, Mr. J.S. Guleria, Deputy Advocate General and Mr. Manoj Bagga, Astt. A.G., for respondents No. 1 & 2.

Mr. Ashok Tyagi, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

Notice. Mr. Manoj Bagga, learned Assistant Advocate General, appears and waives the service of notice on behalf of respondents No.1 & 2 and Mr. Ashok Tyagi, learned counsel, waives the same on behalf of respondent No.3. With the consent of the parties, petition is taken up for disposal at this stage.

2. The Divisional Commissioner, Shimla has dismissed the appeal filed by the petitioner, an Anganwari Worker, as time barred. Hence, present writ petition has been preferred.

2(i) Petitioner is serving as an Anganwari Worker w.e.f. 03.08.2007. Her appointment was challenged by respondent No.3 under Clause 12 of 2007 Scheme/Guidelines for the engagement of the Anganwari Workers/Helpers before the Deputy Commissioner, District Sirmaur. This appeal was allowed by the Additional District Magistrate, District Sirmaur on 07.10.2013 whereby selection and appointment of the petitioner as an Anganwari Worker was quashed and further directions were issued to appoint next in merit, i.e. respondent No.3, as an Anganwari Worker in place of the petitioner.

2(ii) The petitioner challenged the above decision dated 07.10.2013, by filing writ petition before this Court bearing CWP No. 9404 of 2013. This writ petition was disposed off on 26.06.2019, taking note of the fact that under 2007 Anganwari Policy, the orders passed by the Deputy Commissioner under Clause 12, were assailable before the Divisional Commissioner. Since, the writ petition had been filed without availing the alternative remedy, therefore, writ petition was held to be not maintainable. Liberty was reserved to the petitioner to avail appropriate remedy in accordance with law.

2(iii) Petitioner thereafter, preferred an appeal before the Divisional Commissioner, Shimla on 22.07.2019, challenging the order dated 07.10.2013, passed by the Additional District Magistrate, District Sirmaur. Appeal has been dismissed vide order dated 12.09.2019, on the ground that:- In terms of 2007 Policy, appeal before the Divisional Commissioner could have been filed within fifteen days from the order of the Deputy Commissioner; in the instant case, the Additional District Magistrate had passed the order on 07.10.2013 and the appeal was preferred before the Divisional Commissioner on 22.07.2019; therefore, the same was not within prescribed limitation period.

2(iv) Feeling aggrieved, the instant writ petition has been preferred.

3. Heard, learned counsel for the parties and gone through the record.

3(i) During hearing of this case, learned counsel for the petitioner contended that the appeal preferred by respondent No.3, under Clause 12 of 2007 Anganwari Policy before the Deputy Commissioner, Sirmaur, challenging petitioner's appointment and selection was beyond prescribed limitation period and, therefore, the same could not have been entertained. Apparently, this ground was not taken by the petitioner in earlier proceedings.

3(ii) This Court while deciding a bunch of writ petitions and Letter Patent Appeals with lead case CWP No. 438 of 2017, titled as Praveena Devi vs. State of H.P. & Ors. decided on 02.08.2019, discussed the entire gamut of 'limitation' for filing appeals before the appellate authority challenging the selection and appointment of Anganwari Workers under different Anganwari Policies. Extract from the judgment is being reproduced hereinafter:-

> "19. The upshots of the discussion hereinabove, therefore would be as follow:
>
> (i) The provisions contained under Section 5 of the Limitation Act are applicable only to the proceedings pending in the Courts alone and not before the quasi judicial authorities like the Appellate Authority under the Scheme.
>
> (ii) The Appellate Authority under the Scheme where there is provisions of 15 days for filing the appeal from the date of issuance of the result or the date of appointment, as the case may be, is not competent to condone the delay and

the person aggrieved should prefer appeal within 15 days from the date of declaration of the result/appointment of the selected candidate. The Appellate Authority in order to verify the factual position is competent to requisition the record pertaining to the selection so made.

(iii) Since in the Scheme framed by the respondent-State, there is no provision for condonation of delay, therefore, the person aggrieved is not entitled to invoke Section 5 of the Limitation Act and rather to file the appeal well within the time prescribed under the Scheme.

(iv) In few of the schemes where no period of limitation is prescribed for filing an appeal, the aggrieved person must file the appeal within reasonable time to be determined on taking into consideration the facts of each case.

(v) In an appeal preferred against the order of the first Appellate Authority i.e. the Deputy Commissioner to the Divisional Commissioner irrespective of there is no requirement under the scheme to file certified copy of order nor any procedure prescribed for filing the same, the question that certified copy of impugned order is required to be filed along with the memorandum of appeal or it is sufficient to mention the date of such order is left open to be considered in due course, if arises in any of the writ petitions/LPA which have to be heard separately."

The judgment clearly says; Section 5 of Limitation Act cannot be invoked by the aggrieved person in absence of any provision for condonation of delay in filing the appeals in the Anganwari Schemes framed by the State. Therefore the appeal has to be filed within the time prescribed under the scheme and within a reasonable time in case no time limit is prescribed. Under the Anganwari scheme, there is no power with the quasi-judicial appellate authority to condone the delay, in filing the appeal.

3(iii) Since, the selection to the post of Anganwari Worker in question was initiated and completed under 2007 Anganwari Policy, therefore, Clause 12, as it existed in this policy, has to be applied vis-a-vis factual position in respect of determining the question of appeal having been filed within the prescribed limitation period or not. The question of limitation is a mix question of law and fact. This aspect has neither been raised earlier by the petitioner nor has been examined by the concerned authorities and,therefore, it needs to be adjudicated in view of the law laid down in Praveena Devi's case. Accordingly, impugned order dated 12.09.2019 (Annexure P-13) is quashed and set aside. This writ petition is disposed off by remanding the matter to the Deputy Commissioner, District Sirmaur with direction to decide the matter afresh vis-a-vis maintainability of the appeal. It shall be open to the contesting parties to raise all grounds, contentions, defences available to them before learned Deputy Commissioner, District Sirmaur in this regard. Parties through their learned counsel are directed to appear before learned Deputy Commissioner, District Sirmaur on 15.10.2019.

The writ petition is disposed of accordingly, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Sh. Ramjan Mohmmad ...Petitioner

Versus

State of H.P. & Others ...Respondents

CWP No. 2205 of 2019
Reserved on: 12.09.2019.
Decided on: 20.09.2019

Constitution of India, 1950 –Article 226 – Transfer of employee on basis of D.O Note of an elected representative – Effect – Held, any proposal of an elected representative regarding transfer of an employee can not be straightway implemented – It has to be examined by Head

of Department and he has to take an independent decision on the same uninfluenced by the proposal in accordance with law and transfer policy. (Para 3).

For the petitioner : Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rajesh Kumar, Advocate.

For the respondents : Mr. Ashok Sharma, Advocate General with M/s Ritta Goswami, Adarsh Sharma & Mr. Ashwani Sharma, Additional Advocate Generals, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

Petitioner has challenged his transfer order dated 31.08.2019 (Annexue P-8) vide which he has been transferred from Kheri I.P.H Sub Division Nahan to LWSS, Shirguldhar, I&PH Sub Division, Jamta under Nahan Division.

2. This is second round of litigation pertaining to transfer of petitioner.

Facts pertaining to first round:-

2(i) On 11.07.2019 vide Annexure P-1 issued by the Executive Engineer, IPH Division, Nahan, the petitioner working as a Pump Operator in IPH Section Kheri under Division Nahan, was adjusted and sent to LWSS, Shirguldhar, Section Dadahu under IPH Sub Division, Jamta.

2(ii) The Assistant Engineer, IPH Sub Division, Nahan on 19.07.2019 (Annexure P-2), directed the petitioner to join his duties in IPH Sub Division, Jamta. The petitioner challenged this transfer order by filing CWP No.1639 of 2019. During pendency of this petition, a question arose as to whether the Executive Engineer was competent to make local adjustment of Pump Operators when appointing authority for the post was Superintending Engineer. Order passed on 30.07.2019 in CWP No. 1639/2019, is reproduced hereinafter:-

> "Notice. Mr. Nand Lal Thakur, learned Additional Advocate General, takes notice for the respondents. He is directed to find out whether the Executing Engineer, I & PH Division, Nahan is competent to make local adjustments, by shifting persons working as Pump Operators, especially in the light of the allegation that the appointing authority for the post is Superintending Engineer."

On 31.07.2019, further direction was issued to State to find out the duration of temporary adjustment in normal circumstances.

2(iii) While the writ petition was pending, the Superintending Engineer, IPH, Circle Nahan, issued office order dated 20.08.2019 (Annexure P-6) and approved the transfer/adjustment of the petitioner ordered by the Executing Engineer on 11.07.2019 (Annexue P-1). This post-facto, ratification of transfer/adjustment of the petitioner by the competent authority was not approved by the Court, hence, vide judgment dated 21.08.2019, the writ petition was allowed and the impugned transfer order dated 11.07.2019 (Annexure P-1) was quashed and set aside. Paras No. 8 & 9 of this judgment are reproduced hereunder:-

> "8. Once it is confirmed that the first Authority who passed the order of transfer did not have the authority to do so, a post facto ratification by a competent Authority may not be permissible. It is a different matter if the competent Authority has taken a call independently. But post facto ratification is not permissible once an order is found to be without jurisdiction.
>
> 9. Therefore, the writ petition is allowed. The impugned order is set aside."

Facts pertaining to second round of litigation:-

2(iv) The Superintending Engineer, IPH Circle, Nahan, issued fresh transfer order of the petitioner on 31.08.2019 (Annexure P-8) transferring him from Pump House Kheri I.P.H Sub Division Nahan to LWSS, Shirguldhar, I&PH Sub Division, Jamta, under Nahan Division

2(v) Aggrieved against his transfer effected on 31.08.2019, petitioner has preferred instant writ petition primarily on the ground that impugned transfer order has been issued on the basis of a D.O. Note No. 159372 issued by respondent No.5.

2(vi) In view of the allegations levelled in the writ petition in respect of transfer of the petitioner having been made solely on the basis of D.O. Note, we had called for and seen the record pertaining to transfer of the petitioner.

Record:-

3(i) As per record, the proposal to transfer the petitioner was moved by respondent No.5 on 01.08.2019 during the pendency of CWP No.1639/2019, which was approved by the office of Hon'ble Chief Minister on 22.08.2019(i.e. immediately after the disposal of CWP No.1639 of 2019).

3(ii) Record also reflects that on 22.08.2019, it was proposed to send the file containing approval of transfer of the petitioner to the Superintending Engineer Nahan for further necessary action in the matter.

3(iii) Record produced before us does not show that proposal of transfer of petitioner was either sent to or was examined by the Superintending Engineer Nahan. Rather, it appears that on 22.08.2019 itself, proposal was approved by Engineer-in-Chief (IPH) by observing that:- (i) petitioner is working as Pump Operator in IPH Sub Division Nahan w.e.f. 30.07.2007 and has completed his normal tenure there and (ii) 17 posts of Pump Operators are lying vacant in IPH Division Nahan, therefore, petitioner can be transferred from Nahan Sub Division to Jamta Sub Division in Nahan Division against vacancy.

3(iv) It is thereafter that impugned order (Annexure P-8) was issued by the Superintending Engineer, IPH Circle, Nahan.

3(v) In Sanjay Kumar vs. State of Himachal Pradesh and others (2013) 3 Shim.L.C 1373; Amir Chand vs. State of Himachal Pradeh, 2013(2) Him.L.R. (DB) 648 and in Ashok Kumar Attri vs. Himachal Pradesh Power Corporation Limited, 2013 (3) Shim.LC 159, it has been held that any proposal of an elected representative regarding transfer of an employee cannot be straightaway implemented. It has to be examined by the Head of the Department who has to take an independent decision on the same, uninfluenced by the proposal. The decision has to be taken in accordance with law and as per transfer policy.

4. In the instant case, the proposal of transfer of petitioner had originated from the elected representatives during the pendency of CWP No. 1639/2019. This proposal had not been examined by the Competent Authority i.e. Superintending Engineer IPH Division Nahan. The judgment passed in CWP No. 1639/2019 apparently has not been noticed while ordering impugned transfer of the petitioner.

In view of non-examination of the proposal of transfer of petitioner independently by the Competent Authority, impugned transfer order dated 31.08.2019 (Annexure P-8) is quashed and set aside. However, we leave it open to the Competent Authority to independently consider the matter of transfer of petitioner afresh in light of law laid down and in light of transfer policy. The writ petition is disposed of accordingly, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Sukhversha & others .....Appellants

Versus

Bawa Jung Bahadur .....Respondent

RSA No. 606 of 2007
Reserved on: 20.09.2019
Decided on : 25.09.2019

Indian Evidence Act, 1872 - Section 68 – Will in favour of Advocate appointing him as the sole trustee of property — Suspicious circumstances – Proof-- Held, testarix had already filed application before District Judge for withdrawal/ cancellation of vakalatnama executed by her in favour of said Advocate and she further requested court to see that he did not encroach or

prejudice her rights – She had executed General Power of Attorney in favour of her step son and even authorized him therein to dispose or sell her property – Manner of signing of Will totally at variance with usual manner of signing documents by the testatrix – Presence of her signatures at two places on last page with a gap in between is similar to what is a routine while drafting a short affidavit, verification or bond – First two pages of will bearing signatures of attesting witnesses but not of testatrix - Neither attesting witness 'HR' nor propounder of Will stating as who typed Will – Will surrounded by suspicious circumstances and was the result of cheating- Decree(s) setting aside Will upheld. (Paras 16, 17 & 23).

Cases referred:

Satya Gupta vs Brijesh Kumar 1998 (6) SCC 423, Supreme Court

Gurdev Kaur vs Kaki and others (2007) 1 SCC 546

Sham Lal vs Sanjeev Kumar and others 2009(12) SCC 454

Roop Singh v. Ram Singh, (2000) 3 SCC 708

For the Appellants :	Mr. Ajay Kumar, Senior Advocate with Ms. Rohini Karol, Advocate.
For the Respondent:	Mr. Pankaj Chauhan, Advocate.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

Challenging the judgment passed by the First Appellate Court, which had affirmed the judgment and decree passed by the Court of original jurisdiction, which in turn had declared Will Ext. DW-1/A as fraudulent, illegal, void abinitio and had granted a permanent prohibitory injunction in favor of the plaintiff-respondent, restraining the defendant-appellant from taking any benefit of the Will, the Appellant had come up before this Court by way of this Regular Second Appeal.

2. Smt. Manorma Rattan Singh, stepmother of the plaintiff, while engaging a lawyer for her, must have read *Ralph Waldo Emerson,* who had very rightly said, "The good lawyer is not the man who has an eye to every side and angle of contingency, and qualifies all his qualifications, but who throws himself on your part so heartedly, that he can get you out of a scrape." Had she read this famous Spanish proverb, "I*t is better to be a mouse in a cat's mouth than a man in a lawyer's hand*," she would have been cautious and most likely extremely reluctant in putting her signatures on blank papers in her lawyer's chamber.

3. Smt. Manorma Rattan Singh owned a substantial share in a vast prime drive-in property, right on the Mall Road, Shimla, just opposite to the famous Railway Board Building and adjacent to A.G. Post Office and just over the renowned Victory Tunnel, where the distance of Shimla reads proud 'Zero Mile".

4. Smt. Manorma Rattan Singh died on 5th November 1992. The Plaintiff/Respondent Sh. Bawa Jung Bahadur was her stepson. Original Defendant/Appellant was the Counsel of Smt. Manorma Rattan Singh Bawa in a case titled Bawa Jung Bahadur versus General Public filed before the learned District Judge, Shimla, regarding the probate of Will of late Sh. Bawa Rattan Singh, who happened to be the father of the plaintiff and husband of Smt. Manorma Rattan Singh Bawa. The plaintiff became the owner of the share of his stepmother on account of the execution of her Will dated 27th October 1989.

5. The plaintiff for the first time came to know about another Will, which was allegedly executed by Smt. Manorma Rattan Singh on 30.12.1987, whereby her Counsel (Defendant), was appointed as the sole trustee of her share in the entire estate, to the exclusion of the plaintiff, when he was contesting a Rent Petition in the Court of the learned Rent Controller-1, Shimla.

6. Vide plaint dated 14th November 1994, the plaintiff filed a Suit, registered as Civil Suit No. 355/1 of 1999/94, instituted on 17.11.1994. The suit was filed for a permanent prohibitory injunction restraining the defendant from using or taking any benefit of Will dated 30.12.1987 because it was obtained fraudulently and illegally. The plaintiff specifically alleged that the defendant used to be the Counsel for Smt. Manorma Rattan Singh Bawa and as such, he was close to her. However, Smt. Manorma Rattan Singh Bawa somehow realized that her Advocate might be playing fraud upon her and as such, she filed application dated 18.11.1988 before the learned District Judge, Shimla, revoking him to be her Advocate. It was further alleged that as a routine practice, lawyers do take signatures of their clients on blank papers and it is quite possible that once in the garb of furnishing bail bonds of Sh. Bawa Jung Bahadur, his mother, Smt. Manorma Rattan Singh fell into the trap or was otherwise made to sign on blank papers, one of which was later on used to fabricate this Will. The defendant filed a written statement denying all the allegations. It was contended in the written statement that the deceased had only created a charitable trust and appointed the defendant as its sole executor and trustee. It was also stated in paragraph-1 of the written statement that the plaintiff did not take care of his stepmother, and in fact, she had employed one Shri Harbans Lal Punia as her caretaker. It was further alleged by the defendant that the entire property was evacuee property, and the plaintiff had fraudulently acquired the Sale Certificate in his name under Displaced Persons (Compensation and Rehabilitation) Act, 1954. In the replication, the plaintiff explicitly reiterated his stand that it was he who took care of his mother and treated her like his real mother. He further stated that there was no reason for her mother to create this trust which practically is a grant in favor of the lawyer, giving him a free handle.

7. Learned Sub Judge 1st Class (IV), Shimla, vide judgment dated 24th April, 2000, passed in Civil Suit No. 355/1 of 1999/94, decreed the suit in its entirety and declared the Will dated 30.12.1987, whereby defendant-Advocate was appointed as the sole trustee, to be void, fraudulent, illegal and permanent prohibitory injunction was granted in favor of the plaintiff restraining the defendant from taking any benefit of the Will.

8. The defendant challenged the said judgment before the First Appellate Court, and vide judgment dated 27th August 2007, passed in RBT No. 103-S/13 of 2004/2000, dismissed the appeal with costs.

9. The defendant has now come up before this Court by filing this Regular Second Appeal.

10. During the pendency of the Regular Second Appeal, the appellant-defendant expired and vide order dated 06.11.2011, passed by the concerned Registrar, LRs of the deceased appellant were brought on record.

11. I have heard Mr. Ajay Kumar, learned Senior Counsel for the appellants and Mr. Pankaj Chauhan, learned Counsel for the respondent and also waded through the entire record.

REASONING:

12. The plaintiff has proved on record one General Power of attorney, which was exhibited as Ext. PW-6/A. Vide this General Power of attorney, Smt. Manorma Rattan Singh Bawa had appointed plaintiff Shri Jung Bahadur Bawa as her attorney to deal with almost everything including selling or disposing of her properties. This General Power of Attorney was duly registered in the office of the Sub Registrar (Urban), Shimla. It establishes that on 10th of November, 1989, i.e., the date of this Power of Attorney, Smt. Manorma Rattan Singh Bawa had reposed complete faith and trust in her stepson Shri Bawa Jung Bahadur. Before this, vide Will dated 27.10.1989, which was proved as Ext. PW-9/A, she had bequeathed her entire property in favor of her stepson Shri Bawa Jung Bahadur. The said Will is not under challenge in any counter to this suit. The execution this Will also establishes the warmth and depth of the relations between the plaintiff and his stepmother were much more than cordial.

13. In the Will dated 27.10.1989, Ext. PW-9/A, Smt. Manorma Rattan Singh Bawa had put her signatures at one place, and under the signatures, she had written her full name. It was also witnessed by two independent solvent persons, namely Dhani Devi and Udhi Ram.

14. Smt. Manorma Rattan Singh Bawa filed application dated 7th June 1988 before learned District Judge, Shimla, which is proved on record as Ext. PW-7/H. In paragraph 2 of this application, she stated that the "*Vakalatnama of her Advocate (name mentioned) should be canceled on 7.6.88 and see that he DOES NOT prejudice our rights. She further prayed that the Vakalnama in favor of her counsel (Name of Counsel), should be canceled on 7.6.88 & see that he (Name mentioned) does not encroach on our legal rights.*"

15. In this application also, Smt. Manorma Rattan Singh Bawa has put her signatures, and below her signatures, she wrote her name, similar to what was done in Will Ext. PW-9/A.

16. A perusal of the Will under challenge leads to the following inferences.

(a) This Will runs into three pages. Upon this deed, the executant did not have to put her signatures at two places, whereas in other documents like Ext. PW/9/A, i.e., the Will executed in favor of the plaintiff, she had put her signatures just once, and below that, she had written her name with her hand. Similarly, in the application for revocation of the Vakalatnama of her Advocate, she had put her signatures at one point, and below that, she had written her name with her hand in the same ink. To the contrary, in this Will under challenge, i.e., Ext. DW-1/A, she has signed at two places.

(b) The gap between these two signatures, on Ext. DW/1/A is almost similar to what is a routine while drafting a short Affidavit, Verification, or Bond. Therefore, the possibility cannot be ruled out that being the lawyer for Smt. Manorma Rattan Singh Bawa, there was a blank paper with him, containing her signatures obtained for drafting an application or an affidavit or a bond or under some pretext.

(c) The most glaring defect in the WILL under challenge is that although the signatures of the testator are available on the third page twice, whereas, she did not sign the first and the second pages of this Will. It is strange that the testator is putting her signatures twice on the last page and not at all on the first and the second pages. It raises grave doubt about the authenticity of this Will.

(d) Another glaring aspect which raises a big question mark over the genuineness of the Will under Challenge (Ext. DW/1/A) is that although the testator did not sign the first and the second pages, the witnesses have signed both the first page as well as the second page and have also put the date under their signatures. This is simply indigestible.

(e) Out of the two witnesses to the Will, i.e., Shri Hem Raj and Shri Gian Swaroop Kaushal, only one witness i.e., Shri Hem Raj survived, and he appeared as DW-1. In his testimony recorded in the Civil Suit, he admitted his signatures and stated that executant Smt. Manorma Rattan Singh had signed in his presence. In cross-examination, this witness admitted that her Advocate, was employed in the Communist Party, but in his presence, he was never a member of the Communist Party. He further stated that his office, i.e., that of the Advocate was in Bawa estate itself, where the office of Communist Party also situated and because of that reason, he knew him. He admitted that neither the Will was typed in his presence, nor did he know who typed it. He denied that the first two pages were changed later on. He further denied that he made a statement in favor of the Defendant because both of them belonged to the same Communist Party. The Defendant Advocate appeared as DW-2. In his cross-

examination, he stated that he had disengaged from the case because initially he was engaged only for cross-examination. He further noted that this was an oral settlement. He also denied that the moment his client Smt. Manorma Rattan Singh Bawa came to know that he was playing fraud upon her, at that stage, she canceled the Power of Attorney given by her in his favor. He further denied that both the witnesses to the Will belonged to the Communist party. He denied that he forged this Will. The most glaring defect in the cross-examination is that the Defendant, despite being an Advocate, stated that he did not know who had drafted this Will. It is bizarre that on the one hand, Smt. Manorma Rattan Singh Bawa was allegedly creating trust by making her Advocate as her sole trustee, and on the other hand, the Advocate claimed that he did not know what who had typed this Will. He states that Smt. Manorma Rattan Singh had handed over the Will to him just two-three months before her death.

17. A survey of above mentioned glaring improbabilities points out to the irrefutable conclusion that Smt Manorma Rattan Singh never executed the Will under challenge and to the contrary all the roads lead to one destination, which ends up in a deep trench, emitting a foul smell of cheating and concoctions.

18. Now, the entire evidence needs to pass the Judicial Scrutiny on the questions of law on which a co-ordinate Bench admitted this Regular Second Appeal of this Court on the following substantial questions of law:

> *"1. Whether the findings of the Ld. First Appellant Court and the learned Trial Court are a result of complete misreading of pleadings, evidence and the law as applicable to the facts of the case and particularly document Ext. DW1/A and document Ext. PW/9/A and as such palpably erroneous and illegal and if so, to what effect?*
>
> *2. Whether the First Appellate Court failed to formulate proper points for determination which has affected its judgment and resulted into miscarriage of justice to the appellant?*
>
> *3. Whether both the Courts below have grossly misinterpreted and mis-appreciated the evidence and the law as applicable to the facts of the case and what is the effect of ignoring the evidence Exts. DW-2/B, DW/2/C and DW-4/A and if so, to what effect?"*

19. As far as the first substantial question of law is concerned, this cannot be said to be a question of law at all. It is more a question of fact than that of a law.

20. Regarding the second question about the miscarriage of justice to the appellant, a bare reading of the evidence reveals that it was the grave attempt to cause injustice to the plaintiff which has been rectified by both the Courts below, safeguarding a rightful legal heir to use his extremely prime property in the heart of Shimla city. The seeds of the question of law could not germinate, and as such, this question need not be answered.

21. The third substantial question of law is based on the revenue document, whereby the defendant challenged the ownership of the plaintiff. But he had no locus to challenge the ownership of the plaintiff because he had no locus to do so nor the same was his concern. The defendant intended that if he failed to get it then even the plaintiff should also not get it. If the sale Certificate vide which the plaintiff had acquired the property under Displaced Persons (Compensation and Rehabilitation) Act, 1954, goes, then even the title of Smt. Manorma Rattan Singh would also become defective. However, this was not a matter under adjudication. However, it reminds one of the famous poet Kali Dass. As such no green shoots emerged from this question of law.

22. A survey of the following judicial precedents is required to ascertain the scope of substantial questions of law.

a) **In Satya Gupta vs Brijesh Kumar 1998 (6) SCC 423, Supreme Court holds,**

16. "...The High Court, it is well settled, while exercising jurisdiction under Section 100 CPC, cannot reverse the findings of the lower appellate court on facts merely on the ground that on the facts found by the lower appellate court another view was possible."

Another divisional bench of Hon'ble Supreme court in Gurdev Kaur vs Kaki and others (2007) 1 SCC 546 held as under:

70. Now, after 1976 Amendment, the scope of Sec. 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering u/s. 100 of the Code of Civil Procedure only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question.

[71] The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of Sec. 100 of the Code of Civil Procedure have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law.

[77] The High Court has clearly deviated from the settled principle of interpretation of the Will. The Court does not sit in appeal over the right or wrong of the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last Will, that the Court looks into the nature of the bequest.

[78] The learned Single Judge of the High Court has not even properly appreciated the context of the circumstances. The contents of the Will have to be appreciated in the context of his circumstances, and not vis-a-vis the rules for intestate succession. It is only for this limited purpose that the Court examines the nature of bequest. The Court does not substitute its own opinion for what

was the testator's Will or intention as manifested from a reading of the written instrument. After all, a Will is meant to be an expression of his desire and therefore, may result in disinheritance of some and grant to another. In the instant case, wife of the testator Bhagwan Kaur alone had lived with the deceased and only she had looked after him throughout his life. The other daughters were all happily married a long time ago and in their weddings the testator had spent huge amount of money. In his own words, he had spent more than what they would have got in their respective shares out of testator's property.

b) In Sham Lal vs Sanjeev Kumar and others 2009(12) SCC 454, Supreme Court holds,

[26] There is no denying that the property in the hands of the deceased Balak Ram was ancestral since admittedly he had inherited the same form his father. In so far as the question whether under the custom governing the parties, a Will could be executed in respect of ancestral property is concerned, the same is no more res integra.

[27] A learned Single Judge of this Court in Kartari Devi and Ors. v. Tota Ram 1992 (1) Sim. L.C. 4021 has held that in view of Section 30 read with Section 4 of the Hindu Succession Act, 1956 a male Hindu governed by Mitakshara system is not debarred from making a Will in respect of coparcenary/ancestral property. The above view of the learned Single Judge was upheld and approved by a Division Bench of this Court in Tek Chand and Anr. v. Mool Raj and Ors. 1997 (2) H L.R. 306. In view of the above ratio, the learned District Judge has erred in upholding the validity of the Will Ex. DW 1/A only to the extent of the interest of the deceased in the property. Such findings are wrong and liable to be set aside.

[29] "...The High Court also observed that the property in the hands of the deceased Balak Ram was ancestral in character. The High Court also observed that a Will could not be executed as far as ancestral property was concerned and in view of the clear legal position this matter was no longer res integra."

Limitation (Issue No. 8)

[30] Regarding the limitation, the High Court observed as under:

"Undisputedly, the period of limitation prescribed under the law for such a suit is three years from the date the cause of action accrued to the plaintiff. It has been averred by the plaintiff in para 9 of his plaint, as to cause of action, as under:

that the cause of action has arisen on 31.10.87 from death on 20.2.88 from mutation and on various other dates from the knowledge of the illegalities and wrongful actions of Village Jabal Jamrot Pargana Haripur Teh. and Distt. Solan within the jurisdiction of this Court, hence this matter has jurisdiction in the matter."

The learned Trial Court, while recording the findings under issue No. 8 has held the suit to be not within time. No findings have been recorded by the learned District Judge on the question of limitation. Considering the pleadings as a whole as set out in the plaint, the suit of the plaintiff as laid, on the face of it, was not within time. There were neither pleadings nor evidence as to the date on which the plaintiff had derived the knowledge about the mutation and/or the Will.

c) In **Roop Singh v. Ram Singh, (2000) 3 SCC 708**, Supreme Court holds,

7. It is to be reiterated that under Section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC.

23. Resultantly, there is no illegality or perversity in the judgments passed by the Court of original jurisdiction or the First Appellate Court. Furthermore, no substantial question of law has arisen in this case. Moreover, I am fully satisfied with the reasoning and discussions in both the judgments, and I subscribe to a similar view.

24. Consequently, there is no merit in this appeal, and the same is dismissed, along with the pending application(s), if any. Registry to return the records to the concerned Court.

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

Sh. Suresh Kumar and others ....Petitioners.

Vs.

Dr. Arun Sharma and others ....Respondents.

COPC No.: 53 of 2018

Date of Decision: 25.09.2019

Constitution of India, 1950 – Article 215 – Contempt of Courts Act, 1971 – Sections 2(b) & 12 - Civil contempt – Petitioner alleging contempt of court on ground of non-payment of interest on emoluments – Held, court had merely directed respondent to examine the grievances of petitioner - No mandamus as such was issued by the court regarding grant of interest etc. – No case of disobedience of court direction is made out – Petition dismissed. (Paras 5 & 6).

For the petitioner: M/s Onkar Jairath and Shubham Sood, Advocates.

For the respondents: Mr. Dinesh Thakur, Additional Advocate General, with M/s Seema Sharma, Amit Dhumal and Divya Sood, Deputy Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioners have alleged willful disobedience of judgment, dated 02.03.2015, passed by this Court in *CWP No. 9640 of 2014,titled asSuresh Kumar and others Vs. State of H.P. and others*, which stood disposed of by this Court in the following terms:

> *"The learned counsel for the petitioners, at the very out set, stated at the Bar that the present petition is squarely covered by the judgment delivered by this Court in CWP No. 1432 of 2015, titled Shivika Agnihotri and others Vs. State of H.P. and others, and the same relief may be granted in this petition also. His statement is taken on record.*
>
> *2. In the given circumstances, we deem it proper to dispose of this petition, in terms of the judgment rendered by this Court referred to supra. The aforesaid judgment shall form part of this judgment also. Ordered accordingly."*

2. The contention of learned counsel for the petitioners is that though emoluments in terms of the judgment of this Court in *Shivika Agnihotri and others Vs. State of H.P., CWP No. 1432 of 2015* stands released in favour of the petitioners, however, interest thereupon has not been paid to them, as was mandatory in terms of earlier judgment dated 25.09.2014, passed by this Court in *CWP No. 10178 of 2012, titled as Sushil Kumar & Ors. Vs. Sate of H.P. & Ors.*

3. In my considered view, the present contempt petition is misconceived, as there is no willful disobedience of any direction passed by this Court in *CWP No. 9640 of 2014,*

titled as Suresh Kumar and others Vs. State of H.P. and others. A perusal of the judgment passed by this Court in the abovementioned petition demonstrates that it was stated at the Bar by the learned counsel in that case that the petition was squarely covered by the judgment of this Court in *CWP No. 1432 of 2015, titled as Shivika Agnihotri and others Vs. State of H.P.* All that this Court did vide its order, dated 2nd March, 2015, was that it disposed of CWP No. 9640 of 2014 in terms of the judgment rendered by this Court in CWP No. 1432 of 2015.

4. Now, a perusal of the judgment, which was passed in *CWP No. 1432 of 2015, titled as Shivika Agnihotri and others Vs. State of H.P. and others* further demonstrates that the said writ petition was disposed of by this Court vide order, dated 26th February, 2015 in the following terms:

> *"It is stated by the learned counsel for the petitioners that the case of the petitioners is covered by the judgment, dated 1.1.2015, passed by a Division Bench of this Court in CWP No. 5496 of 2014 and the judgment, dated 25.9.2014, passed by the Single Bench of this Court in CWP No. 10178 of 2012. His statement is taken on record.*
>
> *In view of the above, we deem it proper to dispose of the writ petition by directing the respondents/competent Authority to examine the case of the petitioners in light of the judgments referred to above and make a decision within a period of six weeks from today. Ordered accordingly."*

5. A perusal of the said order clearly demonstrates that there was no mandamus issuedin favour of Shivika Agnihotri and others by this Court and all that this Court directed the respondents therein was to examine the case of the petitioners in light of the judgment passed by this Court in CWP No. 10178 of 2012.

6. In the absence of any mandamus having been issued by this Court in *Shivika Agnihotri' case supra* coupled with the fact that similarly no mandamus was issued by this Court while disposing of the writ petition filed by the present petitioners, it cannot be said that there is any willful disobedience of any directions passed by this Court. However, as it is not in dispute that the emoluments which were being claimed by the petitioners in the writ petition filed by them stood paid by the State and the only surviving grievance of the petitioners is regarding non-payment of interest on the alleged delayed payments, it is open to the petitioners to approach the competent Court of law for redressal of said grievance of theirs, if so advised.

7. Accordingly, this contempt petition is dismissed, however, with liberty to the petitioners that if so advised, they can file appropriate proceedings before the appropriate Court of law with regard to their grievance of interest on the alleged delayed payments made to them by the State. Notice discharged.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Sh. Shyam Lal ....Petitioner.

Versus

Sh. Diwan Chand and another ...Respondents

Cr. Revision No.353/2019
Order reserved on : 6.9.2019
Date of Order : 27.09.2019

Negotiable Instruments Act, 1881 - Section 143 -A – Interim compensation by the Trial Court - Applicability – Held – Section 143-A of Act would be attracted only in those complaints where offence was committed after the amendment of Act i.e, w.e.f 1st September, 2018.(Para 9)

Negotiable Instruments Act, 1881 - Section 148 – Interim compensation by Appellate Court – Applicability – Held, provision of Section 148 will apply to all criminal appeals filed on or after 1st September, 2018 even if complaints before trial court(s) were filed prior to 1st September, 2018. (Para 11)

Cases referred:

G.J. Raja versus Tejraj Surana, 2019 SCC OnLine SC 989

Surinder Singh Deswal @ Col. S.S. Deswal v. Virender Gandhi, 2019 STPL 5376 SC

For the Petitioner :	Mr. Vaibhav Tanwar, Advocate.
For the Respondents :	Ms. Meera Devi, Advocate, for Respondent No.1.
	Mr. Nand Lal Thakur, Additional Advocate General, for Respondent No.2/ State.
	Ms. Shradha Karol and Ms. Richa Thakur, Advocates, as Amicus Curiae.

The following order of the Court was delivered:

Anoop Chitkara, Judge

ORDER

The petitioner, who is a convict under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the N.I. Act'), has come up before this Court, by way of the present Criminal Revision Petition, under Sections 397 and 401 of the Code of Criminal Procedure.

2. The accused/convict, who allegedly deals in the sale of agricultural products, issued two cheques, amounting to Rs.20,000/ each, dated 11.7.2011 in favour of the 1st respondent, Diwan Chand, in lieu of sale of vegetable (Broccoli). However, when the cheques were presented for encashment, the same were dishonoured for want of sufficient funds. Consequently, the 1st respondent issued a notice to the petitioner, asking him to make the payment. However, neither the payment was made nor any reply was given to such notice. Consequently, the complainant who is the 1st Respondent, filed a complaint under Section 138 of the Act.

3. After completion of trial, the learned Judicial Magistrate 1st Class, Karsog, District Mandi, vide judgment dated 26.11.2013, convicted the accused and sentenced him to undergo simple imprisonment for a period of three months and to pay a compensation of Rs.40,000/ to the complainant. In default of payment of compensation, the accused was directed to undergo further simple imprisonment for a period of one month. Feeling aggrieved, the convict/petitioner, challenged the said judgment, by way of an appeal, under Section 374 of the Code of Criminal Procedure, filed in the Court of learned Additional Sessions Judge-1, Mandi, HP, camp at Karosog. Vide judgment dated 8.4.2019, learned Additional Sessions Judge, Mandi, Camp at Karsog, dismissed the appeal. Now, the convict has come up before this Court, challenging the judgment of conviction.

4. Vide order dated 23.8.2019, this Court had issued notice, returnable for 30.8.2019, on which date, the complainant was represented by a Counsel. Vide order dated 30.8.2019, this Court suspended the sentence. However, this Court also ordered as follows:-

> *"In this matter proposition of law has emerged that in view of the amendment of the Negotiable Instruments Act, 1881, in the year 2018 whether the mandate of Section 143-A of the Act is retrospective in nature or only prospective i.e. after the amendment. On this proposition, Ms. Shradha Karol and Ms Richa Thakur, Advocates, are appointed to assist the Court as amicus curiae. Learned counsel for the parties shall also assist the Court on this issue."*

5. On the Proposition of Law, I have heard Mr. Vaibhav Tanwar, learned counsel for the petitioner, Ms Meera Devi, learned Ccounsel for the 1st respondent and Mr. Nand Lal Thakur, learned Additional Advocate General, for the 2nd respondent/State. I have also heard Ms. Shradha Karol and Ms. Richa Thakur, learned Advocates, who assisted this Court as Amicus Curiae.

6. Vide Act No.20 of 2018, the N.I. Act, was amended by the Parliament and Sections 143A and 148 were inserted. The amendments came into effect from 1.9.2018 vide S.O. 3995 (E), dated 16.8.2018.

7. Section 143A deals with the cases which are pending trial and Section 148 of the N.I. Act deals with the cases which are in appeal. There is no amendment, in respect of the revisionary jurisdiction of the High Courts under Sections 397 and 401 of CrPC.

8. It shall be appropriate to extract Sections 143A and 148 of the Act, which is as follows:-

"143 A. ***Power to direct interim compensation-***

(1) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant-*

(A) In a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and

(B) In any other case, upon framing of charge.

(2) The interim compensation under sub-section (1) shall not exceed twenty per cent of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under sub-section (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial years, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973(2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this section."

148. ***Power of Appellate Court to order payment pending appeal against conviction****-- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974) in an appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent. of the fine or compensation awarded by the trial Court:*

Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A.

(2) The amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding

thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:

Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant."

9. Miss Shradha Karol, learned Amicus Curiae has drawn attention of this Court to the pronouncement of the Hon'ble Supreme Court in ***G.J. Raja versus Tejraj Surana***, **2019 SCC OnLine SC 989**, decided on 30.07.2019, in which it was held that Section 143-A of the N.I. Act is applicable to all the offences committed on or after 01 Sep 2018 and further clarified that the said Section could be applied or invoked only in those complaints where the offence under Section 138 of the N.I. Act was committed after the amendment of the N.I. Act, i.e. w.e.f. 1st September, 2018. It shall be appropriate to extract the relevant portion of the law laid down by the Hon'ble Supreme Court in the aforesaid case, which reads as follows:

"24. In the ultimate analysis, we hold Section 143A to be prospective in operation and that the provisions of said Section 143A can be applied or invoked only in cases where the offence under Section 138 of the Act was committed after the introduction of said Section 143A in the statute book. Consequently, the orders passed by the Trial Court as well as the High Court are required to be set aside. The money deposited by the Appellant, pursuant to the interim direction passed by this Court, shall be returned to the Appellant along with interest accrued thereon within two weeks from the date of this order."

10. In view of the pronouncement of the Hon'ble Supreme Court on amended Section 143-A of N.I. Act, this proposition of law does not survive because the law is no more *res integra.*

11. Ms. Richa Thakur, learned Amicus Curiae has drawn the attention of this Court to a pronouncement of the Hon'ble Supreme Court in ***Surinder Singh Deswal @ Col. S.S. Deswal v. Virender Gandhi,* 2019 STPL 5376 SC,** decided on29.5.2019. This judgment is exactly on the proposition of law which this Court had proposed to settle and Hon'ble Supreme Court holds that Section 148 of the N.I. Act, as amended, shall be applicable in respect of all the appeals filed against the conviction under section 138 of N.I.Act, even if the complaints were filed prior to 01 Sep 2018. It means that the amended provision of S. 148 applies to all Criminal Appeals filed on or after 1st Sep 2018, against conviction under N.I.Act. The relevant portion of the proposition of law laid down by the Hon'ble Supreme Court in the aforesaid case is extracted as follows:

8.1 Having observed and found that because of the delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings, the object and purpose of the enactment of section 138 of the N.I. Act was being frustrated, the Parliament has thought it fit to amend section 148 of the N.I. Act, by which the first appellate Court, in an appeal challenging the order of conviction under section 138 of the N.I. Act, is conferred with the power to direct the convicted accused - appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court. By the amendment in section 148 of the N.I. Act, it cannot be said that any vested right of appeal of the accused - appellant has been taken away and/or affected. Therefore, submission on behalf of the

appellants that amendment in section 148 of the N.I. Act shall not be made applicable retrospectively and more particularly with respect to cases/complaints filed prior to 1.9.2018 shall not be applicable has no substance and cannot be accepted, as by amendment in section 148 of the N.I. Act, no substantive right of appeal has been taken away and/or affected. Therefore the decisions of this Court in the cases of Garikapatti Veeraya (supra) and Videocon International Limited (supra), relied upon by the learned senior counsel appearing on behalf of the appellants shall not be applicable to the facts of the case on hand. Therefore, considering the Statement of Objects and Reasons of the amendment in section 148 of the N.I. Act stated hereinabove, on purposive interpretation of section 148 of the N.I. Act as amended, we are of the opinion that section 148 of the N.I. Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence under section 138 of the N.I. Act, even in a case where the criminal complaints for the offence under section 138 of the N.I. Act were filed prior to amendment Act No. 20/2018 i.e., prior to 01.09.2018. If such a purposive interpretation is not adopted, in that case, the object and purpose of amendment in section 148 of the N.I. Act would be frustrated. Therefore, as such, no error has been committed by the learned first appellate court directing the appellants to deposit 25% of the amount of fine/compensation as imposed by the learned trial Court considering section 148 of the N.I. Act, as amended.

12. Resultantly, the proposition of law, which this Court proposed to settle, is no more res integra in view of the authoritative pronouncements of the Hon'ble Supreme Court. Therefore, no order is required to be passed, at this stage.

13. The Court expresses its gratitude to both Ms. Shradha Karol and Ms. Richa Thakur, Advocates, who assisted this Court as Amicus Curiae, did extensive research on the amendments and presented the legal position accurately.

13. Both the learned Amicus Curiae are thus discharged from this case. Registry is directed not to reflect their names in this case henceforth.

14. List the matter for final hearing on its own merits, in the month of October, 2019, immediately after Dussehra Holidays.

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

Smt. Shakuntla Devi ....Appellant.

Versus

Shri Amar Singh and another ...Respondents.

RSA No.: 319 of 2007
Decided on: 03.09.2019.

Indian Evidence Act, 1872 – Section 68 – Will - Dispute between brother and sister regarding Will executed by their father ' DC' – Plaintiff (sister) disputing Will as forged and fabricated one – Lower courts dismissing her claim and holding Will in favour of brother (defendant) as valid – RSA – Held , there is distinction between a Will which is forged and fabricated one and Will which is alleged to be procured by coercion or misrepresentation – Case of plaintiff is that the Will is forged and fabricated – Plaintiff not saying anything about forgery or fabrication in her statement – Will duly proved by defendant by examining scribe and an attesting witness – Testator was residing with defendant (son) till his death – It was the last valid Will of testator – RSA dismissed. (Para 10 to 12).

For the appellant : Mr. Rajesh Verma, Advocate.

For the respondent : Mr. K.D. Sood, Sr. advocate with Mr. Rajnish K. Lall, Advocate for respondent No. 1.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this appeal, appellant has challenged the judgment and decree passed by the Court of learned Civil Judge (Sr. Divn.), Sirmour District at Nahan, HP, in Civil Suit No. 89/1 of 2001, decided on 26.02.2005, vide which, learned Trial Court dismissed the suit filed by the present appellant for declaration and permanent prohibitory injunction, as also the judgment and decree passed by the Court of learned District Judge, Sirmaur District at Nahan, H.P., in Civil Appeal No. 33-CA/13 of 2005, dated 21.04.2006, whereby learned Appellate Court while dismissing the appeal filed by the appellant, upheld the judgment and decree passed by the learned trial Court.

2. Brief facts necessary for adjudication of the present appeal are as under:-

Plaintiff Shakuntla Devi filed a suit for declaration and permanent prohibitory injunction against the defendants on the ground that Duni Chand, father of the parties to the suit, was the owner of the landed property with *abadi* comprised of Khasra No. 360/227, measuring 23 bighas, khata khatauni No. 134/179, situated at village Devni, Tehsil Nahan, District Sirmaur, H.P. Parties to the suit were having good relations with their deceased father. It was the plaintiff who used to look after and serve her father in old and ailing condition. Her father had committed to her that he would give landed property of his share, which comes to about 7½ bighas to her, as she was married in a poor family. According to the plaintiff, late Duni Chand was an aged person and was suffering from Asthama, on account of which, he had become feeble and weak, both mentally and physically. His power of hearing and vision was greatly impaired and weakened. Duni Chand died on 06.03.1999 at Zonal Hospital, Nahan. On 15.07.2000, plaintiff asked defendant No. 1 for amicable partition of the suit land, however, defendant No. 1 clearly refused to do so and stated that plaintiff had no right, title or interest over the suit land, as defendant No. 1 was the absolute owner of the suit property. Plaintiff thereafter approached Halqua Patwari and procured Jamabandi, perusal of which demonstrated that on the basis of a Will dated 06.03.1999, defendant No. 1 had got incorporated revenue entries in his favour qua the suit land. According to the plaintiff, said Will as well as the entries of mutation which were recorded in favour of defendant No. 1 were fraudulent, wrong, illegal, manipulated and collusive and were inoperative as far as the plaintiff was concerned. According to the plaintiff, Duni Chand had not executed any Will during his lifetime. She being a co-sharer in joint possession to the extent of 1/3rd share, had a right to seek partition of her share and defendant No. 1 had no right to alienate the property in excess of his share.

3. Whereas defendant No. 1 denied the claim of the plaintiff, defendant No. 2 admitted the claim of the plaintiff. Defendant No. 1 while contesting the plaint took the stand that late Duni Chand had executed a valid Will on 06.03.1999 in his favour which was duly registered before the Sub Registrar, Nahan, on the same day. The property stood bequeathed in his favour by way of Will as he was the only son of deceased Duni Chand. Duni Chand was residing with defendant No. 1. Plaintiff as well as proforma defendant No. 2 were also aware of this fact and mutation was also attested in favour of defendant No. 1 on the basis of said Will. According to defendant No. 1, it was only on account of greed that the suit stood filed by the plaintiff.

4. On the basis of pleadings of the parties, learned Trial Court framed the following issues:-

"1. Whether Will No. 17 dated 06-03-1999 is the last and final Will of late Shri Duni Chand, executed in favour of defendant No. 1, as alleged? If so its effect?.... OPD-1

2. If Issue No. (1) is proved in affirmative, whether the Will is a result of fraud, misrepresentation, as alleged? ....OPP.

3. Whether the suit of the plaintiff is not maintainable as the plaintiff is not in possession of the suit land? ....OPD.

4. Whether the plaintiff is estopped by her act, and conduct to file the present suit? .....OPD.

(5) Relief."

5. On the basis of pleadings and evidence led by the parties in support of their respective cases, the Issues so framed were answered by the learned Trial Court as under:-

"Issue No.1 : Yes.

Issue No. 2 : No.

Issue No. 3 : Yes.

Issue No.4 : Yes.

Issue No. 5 : The Suit dismissed with costs as per operative part of the judgment."

6. The suit was dismissed by the learned Trial Court by holding that whereas Will Ext. D-A stood duly proved on record, it also stood established that said Will was the last Will executed by deceased Duni Chand. Mutation Ext. P-1 demonstrated that plaintiff and proforma defendants were aware of the execution of the Will in favour of defendant No. 1 as they had voluntarily agreed for attestation of the mutation of the property of late Duni Chand in favour of defendant No. 1. Learned Trial Court further held that Will dated 06.03.1999 was the last and final Will of late Duni Chand executed in favour of defendant No. 1 and the same was not result of fraud and misrepresentation.

7. In appeal, these findings were affirmed by the learned Appellate Court. While dismissing the appeal, learned Appellate Court also held that though it was a matter of record that Duni Chand died on the same night, on which he had registered the Will, however, the Will stood registered at around 11:00 a.m. whereas Duni Chand died in the Hospital at about 10:00 p.m. on the same day. Learned Appellate Court held that there is nothing on record to suggest that mental condition of Duni Chand during date time was not sound or that prior to or on 06.03.1999, he was suffering from any mental disorder. It held that death of a person can be sudden but that does not mean that prior to death, that person was not in a sound state of mind. It further held that as the Will stood duly proved by the scribe of the Will as also by the marginal witness, this demonstrated that Duni Chand was in a perfect state of mind at the time of execution of the Will. Learned Court also held that if a propounder of Will was in a position to establish that testator was in sound state of mind at the time of execution of the Will and if it is found that Will does not suffers from any illegality, then the onus of the propounder stands discharged and the Will in that eventuality is required to declared as a valid document in favour of the propounder. It further held that no material illegality or irregularity could be traced in the Will under challenge and as logical reasoning stood assigned by the learned Trial Court, said judgment called for no interference.

8. Feeling aggrieved, the appellant-plaintiff has filed this appeal, which was admitted on 25.07.2007, on the following substantial questions of law:-

"1. Whether the judgment and decree of the Courts below can be sustained when it ignores the statement of DW-3 proving the Will Ex. DA?

2. Whether the judgment and decree of the Court below is against the evidence on record, more especially of PW-1 and PW-2?"

9. I have heard learned Counsel for the parties and gone through the record of the case as well as the judgments and decrees passed by the learned Courts below:-

10. Both the substantial questions of law are being answered together. A perusal of the plaint demonstrates that the case of the plaintiff in unequivocal terms was that Duni Chand in his lifetime had not executed any Will and Will Ext. D-A propounded by defendant No. 1 was a forged Will. In these circumstances, onus was upon the plaintiff to have had substantiated by placing material on record that the Will propounded by defendant No. 1 was a forged and fabricated Will. I may add that, in my considered view, there is a difference between a forged and fabricated Will as compared to a Will which a propounder might have got executed from the testator under coercion or misrepresentation. I repeat, the case of the plaintiff was not of coercion or misrepresentation but was that Will in question was a forged and fabricated Will.

11. In order to prove her case, plaintiff entered the witness box as PW1 and she also examined one Ishaq Mohammad, who deposed in the Court as PW2. Plaintiff as PW1 deposed in the Court that the suit property was owned by her father and her father had told her that he would give his share in favour of the plaintiff. She also stated that her father had given up food etc. much before his death and the day on which her father died, defendant No. 1 had taken him to the Hospital. In her cross examination, plaintiff admitted it to be correct

that her father used to reside with defendant No. 1and that the land was being cultivated by defendant No. 1. Perusal of the statement of PW2 demonstrates that he nowhere stated that the Will propounded by defendant No. 1 was a forged and fabricated Will.

12. On the other hand, in order to prove that late Duni Chand had executed a valid Will in his favour, defendant besides himself, examined DW2 Puroshattam Saini, Advocate, who has scribed the Will as also Raj Mohammad, who was one of the marginal witness to the Will as DW3. A perusal of statements of these witnesses clearly demonstrates that they have duly proved on record that the Will in issue was scribed at the behest of the testator. The same was duly read over and explained to the testator and thereafter only, the testator and marginal witnesses appended their signatures upon it. Therefore, on one hand, whereas the plaintiff has not led any evidence on record to substantiate that the Will in issue was a forged and fabricated document, defendant No. 1 has placed on record reliable evidence to demonstrate that the Will in issue was a valid Will executed by Duni Chand and the same was the last Will of late Duni Chand. In this view of the matter, it cannot be said that the learned Courts below have erred in appreciating the statements of the parties, have misread the contents of Will Ext. D-A, have erred in not appreciating that the Will was not proved on record in accordance with law. Substantial questions of law are answered accordingly.

In view of above discussion, as this Court does not finds any merit in the present appeal, the same is dismissed. Pending miscellaneous application(s), if any, also stand disposed of.

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

Ashok Kumar .....Appellant.

Vs.

Nazir Begum and others .....Respondents.

RSA No.: 327 of 2012

Date of Decision: 24.09.2019

Specific Relief Act, 1963 – Section 31 – Cancellation of an instrument - Plaintiff seeking cancellation of sale deed on ground that it was result of fraud and misrepresentation – Held, pleaded case of plaintiff being that the defendant got a sale deed executed from him instead of a mortgage deed – In deposition on oath saying that when he came to know that defendant was getting a sale deed executed instead of mortgage, he refused and went away – No evidence that signatures on sale deed are not his signatures – Sale deed not shown to be the result of fraud or misrepresentation – RSA dismissed. (Para 13).

For the appellant :Mr. R. P. Singh, Advocate.

For the respondents: Mr. Neeraj Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate, for respondent No. 1.

Respondents No. 2 to 5 are *ex parte.*

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this appeal, the appellant has prayed for the following reliefs:

"It is, therefore, respectfully prayed that in view of the submissions made hereinabove, the appeal may very kindly be accepted and impugned judgments and decrees dated 09.03.2012 in RBT. CA No. 22-P/XIII/07/2010, passed by learned Additional District Judge, Fast Track Court, Kangra at Dharamshala, H.P. and dated 20.10.2006 in Civil Suit No. 257/95 by ld. Civil Judge (Junior Division) (II), Palampur, District Kangra, H.P., whereby suit filed by plaintiff is dismissed, appeal filed is also dismissed, may very kindly be set aside and suit of the plaintiff may very kindly be decreed, in the interest of law and justice."

2. Brief facts necessary for the adjudication of the present appeal are that appellant-plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for declaration that sale deed, dated 22.03.1994, executed in favour of defendant No. 1 qua the suit land comprised in Khata No. 90 min, Khatauni No. 159, Khasra Nos. 245, 243, 299, Kita 3, land measuring 0-96-91 hectares, of which, 1/6th share, i.e., 0-16-06 hectares, situated in Mohal Lamehar, Mouja Saliana, Tehsil Palampur, District Kangra, H.P. was without consideration and was a result of fraud and mis-representation and thus was liable to be set aside and also for consequential relief of permanent prohibitory injunction by restraining the defendants from interfering with the suit land. As per the plaintiff, he was owner in possession of the suit land. As he required some money, he approached defendant No. 2, who agreed to mortgage the suit land with defendant No. 1 for an amount of Rs.25,000/-. An amount of Rs.19,000/- was paid to the plaintiff and balance was agreed to be paid at the time of attestation of mutation as per receipt, dated 11.10.1993. Thereafter, mutation was sanctioned, but balance of Rs.6000/- was not paid to the plaintiff. In these circumstances, *Patwari Halqa* suggested for registration of the mortgage deed to the defendants, who brought the plaintiff to Palampur on 22.05.1994 for getting mortgage deed executed and registered. However, defendants No. 1 and 2 connived with the scribe and instead of getting the mortgage deed executed and registered, they got a sale deed executed and registered with Sub-Registrar, Palampur. According to the plaintiff, the deed was neither read over nor explained to him nor the balance amount was paid to him. According to him, the sale deed was without consideration and a result of fraud and mis-representation.

3. Plaintiff's claim was opposed by the defendants on the ground that the suit land stood sold by him to the defendants for a consideration of Rs.10,000/- vide registered sale deed dated 22.03.1994. According to the defendants, earlier plaintiff had mortgaged part of the suit land with defendant No. 2 and mortgaged money was duly received by him and subsequently, defendant No. 1 only purchased share of the plaintiff in the suit land. According to the defendants, plaintiff had come to Palampur himself for the purpose of execution of the sale deed.

4. On the basis of pleadings of the parties, learned Trial Court framed the following issues:

> *"(1) Whether the plaintiff had mortgaged his share in the suit land with Jagdish Chand, as alleged? OPP*
>
> *2. Whether the sale deed dated 22.03.1994 qua the suit land in favour of defendant No. 1 is invalid being without consideration and a result of fraud and misrepresentation as alleged? OPP*
>
> *3. Whether the plaintiff is entitled to the relief of declaration qua athe sale deed and consequential relief of permanent injunction against the defendants qua the suit land, as prayed? OPP*
>
> *4. Whether the plaintiff is estopped by his act and conduct from filing the present suit?*
> *OPD*
>
> *5. Whether the plaintiff has no cause of action? OPD*
>
> *6. Whether the present suit is not maintainable? OPD*
>
> *7. Relief.*

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

> *"Issue No. 1: Yes.*
>
> *Issue No. 2: No.*
>
> *Issue No. 3: No.*

Issue No. 4:	*No.*
Issue No. 5:	*No.*
Issue No. 6:	*No.*
Relief:	*Suit of the plaintiff dismissed with costs, as per operative portion of the judgment."*

6. The suit was dismissed by the learned Trial Court by holding that though the plaintiff had contended that alleged sale deed dated 22.03.1994 Ex. DW4/A was executed without consideration and was a result of fraud and mis-representation, however, in his sworn testimony as PW-1, he denied the very execution of the sale deed as well as his signatures on the said exhibit. Learned Trial Court held that the sworn testimony of plaintiff was not inconsonance with his pleadings, which demonstrated that plaintiff had deposed beyond pleadings. It further held that though plaintiff stated that the sale deed was not bearing his signatures, however, signatures on the sale deed in fact were his, as was evident from other signatures of the plaintiff on record, including his signatures on application filed under Order V, Rule 20 of the Code of Civil Procedure and affidavit appended therewith. Learned Trial Court also held that otherwise also, it was not the pleaded case of the plaintiff that sale deed was not bearing his signatures, because his case was that the same was got executed by fraud and mis-representation. On these basis, learned Court held that the plaintiff could not be permitted to deny his signatures. Learned Trial Court also held that the plea of the plaintiff that value of the suit land was about Rs.50,000/- per *Kanal* and sale of the suit land to defendant for an amount of Rs.10,000/- was unacceptable, was also without any merit as there was on record Ex. DW3/A, which was another sale deed executed by plaintiff in favour of defendant No. 2 on 22.05.1993, as per which, land measuring 0-06-95 hectares was sold by plaintiff for a consideration of Rs.11,000/-. Learned Court also held that an amount of Rs.10,000/- when added to the mortgaged amount received by the plaintiff did not make the sale price of the suit land to be unfair. Learned Court also held that the sale deed otherwise was duly corroborated by the testimonies of DW-3 and DW-4 and no contradictions in their depositions came forth which clearly proved the fact that the said sale deed was duly executed by the plaintiff in favour of the defendants. On these basis, learned Trial Court dismissed the suit.

7. In appeal, learned Appellate Court upheld these findings by holding that the evidence on record clearly demonstrated that the plaintiff had failed to substantiate the contention of mis-representation and fraud. It held that defendants had examined DW-4 Ashwani Minhas, who had specifically sated that the sale deed was drafted at the instance of the plaintiff and the same was thereafter read over to him and marginal witnesses, signed the same in the presence of the plaintiff and plaintiff also appended his signatures over the same after admitting the contents thereof.

8. Learned Appellate Court dismissed the appeal by holding that plaintiff had not been able to prove that the sale deed was got executed by way of fraud and mis-representation,

9. Feeling aggrieved, the appellant/plaintiff has filed the present appeal, which was admitted on 20.06.2012 on the following substantial question of law:

> *"Whether alleged sale deed Ex. DW4/A in the alternative is liable to be declared void being without any consideration and Courts below having overlooked this aspect of the matter thereby vitiating the impugned judgments & decrees?"*

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

11. A perusal of the record of the case demonstrates that to prove his case, the plaintiff besides himself examined PW-2 Prem Chand and PW-3 Piar Chand in support of his

case. A perusal of the plaint demonstrates that the plaintiff had mentioned therein that the sale deed which was got executed on 22.05.1994, was without consideration, result of mis-representation and connivance between Sub-Registrar, the Scribe and the witnesses with defendants No. 1 and 2.

12. In the written statement, defendant No. 1 categorically mentioned while denying the fact that the sale deed was a result of fraud and mis-representation that he purchased the share of the plaintiff in its entirety for a sum of Rs.10,000/-. A perusal of sale deed Ex. PA demonstrates that the same contains the signatures of the plaintiff. Plaintiff on 12.04.2006 deposed that he had mortgaged the suit land with Jagdish Chand for a sum of Rs.19,000/-. Jagdish told him that they wanted to register the mortgage deed and for this purpose, he went to Palampur with the defendants. There he came to know that defendants wanted to get a sale deed registered qua the suit land, which he refused and he returned back to his house. He further deposed that he had not executed any sale deed in favour of the defendants and he had not sold the suit land. In his cross-examination, he agreed that he had received an amount of Rs.19,000/. However, he denied that he had sold the suit land for an amount of Rs.10,000/- to defendant No. 1.

13. A careful perusal of the plaint and the statement of plaintiff as PW-1 demonstrates that there are glaring contradictions in the same. Whereas in the plaint, the case of the plaintiff is that in the garb of getting the mortgage registered, the defendants fraudulently got a sale deed registered from the plaintiff in their favour without any consideration, however, in the Court plaintiff has deposed that when he was called to Palampur in the garb of registration of a mortgage deed and after he came to know that the defendants wanted a sale deed to be executed, he refused to do so and he returned back to his house. During the course of arguments, learned counsel for the appellant could not justify said discrepancy in the stand of the plaintiff.

14. Be that as it may, the plaintiff in the Court has denied the very execution of the sale deed and has alleged that the same was a result of forgery. There is no evidence led by him to demonstrate that the sale deed was not executed by him or was a result of fraud and mis-representation or was without consideration.

15. On the other hand, a perusal of the evidence led by the defendants clearly demonstrates that they have proved on record the factum of the suit land having been sold by the plaintiff in favour of defendant No. 1 for a consideration of Rs.10,000/-. As it was the allegation of the plaintiff that sale deed Ex. PA was without consideration, onus was upon him to have had proved this fact. This he has miserably failed to do. Therefore, in the absence of there being any material on record from which it could be inferred that sale deed Ex. PA was without any consideration, it cannot be said that the learned Courts below have erred in not holding that the sale deed was without consideration or that the learned Courts below have overlooked this fact. Substantial question of law is answered accordingly.

16. In view of the discussions made hereinabove, as there is no merit in the present appeal, the same is dismissed. Miscellaneous applications, if any, also stand disposed of. No costs.

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

Smt. Brij Sood and others .....Petitioners.

Vs.

Sh. Vijay Kumar .....Respondent.

CMPMO No.: 371 of 2019

Date of Decision: 26.09.2019

Code of Civil Procedure, 1908 – Order VI Rule 17 – Amendment of pleadings after commencement of trial – Permissibility – Held, rent controller had framed issues and also recorded landlord's evidence – Tenants neither leading evidence nor taking steps for summoning witnesses on three opportunities – Filing application for amendment of reply - Amendment as desired in their reply for showing non- existence of bonafide requirement of landlord, not necessary at all - Application for amendment of reply was filed to delay the case – Petition dismissed – Order of rent controller dismissing said application , upheld. (Para 5 & 6).

For the petitioners: Ms. Heena Chauhan, Advocate, vice Mr. B.S. Thakur, Advocates.

For the respondent: Mr. Ashok Sood, Senior Advocate, with Mr. Khem Raj, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the *petitioners* have challenged order, dated 09.07.2019, passed by the Court of learned Rent Controller, Shimla in CMA No. 69-6 of 2019 in Rent Petition No. 192-2 of 2017, titled as *Vijay Kumar Vs. Smt. Brij Sood and others,* vide which, an application filed by the petitioners herein under Order VI, Rule 17 of the Code of Civil Procedure praying for amendment of the reply filed to the eviction petition, has been dismissed.

2. It is not in dispute that after the pleadings were completed and issues were framed, landlord concluded his evidence on 22.11.2018. Thereafter, the case was listed for recording evidence of the present petitioners, who are respondents before the learned Rent Controller. However, neither any steps were taken nor any witness was got examined by the petitioners before the learned Rent Controller despite three opportunities having been granted to them in this regard by the learned Rent Controller. It is thereafter that an application was filed under Order VI, Rule 17 of the Code of Civil Procedure by them for amendment of the reply filed to the eviction petition, mentioning therein that subsequently it had come to their notice that in a family partition between the co-sharers of the landlord, a shop had fallen to his share, which was commercial in nature and which would demonstrate that there was no need for the landlord to have the tenants evicted as he was having sufficient accommodation for running his commercial activities.

3. In the reply which was filed to the said application by the landlord, the averments made in the application, purportedly necessitating the amendment of the reply, were denied by the landlord.

4. Said application has been dismissed by the learned Rent Controller vide impugned order by holding that for the purpose of proving the facts which the tenants intended to introduce in the reply, amendment of the reply was not necessary, as they could lead evidence to prove such facts on record. Learned Court further held that the tenants rather than straightway leading evidence to prove said facts, had filed an application, which in fact was not at all necessary for adjudication of the matter in dispute. Learned Rent Controller also held that the application was filed by the tenants at a belated stage without there being anything mentioned in the application as to when did the tenants came to know of the facts, which they intended to introduce by way of amendment in the reply. It further held that the tenants had not disclosed the date, time and period when these facts came to their knowledge and on these grounds, learned Rent Controller held that as due diligence could not be

established by the tenants, therefore, there was no merit in the application and the same was dismissed.

5. In my considered view, the findings so returned by the learned Rent Controller cannot be said to be either perverse or not borne out from the record. It is matter of record that application does not contains any reasons explaining as to why despite due diligence, the facts which the tenants intended to introduce by way of amendment to be incorporated in the reply, could not be earlier incorporated by them in the original reply to the eviction petition or within some reasonable time thereafter. Besides this, a perusal of the original reply filed by the tenants to the eviction petition demonstrates that in para-8 thereof, while denying the averments made in the eviction petition, they have categorically stated that the contention of the landlord that he has no other suitable commercial premises for use of his business except the tenanted premises in occupation of the tenants is incorrect. In view of the said pleadings contained in the reply filed to the eviction petition, the facts which tenants intend to introduce by way of proposed amendment in the reply easily can be proved by them while leading their evidence.

6. Further, it is clearly borne out from the record that despite three opportunities having been given to the tenants, they failed to lead their evidence. In this view of the matter, the only conclusion which this Court can draw as to why the application was filed for amendment of the reply is that the tenants wanted to gain more time as they were aware that three opportunities given for leading evidence are reasonable and until and unless the party satisfies the Court that there are *bonafide* reasons not to lead the evidence, their right to lead evidence would be closed by the learned Rent Controller.

7. In this view of the matter, this Court concurs with the findings returned by the learned Rent Controller that there was no justification why despite due diligence the amendment proposed in the application could not be incorporated in the reply earlier. Further in view of the specific stand of the tenants in the original reply filed to the eviction petition, the proposed amendments are not even necessary for adjudication of the *lis.* Filing of the application was nothing but delay tactic adopted by tenants. Therefore, as this Court finds no merit in the present petition, the same is dismissed, so also pending miscellaneous applications, if any.

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

Dhani Ram .....Appellant

Versus

Kuldeep Singh & others ....Respondents.

RSA No. 363 of 2015
Reserved on**:** 13.9.2019
Date of Decision: 30.9.2019

Specific Relief Act, 1963 – Section 39 – Mandatory injunction – Grant of - Plaintiff alleging that defendants have made encroachment by extending projections of their structure over his structure and they also having blocked air and light of his house regarding which he had acquired easementary right by way of prescription – Lower courts dismissing plaintiff's claim – RSA – Held, suit land was 'Abadi' with both parties raising their constructions within their share and within possessions they were holding – Land of plaintiff is situated upwardly vis-a-vis land of defendants – No photographs of spot placed on record for showing that defendants having blocked space falling between houses of parties or they having made overhanging

projections over plaintiff's slab – Lower courts were justified in dismissing plaintiff's claim – RSA dismissed. (Para 9 to 11).

For the appellant:	Mr. G. D. Verma, Sr. Advocate with Mr. B. C. Verma, Advocate.
For the respondents:	Mr. J. L. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The plaintiff's suit, bearing Civil Suit No. 143/1 of 2006, claiming therein, rendition, of, a decree, of, permanent prohibitory injunction vis-a-vis, the suit khasra numbers, and, against the defendants, stood dismissed, hence by the learned trial Court, (i) and, in an appeal, bearing Civil Appeal No. 2-AK/13 of 2014, carried therefrom, by the plaintiff, before the learned first appellate Court, the latter Court also, thereon made, a verdict hence affirming, the, verdict, of, dismissal, of, the plaintiffs' suit, as pronounced, by the learned trial Judge concerned. The plaintiff, being aggrieved, by the concurrently recorded verdicts, respectively, by, the learned trial Judge, and, by the learned first appellate Court, hence, for, begetting reversal(s) thereof, has instituted, the instant appeal, before this Court. As detailed in para No.1 of the plaint was abadi deh land whereover they were having their residential houses. His double storey house was ituated on point 'B' whereas the house of the respondents was situated on point 'C'. In between their houses there was a vacant space 20 feet in length and 2 feet vide on the back side and one feet wide on the front side, as specifically depicted in the enclosed sketch map. Adjacent to their house, the respondents were also having a tin roof 6 feet hight kitchen built in mortar masonry. There was also a window in his house opening towards the kitchen of the respondents, through which he had been receiving air and sunlight. By way of prescription, it had matured into easementary right. On 25.9.2006, the respondents threatened to raise construction over the place where their kitchen was situated and in this process, they also threatened to encroach upon the aforementioned vacant place and extend the projection of his slab over the slab of his house. But during the pendency of the suit and despite of the ad-interim injunction order, respondents by totally defying the court order raised the construction and thereby encroached upon the vacant space by extending the slab and thereby also blocked the air and light which used to be received by him through the window of his house. On the premises of the above, he sought a decree of mandatory injunction for demolition and removal of the overhanging projection raised over and above portion D to D of the enclosed site plan.

3. Respondents filed joint written statement and therein they raised preliminary objections of locus-standi, cause of action, maintainability, valuation and non-joinder of necessary parties etc. On merits, they did not deny the nature of the suit land as abadi deh and the existence of their residential houses thereover, but denied the correctness of the site plan showing location of houses of the parties and the existence of any vacant space. Rather, they tried to show that the construction had been raised by them over their portion of the abadi land much prior to be institution of the present suit. They also denied the existence of any vacant space in between their houses and that of the appellant and the exercise of any easementary right to light and air by the appellant through any window of his house. On the premises thereof, they also denied that during the pendency of the suit and during the existence of any stay order, they had raised any construction in defiance of the court order.

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

1. Whether the plaintiff is entitled for a decree of permanent prohibitory injunction, as prayed for? OPP

2. Whether the plaintiff is entitled for a decree of mandatory injunction, as prayed for? OPP
3. Whether the plaintiff has no locus standi to file the present suit, as alleged? OPD.
4. Whether the suit filed by the plaintiff is without cause of action, as alleged? OPD.
5. Whether the plaintiff is estopped from filing the present suit by his own act, conduct, deed and acquiescences, as alleged? OPD.
6. Whether the suit of the plaintiff is not maintainable in the present form, as alleged? OPD
7. Whether the suit of the plaintiff is bad for want of proper court fee and jurisdiction, as alleged? OPD
8. Whether the suit of the plaintiff is bad for non-joinder of necessary parties, as alleged? OPD
9. Whether the present amended suit is not maintainable in the present form, as alleged? OPD.
10. Relief.

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

6. Obviously, through the instant Regular Second Appeal, cast, before this Court, by the plaintiff, he seeks reversal of the concurrent pronouncements, made, against him, by both the learned Courts below.

7. This Court, on 30.10.2015, had, admitted the appeal, instituted by the plaintiff/appellant, against, the judgment and decree, rendered, by the learned first Appellate Court, upon, the hereinafter extracted, substantial question of law, for, its hence making, an adjudication thereon:-

1. Whether on account of misappreciation of the pleadings and law and also misreading of the oral as well as documentary evidence available on record, the findings recorded by Courts below are erroneous and, as such, the judgment and decree impugned in this appeal being perverse and vitiated is not legally sustainable?

Substantial question of Law No.1:

8. The plaintiff, cast, averment(s) in the suit, that owing to meteing, of, threatenings, hence by the defendants, to raise a wall, hence touching the wall of the plaintiff, (i) and, also their meteing further threatenings to raise, a, slab, upon, the lintel of the plaintiff, hence, on 25.9.2006, (ii) thereupon emanating hence imminent obstruction(s) vis-a-vis, his easementary right of air, and, light, and, hence irreparable loss, and, injuries being encumbered, upon, him.

9. On the afore averments, hence relief, of, permanent prohibitory injunction, was, claimed, and, as aforesaid, both the learned courts below rather declined the afore relief, to the plaintiff. Even though, the plaintiff, in his affidavit, borne in Ext. PW-1/A, as stood tendered, during, the course of his examination-in-chief, has, made echoings, rather bearing concurrence, with, the averments, cast, in the plaint, (i) however, merely, upon, the echoings, borne in, Ext. PW-1/A, it would not be appropriate, to, grant the espoused relief, to the plaintiff, as even his deposition, as, embodied, in his cross examination, is enjoined to be read therealongwith. Uncontrovertedly, both the plaintiff, and, the defendants, have raised their respective projections, upon, the suit land, depicted, in, the apposite jamabandi, as abadi

deh. PW-1, in his cross examination, has made candid echoings, qua, his house, as well as, the house of the defendants, rather visibly since the past 20 years, being separately raised, on separate portions, of, land, hence declared as abadi, (ii) he has further disclosed in his cross-examination, that, the khasra number, ascribed, in, the suit land, bearing 55, and, it carrying an area of 7 bighas, and, 13 biswa, and, in the afore khasra number, the estate right holders, hence, in, commensuration, vis-a-vis, their shares in the village, rather holding a right to make user thereof, by, raising their respective residential abodes hence thereon. He has also deposed, that, the construction(s) of abode, by the plaintiff, and, by the defendants, being within their shares, in the abadi land, and, also the residential/abodes, as, raised thereon, respectively by both, also bearing commensuration, vis-a-vis, their apposite valid possessions thereof. Further he makes, a, disclosure in his examination-in-chief, qua, his erecting, a, boundary line encircling his abode, and, the afore boundary wall rather being raised 20 years, preceding, the, institution, of, the extant suit. Further thereonwards, he has made, a, disclosure qua there existing, a, space, inter-se his house, and, the house of the defendants, and, that two windows rather, facing the ground floor of the defendants, rather also occurring thereon. He has also testified that the house of the defendants, is above the ground floor, and, basement, vis-a-vis his house, and, his house, is, located about 13 feet above, the house, of, the defendants. Importantly, in his cross-examination, he has made testification qua his failing, to, place on record, any photographical evidence, making candid display, qua, in the defendants raising the apt construction, theirs making untenable projection rather towards his house.

10. Be that as it may, upon making, the imperative conjoint readings, of the afore echoings, as, borne in the cross-examination, of, the plaintiff, hence unfoldings emerge, (i) qua there being a space inter-se the house of the plaintiff, (ii) and, the defendants, and, with his visibly failing to adduce, any cogent evidence, hence making displays, vis-a-vis, in the defendant(s), making construction(s) of his house, theirs/his attempting, to, lodge his projection, into the space, occurring, and, separating, the, house of the plaintiff, from, the house of the defendants. Pre-eminently, also when, the, plaintiff rather deposes, that, his two windows, facing the house, of, the defendants, occur on the ground floor of his house, and, when he does not make, any further disclosure, that the defendants, are, attempting to raise construction, in the afore space, as, occurs inter-se his house, and, the house of the defendants, thereupon all the afore depositions constrain this Court, to, conclude, (i) the plaintiff failing to prove that the defendants, are, raising construction, of, his house, in a manner, hence causing imminent obstruction, vis-a-vis, his easementary right, of, air and light, (ii) the defendant(s) is, constructing or attempting to construct, overhangings, his not, raising them in a manner, so as to lodge them, on the wall of the house, of, the plaintiff. The abstract of the afore discussion, is, that when the plaintiff, has failed to prove the averments, in the plaint, and, also when a, reading, of, his cross-examination, does, for the reasons aforestated, baulk his espoused relief, (iii) thereupon, the espoused relief, of, injunction stood tenably declined, by both the learned courts below, and, the verdict(s) of dismissal, of, the plaintiff suit, as, pronounced, respectively by the learned trial Judge, and, latter affirmed, by, the learned first appellate Court, do not, warrant any interference from this Court.

11. The above discussion, unfolds, qua the conclusion(s), as arrived by the learned Courts below, being based, upon a proper and mature appreciation, of, evidence on record. Accordingly, the substantial question, of law, is, answered, in, favour of the defendants/respondents, and, against the plaintiff/appellant herein.

12. In view of the above discussion, the instant appeal, is, dismissed, and, the judgment and decree impugned, before this Court, is, affirmed and maintained. Consequently, the plaintiff's suit is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Dharam Singh @ Dharmu ...Appellant

Versus

State of H.P. ....Respondent.

Cr. Appeal No. 326 of 2019
Reserved on : 12.9.2019
Date of decision: 30.9.2019

Protection of Children from Sexual Offences Act, 2012 - Section 4 – **Indian Penal Code, 1860** – Section 376 – Penetrative sexual assault on minor – Proof – Appeal against conviction by accused – Accused arguing wrong appreciation of evidence on part of Special Judge – Held, allegations against accused are being that he forcibly took prosecutrix to his house and raped her there – Statement of prosecutrix not believable as visit of accused to her house would have been noticed by her brother and grandmother - And sexual assault of accused would have brought attraction of his parents also when he was staying with them in one room Kachha structure - Land dispute between father of prosecutrix and accused already existing between them – Statement of prosecutrix unnatural – Appeal allowed – Conviction set aside. (Para 8 to 10).

For the appellant:	Ms. Anjali Soni Verma, Advocate.
For the respondents:	Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel Dy. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal stands directed by, the appellant, against, the judgment, of, conviction pronounced, on 15.6.2019, by the learned Special Judge Kangra, at, Dharmshala, District Kangra, H.P, in, Session Case No. 39-B/VII/2018, wherethrough, after convicting, the, accused, for, commission, of, offence(s) punishable, under, Section 376, of, the IPC, and, under, Section 4, of, the Protection of the Children from Sexual Offences Act, 2012, it, sentenced the accused, to, undergo rigorous imprisonment, for, 7 years, and, to pay, a, fine of Rs. 50,000/-, and, in default of payment of fine, he stood further sentenced, to, undergo simple imprisonment, for, six months.

2. The facts relevant to the case, are, that the father of the prosecutrix namely Tula Ram had solemnized two marriages and five children were born from first marriage and prosecutrix was born from second marriage. Both the wives of the father of the prosecutrix had expired. The prosecutrix was student of 8th class at the time of occurrence. The father of the prosecutrix was running a shop at Village Gunehar and he used to sleep there. Prosecutrix sometimes used to sleep with her father in the shop and sometimes at her home. It is alleged that 5-6 days before 10.4.2018, prosecutrix after having meals had gone to sleep in her house. At about 8-9 p.m. accused came to her room and took her to his house. The accused slept with the prosecutrix and after opening her pajama, accused had committed sexual intercourse with her. It is alleged that prosecutrix suffered pain and slept there. When she woke up in the morning, she found that her pajama open and she tied the string of pajama and left for her house. Due to fear and shame, she did not disclose this fact with her father. It is alleged that some days back, she fell ill and was admitted in Paprola hospital. The matter was reported to the police upon which case FIR was registered against the accused. The police had taken the prosecutrix to civil hospital, Palampur where her medical examination was got conducted and MLC was obtained. The statement of prosecutrix under Section 164 of Cr.P.C. was got recorded before learned JMIC, Baijnath. The police visited the spot and prepared the spot map and had also taken the photographs at the place of occurrence. Statements of witnesses were recorded as per their versions. During

investigation, the accused was arrested. The pajama of prosecutrix and the bed sheet recovered from the room of accused were sent to RFSL, Dharmshala and after analysis, the report of RFSL was procured by the police. During investigation it was found that in the house, except father, no one looked after the prosecutrix and prosecutrix felt danger to her life and by the order of the court, the prosecutrix was finally sent to Balika Ashram Pragpur, Tehsil Dehra. The birth certificate of the prosecutrix was obtained from CMO, Dharmshala, which shows that the date of birth of the prosecutrix is 2.8.2006. On conclusion of investigation, the challan was prepared and presented in the court and accused was produced to face the trial.

3. The learned trial Court, after hearing the parties and aftr going through the record, found, a, prima facie case, against the accused, under, Section 4 of the POCSO Act, 2012, to which the accused pleaded not guilty, and, claimed trial. In proof of the prosecution case, the, prosecution examined 16 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused, under, Section 313 Cr.P.C., stood, recorded by the trial Court, wherein, he made disclosures qua his false implication. However, he did not lead any defence evidence.

4. On an appraisal of evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

5. The accused/appellant, is, aggrieved by the judgment of conviction recorded, hence by the learned trial Court. The learned Counsel appearing, for the accused/appellant has concertedly, and, vigorously hence contended qua the findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, she contends qua the findings of conviction, being reversed, by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced, by, findings of acquittal.

6. On the other hand, the learned Additional Advocate General, has, with compatible force, and, vigor, also contended that the findings of conviction, as, recorded by the learned Court below, rather standing based, on a mature, and, balanced appreciation, “by it”, of evidence on record, and, theirs not necessitating, an, interference, rather theirs meriting vindication.

7. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

8. A perusal, of, the statement, borne, in, the examination-in-chief, of, PW-1, (i) makes, vivid underscoring, qua, the afore witness testifying, qua after hers receiving, the, report of the FSL concerned, hers’ opining, qua, hence there being nothing, to, suggest, vis-a-vis, the prosecutrix, being not subjected, to, sexual intercourse. The afore testification, made by PW-1, has, also to be conjoined with the testification, of, the prosecutrix, who, stepped into the witness box, as, PW-2, and, who prior to her deposition, being recorded, stood queried, by the learned trial Court, for, the latter thereafter hence gauging, from, answers meted thereto, vis-a-vis, her capacity, to depose, as a witness, (ii) and, upon hers meteing satisfactory answers, to, the queries, of, the learned trial court, it, permitted her, to be examined, as a witness. In her examination-in-chief, she has, made, incriminatory ascriptions, vis-a-vis, the accused, inasmuch as, she has therein made echoings, in, concurrence, with her previous statement, recorded in writing, and, as borne in Ext. PW-2/A, and, has, also made a disclosure therein qua, (iii) the accused forcibly carrying her, towards his house, and, his thereat hence forcibly subjecting her, to, sexual intercourse, (iv) and, also, thereafter she echoes qua the afore incident occurring, during night, and, also echoes qua hers continuing to stay overnight, in, the house of the accused. Furthermore, she, in her examination-in-chief, has, testified that there being no other member of the family, of, the accused, residing, in, the house, of, the accused. Further, her testimony embodied, in her examination-in-chief,

though, is, prima facie bereft of any taint, of, hers making any, contradictions therewith, during the course, of, hers being cross-examined, by the learned defence counsel, (v) however, a closest reading of her testimony, as, borne in her cross-examination, unfolds qua hers contradicting, the, afore echoings, as, comprised, in her examination-in-chief, (vi) thereupon, this court may not be inclined, to, mete any credence, to, her testimony, in inasmuch as, given hers acquiescing, to, a suggestion, qua, on the relevant date, her brother, and, grand mother, both being present in the house, and, also hers acquiescing, to, a suggestion, vis-a-vis, the house, of, accused, consisting, of, one room, (vii) wherefrom this court, is, coaxed, to, form an inference qua her version, in her examination-in-chief, vis-a-vis, the accused forcibly carrying her, from her house, to, the house of the accused, and also, reiteratedly when she, make(s) echoings, in, her cross-examination, qua, the house, of, the accused comprising, of, one room, (vii) and, importantly with afore echoing becoming corroborated, from, also alike therewith communication(s) standing borne, in, the cross-examination, of, PW-8, and, also in, the, cross-examinaiton, of, Investigation Officer concerned, who, stepped into the witness box, as, PW-15, (viii) thereupon, her testificaiton, as, embodied in her examination-in-chief, becomes belied (ix), and, rather this court, is, reiteratedly constrained, to, make a conclusion, that, the deposition of the prosecutrix, vis-a-vis, hers being hence, in, a single room, occurring, in, the house of the accused, rather being subjected to sexual intercourse, by the accused, being unnatural, and, it inspiring no credibility, (x) as, emphatically, when the attention, of, the family members, of, the accused, obviously was enjoined, to, be attracted, to the occurrence, which happened inside, the, kaccha house, of, the accused, (xi) and, contrarily when the incident, has, remained unnoticed, by, the other family members of the accused, hence residing along with him, in the single room kaccha house, (xii) and, who were hence enjoined to witness, the, incident, and, also nor the Investigating Officer concerned, in his deposition, making, any voicing, qua, despite his making efforts, to associate them, in the relevant investigation, theirs declining, to, render cooperation, to, him, (a thereupon it is to be also concluded that, despite, theirs being the best witnesses, to, the relevant occurrence, (b) and, also when, unless, they had declined, to be, associated in the relevant investigation, rather were, to be, imperatively associated therein, (c) whereas theirs remaining unexamined, as, prosecution witnesses, (d) conspicuously, also when, hence, if they turned hostile, vis-a-vis, the prosecution case, rather yet, not precluding, the, prosecution, to, upon theirs being declared hostile, elicit from them, the truth of the occurrence, (e) contrarily, theirs being not joined, in, the relevant investigation, and, also nor theirs being cited, as, prosecution witnesses, has smothered, the emergence, of, the afore best evidence. The suppression, of, the afore best evidence, vis-a-vis, the occurrence, hence by the prosecution, rather coaxes this court, to, conclude, vis-a-vis, the prosecutrix contriving, and engineering the genesis, of, the prosecution case, and thereupon, her, testimony becoming incredible.

9. Be that as it may, the genesis of the prosecution case, is, rested upon complaints, reared before the SDM Baijnath, and, therein no ascription is made, vis-a-vis, the accused, and, when the afore factum, is, combined, along with PW-8, the Pradhan, of, the panchayat concerned, acquiescing, to, a suggestion, put to her, during, the course of her cross-examination, qua, there being a land dispute, inter-se, the, accused, and, the father of the prosecutrix, (a) thereupon it appears, that the afore dispute, inter-se, the father of the prosecutrix, and, the accused, rather generating, the, making, of, false allegations, by the prosecutrix, against the accused.

10. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has not appraised the entire evidence on record, in, a wholesome, and, harmonious manner, apart therefrom, the analysis of the material on record, by the learned trial Court, does, suffer from, a, gross perversity, and, absurdity, of, mis-appreciation, and, non appreciation of evidence on record. Consequently, there is merit in the instant appeal, hence, it is allowed, and, the impugned verdict, is, set aside. The accused/appellant is acquitted, of, the charged offences.

11. The Registry is directed to forthwith issue release warrants of the appellant, to, the Jail Superintendent concerned, and, he be forthwith released, if not required, in, any other matter. Bail bonds, if any, furnished by the appellant, are, ordered to be forfeited and cancelled. Fine amount, if any, be refunded, to, the appellant. Records be sent back forthwith.

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

Manager Bajaj Allianz General Insurance Company Ltd. .....Appellant

Versus

Vinod Kumar & another ....Respondents.

FAO No. 291 of 2019
Reserved on : 18.9.2019
Date of decision: 30.9.2019

Motor Vehicles Act , 1988 - Sections 149 & 166 – Motor accident – Defence of driving of vehicle by an unauthorized person – Proof –Vehicle met with an accident when son of registered owner had handed over it to an auto mechanic for rectification of defect – Auto mechanic receiving bodily injuries in accident leading to filing of claim application by him - Insurer contending that claimant was not authorised by registered owner to drive it – And it can not be directed to indemnify the award – Held, no FIR / report was filled either by the registered owner or his son regarding theft of vehicle by auto-mechanic – Effective control over vehicle was with son of registered owner and he had an implied authority to keep the vehicle in the roadworthy condition – He was authorised to deploy claimant as auto- mechanic in vehicle concerned – Insurer can not deny its liability. (Para 3)

For the appellant: Mr. Chandan Goel, Advocate.
For the respondents: Mr. V. D. Khidtta, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal, is, directed, by, the insurer, of, the offending vehicle, against, the award, pronounced, by the Motor Accidents Claims Tribunal-II, Shimla, Camp at Rohru, H.P., upon, MAC Petition No. 3-R/2, of, 2016, wherethrough, compensation amount, comprised, in, a sum of Rs. 5,94,000/-,stood assessed, vis-a-vis, the disabled claimant, (i) and, thereon stood levied, interest, at, the rate of 9%, (ii) and, the afore rate of interest, was, ordered to commence, from, the date of petition, till realization thereof, (iii) and, the apposite indemnificatory liability, stood fastened, upon, the insurer of the offending vehicle.

2. Tritely, the award, whereagaint, the instant appeal stands reared, is, made upon, a, petition, constituted, under, Section 163-A, of, the Motor Vehicles Act. Consequently, it was not imperative, for, the learned Tribunal, to, make any decision, vis-a-vis, the fault, of, the driver concerned. Undisputedly, the driver holds, a, valid, and, effective driving license, to, drive the apposite category, of, vehicle, and, during course, of, plying whereof, for, his hence detecting, any, mechanical defect therein, it met with, a, mishap, hence, entailing upon him, a, disability, as, pronounced in Ext. PW-6/A.

3. The learned counsel for the insurer, does not, contest, the, fact qua the disabled claimant being a mechanic. However, he contests the factum of his being deployed, by its registered owner, to, drive the afore vehicle, in the afore capacity, and, for his hence, detecting, the, occurrence(s) therein of any patent, or, latent defect(s) , (i) his afore contention is rested, upon, the registered owner, in his deposition making, an echoing, vis-a-vis, his not being proficient, to, drive the vehicle, and, his rather deposing qua his son driving, the, vehicle. The effects, of, his though making, a, deposition, in his examination-in-chief, (ii)

qua his handing over the vehicle concerned, to the petitioner, rather for the afore relevant purpose, (iii) whereas, his acquiescing, to, a suggestion, vis-a-vis, his not personally, handing over the vehicle, to, the disabled claimant, for, the relevant purpose, rather his son handing over the vehicle, for, the relevant purpose, to, the disabled claimant, (iv) are, also capitalized, by, the owner, to, contend, qua, the disabled claimant unauthorizedly driving the vehicle, and, hence his not being entitled to maintain, the, apposite petition, and, nor obviously, his being entitled, to, claim any assessment, of, monetary compensation, qua him. However, his afore submission, is, falteringly made, (a) as, neither the registered owner, nor, his son has made, any, report to the authorities concerned, vis-a-vis, the disabled claimant, committing theft, of, the vehicle concerned, (b) and, for lack of the afore evidence, vis-a-vis, commission, of, theft of, the apposite vehicle, (c) and, when the effective control, of, the vehicle, was, throughout assumed, by the son of the registered owner, and, when thereupon, the, latter could, dehors, the registered owner, exercising define authority, upon, the vehicle, rather held, the, implied authority, to ensure, the, keeping, of, the vehicle, in a roadworthy, and, pliable condition, and, concomitantly also held a valid/implied authority, to, hence engage, a, mechanic, for, plying it, for, the latter detecting, any mechanical defect therein, patent, or, latent, (d) thereupon when the insurer does not contest, the, factum, vis-a-vis, the disabled claimant, being a mechanic, (e) thereupon it is to be firmly concluded, that, the disabled claimant, was validly deployed, as s mechanic, in the vehicle concerned, (f) and, when during the course of his driving it, for, his hence detecting any mechanical defect therein, patent or latent, it met, with, an accident, (g) thereupon, when he held, the, authority, to, drive the vehicle, hence he was entitled, for, determination, of, monetary compensation qua him, and, also hence, the apposite indemnificatory liability, being amenable to be saddled, upon, the insurer of the vehicle concerned.

6. For the foregoing reasons, there is no merit, in, the appeal filed, by the insurer, and, is hence dismissed, and, the impugned award, is, maintained, and, affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Neerat Ram & another .....Appellants

Versus

Ram Nath & another .....Respondents.

RSA No. 112 of 2006 a/w CO No. 357 of 2006

Reserved on**:** 13.9.2019

Date of Decision: 30.9.2019

Co-sharers – Joint land – Exclusive hissedari possession of a co-sharer - Nature of - Held, exclusive possession of a co-sharer over joint land does not empower him to appropriate it exclusively to the exclusion of other co-sharers. (Para 9)

For the appellants: Mr. Surender Prakash Sharma, Advocate.

For the respondents: Mr. Vineet Vashista, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The plaintiff's suit, bearing Civil Suit No. 72 of 2004, wherein, he sought rendition of, a, decree, for declaration, vis-a-vis, suit khasra numbers, and, against the defendants, stood dismissed, hence, by the learned trial Judge, (i) and, in an appeal carried therefrom, by the aggrieved plaintiff, before the learned first appellate Court, the latter Court, upon, Civil Appeal No. 85 of 2005, made, a verdict, (ii) wherethrough, the appeal of the plaintiff, was, partly accepted, and, hence the plaintiff, stood declared as joint owner, to, the extent of 45 share, along with, the, defendant, and, the performa defendants, (iii) whereas,

the, declining(s), vis-a-vis, the plaintiff, rather by the learned trial Court, the relief of permanent prohibitory injunction, was, upheld. The defendant is aggrieved therefrom, and, hence through the instant appeal, has strived, to, beget, reversal of the verdict, pronounced, by the learned first appellate Court, upon, the afore civil appeal. The plaintiff also being aggrieved, vis-a-vis, declinings qua him of relief, of, permanent prohibitory injunction, has, through casting cross-objections No. 357 of 2006, rather, the instant appeal, has strived to seek reversal, of, declinings qua him, the afore espoused relief, by, the learned first appellate Court.

2. Briefly stated the facts of the case are that the plaintiff along with the defendants and others is the joint owner in possession of the suit land. Out of total 72 shares of the disputed land, he is the owner with possession of 45 shares. Sh. Bhagtu (defendant) and Smt. Chunni Devi (Proforma defendant) are the owners in possession of 9 and 18 shares, respectively, of the land in dispute. He (plaintiff) has raised an apple orchard over the land in question which is situated adjacent to his house. The defendant Sh. Bhagtu keeps on interfering in his (plaintiff's) possession over the suit property unduly. The proforma defendant (Smt. Chunni Devi) is not causing any kind of interference because of which no relief is being claimed against her. Howe for the last one week, the defendant (Sh. Bhagtu) is threatening to raise the construction over the suit land forcibly without getting his share partitioned. He (plaintiff) had applied for partition of the disputed land. In the partition proceedings, the defendant raised the question of title and filed the objections. The defendant is trying to change the nature of the joint land by raising a permanent structure over it forcibly and has started collecting the material on the site for the said purpose. The cause of action accrued in the month of April, 2004 when the defendant preferred false objections in the partition proceedings and finally a week ago when the defendants threatened to do the building work over the disputed property. He did request the defendants to desist from their illegal designing but in vain. The plaintiff has claimed the following relief(s) in the suit:-

i) the plaintiff be declared to be co-owner in joint possession of land comprised in khasra No. 1617 and 1621 khata/khatouni No. 728 min/1049 Phati Kharal, Kothi Kais, Tehsil and District Kullu, to the extent of 45 shares;

ii) the defenants be restrained through the decree of prohibitory injunction from raising any sort of construction over the suit land till the same is lawfully partitioned among all the co-sharers, and,

iii) a decree for any other relief to which the plaintiff be found entitled and the facts and circumstances of the case be also passed with cost of the suit in favour of the plaintiff and against the defendants in the interest of justice.

3. On notice, the defendants appeared. They filed common written statement controverting the averments made in the plaint. Preliminary objections regarding the maintainability ad competency of the suit in the present form, locus standi of the plaintiff to sue, existence of the cause of action, estoppel, valuation of the suit for the purposes of court fee and jurisdiction, the plaintiff has not come to the court with clean hand as well as he has suppressed the true and material facts from the court have been taken. On merits, the factum that the suit land is owned and possessed by the plaintiff has been denied.

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

1. Whether the plaintiff is entitled for relief of permanent prohibitory injunction as alleged? OPP

2. Whether the suit land is in exclusive possession of Chhapu, Dugla and Dilli and they sold their shares to defendant, if so, its effect? OPP

3. Whether in family partition suit land stood allotted to Chhapu, Duglu and Dilli? If so, its effect OPD

4. Whether defendants are in adverse possession of suit land?

5. Relief.

5. On an appraisal of evidence, adduced before learned trial Court, the learned trial Court, dismissed the plaintiff's suit. In an appeal, preferred therefrom, by, the plaintiff, before the learned First Appellate Court, the latter Court had partly accepted, the, appeal, and, declared the plaintiff, to be a joint owner of the suit land, to the extent of 45 share, along with, the, defendant, and, the, proforma defendant, and, the findings qua dismissed, the, suit of the plaintiff, as, rendered by the learned trial Court, qua the relief of permanent prohibitory injunction, whereof however upheld.

6. Obviously, through the instant Regular Second Appeal, cast, before this Court, by the defendant, the latter seeks reversal of the concurrent pronouncements, as, made, against him, by both the learned Courts below.

7. This Court, on 14.7.2006, had, admitted the appeal, instituted by the appellant/defendant against the judgment, and, decree, rendered, by the learned first Appellate Court, upon substantial questions of law Nos. 1 to 5, occurring at page No.7, of the paper book, for, its hence making, an adjudication thereon:-

1. Whether the first appellate court has erred in appreciating the provisions of law, pleadings of the parties and the evidence on rcord, whereby, vitiated the impugned judgment and decree?

2. Whether the first appellate court has erred in appreciating the evidence by way of documents and pleadings, reaching at the wrong conclusion, whereby, vitiating the impugned judgment and decree?

3. Whether the learned first appellate court has erred in pronouncing the impugned judgment and decree, without framing issue regarding the declaration, thereby, vitiating the impugned judgment and decree?

4. Whether the first appellate court has erred, misread, misconceived, mis-appreciated the pleadings and documentary evidence on record, thereby, vitiating the impugned judgment and decree?

5. Whether the land purchased form the khana kashat after khangi takshim leads to proper transfer of title, thereby amounts to transfer of malquit?

8. Also, this Court, on 30.11.2006, had, admitted the Cross-Objection, as, instituted by the respondent No.1/plaintiff, against, the judgment, and, decree, rendered, by the learned first Appellate Court, upon, substantial question of law, occurring at page No. 49, of, the paper book, for, its hence making, an adjudication thereon:-

1. Whether cross-objector (plaintiff) is entitled to permanent prohibitory injunction against the threatened acts of defendant No.1, another co-sharer in the possession of cross-objector on the suit land as well as threatened acts of defendant No.1 to usurp specific part of suit land by raising permanent construction thereon till the suit land is partitioned?

Substantial questions of Law No.1 to 5 in RSA No.112 of 2006 & Substantial question in Cross-Objection:

9. The defendant, through Ext. D-1, exhibit whereof, is a sale deed, executed, inter-se, one Chhapu, Duglu, and, Dilli, and, qua, the suit land, and with the defendant, hence acquired, a, share, in, the undivided suit land. Even though, reflections, as, appertaining, to, the suit khasra numbers, and, drawn prior to, the, execution, of, Ext. D-1, by the afore Chhapu, Duglu and Dilli, are, respectively borne, in, Ext. D-1, and, in D-4, (i) and all the afore trite displays qua the afore Chhapu, Duglu, and, Dilli, along with, the, proforma defendant, being recorded, as co-owners, in, the undivided suit khasra numbers. However, a,

thorough perusal, of, the afore reflections does, also, make clear unfoldments, qua, the plaintiff, being recorded as, a, co-owner, in the suit land, hence to the extent of 45 share, (ii) however, the suit land is recorded, in, the exclusive possession of the defendant, after, his through Ext. D-1, acquiring the share of the afore Chhapu, Duglu and Dilli, in the jointly recorded suit land, (iii) whereas, prior to the execution of Ext. D-1, the vendor of the contesting defendant, one Bhagtu, stands, recorded, to be, in exclusive possession of the suit land, as, a, co-sharer. Consequently, with the afore reflection, as, appertaining, to the suit land, hence making candid unfoldment(s), vis-a-vis, the plaintiff, holding co-ownership, in the suit khasra numbers, to, the extent of 45 share, rather, also along, with, the contesting defendant, and, the proforma defendant, (iv) and, with the jointly recorded suit khasra numbers, being not evidently and validly dismembered, through, metes and bounds, (v) thereupon the principle underlying, the, concept of co-ownership, begets attraction hereat, vis-a-vis, the undivided hereat hence suit khasra numbers, (vi) and thereupon the exclusivity, of, the possession, if any of the co-owners, concerned, rather not empowering the co-owners concerned, to, appropriate, vis-a-vis, their, exclusive user any portion, of, the undivided suit khasra numbers, (vii), as, thereupon the principle hence underlying, the, concept of co-ownership, and, comprised in each of the co-owners, holding unity, of, title and community, of, possession, vis-a-vis, every portion of the undivided suit land, necessarily becoming the inapt casualty, (viii) rather the exclusitivity, of, possession, if any, of the defendant, vis-a-vis, any portion, of, the undivided suit khasra numbers, is to be concluded, to be, symbolical possession thereof, even vis-a-vis, the plaintiff, (viii) and, thereupon with the plaintiff, holding evidently 45 share, in, the undivided suit khasra numbers, hence, until a valid dismemberment, of, the jointly recorded suit land, hence occurs, through, metes and bounds, rather thereupto, the plaintiff is entitled, to, a declaratory decree, of, joint possession, along with, the, defendant, (viii) or both, are, inferable, to, hold joint possession(s) thereof, and, hence the afore declining, of, a, decre, of, joint possession, to, the plaintiff, rather by the learned trial Judge, is inappropriate, and, the meteings, of, the afore relief, to, the plaintiff, rather by the learned first appellate Court, is, meritworthy.

10. Be that as it may, the defendant had strived, to, validate his being recorded, to be, in exclusive possession, of, the undivided suit khasra numbers, through, his projecting qua a valid dismemberment, of, the undivided suit land rather occurring, and, also canvassed qua his completely ousting the plaintiff, from user of the suit khasra numbers, (i) the, afore espousals stand aptly declined by the learned first appellate Court, as, no best documentary evidence, came to be adduced, vis-a-vis, the plaintiff, acquiring title, vis-a-vis, the suit land, thereafter, way of adverse possession.

11. Since this Court, for reasons, as ascribed hereinabove, hence has recorded, a, conclusion, hence, rested, upon, the concept of co-ownership, and, the afore principle, carrying the apt underlinings, vis-a-vis, upto, a valid dismemberment, of the undivided suit land, hence occurs, through meets and bounds, thereupto each, of, the co-owners, hence being entitled, to, joint possession, of, the jointly recorded suit khasra numbers, (a) and, when hence this Court has, vis-a-vis, the plaintiff made, a, declaration qua his being entitled to, the, relief, of, joint possession, hence to the extent of 45 share, along with, the defendant, (b) and, whereupon the plaintiff, is entitled, for rendition, of, a decree of permanent prohibitory injunction, for, hence restraining the defendant, from, using any portion, of, the undivided suit khasra numbers, for, his/their exclusive use, as, declining, of, the afore relief, to the plaintiff, would entail upon him, the, misapplying of the afore principle, rather governing the rule of joint ownership, becoming the inapt casuality.

12. The above discussion, unfolds, qua the conclusion(s), as arrived by the learned Courts below, being based, upon a proper and mature appreciation, of, evidence on record. Accordingly, the substantial questions, of law, are, answered in favour of the respondent/plaintiff, and, against the appellant/defendant herein. However, substantial question, of, law, in, Cross-objections, are answered, in, favour, of, the cross-objector.

13. In view of the above discussion, the instant appeal, is, dismissed, and, the judgment and decree impugned, before this Court, is, partly affirmed and maintained. However, the cross-objections, of, the plaintiff/respondent, is, allowed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Pwan Kumar .....Appellant

Versus

Liberty Videocon General Insurance Ltd. & others ....Respondents.

FAO No. 415 of 2017 &
CMP No.8209 of 2017
Reserved on : 13.9.2019
Date of decision: 30.9.2019

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Bodily injuries – Enhancement of compensation – Entitlement – Claimant filling appeal against award of tribunal and claiming enhancement of compensation under heads ' Loss of income during medical treatment' and 'future prospects' – Held, disability if any, was temporary in nature and amenable to recuperation – Disability not interdicting the workman to perform callings of his avocation – Claimant being public servant was paid salary during his medical treatment – Petitioner is not entitled for enhancement in compensation on said grounds (Para 2 & 3).

For the appellant: Mr. Rakesh Chauhan, Advocate, vice counsel.

For the respondents: Mr. Hemant Kumar, Advocate, vice counsel for respondent No.1.
Respondents No.2 and 3 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The disabled claimant, is, aggrieved by, the, under assessment, of, compensation, qua him, by, the learned MACT concerned, upon, the latter making a pronouncement, upon, M.A.C. Petition No. 181 of 2015, (i) wherethrough, compensation amount, borne in a sum of Rs. 48,770/- stood assessed, qua, him, and, thereon stood levied, interest, at, the rate of 7.5%, and, the afore rate of interest, was, ordered to commence, from, the date of petition, till realization thereof, along with litigation expenses, borne in a sum of Rs. 5,000/-, (ii) and, the apposite indemnificatory liability, stood fastened, upon, the insurer of the offending vehicle.

2. A perusal of, the, disability certificate, borne, in Ext. PW-2/A, unfolds, qua, a, 20% temporary disability, appertaining to locomotor impairment, hence, standing entailed, upon, the disabled claimant, in sequel, to, befallment of injuries upon him, as, sparked, by, the ill-fated collision, involving the offending vehicle, driven, by respondent No.3. The afore disability certificate, stood, proven, by PW-2, (i) however, during the course, of his cross-examination, the afore witness has acquiesced, to, a suggestion, qua, the disability reflected, in Ext. PW-2/A, being temporary in nature, (ii) and, also it being amenable to recuperation, rather, with passage of time, (iii) and, thereafter, he has also acquiesced, vis-a-vis, a suggestion qua, the afore disability, not, interdicting the workman, to perform the callings, of, his avocation, and, also has made, a, testification, qua, no loss of salary, being entailed upon the disabled claimant, in sequel to the disability, as reflected, in Ext. PW-2/A, hence, standing encumbered, upon, the claimant.

3. The learned Tribunal, upon, meteing credence to the afore deposition, and, also with the claimant, even after the afore percentum of disability, standing entailed, upon, him, rather evidently receiving, the, full complement of salary from the department concerned, hence, declined computation, of, compensation, vis-a-vis, him, under the head (a) loss of earnings, during the period of his treatment, (b) and, also under, the, head loss of future income.

4. The afore declining, to, the claimant, by the learned Tribunal, is, visibly not stained with any aura, of, mis-appraisal, or, non-appraisal, of, the afore evidence, on, record. However, during the pendency of the instant appeal before this Court, the disabled claimant, has, strived to place on record, a, disability certificate, hence making a pronouncement, qua, the echoed therein hence extent of 25% disability, appertaining to locomotor impairment, being entailed, upon him, and, it also making, a, pronouncement, vis-a-vis, the afore percentum, of, disability, being, permanent in nature. Consequently, the counsel for the disabled claimant strives, to, seek leave, to, adduce into evidence, the afore disability certificate, (i) as thereupon, the, declining(s) of the afore relief, to the claimant, would become benumbed, (ii) and, also thereafter contends, that, the espoused leave, to introduce, the, afore disability certificate, into evidence, is just, and, essential, and, also the apt leave being accordable rather for, enabling this Court, to, clinch findings, vis-a-vis, the entitlement, of, the claimant, vis-a-vis, computation, of, compensation, towards loss of earning, during, the period of his treatment, as well as, towards future loss of earning, given, the afore percentum of permanent disability, standing entailed, upon, him.

5. For the reasons to be assigned hereinafter, the afore endeavor, is, a mis-beffiting endeavor, and, enjoins its being declined, (i) as apart, from, averments being , cast, in paragraph-5, of the application qua , the, afore percentum of disability, hence precluding him, to, smoothly perform, his, daily calls, (ii) there is no further averment(s), that, extantly, and, in sequel, to, the afore prcentum, of, permanent disability, hence entailed, upon, him in sequel to the ill-fated collision, rather begetting, the, sequel of his being also ousted from service. Consequently, when the afore imperative averments, is, amiss, in the application, and, when hence it cannot be concluded, that, on account of the afore percentum of disability, as borne, in the apposite disability certificate, as strived to be introduced, into evidence, hence with the leave of this Court, as an additional evidence, rather has, not, sequelled the service(s), of, the claimant, becoming affected, and, nor, hence, permanent loss of future earnings, is, entailed, upon him, thereupon, the declining, of, espoused leave, is, meritworthy.

6. For the foregoing reasons, there is no merit, in, the appeal filed, by the claimant, and, is hence dismissed, and, the impugned award, is, maintained, and, affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Sarita Devi & others .....Appellants

Versus

The Oriental Insurance Co. Ltd. & others ....Respondents.

FAO No. 100 of 2012

Reserved on : 23.9.2019

Motor Vehicles Act, 1988 - Section 163 A – Motor accident – No fault liability – Defence of negligence on part of deceased – Maintainability – Held, in proceedings contemplated under Section 163 A of the Act, question of negligence either on part of deceased or the on part of driver of offending vehicle becomes redundant – On proof of occurrence of motor accident, the Tribunal has to assess compensation as per Schedule appended with the Act. (Para 2 & 3).

Date of decision: 30.9.2019

For the appellants: Ms. Megha Kapur Gautam, Advocate.

For the respondents: Mr. G. C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate, for respondent No.1.
Mr. Vijay Bhatia, Advocate, for respondents No. 2 (a) to 2 (d) and 3.
Mr. Vikas Rajput, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal is directed, by, the aggrieved predecessor-in-interests, of, the deceased claimant, and, against, the dismissal, of, the apposite claim petition, by, the learned Motor Accident Claims Tribunal-II, Mandi, District Mandi, H.P.

2. Though, the, apposite claim petition was cast, under, the provisions, of, Section 163-A, of, the Motor Vehicles Act, and, when hence the learned Tribunal, rather, without, determining, the, commission, of, tort of negligence, if any, of the deceased, or, of, respondent No.1, was, hence enjoined, to, make determination of compensation, in, accordance, with, the schedule appended, with, the Motor Vehicles Act, (i) rather, it proceeded to make, an, order of dismissal, upon, Claim Petition No. 74 of 2006, through, its, meteing fallacious reasons, (a) and also, it, misbefittingly not only struck issues, with, respect to deceased Krishan Lal, suffering his end, by, the rash, and, negligent manner, of, parking, of, the offending truck, (b) also it struck, an, issue, vis-a-vis, the relevant mishap, in sequel whereto, deceased Krishan Lal, met his end, rather, happening from, a, tort of negligence, becoming committed, by, the afore deceased Krishan Lal, (c) also, it erringly proceeded to receive evidence thereon, and, thereafter concluded, through, placing reliance, upon, a verdict, rendered by the Apex Court, in, Oriental Insurance company vs. Prem Lata Shukla, 2007 (13) SCC 476, and, upon, a, verdict of this Court, rendered, in, case titled, Ginni Devi, vs. Union of India & others, 2008 (1) SLJ P&H 152, and, upon, a, verdict titled Shashikali Swain vs. Khairuddin, and, another, reported, in, AIR 2000 Orissa 52, quaeven, vis-a-vis, a, claim petition cast, under, Section 163-A, of, the Motor Vehicles Act, it being amenable to determine, fault if any, of, the aforestated, and, visibly also it proceeded, to, return findings against, the, deceased.

3. The afore assigned reasons, are grossly, unmeritworthy, and, are, amenable, for, rejection given, (i) only upon, a, claim petition cast under Section 166, of, the Motor Vehicles Act, rather enjoining, the, determination(s), of fault if any, or dereliction(s), if any, of the, driver(s) concerned, in, driving the vehicle(s) concerned, (ii) and rather, the, fault of the driver(s) concerned, being not adjudicable, vis-a-vis, a petition cast, under, Section 163-A, of, the Motor Vehicles Act, (iii) also the learned MACT concerned, has not only, mis-understood, the, afore cited judgments, also has mis-applied, the, afore judgments, vis-a-vis, a claim petition, cast under Section 163-A, (iv) significantly, when the afore judgments, are, rendered, upon, a, petition cast, under, Section 166 of the Motor Vehicles Act, and, when only, vis-a-vis, a petition cast, under, Section 166, hence fault is required, to, be determined, (v) and, when hence, the, afore judgments were inapplicable, rather renders, the placing(s), of, reliance thereon(s), by, the learned Tribunal, being construable, to be, an obviously mis-befitting, and, also, a, fallacious recoursing.

4. Furthermore, also hence none, of, the afore fault issues were required, to be, struck, nor, any evidence was enjoined to be adduced thereon, and, contrarily, the learned Tribunal was enjoined, to, without determination, of fault, if any, of, the purported tortfeasor(s) concerned, rather make determination, of, compensation, in consonance, with, the schedule, appended with the Motor Vehicles Act, (i) and, thereafter, it was incumbent,

upon, the learned Tribunal, to, on evidence being adduced, vis-a-vis, the driver, of, the offending truck, holding, a, valid and effective driving license, and, also evidence being adduced, vis-a-vis, the offending vehicle, standing, validly insured with the insurer, to, thereafter, in accordance with law, fasten the apposite indemnificatory liability(ies), upon, the insurer, or, upon the registered owner, of, the offending vehicle. However, visibly, rather, findings, upon, the afore issues, remain unreturned, merely, upon,the, aforestated fallacious reasons, vis-a-vis, the deceased committing, the, tort of negligence.

5. The sequel of the above discussion, is, that the instant appeal, is, meritworthy, and, is allowed. Consequently, after allowing the appeal, the, impugned award is set aside, and, the learned Tribunal, is, directed, to, on remand, of, the lis qua it, hence determine, within three months hereinafter, hence compensation, vis-a-vis, the claimants, in consonance with the schedule, appended, to the Motor Vehicles Act, and, thereafter, in accordance with law, saddle the apposite indemnificatory liabilities, upon, the insurer, or, upon the registered owner, of, the offending vehicle. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of H.P. ...Appellant

Versus

Vinod Kumar ...Respondent.

Cr. Appeal No. 159 of 2009
Reserved on : 24.9.2019
Date of decision 30.9.2019

Indian Evidence Act, 1872 – Section 3 – Interested witness – Appreciation of evidence – Held, mere interestedness of any witness to occurrence would not perse mean that he/she is a witness not worth credence. (Para 2) Title: State of H.P. vs. Vinod Kumar. Page - 474

For the appellant: Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel Dy. A.Gs.

For the respondent: Mr. Bhuvnesh Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

Accused Baldev Parkash, Ganesh Dutt, and, accused Vinod Kumar, stood, charged, for, theirs committing offences, punishable, under Section 452, 380, 323, 506, read with Section 34, of, the Indian Penal Code, and, vis-a-vis, the, afore framed charges, against, all the afore accused, the learned trial Magistrate concerned, convicted accused Baldev Parkash, and, accused Ganesh Dutt, for, the offences punishable under Section 323, 452, 566, read with Section 34 IPC, and, acquitted them, for, commission, of, an offence punishable, under, Section 380 IPC. However, accused Vinod Kumar, stood, convicted, for, the commission of offences punishable, under, Section 323, 452, 506, 380 read with Section 34 IPC, and, subsequently, in consonance therewith, sentences stood imposed, upon, each of the afore convicts. Convict Vinod Kumar, standing, aggrieved therefrom, preferred an appeal before the learned Sessions Judge, Una, District Una, H.P., and, the latter proceeded to reverse, the, verdict, of, conviction, and, therewith sentence imposed, upon, convict Vinod Kumar, hence, State of Himachal Pradesh, becoming aggrieved therefrom, hence, proceeded, to, thereagainst institute the instant appeal, before this Court. Conspicuously, this Court, on

17.5.2017, vis-a-vis, Cr. Appeal No. 610 of 2008, titled State of H.P. vs. Baldev Parkash, and, another hence made, an, order, of, dismissal thereon (a) and, when the afore appeal arose hereat, vis-a-vis, FIR No. 219 of 2002, and, when the latter FIR bears similarity, vis-a-vis, the, FIR, in, the instant appeal, (b) thereupon with this Court recording, an order, rather dismissing, the, aggrieved State of H.Ps'. appeal directed thereagainst, (c) hence for maintaining consistency inter-se the afore verdict pronounced, by this Court in Cr. Appeal No. 610 of 2008, and, hence in conformity therewith, this Court is constrained, to, also dismiss, the, instant criminal appeal.

2. The testifications' of the complainant/victims, and, also of the eye witnesses, to, the ill-fated occurrence, corroborates, the, version qua the occurrence, embodied in F.I.R. Ext.PW-8/A. Their respective testifications' hence, do not, suffer from any taint of theirs' either improving, upon, or, embellishing, upon, their respective previous statements, recorded, in writing, (i) rather, when their respective testifications, are, also bereft of any stains, of, any inter-se contradictions, occurring, in their respective testifications, hence their respective testifications warranted imputation, of, credence thereto, (ii) however, the learned Sessions Judge, had dispelled the vigor, of, their testifications, on the ground of the Investigating Officer concerned "not" joining, as eye witnesses, to the occurrence, the owner(s) of shopslocated, in, the closest proximity, to, the site of occurrence, rather his joining PW-1, and, PW-4, as purported eye witnesses to the occurrence, and, whose testimonies, were, held, to, palpably acquire a taint of interestedness, arising from, the fact of theirs holding acquaintance(s), with, the complainant/victim, (iii) nonetheless, the aforesaid reason, as assigned, by the learned Sessions Judge, for, pronouncing a judgment of acquittal, upon, the accused, may not acquire any vigor, (iv) as, the, mere interestedness of any ocular witnesses, to, the occurrence, would not per se constrain a conclusion, that, their relevant testified ocular versions, hence warranting disimputation, of, credence, (v) "unless" the defence, had, during the course of subjecting each of them, to, cross-examination "unearthed" from them hence echoings, vis-a-vis, theirs' being unavailable, at, the site of occurrence, (vi) however, despite the aforesaid witnesses standing subjected, to, the rigor, of, an exacting cross-examination, their respective versions qua the occurrence, as, unfolded in their respective examinations-in-chief, remained unshattered, vis-a-vis, the efficacy. Consequently, the defence rather failed to establish, that, they were unavailable at the site of occurrence, at the relevant time, of its, taking place, (vii), hence, onscore aforesaid, it is prima facie difficult to accept, the, reasons assigned by the learned Sessions Judge, that, their respective versions qua the occurrence, are, incredible, (viii) arising from the factum of theirs holding leanings vis-à-vis the accused, (ix) and, that hence the Investigating Officer concerned, was enjoined, to, associate as eye witnesses thereto, the owners, of, shops located in proximity, to, the site of occurrence, (x) and, who however may have lent a truthful, and, impartisan ocular version qua the occurrence, (xi) omission whereof begetting an apt inference qua the Investigating Officer, may be, conveying in his apposite report, a, coloured unbelievable version qua the occurrence, (xii) nonetheless, the genesis of the prosecution version, does beget, a stain of untruthfulness, (xiii) significantly when one of the co-accused Baldev Prakash, is, evidently a witness, in, a case registered under Section 376 IPC against the complainant PW-1. The aforesaid evident fact of co-accused Baldev Prakesh, standing cited, as a witness against the victim/complainants "does" when construed, along with, the Investigating Officer, omitting, to, associate as eye witnesses, to, the occurrence, certain shopkeepers rather holding commercial establishments, in, close proximity, to, the site of occurrence, rather, his associating PW-2, and, PW-4, as purported eye witnesses to the occurrence, who, however hold leanings via-a-vis the victims/complainant, arising, from, the factum of theirs holding, a, close acquaintance with them, (xiv) hence garnering an inference, that, a stained/coloured version qua the occurrence, being embodied, in the apposite F.I.R. (xv) also a stained version qua it standing testified, by the victims/complainant, and, also by, the, purported eye witnesses thereto, who, deposed as PW-2, and, as PW-4, qua therewith.

3. The learned Additional Advocate General, has, contended, that, the MLC borne on Ext.PW-9/A, exhibit whereof, standing proven by PW-9, and, also with the latter, in his testification, deposing, that the injuries reflected therein, being causeable, by user of Dandas, recovered under Memo Ext.PW-1/B, hence ought to constrain a conclusion, that, dehors infirmity, if any, gripping, the testifications, of, the victims besides, of, PW-2, and, of, PW-4, yet, therethrough, the prosecution succeeding in establishing the charge.

4. The mere factum, of, proof of injuries, comprised in Ext. PW-9/A, hence by the latters' author, and, also his testifying, that, their occurrence, on, the respective persons, of, the victims/complainant, being sequelable by user, of, Danda, borne, in, Ext.PW-1/B, does not per-se enhance any conclusion, that, the prosecution, has, succeeded in proving, that, dandas Ext. P-1 and P-2, were used by co-accused concerned, for delivering blows, on, the respective persons, of, the victims/complainant. Contrarily when, for, reasons assigned above, rather the effect, of, the aforestated inference, that, the testifications of PW-2, and, of PW-4, rather acquiring a pervasive taint of inveracity, is, construed hence with the prosecution also for reasons assigned hereafter, rather not proving, the, factum of effectuation recovery of Ext. P-1, and, of Ext. P-2, exhibits whereof, are, respectively, the, Dandas, and, stolen cash worth Rs. 3000/-, thereupon an inference, becoming bolstered, qua the prosecution, rather, contriving to falsely implicate, the, accused (a) the recitals embodied in Ext. PW-1/B, make a disclosure qua the complainant handing over dandas, to, the Investigating Officer concerned, (b) however, therein there, is, no reflection qua the date whereon he handed over Dandas, to, the Investigating Officer rather at the end of Ext. PW-1/B the Investigating Officer makes an endorsement qua the aforesaid mode of handing over the Dandas rather occurring, on, 14.10.2002, (c) since Ext. PW-1/B was throughout, in the custody, of, the Investigating Officer concerned hence, the latter, the end of Ext. PW-1/B, appears to have recorded an endorsement qua his preparing Ext. PW-1/B, on 14.10.2002, (d) whereas for obtaining a firm conclusion therefrom qua its preparation occurring, on 14.10.2002, by the Investigating Officer concerned, an apposite therewith recital, was, also enjoined to be embodied therein, (e) and, also the signatories thereto were enjoined, to, under their respective signatures occurring therein, make, an endorsement, qua it, standing prepared, on 14.10.2002, (f) however, the aforesaid relevant endorsements, do not, visibly occur in Ext. PW-1/B, (g) hence, it is to be concluded that the Investigating Officer concerned, through sheer contrivance, introducing Dandas, as, purported weapons of offence, with user whereof, the co-accused inflicted injuries, on, the person of victims/ complainant, (h) moreso, when, with respect to the date, of, preparation of Ext.PW-1/B neither PW-1 nor PW-4 makes any unequivocal apposite communication, (i) even otherwise, Dandas Ext.P-1 and P-2 are the incriminatory pieces, of, evidence against the accused respondents. Normally, the, recovery of any weapon of offence, has to occur within, the, domain of Section 27, of, the Indian Evidence Act, provisions whereof stand extracted hereinafter:

> 27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

(i) wherein for any effectuation of recovery of any weapon, of, offence hence at the instance of the accused, by, the Investigating Officer concerned, to, hence acquire statutory vigor, (ii) enjoins the Investigating Officer concerned to, preceding his making, the, relevant recoveries, rather record a disclosure statement, of, the accused concerned, (iii) however, the Investigating Officer neither within the precincts of Section 27, of, the Indian Evidence Act, recorded any disclosure statement, of any of the accused concerned nor he proceeded to subsequent thereto hence effect, the, relevant recoveries, (iv) contrarily he, for reasons aforestated inefficaciously/fictitiously prepared Ext. PW-1/B, by recording a recital therein qua the victims/complainants, rather, handing over Dandas, to him, (v) the aforesaid

incriminating piece(s) of evidence against the accused, stand canvassed, by the learned Deputy Advocate General, to be, not warranting hence disimputation, of, any credence thereto nor also it being open for this Court, to discard, their probative vigor, (vi) as the accused after using them left them, at the site of occurrence, whereafter they fled therefrom, (vii) hence, he contends, that, when the victims/complainant proceeded, to, handover the dandas, to, the Investigating Officer concerned. He also proceeds to contend, that, since the Investigating Officer concerned 'not' within the domain of Section 27, of, the Indian Evidence Act, effectuating their recovery, (viii) hence there was no legal necessity, cast upon him, to obey its mandate nor hence on its mandate standing infringed, rather would give any capital, to, the accused, (ix) however, the aforesaid submission warrants rejection, as the aforesaid manner of effectuation of recovery, of, purported weapon(s) of offence, appears to be made, by the Investigating Officer concerned, by his, actively circumventing themandate, of, Section 27 of the Indian Evidence Act, (x) whereas, with the aforesaid weapons of offence rather comprising, the, incriminating pieces of evidence also when, qua, recovery thereof, the, apt provisions, are, encapsulated in the relevant Indian Evidence Act, (xi) hence he was enjoined, to for, dispelling, any, arousal of suspicion, with, respect to the efficacy, of, the relevant recovery, (xii) hence revere, the, mandate thereof, rather than his proceeding, to, engineer an ingenious method, to proceed to make recovery, of, weapon(s), of, offence in the manner, he did, under memo Ext. PW-1/B. Consequently, with this Court concluding that recovery of Dandas not holding any vigor, it is apt to conclude that the prosecution, has failed, to establish, that, the Dandas, were used, by the accused concerned, to inflict blows, on, the victims/complainants.

5. Be that as it may, the vigor of Ext. PW-1/D, whereunder, recovery of cash holding, a, value, of, Rs. 3000/-, stood, purportedly effectuated, and, recovery whereof is disclosed to occur, on, co-accused Baldev Parkash, handing over, the sum of Rs. 3000/- at police chowki, is also to be tested. In case this Court concludes, that, Ext. PW-1/D, is fictitiously prepared, then the entire genesis of the prosecution version, as, comprised in F.I.R. rather would stand completely shattered. Ext. PW-1/D does not echo the date of its preparation. The accused came to be arrested on 14.10.2002, hence when, during, the, course of the custodial interrogation, of, the accused concerned, the Investigating Officer concerned, could well, have elicited, a, confession, with respect to his hiding or concealing a sum of Rs. 3000/-, as, stood allegedly stolen, by, him from the cash box, of, the victim/complainant, yet, he appears to have not elicited, the, aforesaid confession, from, the accused, rather he appears, to, have engineered, the, preparation of Ext. PW-1/D. Consequently, it is difficult to accept all, the, communications occurring therein, especially with co-accused concerned, being arrested, on the date of occurrence, yet his proceeding to walk, upto, the Chowki and handing over Rs. 3000/-, to, the Investigating Officer. In aftermath, it appears, that, with critical inveracity also gripping the preparation, of, Ext. PW-1/D, hence no reliance can be placed thereupon.

6. For the reasons which have been recorded hereinabove, this Court holds that the learned, Sessions Judge, has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis, of, the material on record, by, the learned Sessions Judge, does, not suffer from any perversity or absurdity, of, mis-appreciation, and, of, non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

7. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgment, is, affirmed, and, maintained. Records be sent back forthwith.

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

Thinku Ram deceased through LRs. .....Appellants

Versus

Om Parkash & others. ....Respondents.

RSA No. 437 of 2005
Reserved on: 12.9.2019
Date of Decision: 30.9.2019

Himachal Pradesh Tenancy & Land Reforms Act , 1972 – Section 2 – 'Tenant'– Proof – Plaintiff claiming himself to be a non-occupancy tenant in suit land – Defendant denying plea of tenancy – Held, plaintiff not revealing the name of landowner or the time when he was inducted as tenant in said land – Revenue entries showing him as non-occupancy tenant under mortgagee "R' stand rebutted as plaintiff pleaded ignorance about existence of any such mortgage – AC-II grade already ordered recording of possession of defendants over suit land by substituting entries occurring in favour of plaintiff - Plaintiff not challenging order of AC-II grade in suit – Plea of tenancy not proved – RSA dismissed. (Para 9 to 11)

For the appellants: Mr. Karan Singh Kanwar, Advocate.
For the respondents: Mr. Ashok Sood, Sr. Advocate with Mr. Dhirij Thakur, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The plaintiff's suit, for, rendition of, a, decree, for, permanent prohibitory injunction, vis-a-vis, the, suit khasra numbers, and, against the defendants, stood dismissed, hence, by the learned trial Judge, (i) and, in an appeal carried therefrom, by the aggrieved plaintiff, before the learned first appellate Court, the latter Court also, upon, Civil Appeal No. 62/1 of 2002/2001, hence made, a, verdict, in affirmation, vis-a-vis, the, verdict, pronounced by the learned trial Court concerned. The aggrieved therefrom plaintiff, has, through the instant appeal, cast before this Court, strives to seek reversal, of, the concurrently pronounced verdicts, against him.

2. Briefly stated the facts of the case are that the appellant Thinku Ram, claims himself to be a non-occupancy tenant on land comprising in khasra No. 253, measuring 306 bighas, situate at village Lana Pallar, Tehsil Sangrah, District Sirmour, H.P., as per jamabandi for the year 1962-63 under khata No. 106/180 and for 1996-97 under khata No. 116/172. The respondents are the sons of late Basti Ram, who was one of the co-owner. The grievance of the plaintiff is that the defendants are interfering in the suit land and are intending to oust him from the suit land by hook or crook. They have interfered in his possession over suit land on 29.8.2001 by damaging the maize crop and also uprooted some banana trees besides damaging his cow-shed causing a loss of Rs.5000/-. As such, the plaintiff preferred the present suit seeking to restrain the defendants form interfering in any manner in the suit land.

3. The suit was contested by the defendants by taking preliminary objections on the ground of maintainability, locus-standi, non-joinder and cause of action. The defendants case is that in fact before 1958-59, the suit land was mortgaged with one Ran Singh, who was recorded as such. Thereafter, from the year 1962-63 to 1972-73, the plaintiff was recorded as non-occupancy tenant in the column of possession on behalf of Ran Singh, mortgagee but in the year 1972-73, the suit land was redeemed and the entry of mortgage was deleted. The plaintiff is said to have wrongly been continued as the vendor in the revenue record which entry is alleged to be totally illegal, wrong and collusive. The defendants case is that in fact their father has been coming in possession of the suit land since 1974 as he was given possession of the same by the true owners. Thereafter the entry of Gair Marusi Doyam figured in the khasra girdawari in favour of the defendants in the year 1981 though, it was not carried in the jamabandi by the revenue staff. Therefore, they moved an application before the revenue officer in the year 1992. The revenue officer on 2.12.1992 accepted the

application after proper verification and ordered the correction of entry in the revenue record. Hence they are in possession of the suit land since 1974.

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

1. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed? OPP
2. Whether the sit in the present form is not maintainable? OPD
3. Whether the plaintiff is not in possession of suit land, therefore, he is not entitled to relief of injunction, as prayed? OPD
4. Whether the plaintiff has no locus-standi to file the present suit? OPD
5. Whether the suit is bad for non-joinder of necessary parties?
6. Whether the plaintiff has no cause of action to file the present suit?
7. Relief.

5. On an appraisal of evidence, adduced before learned trial Court, the learned trial Court, dismissed the plaintiff's suit. In an appeal, preferred therefrom, by, the plaintiff, before the learned First Appellate Court, the latter Court had also dismissed, the, appeal, and, the findings qua dismissal, of, the suit of the plaintiff, as, rendered by the learned trial Court, stood upheld.

6. Obviously, through the instant Regular Second Appeal, cast, before this Court, by the appellant, the latter seeks reversal of the concurrent pronouncements, as, made, against him, by both the learned Courts below.

7. This Court, on 25.8.2005, had, admitted the appeal, instituted by the appellant/plaintiff against the concurrently pronounced verdicts, by both the learned courts below, upon, the hereinafter extracted substantial questions of law, for, its hence making, an adjudication thereon:-

1. Whether order dated 2.12.2002 Ext. D-1 of Assistant Collector 2nd Grade is wrong, illegal and without jurisdiction vide which long standing revenue entry of plaintiff as tenant on suit land and incorporated in many jamabandies has been changed showing the defendants in possession of the suit land and the learned District Judge has erred in relying Ext. D-1 in dismissing the suit of the plaintiff?
2. Whether presumption of truth attached to jamabandies prepared after 1962-63 regarding the suit land showing the plaintiff as tenant under the owners has been rebutted by the defendants by legal evidence to show that they are in possession of the suit land instead of plaintiff?
3. Whether compromise dated 15.10.2001 Ext. PW-4/A which establishes the possession of the plaintiff on the suit land has been misconstrued, misinterpreted by the learned District Judge and has been ignored illegally?
4. Whether the courts below have misconstrued, misinterpreted and misapplied the pleadings, jamabandies form 1962-63 onwards of the suit land, Ext. D-1 order dated 2.12.1992, ext. D-2 order dated 15.3.2002, compromise dated 15.10.2001 Ext. PW-4/A and other material on record in taking the view that the plaintiff is not in possession of the suit land?

Substantial questions of Law No.1 to 4 :

9. Both the learned courts below, declined, to, assign sanctity, to, Ext. PB, comprising, the, jamabandi, appertaining to the suit land, and, drawn, vis-a-vis, the years 1962-63, hence recording the plaintiff, as, a non-occupancy tenant, upon, the, suit khasra numbers, (i) and despite the afore entries, also continuing, upto, the year 1996-97, (ii) primarily, on anvil qua uncontrovertedly, the suit land becoming, in, the year 1959, hence

mortgaged, vis-a-vis, one Ran Singh, and, thereafter, the plaintiff being recorded as, a, gair morusi in the column, of, possession, in the jamabandies, as, stood drawn, for, the year 1962-63, (ii) however, the suit land become redeemed by the defendants, in the year 1972-73, and, mutation bearing No. 629, becoming, in concurrence therewith hence attested. Consequently, the plaintiff was enjoined to make, a, deposition, vis-a-vis, the name hence with clarity, of, the land owners, and, qua his capacity, as, a tenant, under him, in the suit land, inasmuch as, his being enjoined to make bespeakings, vis-a-vis, his recorded possession, via-a-vis, the suit land rather being in, the, capacity as, a, tenant. However, a, closest reading of his deposition reveals qua the afore being amiss therein, (a) inasmuch, as the land owner, whereunder when, he stood inducted, as, a tenant, in, the suit land, and, the exact time, whereat, he, stood inducted as, a, tenant, in the suit land, rather not with precision occurring therein, (b) whereupon, hence, the afore lack, of, precise bespeakings, in his deposition, does benumb, all the averments, as, carried in the plaint. Furthermore, his gross ignorance qua a mortgage being created, vis-a-vis, Ran Singh, and, qua the suit, and, thereafter, its redemption occurring in the year 1972-73, also constrain a conclusion, qua his afore ignorance, begetting concomitant effect(s), (c) qua his setting up, a, false projection, in the plaint, (d) and, with, a, further corollary thereto being qua also an inference becoming and engendered, vis-a-vis, his misespousing qua his holding possession, of, the suit land. The afore presumption of truth hence becomes scuttled, (e) and, carries, a, sequel qua the afore entries, occurring in the jamabandies appertaining, to, the suit land, and, borne, in, ext. D-1, to, Ext. D-15, hence carrying reflections, vis-a-vis, the plaintiff rather holding possession, as, a gair morusi tenant, upon, the suit khasra numbers, hence becoming ipso facto, on anvil of the afore ignorance, of, the plaintiff, rather becoming dislodged, and, rebutted. In aftermath, on anvil of the afore entries, the plaintiff being disabled, to, derive any capitalization.

10. Be that as it may, the plaintiff, had not claimed, any relief in the suit, hence, for quashing, and, setting aside Ext. D-1, exhibit whereof, is, recorded, on 2.12.1992, hence by the Assistant Collector 2nd Grade, (i) wherethrough, in substitution of the recorded possession, of, the plaintiff, vis-a-vis, the suit khasra numbers, rather, the possession, of, the defendants, was, reflected therein, (ii) yet, it appears that this Court had qua the afore unespoused relief, rather formulated substantial question, of, law No.1, (iii) hence, it appears, that obviously, the, afore formulated substantial question of law, is, beyond the espoused relief, in the suit, (iv) thereupon, this Court is of the formidable view, that it not being amenable, for, any answer, being meted thereon, (v) as, thereupon any answer, vis-a-vis, the plaintiff or the defendants, would assuredly sequel, the, inapt consequences, of, this Court proceeding, to, make or pronounce, a, decree, vis-a-vis, an unespoused relief.

11. The defendants had contrarily relied, upon, the afore exhibits, for sustaining their contention, vis-a-vis, theirs' therefrom, hence, holding evident possession, vis-a-vis, the suit khasra numbers. The order embodied, in Ext. D-1 underscores, vis-a-vis, it being preceded, by, a detailed verification, vis-a-vis, the suit khasra numbers, rather being made hence by the revenue official concerned, (i) and, also it being preceded, by, representation, therebefore, being made, on, behalf of the plaintiff, and, hence when the order, borne in Ext. D-1, remains un-sullied, by any vice, of, hence the solemn cannon, of, audi-alterum-partem, becoming infringed, (ii), it thereupon per-se comprise, a, valid piece of evidence, for, dislodging the presumption of truth, as, carried in the revenue entries, and, as embodied, in, the apposite jamabandies, appertaining to the suit land, and, commencing, from, the year 1962-63, and, ending in the year 1996-97, wherein the plaintiff, is, recorded, to, hold possession of the suit land, hence as a gair mursi. Furthermore, also a perusal of Ext. D-2, comprising, the, order, made, by the Assistant Collector, 1st Grade, on 15.3.2002, upon the plaintiffs' application, for, correction, of, revenue entries, does make unfoldments, vis-a-vis, his not being in evident possession, of, the suit property. Since the orders respectively, borne in Ext. D-1, and, in Ext. D-2, remained unchallenged, before the higher echolors, of, revenue officer(s) concerned, and, also when, the, plaintiff, does not espouse, any relief, qua the afore

orders, being set aside, hence they acquire conclusivity, and, binding effects, (i) and, hence reiteratedly, with the afore orders, making marked bespeakings, vis-a-vis, the, defendants holding possession, of the suit land, as gair mursi(s), (ii) thereupon, they prevail upon, and, benumb, all the entries, as, carried, in, the jamabandies, and, appertaining to the suit land, and commencing from years 1962-63, and, ending in the year 1996-97, (iii) wherein rather the plaintiff, is, recorded, in possession, of, the suit land, as, a gair mursi, also, hence the, requisite substitution, is, concluded, to be made, in accordance with law.

12. Lastly, the learned counsel, for the aggrieved plaintiff, has rested his submission, for, negating all the afore conclusion(s), (i) upon, a compromise, borne in Ext. PW-4/A, compromise whereof, is drawn on, 5.10.2001, (i) and, with clause-3 therein, making candid recitals, vis-a-vis, the plaintiff being acquiesced, to hold conditional possession, of, the suit land, uptil, a decision is recorded, upon, any sub-judice lis inter-se them, (ii) hence he contends, that, the plaintiff's suit, for rendition, of, a decree, for permanent prohibitory injunction, rather was decreeable. However, the afore submission, is, rejected, as, the apt clause-3, borne in Ext. PW-4/A, is, a conditional clause, and, also when he has remained unmindful, vis-a-vis, Ext. PW-4/A, standing drawn, on 15.10.2001, (iii) and, hence it appears, that, the afore referred conditional clause, only, appertains, to, the plaintiff, being acquiesced to hold, rather conditional possession, vis-a-vis, the, suit khasra numbers, upto, the authority concerned, pronouncing, a, verdict, upon, the sub-judice lis, inter-se them. However, when the sub-judice lis, inter-se, the contesting litigants, and, as, referred in clause-3 of Ext. PW-4/A, is, comprised, in, the application, and, whereon, an order borne in Ext. D-2, hence stood, subsequent thereto rather rendered, on 15.3.2002, (iv) thereupon the afore clause works, vis-a-vis, the defendants, as, the imperative condition carried therein, unfolds qua, the, acquiesced possession of the plaintiff, in the suit khasra numbers rather remaining alive, only upto, the sub-judice lis, becoming finally adjudicated, (v) whereupon when, as, aforestated, the, apt sub-judice lis, whereon Ext. D-1, stood pronounced, is, borne in Ext. D-2, and, with Ext. D-1, acquiring conclusivity, and, finality, (vi) thereupon the effect, of, finality, being assigned, to Ext. D-2, is qua it negating, the, acquiescing condition, borne in Clause-3, and, obviously it enuring, for, the benefit, of, the defendants.

13. The above discussion, unfolds, qua the conclusion(s), as arrived by the learned Courts below, being based, upon a proper and mature appreciation, of, evidence on record. Accordingly, the substantial questions, of law, are, answered in favour of the respondents/defendants, and, against the appellant/plaintiff herein.

14. In view of the above discussion, the instant appeal, is, dismissed, and, the judgment and decree impugned, before this Court, is, affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Kaushalya Devi .....Petitioner.

Versus

The State of Himachal Pradesh and others .....Respondents.

CWP No.2591 of 2018.

Date of decision: 01.10.2019.

Constitution of India, 1950 - Article 226 – Misuse of Public office – Issuance of wrong income certificate of 'nursery teacher training' by Society for Child Relief and Women Welfare enabling private respondent to obtain employment on that basis – Held, public offices are not meant for abuse – Certificate issued by public functionaries on inquiry was found false – Selection of private respondent effected on basis of such documents, set aside -

Departmental / Criminal proceedings ordered to be initiated against erring officials. (Para 3, 6 to 8)

Case referred:
Noida Entrepreneurs Association vs. Noida and others, (2011) 6 SCC 508

For the Petitioner :	Mr. Onkar Jairath, Advocate.
For the Respondents:	Mr. Vinod Thakur, Additional Advocate General with Mr. Bhupinder Thakur and Ms. Svaneel Jaswal, Deputy Advocate Generals, for respondents No. 1 to 7 and 9. Mr. Nimish Gupta, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

On 20.08.2019, this Court passed the following orders:

"Heard in part. At this stage, it appears that the Director, Elementary Education is a necessary party and he is accordingly impleaded as such and shall figure as respondent No. 9. He is directed to file his personal affidavit with regard to the certificates annexed with the petition as Annexures P-13 & P-14, respectively and shall specifically state as to:

(i) Whether the institution mentioned in the certificate is recognised and if so by whom and under what provisions of law.

(ii) Whether it is permissible for a candidate to pursue regular study in +2 and at the same time appear for the examination as mentioned in this certificate.

2. He shall also enquire into the authenticity of the experience certificate annexed with the petitioner as Annexure P-15 (page 45), which suggests that private respondent was working as a Pre Primary Volunteer Teacher w.e.f. 01.03.2014 to 31.03.2016 (two years) specially when admittedly this respondent was pursuing regular +2 course at Government Senior Secondary School, Gaunth.

3. Learned counsel for the petitioner has also brought to my notice the contradiction in the income certificates issued in favour of the private respondent No. 8, wherein in the first certificate Annexure P-17 at page 48, issued on 10.04.2018, the family income from all sources has been shown to be less than Rs.50,000/- and in another certificate of income issued on 12.06.2018 Annexure P-18 at page 49 of the Paper Book, it has been mentioned that her family income from all sources does not exceed Rs.35,000/-.

4. The learned counsel for the petitioner has invited my attention to another income certificate dated 24.03.2018, Annexure R/8-3, wherein it has been stated that the income of the family of the husband of respondent No. 8 does not exceed.

5. The Deputy Commissioner, Sirmaur, after holding a regular inquiry shall file his personal affidavit with regard to the income certificates as annexed with the petition as Annexures P-17 and P-18 at pages 48 & 49 of the paper book.

6. The Deputy Commissioner shall further furnish his comments regarding the legality of the other certificates that are available at pages 89 to 104 (Annexure R/8-4 colly)

7. The Deputy Commissioner shall name(s) all officer(s), who has/have issued such certificate(s) and shall clearly specify whether such officer(s) is/are competent to issue such certificate(s) and shall further state that whether said officer(s) is/are still in service or have retired and supply the name, address, designation and place of posting of such officer(s).

8. Needful be done within four weeks. List on ***17.09.2019****.*

Copy dasti."

2. In compliance to the aforesaid orders, the Deputy Commissioner, District Sirmaur at Nahan, H.P. has filed a detailed affidavit, wherein after holding inquiry, it has been observed as under:

"As far as the legality of these certificates is concerned, in this regard, it is submitted that these certificates have been issued by the Naib Tehsildar, Haripurdhar on the basis of income from agricultural land as reported by the patwaries concerned and self declaration submitted by the applicants. But during examination of the revenue record, the land details and income from land have been found to be mentioned wrongly by the patwaris concerned on the application forms of the applicants on the basis of which income certificates were issued to them. Hence, these certificates cannot be stated to be issued on the basis of actual facts and are not stated to be legally valid. Further, these certificates are issued for one year as per Para 28.11 of the H.P. Land Record Manual and there is no provision to issue income certificate for different purposes.

The following Officers/Officials are concerned for issuing these certificates:-

Sr. No.	*Name of Officer/ Official*	*Designation/Address*
1.	*Sh.Dinesh Kumar*	*Naib-Tehsildar, Sub Tehsil Haripurdhar, Distt. Sirmaur. He has joined as Naib Tehsildar, Haripurdhar on 02.07.2016 and he remained as Naib Tehsildar in Sub-Tehsil Haripurdhar w.e.f. 02.07.2016 to 25.04.2019 and since he was transferred thereafter but he again joined as Naib-Tehsildar on 08.07.2019 at Haripurdhar and since then he has been working as Naib-Tehsildar, Haripurdhar.*
2.	*Sh.Satpal Sharma*	*Patwari Patwar Circle, Tikkri Dasakna, Sub Tehsil Haripurdhar, presently working as JBT Teacher in Govt. Primary School, Kota Pab, Tehsil Shillai, District Sirmaur, H.P. He has joined as patwari on 17.10.2015 and quit his job of patwari on 23.01.2019.*
3.	*Sh. Babu Ram*	*Patwari, Patwar Circle Badol, Sub-Tehsil, Haripurdhar. He has joined on 16.06.2016 and since then he has been working as Patwari, Patwar Circle Badol.*
4.	*Sh. Chajju Ram*	*Patwari, Patwar Circle Bhalad, Sub-Tehsil, Haripurdhar. He remained as Patwari there till 06.12.2018.*
5.	*Sh. Baru Ram*	*Junior Office Assistant (IT) Office of the Sub-Tehsil, Hairpurdhar, District Sirmaur, H.P. He has joined as Junior Office Assistant (IT) on 03.10.2017 and since then he has been working in the office of Sub-Tehsil, Haripurdhar.*

Besides, it is further submitted that in the instant case, the then patwaris as well as Naib-Tehsildar did not strictly adhere to the provisions laid down in para 28.8 and 28.9 of the Himachal Pradesh Land Record Manual and erred while issuing above mentioned income certificates."

3. The aforesaid officials have failed to realize that the offices being held by them are public offices which are meant for use and not for abuse and in case repositories of such offices spoil the rule, then the law is not that powerless and would step in to not only quash such arbitrary actions, but would also ensure that such abuse is not repeated in future. Being Officers of the State, they could not have acted like a private individual, who is free to act in a manner whatsoever he likes, unless interdicted by law. It needs no reiteration that the State and its Officers have to strictly fall within the four corners of law and all their activities are governed by rules, regulations, instructions etc.

4. The situation, in best, is described by the Hon'ble Supreme Court in ***Noida Entrepreneurs Association*** *vs.* ***Noida and others, (2011) 6 SCC 508***, wherein it was observed as under:

"Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in large public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons." It must be exercised bona fide for the purpose and for none other."

5. At this stage, it may not be appropriate for the Court to comment upon the role of each of the aforesaid persons, but the clout and influence exercised by them can be well imagined from the fact that on the last date and even today, learned counsel for the petitioner, on instructions, from his client stated that he was under instructions not to press the instant petition. However, the mere fact that the petitioner does not want to pursue the instant writ petition cannot be a ground to simply brush aside or ignore what has come in the inquiry.

6. Accordingly, the Deputy Commissioner, District Sirmaur at Nahan, H.P. is directed to hold a departmental inquiry against the aforesaid erring officials and take the same to its logical end and complete the same before **31.03.2020**. In addition thereto, the Deputy Commissioner, District Sirmaur at Nahan, H.P. may of his own or through the concerned authority initiate appropriate action including criminal action against the Society for Child Relief and Women Welfare, Nahan, District Sirmaur, which has issued the diploma in Nursery Teacher Training.

7. No doubt, one of the officials, Shri Satpal Sharma has quit his job as Patwari on 23.01.2019, but that itself cannot be a ground not to conduct an inquiry against the said official. Apart from the above, the Deputy Commissioner, District Sirmaur at Nahan, after collecting the entire records shall hand over a copy thereof to the Superintendent of Police, District Sirmaur at Nahan, who in turn, will cause an inquiry/investigation to be conducted by an Officer not lower in rank to a Deputy Superintendent of Police. In case, complicity of any person or each of them is found to have been, prima facie, established during such inquiry/investigation, then an FIR be registered and thereafter the same be taken to its logical end.

8. Before parting, it needs to be noted that even though the petitioner does not press the instant writ petition, however, the selection is based on income certificates, which evidently have been issued without adherence to the provisions laid down in 28.8 and 28.9 of

the Himachal Pradesh Land Records Manual and have rather been issued wrongly by the Patwari concerned on the application forms of the applicant. Therefore, the selection is set aside and the respondents are directed to conduct fresh selection in accordance with law within a period of six weeks from today

9. The writ petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

10. For compliance, to come up on **02.04.2020.**

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

Lakhbir Singh ....Petitioner.

-Versus-

Dev Kaur and others .....Respondents.

CMPMO No.: 353 of 2018
Date of Decision: 01.10.2019

Code of Civil Procedure, 1908 - Order XXII Rules 4 & 5 – Death of defendant during pendency of suit – Inquiry as to legal representatives – Held, court must hold inquiry and record findings as to persons(s) who will represent the estate of deceased. (Para 5)

For the petitioner: Mr. T. S. Chauhan, Advocate.

For the respondents: Mr. N.K. Thakur, Senior Advocate, with Mr. Karanvir Singh Thakur, Advocate, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

As per report of the Registry, respondents No. 3 and 4 have not been served, as they are stated to be residing in Ludhiana. Learned counsel for the petitioner submits that for the purpose of adjudication of present petition, the presence of respondents No. 3 and 4 is not required.

2. The grievance of the petitioner herein is with regard to an order, dated 21.05.2018, which has been passed by the learned Trial Court on an application filed by the plaintiff before the learned Trial Court under Order XXII, Rule 4 read with Section 151 of the Code of Civil Procedure to bring on record the legal representatives of deceased defendant No. 1 before the learned Trial Court. The application is on record as Annexure P-3. A perusal of the averments made in the application demonstrates that it was mentioned therein that defendant No.1-Shri Tarsem Singh had died on 29.09.2017, leaving behind following legal heirs/ representatives:

"(a) Smt. Dev Kaur (sister of deceased Tarsem Singh/plaintiff).

(b) Sh. Prem Singh (brother of deceased defendant No. 1)."

Accordingly, a prayer was made in the application to substitute the deceased defendant by bringing on record his legal heirs/representatives as defendants.

3. The petitioner herein contested the said application by filing reply thereto. His stand was that the application was not maintainable, because the proposed legal representatives had not indeed inherited the property of deceased defendant No. 1, who during his lifetime had executed a Will in favour of the petitioner, vide which, he bequeathed his estate to the petitioner.

4. Vide impugned order, the application filed by the plaintiff before the learned Trial Court, i.e., respondent No. 1 herein, stands allowed by the learned Trial Court by passing the following order:

> *"Photocopy of death certificate is also placed on record and as per the death certificate Tarsem Singh died on 20.09.2017. The factum of death is not disputed but as per the respondent the L.Rs. mentioned in the application are not th legal representatives of the deceased and as per the registered Will of Tarsem Singh, Lakhbir Singh is the L.R., of the deceased. From the perusal of record, it is clear that the L.R. Prem Singh appeared before the Court and he stated that he is not interested to contest the suit and another L.R., is already the plaintiff and Lakhbir Singh, who is alleged to be the L.Rs. of the deceased is also the defendant No. 2 in this case, who is represented by the Ld. Counsel. Therefore, I find that there is no requirement for summoning any person, hence I allow the present application in the interest of justice which is filed within the period of limitation Application accordingly stands disposed. Be tagged with main case file.*

5. Having heard learned counsel for the parties and having perused the impugned order, in my considered view, the same *per se* is not sustainable in law. I say so for the reason that the objection which stood taken by the petitioner herein in the reply filed to the application filed under Order XXII, Rule 4 of the Code of Civil Procedure has not been dealt with by the Officer in the impugned order. Besides this, the impugned other otherwise also is not sustainable in law, because whereas on one hand, it stands recorded in the same that as one of the proposed legal representatives of deceased defendant was a party in the suit as a plaintiff and the other proposed legal representative refused to contest the case, there was no need to summon any person, yet thereafter, learned Trial Court went on to allow the application. This contradiction in the impugned order also could not be explained by the learned counsel for the contesting respondents during the course of arguments.

6. Accordingly, the petition is partly allowed. Impugned order, dated 21.05.2018, passed in CMA No. 1696 of 2017 filed in Civil Suit No. 752 of 2013, is set aside. Application filed under Order XXII, Rule 4 read with Section 151 of the Code of Civil Procedure is ordered to be revived and the learned Trial Court is directed to pass afresh orders upon the same, after hearing all the parties concerned. Parties through learned counsel are directed to appear before the learned Trial Court on ***4th November, 2019.***

Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

M/s Smart Value Products and Services Ltd. .....Petitioner.

Versus

M/s Ethix Healthcare Inc. .....Respondent.

CMPMO No.: 258 of 2019

Date of Decision: 03.10.2019

Code of Civil Procedure, 1908 – Order IX Rule 7 – Dismissal of application seeking setting aside of order proceeding defendant ex-parte – Petition against – Trial court dismissed application of defendant praying for setting aside ex-parte order on ground that in another application filed for same relief, defendant had taken different version from plea raised in instant petition – Held, court must not ignore the fact that generally such applications are prepared more at behest of counsel of parties rather than on instructions so imparted to them – Suit at initial stage – Order of trial court set aside in interest of justice – Defendant permitted to file written statement in suit. (Para 5)

For the petitioner: Mr. Dalip K. Sharma, Advocate.
For the respondent: Mr. Sunil Chauhan, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner/defendant has challenged order, dated 05.04.2019, vide which, an application filed by the petitioner herein before the Court of learned Civil Judge, Court No. 1, Solan, District Solan, H.P., i.e., CMA No. 81-6 of 2019 in Civil Suit No. 117/2017 (115/10/2017) under Order IX, Rule 7 read with Section 151 of the Code of Civil Procedure, for recalling order, dated 09.04.2018, vide which, said petitioner was proceeded against *ex parte* by the learned Trial Court, was dismissed.

2. I have heard learned counsel for the parties and have also gone through the impugned order as well as other documents appended with the petition.

3. It is not in dispute that despite service, petitioner did not put in appearance before the learned Trial Court, which led to the passing of the order, dated 09.04.2008, vide which, the present petitioner, who is sole defendant before the learned Trial Court, was ordered to be proceeded against *ex parte*. The suit which has been filed by the respondent herein against the petitioner is a suit for recovery. After proceeding against the present petitioner *ex parte*, the case is pending adjudication before the learned Trial Court and is at the stage of recording the evidence of the plaintiff.

4. Learned counsel for the petitioner has argued that as the case is still at the stage of recording the evidence of the plaintiff, therefore, it will be in the interest of justice in case the impugned order is set aside and the petitioner is permitted to join the proceedings. He has further submitted that the respondent/plaintiff can be compensated by imposing reasonable cost upon the petitioner.

5. On the other hand, learned counsel for the respondent-plaintiff has argued that there is no infirmity with the impugned order, as the learned Trial Court has rightly rejected the application filed under Order IX, Rule 7 of the Code of Civil Procedure, because the petitioner had not approached the learned Trial Court with clean hands for having the order recalled vide which the petitioner was proceeded against *ex parte.*

It is not in dispute that before filing the application under Order IX, Rule 7 of the Code, which resulted in the passing of impugned order by the learned Trial Court, earlier an application was filed with the same prayer by the petitioner through its counsel, in which, the explanation which was given as to why none appeared before the learned Trial Court on 09.04.2018, was different from the one which was given in the subsequent application. However, in my considered view, this Court cannot ignore the fact that generally such applications are prepared more at the behest of learned counsel representing the parties, rather than instructions so imparted to them. As it is not in dispute that the case is still at the stage of recording the evidence of the plaintiff, in my considered view, it will be in the interest of justice in case the petitioner is permitted to join the proceedings before the learned Trial Court by setting aside the *ex parte* order and by giving an opportunity to the petitioner to file the written statement. The interest of the respondent/plaintiff can be taken care of by imposing cost upon the petitioner, which will also act as a deterrent.

6. Accordingly, this petition is allowed. Order, dated 05.04.2019, vide which, the application filed by the petitioner herein under Order IX, Rule 7 read with Section 151 of the Code of Civil Procedure for setting aside *ex parte order*, dated 09.04.2018, is set aside, however, subject to payment of cost of Rs.25,000/- by the petitioner to the respondent-plaintiff. Said cost shall be paid by the petitioner to the respondent-plaintiff on or before the next date of hearing by way of a Bank Draft. Thereafter, learned Trial Court shall give one

opportunity of at least four weeks to the petitioner to file the written statement to the plaint. Thereafter, the matter shall be decided by the learned Trial Court in accordance with law. It is clarified that in case the cost is not paid by the petitioner, in terms of the order passed by this Court today, then the opportunity given by this Court to the petitioner to join the proceedings shall cease to exist and the impugned order shall automatically stand revived. It is further clarified that after payment of cost, in case the petitioner does not files the written statement within the time granted by the learned Trial Court, then no further opportunity in this regard, under any circumstance, shall be granted by the learned Trial Court to the petitioner.

Parties to appear before the learned Trial Court on ***30th October, 2019.***

Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Smt. Reena Devi and others ...Petitioners

Versus

State of Himachal Pradesh ...Respondents

CrMMO No.271 of 2019
Reserved on : 23.8.2019
Date of Order : 10th September, 2019

Code of Criminal Procedure, 1973 - Section 482 – Inherent powers – Exercise of - Quashing of FIR registered for rape etc., pursuant to compromise between parties – Held, Sessions Judge has framed charges against the accused – Petition seeking quashing of FIR and consequential proceedings is not accompanying the copy of order vide which charges were framed – Petition can not be construed to be one for quashing charges - Petition being defective, is dismissed. (Para 14).

For the Petitioners : Mr. B.L. Soni and Mr. Aman Parth, Advocates.

For the Respondents : Mr. Ashwani K. Sharma and Mr. Nand Lal Thakur, Additional Advocate Generals.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

A victim of alleged sexual offences has come up before this Court by filing a joint petition of compromise, with the accused, who are her husband, mother-in-law and brother-in-law, for quashing of FIR registered at her instance and on her complaint.

2. The victim informed Police Station Sadar, District Hamirpur on 15.9.2017, complaining that the second Petitioner Ramesh Kumar, who was her brother-in-law, being husband of her husband's sister, established sexual relations with her, without her will and consent and he continued to indulge in coitus on numerous occasions by blackmailing her with threats of uploading her obscene videos on social media. When she told the incident to her mother-in-law Rukamani Devi, who was arraigned as second accused and is now the third petitioner; and to her husband Vinod Kumar, who is third accused and fourth petitioner, they asked her not to reveal it to anyone.

3. Based on this complaint, the Police Station, Sadar, District Hamirpur, registered FIR No.220/2017, under Sections 376, 354D, 342, 506,120B of the Indian Penal Code. Now, the complainant-victim, who is also the 1st petitioner, by filing a joint petition with the accused, who are Petitioners No.2 to 4, has come up before this Court, under Section

482 of the Code of Criminal Procedure, 1973, (After now called CrPC), for quashing of the said FIR and all consequential proceedings. The petition accompanies an out of court compromise deed, signed by the complaint/victim and all the accused. In this deed, victim declares of lodging the complaint in a fit of anger and due to misunderstanding.

4. I have heard learned counsel for both the parties and waded through the entire records.

5. The respondent, through Superintendent of Police, Hamirpur, HP, filed a reply affidavit to this petition. In Paragraph No.7 of the response, he states that on 19.3.2019, the trial Court, based upon the police report, have already framed charges against the accused. Shri Nand Lal Thakur, Addl. Advocate General, appearing for the State of HP contended that the Petitioners 2 to 4, who are accused and against whom the charges stand framed, have neither challenged the order framing the charges nor the charges as spelled out in the Form No. 32 of the Second Schedule of CrPC, or placed on record the copies of these orders, as such the petition is not maintainable. His second contention is that once charges have been framed, then even for quashing of the same, on any ground, be it compromise or on merits, the legal recourse available is by filing a Criminal Revision petition under Section 397/401 CrPC and not by filing a petition under section 482 CrPC.

6. Adverting to the first contention, the present petition was filed on 24.4.2019, i.e., after the framing of charges on 19.03.2019. In the first Paragraph of the petition, the averments are for quashing of FIR and for setting aside of consequent proceedings, and the same is the prayer of the petitioners. Since the charges have been framed then to cull the criminal proceedings, such an order needs to be set aside. The Petitioners neither placed with the petition the order framing charges nor the Form No. 32 of the Second Schedule of CrPC; as such the Petition is defective and not maintainable.

7. To answer the second contention of Ld. Additional Advocate General, a survey of fundamental provisions of CrPC, from the setting into motion of the criminal machinery and its final termination, is required. The proposition of law that emerges is which remedy is available to the accused persons, who want to challenge the criminal charges framed against them, whether it is by filing a Criminal Revision Petition, under Ss. 397, 401 CrPC or 482 CrPC. In the present case, the scope of Article 227 of the Constitution of India is not under consideration.

8. Before discussing this proposition, it is apposite to state that compoundable criminal cases can be compromised at any stage. The best illustration would be the case involving an offence, which is compoundable under Section 320 of the CrPC. The Court can permit compounding of such matter at any stage, be it in Trial, Appeal or Revision. Even post-conviction, such an offence is compoundable under Section 320 CrPC. However, in those cases, not listed under the schedule of S. 320 CrPC, a petition under section 482 CrPC would be maintainable for quashing of all proceedings, based on the compromise or otherwise, as the case may be. The reason is the absence of any remedy available under the CrPC.

9. Before arriving at any conclusion to ascertain the appropriate remedy for an accused, against whom, a notice of accusation has been issued, or the charge has been framed and who wants to challenge the same, the tour of the following stages will give the required exposure.

Stage-1 The most prominent and the earliest provision which ignites the engine of criminal law and brings it into motion is the registration of FIR, under Section 154 of the CrPC. Needless to say, this provision confines to cognizable offences. After the investigation, if in the opinion of the Station House Officer, a case for the prosecution is made out, then he files a report under Section 173 of the CrPC. Any person arraigned as an accused in such FIR can seek its quashing from High Court having jurisdiction, by filing a petition under section 482 CrPC.

Stage-2 Section 190 of the CrPC, envisages three situations, upon which the Magistrate can take cognizance of offence, namely, (a) Upon receiving a complaint of facts which constitutes such offence; (b) Upon a Police Report of such facts; (c) Upon information received from any person other than a Police Officer or upon his own knowledge that such an offence has been committed. Exercising powers under Section 204 of CrPC, the Magistrate taking cognizance of offences, may proceed against an accused, if he believes in the existence of sufficient grounds for proceeding. Any person who has been arraigned as an accused and is aggrieved either by registration of FIR or filing of charge-sheet or taking cognizance or issuance of the process can seek adjudication under Section 482 of the CrPC. Order taking cognizance can also be challenged by filing a revision petition, in the Sessions Court or High Court. There will be a situation where after the filing of the petition for quashing of FIR, in the meantime, the charge-sheet is filed; the law is no more *res Integra* that in all those cases, FIR and all consequential proceedings can be quashed. An accused cannot approach a Sessions Court till this stage because the only available statutory remedy is by invoking inherent powers of High Court under Section 482 of the CrPC.

Stage-3 The next stage in criminal proceedings is similar to transformation of a caterpillar emerging as a butterfly and it begins on the framing of charges under Sections 211, and 228 of CrPC or on issuance of notice of accusation under Section 251 of the CrPC. If not challenged, it shall culminate under section 229, 241 or 248 of the CrPC only by a judgment of acquittal or conviction. Once charges stand framed or the notice of accusation stands issued, as the case may be, then the appropriate remedy to challenge the same is only by filing Criminal Revision Petition in the Court where it lies and not by filing a petition under section 482 CrPC.

Stage-4 The next stage is post conviction or acquittal. A judgment of conviction can only be challenged under Chapter-29 of the CrPC (Sections 372 to 394). During the pendency of such an appeal, the parties may file an application for compounding of the offences but such applications in appeal, would be within and not without. A convict cannot bye-pass Chapter 29 and instead of filing a statutory appeal before the First Appellate Court cannot straightaway resort to Sections 397, 401 and 482 of the CrPC.

Stage-5 The next stage is challenging the dismissal of the appeals of the convicts and that can be done by approaching the Courts under its Revisionary Jurisdiction, under section 397-401 CrPC. During the pendency of such Revision Petitions, if parties compound the offences, then the process is similar to that in the appeals.

10. The other stages, if any, would also tread the similar path and cross the similar obstacles.

11. The above survey leads to an irresistible conclusion that once charges have been framed, then the remedy is not to file petition under Section 482 of the CrPC but to invoke the revisionary jurisdiction under section 397 & 401 CrPC. However, in the present petition, what is sought to be quashed is FIR and all consequential proceedings, based upon the out of court compromise entered between the victim and the accused and the challenge is not on the merits of charges or accusations.

12. Thus the question that needs an answer is as follows,

> What remedy is available to an accused who has compromised the offence after the charges have been framed or notice of accusation issued and before the pronouncement of the final judgment by the trial court?

13. As already discussed in Stage 2, charges and notices of accusation can be challenged on merits, only by invoking revisionary jurisdiction, within the prescribed period of limitation. However, if parties compound the offence in the interregnum period of post charge pre judgment stage, than the matter for consideration before the Court would not be to assess the merits of charge but a finding on the compromise. After the compounding, the continuation of criminal proceedings would amount to abuse of process of law resulting in the miscarriage of Justice. Thus, the charges or the notice of accusations can also be quashed by filing a petition under section 482 CrPC, invoking the inherent jurisdiction of the High Court.

14. Now, adverting to the averments made in the present petition, the Petitioners have carefully worded it as "quashing the FIR and all consequential proceedings," but such nomenclature would not mean quashing of charges. Moreover, although the quashing petition was filed after the framing of charges, but the petitioner did not place on the record even the copy of the order of framing of the charge. Therefore, this petition is defective.

15. Given the above discussions, this petition is not maintainable and, hence, in-fructuous. The accused are at liberty to file a petition under section 482 CrPC or a petition under sections 397/401 CrPC, whatever mode they wish to adopt. Since no limitation is prescribed for filing a petition under section 482 CrPC as such it can be filed at any stage. However, if the accused prefer to file a petition under sections 397/ 401 CrPC, than they would be entitled to claim the benefit of limitation by excluding the period for which the present petition was pending before this Court. Any observations made in this judgment shall not be taken as an expression of opinion on the merits of petition, if filed.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Devender … Petitioner.

Versus

State of Himachal Pradesh … Respondent

Cr.MP(M) No.1607/2019
Reserved on : 13th September, 2019
Date of Decision: 20th September, 2019

Code of Criminal Procedure, 1973 – Section 439 – Narcotic Drugs And Psychotropic Substances Act, 1985 – Section 37(1) (b)(ii) - Regular bail in case of recovery of 'commercial quantity' of contraband – Grant of – Held, reading of Section 37(1)(b)(ii) mandates that two conditions are to be satisfied before accused possessing 'commercial quantity' of drug or psychotropic substance is to be released on bail. First, public prosecutor does not oppose the bail application and second, court is satisfied that reasonable grounds exist for believing that accused is not guilty of such offence and he is not likely to commit any such offence while on bail – Fulfillment of both conditions is necessary for the grant of bail in such cases. (Para 10).

Cases referred:

Nikesh Tara Chand Shah vs. Union of India and Anr., 2018 (11) SCC 1

Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and Anr., 2005 (5) SCC 294

Dataram Singh v. State of Uttar Pradesh and Another, (2018) 3 SCC 22

Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705

Union of India v. Merajuddin, [2000] 3 RLW(SC) 406

Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549

Bijando Singh v. Md. Ibocha, 2004(10) SCC 151

N.C.B. Trivandrarum v. Jalaluddin A, 2004 (115) ECR 99

N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721

Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624

Satpal Singh v. State of Punjab, (2018) 13 SCC 813

Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738

For the Petitioner : Mr. Yashveer Singh Rathore and Mr. Ajit Sharma, Advocates.
For the Respondent : Mr. Nand Lal Thakur, Additional Advocate General, for the State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

The petitioner, who was a link in the transport chain, is in judicial custody on accusations of criminal conspiracy by acting as a cohort of the main accused detained for possessing commercial quantity of Charas, has come up before this Court seeking regular bail.

2. I have waded through the Police file in FIR No.3/2019, dated 12.7.2019, under Sections 20 and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985, (After now called as NDPS Act), registered in Police Station, SV&ACB, Mandi, District Mandi, HP, which was returned to the Police official, through learned Additional Advocate General. Status report is also filed and taken on record. I have also heard the counsel for the parties.

3. The gist of the case necessary to decide the present bail application is that in the morning of 12.7.2019, police on the basis of some prior information, had recovered 3.934 Kilograms of Canabis (Charas) from a pillion rider named Hem Raj. The said motorcycle was being driven by one Narayan Dass. Both of them were arrested and arraigned as accused under Sections 20 and 29 of the NDPS Act. During investigation, the Police arrested one Ram Lal @ Raju and also arraigned him as an accused. On 19.7.2019, police investigated a person named Manish Kumar @ Manu. After investigation, Police got his statement recorded under Section 164 of the Code of Criminal Procedure. It is on the basis of the statement of Manish Kumar @ Manu that the Police arraigned the petitioner as an accused and arrested him for criminal conspiracy punishable under Section 29 of NDPS Act.

4. I have gone through the copy of the statement of Manish Kumar @ Manu, recorded under Section 164 of the Code of Criminal Procedure, on 19.7.2019, which forms part of the Police file. This statement is in Hindi script and refers to FIR No.3/2019 dated 12.7.2019, registered in Police Station, SV&ACT, Mandi, District Mandi, H.P., under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as "the Act').

5. The gist of the statement is that Manish Kumar was a taxi driver of taxi bearing No.HP-01M-2545 and he knew Ram Lal who is the co-accused herein. On 10.7.2019, in the morning at 6:00 a.m., Ram Lal made a phone call to him and asked him that one person named Devinder (petitioner herein) will meet him and he would further tell him about one of his relative who is to travel with him. He also gave him the phone number of Devinder. After driving 7-8 Kilometers, Devinder met him, who told him that 2-3 Kilometers ahead; he would come across that person. After traveling 2-3 Kilometers, a person gave signal to stop the vehicle and he inquired if he had been deputed by Raju and they shook hands with him. On this, Manish Kumar inquired from him that who was the person who had to travel in his taxi. On this, the petitioner told him that a relative of those persons has expired and they have already informed Raju about the same. However, the said person put a carton and a bag in the dickey of the vehicle. On opening the zip of the bag, it contained apricots. The petitioner gave 4-5 apricots to Manish to eat. The said person told Manish Kumar to handover these articles to Raju. Thereafter, he returned from the said place towards Padhar. After sometime, the petitioner called him on his mobile and told him that he is going to Padhar and asked him to reach there. On his way to Padhar, when he reached near Pandoh, then the petitioner again called him and asked him to come to Ner Chowk because wife of

Raju was critically ill. Thereafter, the moment he reached near Shanidev temple, then he noticed Raju who was in his vehicle HP-65-6329 and the petitioner was also sitting with Raju and the petitioner signaled him to stop. Thereafter, the petitioner sat in the vehicle of Manish Kumar and asked him to drive further. At that time, he noticed that a white colour scooty was following them, which was being driven by a very stout male. He brought his scooty near the car and asked him to stop. On this, the petitioner also asked him to stop. At that time, the petitioner handed over the said carry bag to the person who had come on scooty. It was the same bag which was kept in his vehicle at Banjar. After taking the bag, the said stout person drove away the scooty. After that, when they had traveled for some time, then petitioner got down from the vehicle. Thereafter, Raju gave him fare of Rs.8,000/- instead of Rs.4,000/-. He further stated that after one or two days, he saw a video on Facebook,which was regarding the arrest of cannabis smuggler. On this, he recognized the said person to be the same to whom the petitioner Devinder had handed over the bag.

6. Mr. Yashveer Singh Rathore, learned counsel, appearing for the petitioner, submits that there is a contradiction of the taxi numbers and also the fact that in the statement under Section 164 of the Code of Criminal Procedure, the person to whom the petitioner had handed over the bag was driving a scooty, whereas the person from whom the Police had recovered the bag, was on the motorcycle. It is his further case that the bag containing Charas has not been identified from Manish Kumar @ Manu. His next contention is that, on such weak evidence, the liberty of the accused cannot be curtailed.

REASONING

7. There cannot be any quarrel with the metaphor that conspiracies are mostly hatched in secrecy and with utmost caution and care. A perusal of the statement of Manish Kumar recorded under Section 164 of the CrPC reveals how shrewdly the Charas was being taken from point A to point B and so on. Simply because the recovery was from the motorcycle, whereas Hem Raj, to whom the petitioner had handed over the bag was riding a scooty, does not mean that they had not changed the vehicles before being apprehended by the Police. What is important in this case, is the *modus operandi,* with which the Charas was being taken from one destination to the other. Apart from the statement of Manish @ Manu on identifying Devinder on the Facebook video, the Investigating Officer also gathered the evidence of call details of the said time period.

8. Ld. Counsel states that Manish Kumar @ Manu stands in the foot of the other accused and simply to bypass the provisions of S. 306 CrPC, the police has made him a witness. This argument may not be admissible at the stage of bail and might be of some help during Trial. The Investigating Officer might not have arraigned Manish Kumar @ Manu as an accused for the reasons that according to the Investigating Officer, he was used as a tool to transfer the contraband without his knowledge. However, observations would not be construed as comment on his role, which are left to be decided at the stage of trial. For the purpose of deciding this bail petition, statement is admissible and, hence, the precedent relied upon by the accused is not attracted.

9. The narration of events revealed by Manish Kumar @ Manu does suggest that the petitioner was aware of the transportation of the contraband and it is suffice to say that the petitioner has failed to cross the check post of Section 37 of the NDPS Act. The quantity of Charas is greater than 1 Kg., which makes it a commercial quantity, attracting rigors of S. 37 of NDPS Act. Resultantly before granting bail, this Court is under statutory obligation to deal with stringent conditions of Section 37 of the NDPS Act, which reads as follows:-

> "37. Offences to be cognizable and non-bailable.
>
> (1)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)
>
> (a) every offence punishable under this Act shall be cognizable;

> (b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

10. Reading of Section 37(1)(b)(ii) mandates that two conditions are to be satisfied before a person/accused of possessing a commercial quantity of drugs or psychotropic substance, is to be released on bail. The first condition is when the Public Prosecutor does not oppose the bail application. And the second stipulation is that the Court must be satisfied that reasonable grounds exist for believing that the accused is not guilty of such offence and also he is not likely to commit any offence while on bail. Be that as it may, if such a finding is arrived at by the Court, then it is equivalent to giving a certificate of discharge to the accused. Even on fulfilling one of the conditions that the accused is not guilty of such an offence, still, it is not possible for the Court to give a finding or assurance that the accused is not likely to commit any such crime. However, the grant of bail or denial of bail for possessing commercial quantity would depend on facts of each case.

11. To understand that why is the present bail petitioner not entitled to the discretion of pre-arrest bail, the following illustration is relevant. Take somewhat an identical case where some person, when he sees the Police or when the cops challenge him, throws away his bag, containing the prohibited contraband in it, and runs away from the spot. At a later stage Investigating Officer arrests the person by claiming it was the same person who had run away on seeing the Police party. But such person leads primary evidence of alibi by proving his presence at some other place, or some allegations that the Police let off the real culprit, on some extraneous considerations, and that the Police is making him a scapegoat.

12. In the present case, there is not even a whisper or a word in the pleadings of the accused of some hostility with the Police personal.

13. The learned counsel for the petitioner has placed reliance upon the following judgments:-

(i) *Nikesh Tara Chand Shah vs. Union of India and Anr.*, 2018 (11) SCC 1. This judgment does not deal with Section 37 of the NDPS Act and it deals with the Prevention of Money Laundering Act, 2002.

(ii) The next judgment relied upon by the learned counsel is *Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and Anr.*, 2005 (5) SCC 294. This case relates to a bail under Maharashtra Control of Crimes Act. This is not applicable to decide the case under NDPS Act.

(iii) The third judgment, on which learned counsel places reliance is by a Co-ordinate Bench of this Court in *Rehmat Ali vs. State of Himachal Pradesh,* passed in Cr.MP(M) No.203/2019, on 8.3.2019, which deals with the offences under Sections 20, 25 and 29 of the NDPS Act. In the said case, the case against the bail petitioner was that he had helped the co-accused transferring the contraband and the case against the petitioner was on the basis of a statement made by the co-accused. However, in the present case, statement under Section 164 CrPC was recorded of a witness and not of an accused.

14. Learned counsel has also placed reliance upon the landmark judgment of *Dataram Singh v. State of Uttar Pradesh and Another*, (2018) 3 SCC 22. However, the said case was primarily of cheating for stopping the payment of cheque. This case does not deal with the rigors of Section 37 of NDPS Act and is not applicable.

15. The limitations stipulated in S. 37 of NDPS Act come into play only when the Courts are *prima facie* inclined to grant the bail and irrespective of the quantity of the contraband, S. 37 does not attract when the Courts are unwilling to give the bail.

16. When S. 37 of NDPS Act comes into operation then apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance are (1) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and (2) that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative.

17. To understand the exact legal quandary involved in these matters, a brief survey of the judicial precedents pronounced by Hon'ble Supreme Court on S. 37 of NDPS Act, would be of immense help:

(a) In Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705, Supreme Court holds,

> 6. Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The Narcotic Drugs And Psychotropic Substances Act is a special enactment as already noted it was enacted with a view to make stringent provision for the control and regulation of operations relating to narcotic drugs and psychotropic substances. The being the underlying object and particularly when the provisions of Section 37 of Narcotic Drugs And Psychotropic Substances Act are in negative terms limiting the scope of the applicability of the provisions of Criminal Procedure Code regarding bail, in our view, it cannot be held that the High Court's powers to grant bail under Section 439 Criminal Procedure Code are not subject to the limitation mentioned under Section 37 of Narcotic Drugs And Psychotropic Substances Act. The non-obstante clause with which the Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconistency between Section 439 Criminal Procedure Code and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 Section 37 prevails. In this context Section 4 Criminal Procedure Code may be noted which read thus :
>
> "(4) Trial of offences under the Indian Penal Code and other laws-(1) All offences under the Indian Penal Code, 1860 shall be investigated, inquired into, tried, and otherwise dealt with according to the provision hereinafter contained.
>
> (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provision, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."
>
> It can thus be seen that when there is a special enactment in force relating to the manner of investigation, enquiry or otherwise dealing with such offences, the other powers under Criminal Procedure Code should be subject to such special enactment.

(b) In Union of India v. Merajuddin, [2000] 3 RLW(SC) 406, a three member bench of Supreme Court while cancelling the bail, observed as follows, "The High Court appears to have completely ignored the mandate of Sec. 37 of the Narcotic Drugs and Psychotropic Substances Act while granting him bail. The High Court overlooked the prescribed procedure."

(c) In Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549, a three Judge bench of Supreme Court holds,

> 7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of

the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based for reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

(d) In Bijando Singh v. Md. Ibocha, 2004(10) SCC 151, Supreme Court holds,

3. Being aggrieved by the order of the Special Court (NDPS), releasing the accused on bail, the appellant moved the Guwahati High Court against the said order on the ground that the order granting bail is contrary to the provisions of law and the appropriate authority never noticed the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act. The High Court, however, being of the opinion that if the attendance of the accused is secured by means of bail bonds, then he is entitled to be released on bail. The High Court, thus, in our opinion, did not consider the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act. In this view of the matter, the order releasing the accused on bail by the Special Judge as well as the order of the High Court in revision are quashed. The accused should be taken into custody forthwith.

(e) In N.C.B. Trivandrarum v. Jalaluddin A, 2004 (115) ECR 99, Supreme Court observed,

"Be that as it may another mandatory requirement of Section 37 of the Act is that where Public Prosecutor opposes the bail application, the court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. In the impugned order we do not find any such satisfaction recorded by the High Court while granting bail nor there is any material available to show that the High Court applied its mind to these mandatory requirements of the Act.

(f) In N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721, Supreme Court holds:-

9... ... ... (7) The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing, that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case hand the High Court seems to have completely overlooked underlying object of Section 37.

(g) In Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624, Supreme Court holds,

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the Narcotic Drugs And Psychotropic Substances Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

(h) In Satpal Singh v. State of Punjab, (2018) 13 SCC 813, a bench of three judges of Supreme Court directed that since the quantity involved was commercial, as such High Court could not have and should not have passed the order under sections 438 or 439 Cr.P.C., without reference to Section 37 of the NDPS Act.

(i) In Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738, Supreme Court holds,

> 6. Section 37 of the NDPS Act contains special provisions with regard to grant of bail in respect of certain offences enumerated under the said Section. They are :- (1) In the case of a person accused of an offence punishable under Section 19, (2) Under Section 24, (3) Under Section 27A and (4) Of offences involving commercial quantity. 7. The accusation in the present case is with regard to the fourth factor namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under Section 37 of the NDPS Act, in case, the court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Cr.P.C. or any other enactment. (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; (2) that person is not likely to commit any offence while on bail.
>
> 8. There is no such consideration with regard to the mandatory requirements, while releasing the respondents on bail.
>
> 9. Hence, we are satisfied that the matter needs to be considered afresh by the High Court. The impugned order is set aside and the matter is remitted to the High Court for fresh consideration. It will be open to the parties to take all available contentions before the High Court.
>
> "....."

18. In the facts and circumstances of the case, the petitioner is unable to clear the check-post of Section 37 of the NDPS Act. Resultantly, the petition stands dismissed. The dismissal of this bail shall not come in the way of the petitioner filing subsequent bail petitions.

Any observation made in this order shall not be taken as an expression of opinion on the merits of the case, and the Court(s) shall decide the matter uninfluenced by any observation made hereinabove.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Hari Ram ....Appellant
Versus
Jamuna Devi & others ...Respondents

FAO No. 135/2018
Reserved on: 20.09.2019
Decided on: 04.10.2019

Motor Vehicles Act, 1988 – Section 149(2) (a)(ii) - Motor accident – Claim application – Fake driving licence – Liability of insurer – Held, insurer can not absolve itself from liability to indemnify award simply on ground that driving licence of driver of offending vehicle was fake - The question which is relevant is whether the insured was aware of the fact that driving licence of driver was fake before employing him as a driver ? (Para 6).

ases referred:
United India Insurance Ltd. Company vs. Lehru, (2003) 3 SCC 338
National Insurance Company vs. Swaran Singh, (2004) 3 SCC 297
Pepsu Road Transport Corporation vs. National Insurance Company, (2013) 10 SCC 217
Ram Chandra Singh vs. Rajaram and others, (2018) 8 SCC 799

For the appellant Mr. Manoj Thakur, Advocate.
For the respondents Mr. T.S. Chauhan, Advocate, for respondent No.1.

Mr. Virender Thakur, Advocate, for respondents No. 4 & 5.
Mr. Jagdish Thakur, Advocate, for respondents No. 3 & 6.
None for respondent No.2.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

Owner of the vehicle is in appeal against an award where-under liability to pay the awarded amount, in the first instance was though fastened upon the Insurance Company, but it was held entitled to recover the same from the owner and driver in accordance with law.

2. Facts:-

2(i) An accident occurred on 30.10.2015, involving Trucks bearing No. HP-11-5104 & HP-11-5448 near Petrol Pump at village Nai Sarli, Tehsil Sadar, District Bilaspur. One Sh. Suraj Kumar alias Lucky, aged 17 years, lost his life in this accident. Claim petition was preferred by his mother seeking compensation of Rs. 40,00,000/-.

2(ii) Learned Motor Accident Claims Tribunal, Bilaspur vide impugned award dated 17.11.2017 held that Sh. Suraj Kumar alias Lucky died due to rash and negligent driving of truck bearing No. HP-11-5448, owned by the present appellant and driven by respondent No.2, Sh. Ashwani Kumar. This finding has not been challenged and has attained finality.

2(iii) Insurance Company in its reply to the claim petition took up a defence that the driver of the offending vehicle did not possess a valid and effective driving licence, therefore, insurer cannot be fastened with the liability to pay any compensation. Learned Motor Accident Claims Tribunal, Bilaspur examined this issue and returned the finding that driving licence has not been proved on record and, therefore, it need not be disproved by the Insurance Company. Accordingly, the finding was given against the appellant/owner of the vehicle.

2(iv) While determining compensation, learned Tribunal considered the notional income of the deceased, a minor aged 17 years, at Rs. 7000/- per month; After deducting 50% of this income towards assumed expenditure by the deceased on himself, the dependency was considered at Rs. 3500/- per month; Applying the judgment of Hon'ble Apex Court in Pranay Sethi's case (2007) ACJ 2700, 40% of the dependency towards future prospective income of deceased was added; Additionally, Rs. 80,000/- as compensation under conventional heads was awarded. In all, compensation amount of Rs. 11,38,400/- was awarded along with interest @ 7.50% per annum from the date of filing of petition till the date of deposit of amount. The liability to pay the amount was fastened upon respondent No.3, Insurance Company, which was held entitled to recover the same from the owner and driver in accordance with law.

3. Since, Insurance Company was held entitled to recover the compensation amount from the owner and driver on account of the finding given by the learned Motor Accident Claims Tribunal, Bilaspur, on issue No.9 framed in respect of respondent No.2/driver not possessing a valid and effective driving licence, therefore, the owner is in appeal against the impugned award dated 17.11.2017, passed by learned Motor Accident Claims Tribunal, Bilaspur.

I have heard Mr. Manoj Thakur, learned counsel for the appellant, Mr. T.S. Chauhan, Mr. Virender Thakur and Mr. Jagdish Thakur, learned counsel for the respondents and with their assistance gone through the record.

4. **The main points** to be examined in this appeal are:-

- **(i)** Whether respondent No.2, possessed a valid and effective driving licence to drive the vehicle in question?
- **(ii)** Even if, respondent No.2 did not possess a valid and effective driving licence for driving the vehicle in question, can the appellant/owner of the vehicle be held liable to discharge the compensation liability towards the claimants?

5(i) Point No.1:-

Issue No.9, framed by the Learned Motor Accident Claims Tribunal, Bilaspur was as follows:-

"Whether the offending vehicles were being driven by unauthorized persons, who had no valid and effective driving licence to drive the offending vehicle as alleged. If so, its effect?.....OPRs-3 &6."

The onus to prove the above issue was on the insurer.

5(ii) **Summary of the evidence** led by the parties in this regard may be noticed hereunder:-

On behalf of Insurer, Sh. Amandeep Sharma, **RW-4**, produced verification report (RW-4/C-1) of driving licence in question. He stated that:- the investigation regarding respondent No.2's driving licence was carried out by the Insurance Company through its investigator Sh. Bapan Nag, who in turn, received investigation report from Motor Vehicles Department, Office of the District Transport Officer, Tuensand, Nagaland, Government of India; In the investigation report, it was informed that there was no record with Motor Vehicle Department, Office of the District Transport Officer, Tuensand, Nagaland, Government of Nagaland, in respect of the driving licence in question in the name of respondent No.2. Learned counsel for respondent No.3, has contended that the driving licence Mark R-1, was even otherwise issued contrary to provisions of the Motor Vehicles Act.

5(iii) Learned counsel for the appellant contended that the investigation report Ext. RW-4/C-1, cannot be considered in evidence; as:-

i) The author of the report, Sh. Bapan Nag had not himself stepped into the witness box and;

ii) this was a mere photocopy of the original report.

5(iii)(a) Sh. Bapan Nag is not the author of the verification report. The verification report was supplied to him by the Motor Vehicle Department, Office of the District Transport Officer, Tuensand, Nagaland, Government of Nagaland, under Right to Information Act.

5(iii)(b) It is seen from the record that the investigation report (Ext. RW-4/C-1), initially brought on record was a photocopy. However, later on, a CMP No.396/06 of 2017, was moved by the Insurer under Order 8 Rule 1A (3) CPC to bring on record and tender in evidence the original verification report of the driving licence of respondent No.2, issued by the Motor Vehicle Department, Office of the District Transport Officer, Tuensand, Nagaland, Government of Nagaland. This application was allowed by learned Motor Accident Claims Tribunal vide order dated 31.08.2017, where-after original report was taken on record of the case.

In Munshi Ram vs. Balkar Singh and Ors., FAO No. 598 of 2014 (O & M) and FAO Nos. 2705, 2838 of 2013 (O & M), decided on 18.02.2016, Hon'ble High Court of Punjab & haryana, observed as under:

".....At the Appellate Court, the owner has filed an application under Order 41 Rule 27 CPC that has elicited through RTI a response to say the licence number had been wrongly given as 18690/Ag/2003 when it was actually 16690/Ag/2003 and that it had been issued in the name of Balkar Singh. A response through RTI is of a public officer and it is a public document and would require no further corroboration in the manner contemplated under Section 77 of the Evidence Act. The document must be taken to be true of what its recitals state..."

The RTI Information was relied upon by a Coordinate Bench of this Court in a decision rendered on 04.07.2012 in FAO No. 210 of 2011 titled as ICCI Lombard General Insurance Co. Ltd. vs. Smt. Bhima Devi and Others.

In view of the above, there is no escape from conclusion that the driving licence of respondent No.2 was actually fake. Point is answered accordingly.

6 **Point No.2:-**

Having concurred with the findings of the learned Tribunal below that driving licence possessed by respondent No.2 was fake, the next question that arises is, whether the owner/ appellant is to be held liable for the compensation amount payable to the claimant?

6(i)(a) In ***(2003) 3 SCC 338*** titled as ***United India Insurance Ltd. Company vs. Lehru***, it was observed:- that the owner at the time of hiring a driver has to check as to whether the driver possesses a driving licence; if the driver produces a driving licence which, on the face of it, appears to be genuine then the owner is not expected to find out whether

the licence has actually been issued by the competent authority or not; if the owner finds that driver is competent enough then he will hire the driver; therefore, it was observed that where the owner has satisfied himself that driver has a licence and is driving competently then there would be no breach of Section 149 (2) (a) (ii) of Motor Vehicles Act; the Insurance Company, then will not be absolved of its liability, even if the driving licence ultimately turns out to be fake, unless and until, it is proved that owner/insured was aware of the fact that licence was fake and despite that such person was permitted to drive the vehicle.

6(i)(b) In ***National Insurance Company*** vs. ***Swaran Singh, reported in (2004) 3 SCC 297,*** after considering the previous judgments on the issue, the Hon'ble Apex Court held that defence of licence held by the person driving the vehicle was fake, is available to Insurance Company, but insurer has to establish willful breach on part of insured, which will have to be determined in each case.

6(i)(c) The question was again considered by the Hon'ble Apex Court in ***(2013) 10 SCC 217*** titled as ***Pepsu Road Transport Corporation vs. National Insurance Company***, wherein, after noticing Lehru's case, Swaran Singh's case and Laxmi Dutt's case, it was observed as under:-

> *"**10**. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."*

6(i)(d) Above judgments were considered by the Hon'ble Apex Court in ***(2018) 8 SCC 799,*** *titled as* ***Ram Chandra Singh vs. Rajaram and others***. This was also a case, wherein the MACT and the High Court, had concurrently burdened the owner with liability to pay compensation amount on account of driving licence of driver having been found to be fake. The owner had practically conceded that driving licence was fake and had failed to produce any evidence to prove otherwise. The Insurance Company had taken an objection that owner of the vehicle was required to produce the driving licence so that it could be verified from the concerned licencing authority. It will be beneficial to notice the contentions raised by the parties therein:- insurer in its reply to the claim petition had taken a plea that driving licence of the driver was not valid and in the alternative, it was asserted that owner of the vehicle should himself produce the driving licence so that it could be verified from the licencing authority; Insurer had also placed on record an investigation report/ verification report and a photocopy of the driving licence to establish the fact that the driving licence relied upon by the owner and driver was fake and not valid; whereas, owner had stated that he had seen the photocopy of the driving licence and had satisfied himself about driver's driving skills before employing him as driver. Learned Tribunal in Ram Chandra's case (supra) made no attempt to analysis the pleadings and evidence on record. On behalf of the owner therein, reliance was placed upon Pepsu RTC's case. The High Court held Pepsu RTC's judgment as not applicable to the facts of the case. In this background, Hon'ble Apex Court held as under:-

> *"**10**. The decision in PEPSU Road Transport Corporation (supra) was relied upon by the appellant before the High Court which, however, distinguished the*

same by observing that it was on the facts of that case, where the Court opined that there was no evidence to prove that the driving licence produced by the authorities was fake. That approach, in our opinion, is manifestly wrong. Whereas, even in that case, the Court was called upon to deal with the similar question as is involved in this appeal. In that case, the Court first adverted to the decision in United India Insurance Co. Ltd. Vs. Lehru, and then to the three-Judge Bench decision in National Insurance Co. Ltd. Vs. Swaran Singh. Paras. 99-101 of Swaran Singh have been extracted, which read thus: (SCC p. 339)

"99. So far as the purported conflict in the judgments of Kamla and Lehru is concerned, we may wish to point out that the defence to the effect that the licence held by the person driving the vehicle was a fake one, would be available to the insurance companies, but whether despite the same, the plea of default on the part of the owner has been established or not would be a question which will have to be determined in each case.

100. This Court, however, in Lehru must not be read to mean that an owner of a vehicle can under no circumstances have any duty to make any enquiry in this respect. The same, however, would again be a question which would arise for consideration in each individual case.

101. The submission of Mr Salve that in Lehru case, this Court has, for all intent and purport, taken away the right of an insurer to raise a defence that the licence is fake does not appear to be correct. Such defence can certainly be raised but it will be for the insurer to prove that the insured did not take adequate care and caution to verify the genuineness or otherwise of the licence held by the driver." (Pepsu RTC case, SCC pp. 222-23, para 8)

The Court then went on to advert to a two-Judge Bench decision of this Court in National Insurance Co. Ltd. Vs. Laxmi Narain Dhut, before dealing with the facts of the case before it.

***11.** Suffice it to observe that it is well established that if the owner was aware of the fact that the licence was fake and still permitted the driver to drive the vehicle, then the insurer would stand absolved. However, the mere fact that the driving licence is fake, per se, would not absolve the insurer. Indubitably, the High Court noted that the counsel for the appellant did not dispute that the driving licence was found to be fake, but that concession by itself was not sufficient to absolve the insurer."*

6(ii) Summary of evidence on Point No.2:-

6(ii)(a) Applying the above law to the facts of instant case, it may be noticed that the **appellant/owner** of the vehicle stepped into the witness box as RW-1 and stated that; he had employed respondent No.2 as driver on truck bearing No. HP-11-5448; he had checked the driving licence of respondent No.2 while employing him; he had returned the original driving licence to respondent No.2 after retaining photocopy of the same which, he brought on record of the claim petition as Mark R-1; he expressed his ignorance as to whether respondent No.2 had produced his driving licence before the police or not; he also brought on record R-C (Ext. RW-1/A), Fitness Certificate (Ext. RW-1/B), Receipt of Token Tax (RW-1/C), Permit (Ext. RW-1/D), National Permit (Ext. RW-1/E) and Insurance Policy (RW-1/F).

During his cross-examination, the appellant stated that:- he was not aware as to where the original driving licence of respondent No.2 was; respondent No.2 had been working with the appellant for around 25 days prior to the accident; he had checked the driving licence of respondent No.2 to ensure that he could drive heavy vehicles; driving licence of respondent No.2 was from Nagaland. He denied the suggestions that the photocopy of driving licence produced by him was forged and for that reason, he had not produced the original driving licence.

6(ii)(b) **RW-3** ASI Rajender Kumar stated that FIR No. 273/2015 (Ext. PW-1/A) was registered regarding the accident on 30.10.2015, on the basis of which, case was registered against respondent No.2 under Sections 279, 337, 304-A of Indian Penal Code read with Sections 181 & 187 of Motor Vehicles Act; During investigation, respondent No.2 did not produce his driving licence.

6(ii)(c) In the instant case, decision in Pepsu RTC's case (supra) was pressed into service by the appellant before the learned Tribunal, however, learned Tribunal held the same

to be not applicable on the ground that copy of driving licence had not been proved. The facts of the instant case are more or less similar to the facts of Ram Chandara's case (supra). After holding that driving licence was fake, learned Tribunal could not have refused to consider judgment of Hon'ble Apex Court in Pepsu RTC's case merely on the ground that copy of driving licence Mark R-1, was not proved on record since original driving licence was not there. Respondent No.2, the driver of the vehicle was lodged in Bilaspur jail when he was summoned in the case by the Ld. MACT. Power of Attorney was filed on his behalf when he was produced pursuant to a production warrant. Though, written statement was filed on his behalf on 30.06.2016, but neither any evidence was led by him nor he stepped into the witness box and was proceeded *ex parte* on 08.06.2017. Nonetheless, the copy of driving licence produced by the appellant-owner of the vehicle (Mark R-1), the pleadings and evidence on record were required to be gone into by the learned Motor Accident Claims Tribunal to determine as to whether the owner was aware of respondent No.2's driving licence being fake or not. It has already been observed in the instant appeal that the driving licence in question was fake. However, merely, by holding that driving licence of respondent No.2 was fake, it will not be lawful to fasten the liability to pay the compensation amount on the appellant. This finding alone, will not absolve the insurer unless and until a finding comes on Point No.2, therefore, it would be just and appropriate to remand the matter to learned Motor Accident Claims Tribunal for fresh determination of liability to satisfy the compensation amount. In view of relegation of parties to learned Motor Accident Claims Tribunal, it is not necessary at this stage to go into question of justifiability of quantum of compensation awarded by learned Motor Accident Claims Tribunal below. It will be open to parties including the Insurance Company to agitate the award on all available grounds in case they feel aggrieved, after learned Motor Accident Claims Tribunal re-determines the liability to pay the compensation.

7. Accordingly, this appeal is allowed. The impugned award is set aside to the extent it fastens the liability upon the appellant. Matter is remanded to the learned Motor Accident Claims Tribunal, Bilaspur, H.P. to decide the case afresh, in the light of above discussions and observations for determining the liability to pay the compensation amount. The parties shall be free to raise all contentions available to them in accordance with law before the learned Tribunal. The observations made hereinabove are only for the purpose of adjudication of the controversy involved in the present appeal and will have no bearing whatsoever on the merits of the case. Parties through their respective counsels are directed to appear before the learned Motor Accident Claims Tribunal, Bilaspur, H.P on 31.10.2019. Record be returned forthwith.

The appeal is disposed of along with pending application(s), if any.

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

Abhishek Bhandari ...Appellant.

Versus

Manoj Kumar & others ....Respondents.

FAO No. 242 of 2019
Reserved on : 4.9.2019
Decided on: 12.9.2019

Motor Vehicles Act , 1988 - Section 166 – Motor accident - Bodily injuries disabling claimant to complete his B-Tech in time – Compensation - Held, in sequel to disability inflicted upon the claimant, he was precluded to prosecute his B-Tech for a year – Compensation of Rs. 1,50,000/- assessed towards prolongation of duration of his course. (Para 4).

For the Appellant: Mr. Naresh Kumar Verma, Advocate.
For the Respondents: Mr. Suneet Goel, Advocate, for respondent No.1.
Ms. Chetna Thakur, Advocate, for respondent No.2.
Respondent No.3 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the aggrieved disabled claimant/appellant herein (for short "disabled claimant"), against, the award pronounced by the learned Motor Accident Claims Tribunal-III Solan, District Solan, H.P (for short "Tribunal"), upon, MACT Petition No. 32ADJ-II/2 of 2015, (i) wherethrough compensation amount, borne, in a sum of Rs.95,555/- alongwith interest accrued thereon, at, the rate of 9% per annum, and, commencing from the date of award, till its realization, stood assessed, upon, him. The apposite indemnificatory liability, stood fastened, upon, the insurer of the offending vehicle i.e. respondent No.3 herein.

2. The learned counsel for the disabled claimant, has impugned the award, on, limited grounds, qua, (i) the learned Tribunal failing, to, assess compensation, under the head appertaining to, the loss of future earnings, and, also qua loss of earnings, as, entailed upon him, from, his tuitioning children rather remaining unassessed (ii) and, has also challenged the failure on the part, of, the learned Tribunal, to, assess compensation, for, evident loss of academic session, as, stood entailed, upon, the disabled claimant in sequel to his being encumbered with the injuries reflected, in, the apposite MLC.

3. However, the afore initial challenge cast, before this Court, by the learned counsel for the aggrieved disabled claimant, in as much as, the learned tribunal failing, to, award monetary compensation, vis-a-vis, loss of future earnings entailed, upon, the disabled claimant, in sequel, to, the requisite disability being entailed upon him, is, both legally frail, and, inefficacious as (a) PW-4 (Dr. Pawan Thakur) though makes, in his examination-in-chief, a testification, qua, the fracture encumbered, upon, the disabled claimant, in sequel to the ill-fated mishap, begetting rectification, through insertion, of, interlocking nail, (b) yet when the afore has thereafter, not, made any echoing either in his examination-in-chief, or, in his cross-examination, that, hence the afore rectification also begetting the further sequel, of, the disabled claimant, being precluded, to, earn money from his hitherto avocations, of, tuitioning children, (c) thereupon, and, with the claimant in his cross-examination meteing a dis-affirmative answer, to, a dis-affirmative suggestion put to him, qua, his rearing an income of Rs. 10,000/- from his tuitioning children, (d) hence the disabled claimant was not entitled, to, any sum of compensation being determined, for, any loss of earning during the period, of, his hospitalization, if any, nor was entitled to computation of compensation vis-a-vis any loss of future earnings from his hitherto tuition work.

4. Be that as it may the disabled claimant, has pleaded in his claim petition, that in sequel to the apposite disability being entailed upon him, his being precluded, to, prosecute his B-Tech Course for a year, (a) and, hence compensation, for, the afore scheduled duration, of, afore course hence being prolonged, and, also, for his being concomitantly being barred, to, on completion of the afore course, rear an income from, his apposite employment rather being computable, does garner, an aura of formidablity, given (b) both the disabled claimant, and, his father while respectively stepping into the witness box as PW-1, and, as PW-2, and, during the course thereof, theirs respectively tendering affidavits respectively borne in Ex. PW-1/A, and, in PW-1/B, (c) wherethrough both with complete intra-se corroboration render proof, vis-a-vis, the afore pleaded fact, (d) and, when the afore pleaded fact has not been endevoured to be stripped, of, its efficacy, by the learned counsel, for the insurer, either by putting suggestion to both, or, through eliciting records, from, the institution concerned, (e) thereupon, the afore pleaded factum, is, concluded to acquire tenacity, and, vigour, vis-a-vis, the afore claim. Hence, qua thereupon, it is deemed fit, to, adjudge compensation borne in a sum of Rs.1,50,000/- lacs, with, interest at the rate of 9% per annum commencing from date of petition till realization thereof.

5. In view of the above, the disabled claimant/appellant herein is entitled to total compensation in a sum of Rs.2,45,555/- (Rs.1,50,000/- + 95,555/-) with interest at the rate of Rs. 9% per annum, commencing from the date of filing of the claim petition till realization thereof, and, the liability thereof, is saddled upon respondent No.3/Oriental insurance Company. The appeal, is, partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. All pending applications stand disposed of accordingly. Records be sent back.

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

Dalip Kumar and others ...Appellants.

Versus
Des Raj and Others ...Respondents.

RSA No. 142 of 2006
Reserved on: 9.9.2019
Decided on : 12.9.2019

Transfer of Property Act, 1882 – Section 62 – Limitation Act, 1963 – Article 61 – Usufructory mortgage – Redemption thereof – Limitation and commencement – Held, right to recover possession of mortgaged land by the usufructory mortgagor commences from date when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment by the mortgagor – This right does not extinguish merely with lapse of 30 years from the mortgage. (Para 15)

Transfer of Property Act ,1882 – Section 58 (d) - Usufructory mortgage – 'Ghasni land' – Held, grass grown over 'Ghasni' can be harvested by the mortgagee which is capable of being sold etc – Mortgagee can reap gains and profits from its sale – As such, usufructory mortgage can be created with respect to land recorded as 'Ghasni'. (Para 17).

For the Appellants: Mr. G.C Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the Respondents: Mr. G.D Verma, Sr. Advocate with Mr. B.C Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The mortgagees/plaintiffs' suit, bearing No. 321-1 of 99, for, rendition of a decree, for, foreclosure, vis-a-vis, the suit land, and, against the defendants, hence stood dismissed, by the learned Civil Judge (Junior Division), Court No. (V), Shimla, H.P. In an appeal bearing No. 114-S/13 of 2005, as, carried therefrom by the aggrieved plaintiffs, hence, before the learned District Judge, Shimla, the latter Court hence dismissed, the, afore appeal, and, affirmed, the, verdict recorded, by, the learned trial Court.

2. The aggrieved therefrom, the, plaintiffs/appellants herein (for short "the plaintiffs/mortgagees"), through, the instant RSA preferred before this Court, hence strive, to, beget reversal, of, concurrently recorded verdicts, as, pronounced, by both, the learned Courts below.

3. The brief facts of the case are that Shri Matru was owner in possession of land of Khata Khatauni No. 2/2 and 3 situated in Mauja Bhariyal, Tehsil Kandaghat, District Koshitan (for short "the suit land"). He had mortgaged his share measuring 4-6 bighas with possession in favour of Sh. Kanku and the same was redeemed by him vide mutation No. 141 dated 28.9.2006 BK. He also took possession of the mortgaged land. On same day, vide mutation No. 142 an area of 2-9 bighas was again mortgaged with possession in favour of Sh. Kanku by said owner Shri Mathru for a sum of Rs. 100/- the mortgagee Shri Kanku was put in possession. Shri Kanku on death was succeeded by his son Sh. Parsu who possessed the mortgaged land and he on death was succeeded by Ganga Ram alongwith Shri Ananat Ram and Shri Janki. As such, the plaintiffs are mortgagees in possession of the suit land since the date of mortgage 28.9.2006. The plaintiffs and their predecessor-in-interest, are, possessing the suit land. It has not been redeemed by the defendants, or, their predecessor-in-interest/mortgagor. Limitation to redeem has expired and defendants have lost right, title and interest in the suit land by way of efflux of time. Hence, the plaintiffs have become absolute owners in possession of the mortgaged suit land.

4. In their written-statements, the defendants/respondents herein (for short "defendants") raised objections qua estoppel, limitation, non-joinder of necessary parties, act and conduct. The defendants/mortgagors, in, their pleadings averred that Shri Mathru had mortgaged 1/9th share with Sh. Kanku for Rs. 100/-, however, possession of the mortgaged land was never delivered to Shri Kanku. Mortgage was without possession. Entire area of the land of Khasra No. 243 remained in ownership and possession of the Shri Mathru. Therefore, the plaintiffs never acquired right, title or interest over any portion of the suit land. They have not become owners by way of foreclosure. Shri Mathru during his lifetime has redeemed 1/9th share of the suit land by paying Rs. 100/- to Shri Parsu son of Shri Kanku.

5. In the replication, the plaintiffs have reiterated and reasserted the contents the facts enumerated in the plaint and have controverted that of the written-statement.

6. From the pleadings of the parties, the following issues were framed by the learned trial Court:-

1. Whether the plaintiffs are entitled for the decree of foreclosure, as alleged? OPP

2. Whether the plaintiff is entitled for the relief of declaration, as prayed? OPP

3. Whether the suit is not maintainable? OPD

4. Whether the plaintiffs have no existing right title and interest over the suit land? OPD

5. Whether the plaintiffs are estopped by their acts, deeds and conduct? OPD

6. Whether the suit is barred by limitation? OPD

7. Whether the suit is bad for non-joinder of necessary parties? OPD

8. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, dismissed the suit of the plaintiffs. In an appeal, preferred therefrom, by the aggrieved plaintiffs, before the learned First Appellate Court, the latter Court, hence, affirmed the findings recorded, by, the learned trial Court.

8. Now the plaintiffs have instituted the instant Regular Second Appeal before this Court, wherein, they assail the findings recorded, in the impugned verdicts, hence by both the learned Courts below. When the appeal came up for admission, on 30.3.2007, this Court, admitted the appeal, on, the hereinafter extracted substantial question, of law:-

> "When the mortgage comes to an end by lapse of time can't the mortgagee seek a decree of foreclosure against the mortgagor who happens to be a debtor within the meaning of H.P Debt Reduction Act?"

Substantial question of law:

9. Though the pleadings, cast in the plaint, are, candidly significatory, vis-a-vis, the factum, qua, an usufructuary mortgage being created, hence, by the predecessor-in-interest of the defendants, and, vis-a-vis, a portion of suit land, initially, vis-a-vis, one Kanku, (i) and upon the latter's demise, his, hence becoming succeeded by his successors-in-interest, who are arrayed, as, plaintiffs. The afore admission in pleadings, do rear, an inference, qua, an usufructuary mortgage being created, vis-a-vis, the suit land, (ii) and, though the afore factum, is denied, by the defendants, nonetheless, for, the afore denial being meted credence, enjoined reflections in support thereto, being also borne, in, the apposite revenue records. However, the revenue records, as, respectively borne in Ex.P-1, to, Ex.P-6, all carry candid reflections, vis-a-vis, both the mortgagees, and, the mortgagors, hence, holding joint possession, of, the mortgaged land.

10. Since the afore reflections, as, cast in the afore exhibits, are, not strived to be rebutted, through cogent documentary evidence, (a) rather when the afore entries, as, respectively embodied, in, the afore exhibits, are made in concurrence, with, apposite therewith recorded mutations, and, with all respectively conveying qua the mortgagors concerned, creating a mortgage, vis-a-vis, his share in the joint land, and, when the entries with respect, to, hence both continuing, in, joint possession, of, the mortgaged land, as borne in the apposite jamabandies, respectively borne in Ex. P-5, and, in Ex. P-6, exhibits whereof comprise(s), the, Jamabandi(s) appertaining, to, the year 1987-88, and, to the year 1952-53, (b) and, when since then, up to, the filing, of, the present suit, the afore reflections are not strived, to be scuttled, of their vigour, through, an appropriate motion being cast before the Civil Court concerned, (c) rather when the defendants- mortgagors, in, their written-statement, contend that in the year 1970, the principal mortgage debt, being redeemed, and, hence thereat the mortgaged land, becoming free, from, all encumbrances, (d) hence thereupon, it is to be concluded qua the defendants acquiescing to the all reflections, borne in the jamabandi(s) appertaining to the year 1952-53, and, to the year 1987-88, wherein the mortgagors, and, the mortgagee, are, reflected to be jointly holding hence possession, of, the mortgaged land.

11. Since, in, the afore alluded documentary evidence, reflections are grossly amiss, vis-a-vis, the mortgaged land, being redeemed, in, the year 1970, thereupon the afore propagation, as, reared by the defendants rather wanes, (i) and, with rather even subsequent to the year 1970, hence, reflections being cast in the revenue records, especially, in Ex. P5, exhibit whereof, is, the jamabandi appertaining to suit land, and, for the year 1987-1988, (ii), and, rather palpably connotative, vis-a-vis, the suit land being jointly possessed by the mortgagors, and, the mortgagees, and, when no cogent rebuttal evidence, hence, for displacing their vigour hence stands adduced, (iii) thereupon the afore reflections acquire vigour, and, it is to be concluded qua the mortgaged land, up to, the institution of the suit, rather remaining unredeemed by the defendants, upon, the latter liquidating the mortgage debt, vis-a-vis, the plaintiffs.

12. Even though, the defendants contest the validity, of, an entry occurring in the column of the possession, vis-a-vis, the suit land, and ,borne in Ex. P-7, exhibit whereof, is, the jamabandi appertaining to the year 1998-99, (i) wherein contrary, to, the prior thereto reflections, hence conveying, qua, the mortgagees, and, the mortgagors holding joint possession, of, the mortgaged land, rather, the mortgagees are shown to be holding exclusive possession of the mortgaged land. However, the afore challenge cannot galvanize, any, immense vigor, as, the afore remains un-aided, by, the adduction, of, apposite khasra girdawari(s). The afore lack of vigor, being unmeteable, to, the reflections cast in Ex. P-7, would also spark an inference, qua, vigour being also unmeteable, to, the reflections, as, cast therein, hence connotative, vis-a-vis, the exclusivity of possession, vis-a-vis, the mortgaged land, hence, of, the mortgagees. Conspicuously, when the requisite khasra girdwari(s) remained unadduced into evidence, thereupon it is to be concluded qua the defendants, rather withholding the afore apposite khasra girdawari(s), for, suppressing the material facts, as may be, borne therein, and, may be hence adversarial to the defendants/mortgagors, and, hence the afore entries, are, concluded, to be made, in consequence, to, the apposite therewith khasra girdawari(s), as, drawn, by the Halqua Patwari/kanungo concerned.

13. Be that as it may, the imminent fact(s), as, emerge from the afore discussion, is, qua, with the mortgaged land being classified as “Ghasni” in the revenue records, and the the mortgagor inducting therein, the, mortgagees concerned, (a) and hence within the apposite entire share therein, of, the mortgagor therein, rather coming under a validly assigned possession, of, the predecessor-in-interest, of, the mortgagees. Consequently, with the revenue records also withstanding, (a) the, pleadings, as, constituted in the plaint, qua, a mortgage with possession being created, vis-a-vis, the predecessor-in-interest of the plaintiffs, and, qua the mortgaged land, (b) and, also when the afore discussion, does forestall, the propagation, of, the defendants qua rather a mortgage without possession, being created, over the mortgaged land, (c) and, also qua, mortgage being created, not within, the, entire share of the mortgagor, in, the suit land, (d) rather it being created only within a part of his share, in, the suit land, thereupon the afore, leads to a concomitant deduction qua an usufructuary mortgage, vis-a-vis, the mortgaged land rather coming into existence.

14. However, the afore grant of, a, usufructuary mortgage, vis-a-vis, the mortgaged land, hence carrying the description, of, a “ghasni”, though within, the ambit of Section 6 of the H.P Debt Reduction Act, provisions whereof, stand extracted hereinafter, purveys an untenable latitude, in time, to, the mortgagors hence, to, redeem, the, mortgaged land, (i) however, the afore unrestricted, and, untrammeled latitude, in time, is to be read, alongwith the right, of, a mortgagee, to, within the relevant provisions, of, the Transfer of Property Act, 1882, and, upon, failure of the mortgagor, to redeem, the mortgage debt, hence, institute a suit for foreclosure, (ii) however even though, an, indefeasible right, is, vested in the mortgagee, to, within, the apposite mandate, of, Section 61 of the Limitation Act, and, upon, non-payment or non-liquidation of mortgage debt, vis-a-vis, him by the mortgagee, hence institute a suit, for, foreclosure of mortgage.

> “Section 6 of H.P Debt Reduction Act, 1976- Notwithstanding the terms of any contract regarding the date or dates on which a debt shall become due, a suit to which this Act applies for the redemption of a mortgage or for accounts may be instituted by a debtor at any time after the commencement of this Act.”

15. However, the afore right to sue, for, claiming hence rendition, of, a decree for foreclosure, vis-a-vis, the mortgaged, is, squarely, and, pointedly trammeled, and, restricted, upon, evident creation, of, a usufructuary mortgage, inter-se both, (a) and, in the latter event, in, the face, of, trite expostulations, of, law, as, cast in a judgment reported in 2016 (1) Shim.

LC 466, *titled as Singh Ram (D) through LRs* versus *Sheo Ram and others,* the relevant paragraphs, whereof 14 and 15, stand extracted hereinafter (b) expostulations whereof appertain, to, a special right, of, a usufructuary mortgagor, as reflected, in Section 62 of the Transfer of Property Act, and, also bestow, upon, an usufructuary mortgagor a right, to, recover possession of the mortgaged land, upon, his liquidating the mortgage money hence out of rent and profits, and, by payment(s) thereof, to the mortgagee, (c) , and, also appertain vis-a-vis, the apt prescribed period of limitation, existing in Article 61, of, the Schedule to the Limitation Act, hence, empowering the mortgagee to institute, a, suit for foreclosure, against, the mortgagor, rather within 30 years, period whereof, commencing from the creation, of, a mortgage, other than, except qua an usufructuary mortgage, (d) rather not ipso facto merely, on expiry of 30 years, from the date, of, creation, of, an usufructuary mortgage, enabling the mortgagee to make, a, espousal, for, rendition of a decree, for, foreclosure, vis-a-vis, the mortgaged suit land (e) rather the apt commencement, of, the afore period of limitation, becoming reckonable from the date, when, the appropriate appropriation(s), are made, by the usufructuary mortgagee hence towards settlement, of, the apt component of interest, and, vis-a-vis the principal mortgage debt, hence, from the profits, and, gains, as, derived therefrom.

> "14. We need not multiply reference to other judgments. Reference to above judgments clearly spell out the reasons for conflicting views. In cases where distinction in usufructuary mortgagor's right under Section 62 of the T.P Act has been noted, right to redeem has been held t continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held t accrue don the date of mortgage resulting in extinguishment of right of redemption after 30 years.
>
> 15. We, thus hold that special right of usufructuary mortgagor under Section 62 of the T.P Act to recover possession commences in the manner specified therein, i.e. when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment of deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly."

16. Be that as it may, the learned counsel, for the aggrieved plaintiffs, has yet proceeded, to, make, a, vehement contention, before this Court, by his making an allusion, to, the statutory postulations, as, engrafted in Section 58(d), of, the Transfer of the Property Act, mandate whereof stands extracted hereinafter, (i) and, contends that, since, the imperative statutory condition, as, borne therein, qua, there being a statutory necessity, of, an explicit or implied right, being bestowed, upon, the mortgagee, to, receive gains, and, profits, as, accruing, from, mortgaged land (ii), and, to, also appropriate the afore derived gains and profits, vis-a-vis, payment, of, the component of interest accrued, upon the mortgage money, and, vis-a-vis, the principal debt, rather not begetting their apt satiation hereat, (iii) and, the afore submission is anchored, upon, the mortgaged land, being classified as "ghasni", (iv) hence it being unamenable, for, the mortgagee to derive gains and profits, hence therefrom nor any opportunity being afforded, to, the mortgagees, to in the manner, postulated in the verdict recorded in Singh Ram's case (supra), hence, make apposite settlements rather towards liquidation, of, the mortgage debt, (v) and, thereafter, he makes, a, submission, that, hence the afore judgment supra, as, rendered by the Hon'ble Apex Court, remaining unattracted hereat, and, the institution of suit, for, foreclosure hence by the mortgagee, within 30 years, from, the creation, of, mortgage, being well constituted, and, it meriting, its, being decreed.

> "Section 58(d) of the Transfer of property Act- Usufructuary mortgage- Where the mortgagor delivers possession [or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property [or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

17. The afore submission, has, prima-facie, some vigour, however, all its vigour is ripped apart, by the, imminent, and, evident fact (a) qua the description, of, the mortgaged land, as "Ghasni", though not bestowing, the afore settled leverage(s), vis-a-vis, the

mortgagees, yet, the afore description of the land, in the revenue records, would scuttle, the plaintiffs espousal, only upon, evidence being adduced qua, since, the mortgagees, holding possession of the mortgaged land, hence, carrying the description of "Ghasni" rather the mortgagees hence since then up to now, not harvesting grass, as, grown thereon. However, the afore evidence is amiss, and, hence the afore grass grown, upon, the "ghasni", is, to be concluded to be harvested by the mortgagees. Nonetheless, though, the afore grass is usable as fodder, for, their cattle(s), and, when hence they may be baulked, to, from, its sale derive, any, profits, yet, evidence qua therewith, is amiss, (a) whereupon the mortgagees, are, concluded, to be deriving gains, and, profits, from the sale, of, grass growing, upon, the ghasni, (b) and, though, the apposite profits derived therefrom, by them, are enjoined, to be, appropriated, vis-a-vis, settlement, of the apt component of interest, and, vis-a-vis, payment of principal mortgage debt, (c) however, vis-a-vis the afore rather trite therewith evidence is amiss, (d) also, as, a corollary, when only upon, since maintenance, of, the afore accounts, and, upon 30 years hence elapsing therefrom rather becomes the apt commencing period of the prescribed period, of, limitation of 30 years, for, a claim, for, rendition, of, a decree for foreclosure, vis-a-vis, the mortgaged land, being espoused. In aftermath, the effect, of, non-maintenance, of the requisite accounts, rather by the mortgagees, and, yet despite the mortgagees, deriving, profits from the apposite usufructuary mortgage created qua them, and vis-a-vis the mortgaged land, renders the mere elapse of 30 years, since, the creation of an usufructuary mortgage, to, not constitute a valid ground vis-a-vis the mortgagees to hence claim rendition, of, a decree, for, foreclosure qua the mortgaged land, rather only from the period whereat they maintained the afore spoken accounts, hence empowers them, to, within 30 years elapsing therefrom, stake a claim of rendition, of, a decree for foreclosure qua the usufructuary mortgaged land.

18. In view of the above, there is no merit in the appeal, the same is accordingly dismissed. Impugned verdicts are maintained and affirmed. Substantial questions of law are answered accordingly. All pending applications stand disposed of accordingly. Records be sent back.

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

Gopal Sharma …Petitioner.

Versus

Sh. Anurag Sood and another …Respondents.

Cr. Revision No. 34 of 2012
Reserved on: 3.9.2019
Decided on : 12.9.2019

Negotiable Instruments Act, 1881 – Sections 138 & 139 – Dishonour of cheque – Complaint – Held, accused not denying his signatures or scribings made in words and figures as borne in the cheque – Complainant is mentioned as the payee in it – There is presumption that cheque was issued in complainant's favour for consideration. (Para 5)

For the Petitioner: Mr. Shanti Swaroop, Advocate.

For the Respondents: Mr. Dushyant Dadwal, Advocate, for respondent No.1.
Mr. Hemant Vaid, Mr. Hemanshu Mishra, Additional Advocate Generals with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel, Deputy Advocate Generals, for respondent No. 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant criminal revision petition is directed, against, the concurrently recorded verdicts, by both, the Courts below, wherethrough, both convicted, and, consequently sentenced the petitioner herein (for short "accused"), for, a charge, under, Section 138 of the negotiable instruments Act.

2. The dishonored negotiable instrument, is, embodied in Ex. P-1, and, upon presentation of the afore Ex. P-1, before the banker concerned, it through memo borne in Ex. P-2, stood declined, to be honoured, by the banker concerned.

3. Be that as it may, the holder of the afore dishonored negotiable instrument i.e complainant/respondent No. 1 herein, (a) is, leveraged with the statutory presumption, borne in Section 139 of the Negotiable Instruments Act, provisions whereof stand extracted hereinafter, (b) and, wherethrough he is empowered, to, make a valid espousal, qua, his holding it, in discharge of a legally enforceable debt, or, other liabilities, arising or subsisting inter-se him, and, the accused. However, the afore statutory presumption is rebuttable, and, it is trite law, (c) that the onus of adducing potent discharging evidence, for, rebutting the afore leverage, as, bestowed, upon the holder of Negotiable instrument, is, also encumbered upon the accused. It is also trite expostulation of law, that, the afore onus, is, discharge-able, through, suggestions being meted to the complainant's witnesses, or, through apt cogent oral and documentary evidence, hence, being adduced, after, completion of proceedings, drawn, under Section 313 of Cr.P.C.

> "139. Presumption in favour of holder-It shall be presumed, unless the contrary is proved that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debtor other liability."

4. Visibly the accused, for, discharging the afore onus, for, hence displacing the afore statutory presumption hence leveraged, vis-a-vis, the holder of Ex.P-1, (i) had and, propounded, vis-a-vis, Ex. P-1 being handed over on 19.7.1999 to one Tulsi Ram, as, collateral security, (ii) obviously he also propounds that Ex.P-1, rather coming to be abused or misused by the complainant, and, thereupon propounds qua there existing no legally enforceable debt or other liabilities inter-se both. Necessarily, when hence there was no subsisting or existing legally enforceable contractual, or, other liabilities, inter-se, him or the complainant, thereupon he reiteratedly espouses qua the cheque being misused. However, the afore evidence, for, discharging the apt onus for displacing the statutory presumption, is, limited to a suggestion apposite thereto, being meted, to the complainant's witnesses, during the course of their respective cross-examinations, (i) however the afore endeavor is neither sufficient, nor, adequate, for, it being construable, to,constitute, any, complete apt discharge(s) vis-a-vis the requisite onus cast, upon, the accused, as, it does not comprise, the, best evidence qua therewith, rather, the best evidence qua therewith, is, comprised in the afore Tulsi Ram, being ensured to step into the witness box, for, proving the afore espousal, (ii) whereas the afore best evidence remaining un-adduced, (iii) thereupon, it is unflinchingly concluded qua the accused, abysmally failing, to, adduce cogent evidence, for, negating the afore statutory presumption leverage hence bestowed, upon, the holder of the negotiable instrument, also hence the concomitant therefrom conclusion, is qua the afore statutory presumption hence acquiring both conclusivity or finality.

5. Even otherwise the accused, does not, contest the existence, of, his valid signatures on Ex.P-1, nor, he challenges the scribings both in words and figures, as, are borne therein. The apt corollary thereof is that when the drawee, of, the afore negotiable instrument, is, mentioned in Ex.P-1, to be the complainant, thereupon, the accused is estopped either to, make any valid contest before this Court that Ex. P-1 was issued, vis-a-vis, one Tulsi Ram, and, it was not issued, vis-a-vis, the complainant, nor, he can make any valid espousal, that there exists no subsisting legally enforceable debt or liability inter-se him, and, the complainant, nor, he can contend that the respondent/complainant hence had misused or abused Ex.P-1.

6. In view of the above, there is no merit in the petition, and, the same is accordingly dismissed. The impugned verdicts, are, maintained and affirmed. Records be sent back.

All pending applications stand disposed of accordingly.

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

Smt. Kiran Thakur .....Appellant

Versus

Krishan Lal ....Respondent.

Cr. Appeal No. 38 of 2019
Reserved On : 3.9.2019
Decided on: 12.9.2019

Negotiable Instruments Act , 1881 – Sections 53 & 138 – Dishonour of cheque – Death of payee before the filing of complaint – Effect – Held, person deriving title from the payee of cheque is entitled to file complaint under section 138 of Act against its drawer (Para 5).

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The complainant/appellant herein (for short "the complainant"), is, aggrieved by the verdict of dismissal, recorded, upon, Criminal Case No.000135/2014/97-III/2014, hence, by the learned Judicial Magistrate, Ist Class, Manali, District Kullu, H.P.

2. The learned Judicial Magistrate, had recorded, a verdict of dismissal, upon, the afore Criminal Case, upon, its assigning reasons, qua, (a) the dishonored negotiable instrument, being issued, vis-a-vis, the deceased husband, of complainant, and, (b) only her deceased husband being legally empowered, to, maintain the complaint. In addition thereto the further reasons, as, assigned by the learned Judicial Magistrate concerned, for, recording an order of dismissal, is, grooved (a), in, want of consent being meted rather by, the, other LRs, of, deceased Shobha Ram, vis-a-vis her, (b) and, in want of theirs constituting one Kiran Thakur, the complainant, as, their attorney, for, the relevant purpose.

3. Be that as it may, during, the pendency of the instant appeal, before this Court, the complainant filed an application, cast under the provisions of Section 391, of, the Code of Criminal Procedure, wherethrough she strives, for, leave being granted to her, for, placing on record, the testamentary disposition executed by her deceased husband Shobha Ram, wherethrough, she stands constituted, as, his sole legatee.

4. The learned counsel appearing for the respondent-accused, contends, that the espoused relief, being not grantable, vis-a-vis, the complainant, as, the statutory latitude, for, maintaining the complaint, was, or remained vested only, in, the deceased, holder, of, the dishonroed negotiable instrument, as, borne in Ex.CW-1/B, and, after whose demise, it, not surviving, vis-a-vis, his LRs.

5. However, for the reasons to be assigned hereinafter, the afore submission, does not coax this Court, to, accept it, (i) as, the apt provisions of Section 53 of the Negotiable instruments Act, provisions whereof stand extracted hereinafter, purvey a statutory leverage, upon, a person deriving title, from, a holder in due course, of, a negotiable instrument, (ii) and also therewithin, all the rights vested in the apt holder, in due course, of the negotiable instrument, are alike therewith hence vested, in, the legatee, of the deceased holder, of, the negotiable instrument, (iii) and, when the afore Kiran Thakur, has, through the apposite testamentary disposition executed, in her favour, by her deceased husband, the original holder of Ex. CW-1/B, has hence therethrough, rather, acquired title vis-a-vis his estate, and, concomitantly also when she alike him, has, all the apt statutory right(s), thereupon, this Court, is, constrained, to, grant the espoused leave, vis-a-vis, the complainant.

> "Section 53: Holder deriving title from holder in due course-A holder of a negotiable instrument who derives title from a holder in due course has the rights thereon of that holder in due course."

6. Since the afore document, was, not existing, on, the file of the learned Judicial Magistrate concerned, and, also when hence, he did not appraise its evidentiary worth, nor, applied thereon, the applicable thereto hence other statutory provisions, (i) whereupon it would not be befitting for this Court, to, construe that the afore germane evidence, has been misappraised, or, has remained un-appreciated, nor also, it would be befitting for this Court, to suo motu, make any conclusion, vis-a-vis, the afore factum probandum, (ii) when hence, thereupon this Court would be untenably appropriating, to itself the judicial function, to be otherwise, performed by the Judicial Magistrate concerned. Consequently after allowing Cr.M.P No. 283 of 2019, and, also necessarily hence, after quashing the impugned order, for, enabling, the, hereinafter facilitation(s) vis-a-vis the remandee Court, this Court, makes an

order of remand to the remandee Magistrate, to, after his ensuring, the, tendering, before it, of the testamentary disposition, executed by the deceased Shoba Ram, vis-a-vis, one Kiran Thakur, and, also after permitting the accused, to, adduce evidence in rebuttal thereto, to thereafter make a fresh decision, upon, the apposite complaint.

In view of the above, the present petition stands disposed of, alongwith all pending applications.

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

Paras Ram through his LRs ...Appellants.

Versus

Kishore Chand and Others ....Respondents.

RSA No. 92 of 2007
Reserved on: 3.9.2019
Decided on: 12.09.2019

Himachal Pradesh Tenancy and Land Reforms Act, 1972 - Section 114 – Mutation conferring proprietary rights – Review of - Held, A.C-II grade has no jurisdiction to review order passed by the Land Reforms Officer. (Para 11).

For the Appellants: Mr. K.D Sood, Sr. Advocate with Mr. Sukrit Sood, Advocate.
For the Respondents: Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate, for respondents No. 1,3 and 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The plaintiff's suit bearing No. 204 of 1992, wherethrough, he espoused, for, rendition of a decree, of, permanent prohibitory injunction, against the defendants, and, qua the stood khasra numbers, stood decreed, by the learned Civil Judge (Sr. Div) Hamirpur, H.P. However, in an appeal, carried therefrom, by the aggrieved defendants, before the learned District Judge, Hamirpur, the latter Court, upon Civil Appeal No. 58 of 2004, made a verdict in reversal, vis-a-vis, the verdict recorded, by the trial Court concerned, and, obviously proceeded, to, dismiss the plaintiff's suit.

2. The deceased plaintiff, through his LRs, has, through the instant appeal, hence, cast a challenge, upon, the verdict recorded, by the learned first appellate Court, and, also strives, to, beget reversal thereof.

3. The brief facts of the case are that the predecessor-in-interest of the appellants herein (for short the plaintiff) had filed a suit seeking rendition of a decree of permanent prohibitory injunction to the effect that he is the owner as well as tenant in possession of Khasra No. 52/2 measuring 1K-12 M out of the land comprised in khata No. 86 min, Khatoni No. 94, khasra No. 52 measuring 1K-14 M as described in the copy of jamabandi for the year 1986-87 situated in Tika Kangru Tappa Ugialta, Tehsil and District Hamirpur (for short "suit khasra numbers") and the defendants be restrained from making interference over the suit khasra numbers in any manner. The afore reliefs have been claimed by the plaintiff on the ground that the suit land has been shown in possession of the plaintiff as tenant. One of the owner of the suit land named Sher Singh applied for resumption which was allowed to the extent of 2 marlas vide mutation No. 455, as a result of which the land comprised in khasra No. 52/1 measuring 2 marlas was resumed in favour of Sher Singh and the suit khasra numbers remained with the plaintiff. The plaintiff was also given and conferred proprietary rights qua the share of Shamsher Singh to the extent of 2 marlas vide mutation No. 454 out of the suit khasra numbers of which he became owner and continued to be tenant in respect of rest of the land in question. It was claimed by the plaintiff that the defendants have no right, title and interest in the suit Khasra numbers, however defendant No.1 tried to cause interference and threated to take forcible possession of the suit khasra numbers.

4. The defendants filed written-statement and thereby resisted and contested the suit by taking preliminary objections qua maintainability, estoppal and valuation. On merits,

it is pleaded that the suit khasra numbers are in possession of defendant No.1 and his family members. Even proprietary rights had been conferred in favour of defendant No.1. The defendants prayed for dismissal of the suit.

5. The plaintiff filed replication and thereby reaffirmed and reasserted the averments made in the plaint and controverted the averments made in the written-statement.

6. From the pleadings of the parties, the following issues were framed by the learned trial Court:-

1. Whether the suit is not maintainable as alleged? OPD

2. Whether order dated 24.12.1981 of the A.C Iind grade is illegal and is not binding upon the defendants, as alleged? OPD

3. Whether the plaintiff is estopped from filing the suit by his act and conduct? OPD

4. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction, if so, what is its value for this purpose, OP Parties.

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

6. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, decreed the suit of the plaintiff. In an appeal, preferred therefrom, by the aggrieved defendants, before, the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded, by the learned trial Court.

8. Now the appellants herein have instituted the instant Regular Second Appeal before this Court, wherein, they assail the findings recorded, in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court had admitted, the appeal, on, the hereinafter extracted substantial questions of law:

"1. Whether in view of the resumption order passed by the Land Reforms Officer on the application of Sher Singh and the mutation orders Ext. PC and Ext. PD consequently passed and the order Ext. PE having become final, it was open to the defendants to challenge the said order in the collateral proceedings?

2. Whether the findings of the Court below are perverse, based on misreading of oral and documentary evidence and the pleadings of the parties and ignoring the material evidence particularly the statements of PW-2 Amar Singh and PW-3 Samarjit Singh and the resumption order and mutations Ext. PC and Ext. PD as also the order Ext. PE?"

Substantial questions of law:-

9. For meteing an answer, to, the afore formulated substantial questions of law, it is deemed imperative, to, relegate, the, lis onto, the stage of, preparation, of, the hereinafter alluded, apt revenue records. The genesis of the lis, is, embroiled in (a) presumption of truth, or, otherwise being attracted, vis-a-vis, the, jamabandis appertaining to the suit land, and, borne in Ex. D-5, wherein reflections are cast, vis-a-vis, the predecessor-in-interest of the defendants No. 1 to 3, one Mahantu hence carrying the status of "Gair Marusi", vis-a-vis, the suit khasra numbers, (b) and, also whether the subsequent thereto alike reflections, as, cast in the jamabandi(s) appertaining to, the, suit khasra numbers, and, conspicuously, also, in Ex. D-1, wherein the defendant Kishore Chand, the successor-in-interest of Mahantu, upon, demise of his predecessor-in-interest, hence is, in, the column of possession carried in Ex. D-1, rather, is recorded, to be carrying the status of "Gair Marusi", vis-a-vis, the suit khasra numbers, do or not carry the apt tenacities. Also the efficacy, and, import of, Ex. DX, exhibit whereof, is, an order pronounced by the Revenue Officer concerned, in, a lis engaging the land owners concerned, and, defendant Kishore Chand, rather suing through his father Mahantu, wherein, a, declaration, is, made qua defendant Kishore Chand, carrying the status, of, a Gair Marusi, vis-a-vis, the suit Khasra numbers, and, also a further declaration is borne therein, qua, upon coming into force, of, the apt statutory mandate, borne in HP Tenancy and Land Reforms Act (for short "the act"), (i) hence his being entitled, to, automatic conferment of proprietary rights, (ii) besides wherein a declaration, is, borne, qua, land owners, in exclusion, of, Shamsher Singh, who, stands arrayed in the memo of parties, in, Ex.DX, being barred to claim resumption of the suit khasra numbers mentioned therein, and, numbers whereof bear analogity, vis-a-vis, the suit khasra numbers, embodied in the extant lis, likewise does warrant, rather imperative fathoming(s) qua its vigour.

10. Since Ex. DX is pronounced subsequent to the drawings, of, the afore alluded, to, hence afore jamabandis, as, appertain, to the suit khasra numbers, and, wherewithins rather the afore reflections are carried, (i) thereupon, and, cumulatively alongwith hence Shamsher Singh being also included, in, the array of appellants, in the opposite lis, whereon Ex. DX, stood pronounced, (ii) thereupon, the, consequences thereof, are, qua the presumption of truth, as, carried by the afore reflections, as, borne in the afore jamabandies hence acquiring a deep hue of tenacity, besides conclusivity, (iii) conspicuously given the participation of afore Shamsher Singh, in the afore lis, (iv) moreover when there is also a declaration pronounced in Ex. DX, vis-a-vis, the land owners inclusive of Shamsher Singh, being barred, to, claim resumption of suit khasra numbers, thereupon the order of mutation recorded in Ex. PC, and, in Ex. PD, per se ipso facto, loosing its/theirs apt vigour, it/their being beyond the domain of Ex. DX,(v) rather the afore orders borne in the afore exhibit rather are concluded to arise, from, Shamsher Singh obtaining the afore orders, through, his practicing suppressio veri, and, suggestio falsi.

11. Be that as it may, under orders recorded, in, Ex. PE, the mutation conferring proprietary right, upon, the defendant Kishore Chand, was reviewed, (a) however the afore order of review, of, the apposite mutation, hence conferring proprietary rights, vis-a-vis, Kishore chand, is, perse legally infirm, (b) as, it is made by the AC-IInd grade Hamirpur, who however is not the apt statutorily designated, reviewing authority, in the apt thereto provisions borne, in, Section 114 of the Act, (c) and, rather with the requisite statutorily designated reviewing authority under the afore provisions of the Act, being, the Land Reforms Officer concerned, thereupon Ex. PE lacks judicial tenacity, it being made by an officer rather not holding the apt judicial empowerment, hence, to make it.

12. In aftermath, all the consequential therewith corrections, as, made in the jamabandis, as, appertain to the suit khasra number, and, prepared subsequent thereto, are, all construable to acquire, an, alike taint of suppressio veri suggestio falsi, (i) and, are neither amenable, to be, meted any credence, for eroding the vigour of the order made under Ex. DX, (ii) nor, hence therethrough, the, presumption of truth attracted, upon, the jamabandies appertaining, up to, the year 1973-1974, is either dislodged nor is displaced, (iii) necessarily, hence the verdict pronounced, upon, the Civil Suit hence decreeing the afore Civil Suit, is, unmeritworthy, and, rather the verdict recorded by the learned first appellate Court, is, both meritworthy, and, tenable.

13. Be that as it may, during, the pendency of the instant appeal, before this Court, the aggrieved appellant, had, through an application cast under Order 41 Rule 27 readwith Section 151 of Code of Civil Procedure, strived to obtain permission, to, adduce into evidence, an, order made by the LRO, in a lis, engaging Shamsher Singh, and, the plaintiff Paras Ram, wherein there, is, an order qua Shamsher Singh, being entitled to resume the suit land, (i) and, wherein also there is an order qua residues thereof, bestowing leverage, to, Paras Ram, to, claim statutory vestment of proprietary rights. However, the, espoused relief is declined, as, the adduction into evidence, of, the afore order is neither just nor essential, for, resting the lis, engaging the parties at contest rather when Ex. DX, barred all the co-owners, to, claim resumption of suit khasra numbers, (ii) and, when therein, in, the array of litigants, the name of Shamsher singh also exists, thereupon the apt order in respect whereof, strivings are made, hence, to, adduce, it, as, additional evidence, is, also construable to obtained by Shamsher Singh, by his proactively practicing suppressio veri suggestio falsi, comprised in his concealing, from, the sight of, the, authority concerned, the, order comprised, in, Ex. DX.

14. In view of the above, there is no merit in the appeal, the same is accordingly dismissed, and, the impugned verdict is maintained and affirmed. Substantial questions of law are answered accordingly. Records be sent back.

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

Smt. Radhika Verma ....Petitioner.

Vs.

Shri Milan Sharma and others .....Respondents.

CMPMO No.: 281 of 2019

Date of Decision: 12.09.2019

Code of Civil Procedure, 1908 – Order 1 Rule 10 – Rent petition – Application for impleadment as a co-tenant – Permissibility – Held , eviction petition was filed in the year 2012 against her brother – Earlier, an application of the sister of applicant for her own impleadment in the petition was dismissed by Rent Controller – Applicant filed application for her impleadment in 2019 – Reason given for the delay caused in filing application is not substantiated - Application is not bonafide – It is the landlord who will have to face consequences of non-joining the necessary parties – Petition dismissed. (Paras 9 &11)

For the petitioner: Mr. Tek Chand Sharma, Advocate.

For the respondents: Mr. Ajay Kumar, Senior Advocate, with M/s Gautam Sood & Rohini Karol, Advocates, for respondents No. 1 to 3.

No notice has been issued to respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral):*

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has prayed for setting aside order, dated 13.05.2019 (Annexure P-3), passed by the Court of learned Rent Controller, Shimla, H.P. in CMA CIS CNR Reg. No. 373/2019 in RBT No. 16-2 of 2017/12, titled as *Shri Milan Sharma and others Vs. Shri Rajinder Kumar*, vide which, an application filed by the petitioner herein under Order I, Rule 10 read with Section 151 of the Code of Civil Procedure for impleading her as a necessary party in the Eviction Petition, stands dismissed.

2. Facts necessary for the adjudication of the present petition are that Eviction Petition has been filed by respondents No. 1 to 3 herein (hereinafter referred to as 'the landlords') against one Shri Rajinder Kumar, impleaded in the present petition as respondent No. 4, i.e., Rent Petition No. 16-2 of 2017/12, which is pending adjudication before the Court of learned Rent Controller, Shimla. This petition was filed by the landlords in the year 2012.

3. In April, 2019, an application was filed by the present petitioner under Order I, Rule 10 read with Section 151 of the Code of Civil Procedure for impleading her as a party respondent in the Eviction Petition. It was mentioned in the application that the premises were initially under the tenancy of late Shri Amar Chand, who was her father. She had also inherited the tenancy being legal heir of late Shri Amar Chand alongwith her brother Shri Rajender Kumar. In the Eviction Petition, the landlords had impleaded only Shri Rajender Kumar as a party respondent. Petitioner was also residing in the demised premises during her visits to Shimla and she was a proper and necessary party for the adjudication of Eviction Petition. The factum of filing of the Eviction Petition was not disclosed to her by her brother Sh. Rajinder Kumar. It was only a day before the filing of the application when the applicant was in the premises to see the accounts of business that one of the landlord met her and unintentionally apprised her about the pendency of Eviction Petition. On these grounds, impleadment was sought by the applicant in the Eviction Petition on the plea that non-impleadment of the applicant in the Eviction Petition would cause her irreparable loss and injury and would lead to multiplicity of litigation.

4. Landlords resisted the application, inter alia, on the ground that the application was not filed *bonafidely*, but was filed with an ulterior motive of delaying the case in collusion with the impleaded respondent-tenant in the Eviction Petition. As per the landlords, applicant was neither residing nor settled in Shimla nor she ever participated in the business with her father. As per the landlords, applicant had not produced any document on record to demonstrate that she was either residing in Shimla or was participating in the business with her father. It was further the case of the landlords that as the cause of the applicant was being watched by her brother, therefore also she was not a necessary party.

5. By way of way the impugned order, learned Rent Controller has dismissed the application so filed by the petitioner. Learned Rent Controller held that the application was

filed for impleadment after seven years from the date of filing of the Eviction Petition. It held that the assertions made in the application in fact went on to reveal that since the year 2012, the applicant had never visited the premises, but she visited the same only in the year 2019. It held that the applicant had disclosed her residential address in the demised premises, which in fact were non-residential. Learned Rent Controller also held that in the affidavit, the applicant has mentioned her occupation as a retired employee and all these facts clearly demonstrated that the applicant was not carrying any business in the demised premises alongwith the impleaded respondents. Learned Rent Controller also held that the circumstances suggested that the application was filed *malafidely* in collusion with the respondent to delay the matter. Learned Court also held that even otherwise when one of the legal heirs of the original tenant had been arrayed as a respondent, the same was sufficient for the purpose of adjudication of the matter. Learned Rent Controller also took note of the fact that a similar application was earlier filed by the sister of the applicant, which stood dismissed. On these basis, it held that facts suggested that the application was filed with an intent to delay the matter, rather than for any *bonafide* reasons. Learned Rent Controller thus dismissed the application.

6. Feeling aggrieved, the applicant has filed the present petition.

7. I have heard learned counsel for the parties and have also gone through the impugned order as well as other documents appended with the petition.

8. It is not in dispute that the suit for eviction has been filed by the landlords in the year 2012. It is also not in dispute that the application under Order I, Rule 10 read with Section 151 of the Code of Civil Procedure for being impleaded as a party respondent stood filed by the petitioner before the learned Rent Controller in the month of April, 2019. The reason given in the application to justify as to why the application was not filed earlier is that the applicant was not aware of the pendency of the Eviction Petition and it was just a day before drafting of the application that one of the landlords unintentionally disclosed the factum of the pendency of the Eviction Petition to her when she was in the demised premises. There is nothing on record to substantiate this bald assertion made by the applicant to justify the delay in filing the application. During the course of arguments, it could not be disputed by learned counsel for the petitioner that a similar application filed by the sister of the applicant in the Eviction Petition pending before the learned Rent Controller stood dismissed earlier.

9. A perusal of the application filed under Order I, Rule 10 of the Code of Civil Procedure by the petitioner demonstrates that it stood mentioned in the application that she was a necessary party, as she used to reside in the demised premises during her visits at Shimla. These averments of the applicant in fact create doubt over her *bonafides*. This is for the reason that as the demised premises are non-residential, where commercial activities are being carried out, it is not understood as to how the applicant can state that she has been residing in the demised premises. Similarly, there is nothing on record to demonstrate *prima facie* that the applicant was carrying business in the demised premises with the original tenant. The affidavit filed in support of the application demonstrates that whereas the applicant has shown demised premises to be her residential address, she has mentioned her occupation in the same as 'retired employee'. Similarly, the affidavit which has been filed in support of the present petition, also demonstrates the occupation of the petitioner to be a retired employee. All these facts clearly demonstrate that the application in fact stood filed with an ulterior motive to delay the proceedings and same lacked *bonafide*.

10. It is settled law that heirs of original tenant succeeded to his tenancy on his death as joint tenants and the tenancy cannot be split as it devolves upon the heirs. Service of Notice of proceedings to one of the tenants is sufficient Notice to all and this position of law was reiterated by Hon'ble Coordinate Bench of this Court in **Asha versus Raj Kumar Mehra and others**, (2018) 1 SLC 186, in which it has been held as under:-

"24. That apart, the impleadment of the petitioner is not at all necessary because eventually if the eviction petition is found to be bad for want of non-joinder of necessary parties, the landlord would obviously bear the consequences.

25. At this stage, learned senior counsel for the respondents/landlords has sought a direction to the learned Rent Controller to decide the eviction petition expeditiously by relying upon a recent judgment of the Hon'ble Supreme Court in Hameed Kunju v. Nazim, 2017 8 SCC 611, wherein it has been categorically held that the object of the Rent laws is to ensure speedy disposal of eviction cases between the landlord and tenant and especially those cases where the landlord seek eviction for his bona fide need.

26. Obviously, there can be no quarrel with the aforesaid submission, but taking into consideration the fact that another petition inter se the same landlords and different tenants is already pending adjudication before a coordinate bench of this court, where the trial in the eviction petition has actually been ordered to be stayed, therefore, this Court is not in a position to accede to the request of the learned senior counsel.

27. For the forgoing discussion, I find no merit in this petition and rather find the application under Order 1 Rule 10 CPC filed by the petitioner to have been filed with mala fide intention simply in order to delay the outcome of eviction proceeding that has been initiated by the respondent No.1 against the proforma respondent and consequently, dismiss the present revision petition with costs of Rs.10,000/-. Pending application(s), if any, also stands dismissed."

11. It is pertinent to mention at this stage that even otherwise, because there is an objection taken with regard to the maintainability of the eviction petition by the impleaded respondent that the petition is bad for non-joinder of necessary parties, this issue will be looked into by the learned Rent Controller and in case the issue is decided against the landlords, then consequences will follow. Findings returned by learned Rent Controller that the application lacked bonafide and was filed with the intent of delaying the matter, are duly borne out from the fact that not only there is inordinate delay in filing the application, the same was conspicuously filed after similar application filed by the sister of the present petitioner was dismissed by the learned Rent Controller.

12. In view of the findings returned hereinabove, as this Court does not finds any merit in the present petition, the same is accordingly dismissed. Pending miscellaneous application(s), if any, also stand disposed of.

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

State of H.P and others ...Appellants.

Versus

Bhagwan Dass and Others ....Respondents.

RSA No. 227 of 2019
Reserved on: 9.9.2019
Decided on : 12.9.2019

Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 – Section 4 (3), Proviso - Cancellation of lease qua common land granted by Gram Panchayat – Procedure –Held, Collector is required to give opportunity of being heard to the lessee before passing order of cancellation of lease – Order cancelling grant without affording opportunity of being heard as contemplated under Section 4 (3) of Act is illegal. (Para 10).

For the Appellants: Mr. Vikrant Chandel, Deputy Advocate General.

For the Respondents: Mr. Ramakant Sharma, Sr. Advocate with Mr. Dinesh Bhatia, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Through, the, instant appeal cast before this Court, the aggrieved defendants/appellants herein (for short "defendants), cast a challenge, upon, the concurrently recorded verdicts, by both the Courts below respectively, upon, Civil Suit No. 20/1 of 2005, and, upon Civil Appeal No. 18-NL/13 of 2014, (i) wherethrough the plaintiff's suit, for, rendition, of, a decree of declaration, and, for setting aside the order of cancellation of lease, vis-a-vis, the suit land, and, granted qua the plaintiff/respondent herein (for short "the plaintiff), stood decreed, and, also a decree of permanent prohibitory injunction, stood rendered against the defendants, hence, restraining them, from, making any interference, in, the possession, of, the plaintiff, upon, the suit land.

2. The brief facts of the case are that the land measuring 10 bigha out of land measuring 111 bigha 12 biswas, comprised in khata Khatauni No. 21/21 min, bearing khasra No. 66 min, situated in village Baindhu, Hadbast No. 29, Pargana Gullarwala, Tehsil Nalagarh, District Solan, H.P. (for short "the suit land") was alloted to the plaintiff by Gram Panchayat, Joghon, Tehsil Nalagarh, District Solan, on lease at the rate of Rs.1/- per bigha per year on 9.11.1970, vide, resolution No. 2, rendered by the Panchayat, and, accordingly, the plaintiff was put in physical possession of the suit land, as, lessee, and, lease so created was initially for five years, and, the plaintiff had deposited the lease money for five years with the Panchayat concerned, amounting to Rs.50/-, and, as such the plaintiff entered into possession of the suit land. It is further averred that the plaintiff has not been dispossessed from the suit land at any point of time till date and he is still in possession of the suit land. It is further averred that the plaintiff has been in occupation of the suit land as lessee under a valid lease up to 8.11.1975 and thereafter he has been holding the suit land so leased to him, and, as such the defendants have no right title and interest to forcibly and illegally dispossess the plaintiff from the suit land except in due course of law. It is further averred that during the month of October, 2004 the defendants started extending threats through themselves and through their subordinates to forcibly dispossess the plaintiff from the suit land by proclaiming that the status of the plaintiff of being lessee in possession of the suit land is no more in existence and stood cancelled by the defendants, and, as such, the plaintiff obtained copies of the relevant lease record from the office of defendant No.2 and also obtained copies of revenue record appertaining to the suit land, and, on perusal whereof the plaintiff came to know that the entries showing the plaintiff to be in possession of the suit land were illegally and wrongly changed vide rapat No. 427 of 4.6.1995, upon, the order of Assistant Collector, Ist class, Nalagarh by Patwari Halqua which order was passed behind his back, on the basis of ex-part order of cancellation of lease in favour of the plaintiff passed by Sub Divisional Collect, Nalagarh on 31.5.1976 which order was also passed behind the back of the plaintiff as no notice prior thereto was issued in favour of the plaintiff nor the plaintiff was given any opportunity of being heard, and, therefore the order cancelling the lease of the plaintiff passed by the defendant No.2 is illegal null void and not binding upon the plaintiff, and, entries changed on the basis of the afore order also not binding upon the plaintiff. It is further averred that the defendants never took any steps nor followed mandatory provisions of Sections 3 and 4 of the Himachal Pradesh Village Common Lands Vesting and Utilization Act (for short "the Act") and rules framed thereunder wherein it is clearly mandated in section 4 of sub section (3) that no order under sub section 2 and 3 shall be passed by the collector without affording an opportunity of being heard to the parties to the lease, contract or agreement, as such, the defendants have no right to interfere in the suit land.

3. The defendants, by filing the written-statement, have contested the suit of the plaintiff, and, have taken preliminary objections of locus standi, estoppel, limitation, case of action, jurisdiction, valuation and the suit is bad for want of mandatory notice under Section 80(1) CPC. On merits, it is denied that the plaintiff was allotted the suit land measuring 10 bighas as lessee by Gram Panchayat, Joghon, but averred that the plaintiff was allotted only 5 bighs of land by gram Panchayat, Joghon which stood cancelled vide order dated 31.5.1976 passed by defendant No.2 as the plaintiff has never deposited Chakota money either with the Gram Panchayat or with the replying defendants. It is denied that the plaintiff is in possession of the suit land since 1970. It is also averred that the plaintiff is stranger having

no right title or interest over the suit land which is owned and possessed by the State of H.P and the plaintiff has concocted a false story in order to grab the government land. It is further averred that the plaintiff stood evicted from the suit land in pursuance of cancellation order passed by Sub Divisional Collector, Nalagarh on 31.5.1976 and the proforma defendant Khushi Ram who is brother of plaintiff has deposed before the Sub Divisional Collector, Nalagarh that the chakota of the plaintiff be cancelled due to the reason that the plaintiff is not entitled to lease of the land as the plaintiff has been living with his father who is owning 36 bighas of the land, and, as such the Sub Divisional Collector Nalagah has rightly cancelled the lease qua the suit land granted to the plaintiff by Gram Panchyat, Joghon. It is further averred that Sub Divisional Collector, Nalagarh when found that the wrong entries in the record are still existing even after passing of the order of cancellation of lease, further ordered on 3.5.1995 that the entries existing in the revenue record showing the plaintiff as lessee be corrected and the revenue entires were accordingly corrected. It is further averred that since the plaintiff is in possession of the suit land, therefore, there is no question of threatening the plaintiff by the defendants or its subordinates to dispossess him forcibly from the suit land. It is also averred that after scrutiny of records, it was found that both plaintiff and proforma defendant were shown in possession of 20 bighas of land as lessee which was wrong in view of the order of cancellation of lease of the plaintiff, and, as such, the Sub Divisional Collector, Nalagarh passed an order on 3.5.1995 that only proforma defendant be recorded as lessee of the land measuring 5 bighas whereas rest of the entry showing the plaintiff and proforma defendant as lessees was ordered to be deleted which was accordingly deleted vide rapat No. 427 of 14.6.1995 and such order passed by the Sub Divisional Collector Nalagarh is also legal and valid, and, sub Divisional Collector, Nalagarh was fully competent to cancel the lease, contract or agreement under Section 4 of the Act, whenever reported to him and he has taken all the mandatory steps under Section 3 and 4 of the Act.

4. In the replication, the plaintiff has reiterated, and, reasserted the contents, as, enumerated in the plaint, and, has controverted contention(s) raised, in, the written-statement.

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

> "1. Whether the cancellation of lease is wrong, illegal and void as the defendants never took any steps or followed mandatory provisions, as alleged? OPP
>
> 2. Whether the revenue entries showing the plaintiff to be the lessee of th suit land till 14.6.1995 are illegally and wrongly changed, as alleged? OPP
>
> 3. Whether the plaintiff is entitled to the relief of declaration, as alleged? OPP
>
> 4. Whether the plaintiff is also entitled to the relief of permanent prohibitory injunction, as prayed? OPP
>
> 5. Whether the suit is not maintainable? OPD
>
> 6. Whether the plaintiff is estopped to file the present suit on account of his acts, deeds, conducts and acquiescence? OPD
>
> 7. Whether the suit is time barred? OPD
>
> 8. Whether this Court has no jurisdiction to try and entertain the present suit? OPD
>
> 9. Whether the plaintiff has no cause of action against the defendants.
>
> 10. Whether the suit has not been valued properly for the purpose of Court fee and jurisdiction? OPD
>
> 11. Relief."

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, decreed the suit of the plaintiff. In an appeal, preferred therefrom, by the aggrieved defendants, before the learned First Appellate Court, the latter Court, hence, affirmed the findings recorded by the learned trial Court.

7. Now the defendants have instituted the instant Regular Second Appeal before this Court, wherein, they assail the findings recorded, in the impugned verdicts, hence by both the learned Courts below.

8. The entire fulcrum of the lis engaging the contesting parties, is, founded upon the afore cancellation being a sequel of the proforma defendant, the brother of the plaintiff, making a deposition before the Collector Sub Division, Nalagarh qua the grant made, vis-a-vis, the suit khasra number, and, vis-a-vis the plaintiff, being amenable for cancellation given (a) his being ineligible for the afore grant (b) and, the failure of the plaintiff, to, deposit the lease money.

9. For the afore order of cancellation, being construed to be , merit-worthy, it necessitated qua its standing preceded by the authority concerned, evidently meteing the strictest compliance qua the provisions, borne, in Section 4 of the Act, provisions whereof stand extracted hereinafter:-

> "4. Treatment of leases made by Panchayats. - (1) The Collector shall call for from Panchayats in his district the record of eases contracts or agreements entered into by the Panchayats in respect of any land vested in the Panchayats under the Punjab Village Common Lands (Regulation) Act, 1961, (18 of 1961) and the rules made thereunder and examine such record himself to the legality or propriety of such leases, contracts or agreements.
>
> (2) Where on examination of the record under sub-section (1) and after making such enquiry as he deems fit, the Collector is satisfied that such leases, contracts or agreements are in accordance with the provisions of the said Act and rules, he shall pass orders declaring such leases, contracts or agreements having been made on behalf of the State Government and will fix the lease money at the rate notified by the State Government from time to time. Such lease money shall be recovered by the Panchayat concerned from the lessee.
>
> (3) Where on such examination and enquiry the Collector finds that a lease, contract or agreement has been entered into in contravention of any of the provisions of the said Act or the rules made thereunder or has been entered into as a result of fraud or concealment of facts or is detrimental to the interest of the estate right-holders, he shall cancel such a lease, contract or agreement and such person shall be liable to ejectment under the provisions of section 150 of the Punjab Land Revenue Act, 1887:(17 of 1887).
>
> Provided that no order under sub-sections (2) and (3) of this section shall be passed by the Collector without affording an opportunity of being heard to the parties to the lease, contract or agreement."

10. A perusal of the hereinbefore extracted provisions of Section 4 of the Act, makes imminent upsurgings, vis-a-vis, it being incumbent, upon, the cancelling authority, to, prior, to, its making an order, of, cancelling, the, apposite grant, it affording an opportunity of being heard, to, the purported errant concerned. However, a perusal of record, discloses that the afore dire statutory necessity, cast upon, the cancelling authority, remained uncomplied with, (i) hence, for want of meteing of the strictest mandatory compliance, vis-a-vis, the peremptory mandate, as, borne in Section of 4 of the Act, (ii) thereupon the order of cancellation, of, grant, as, made by the authority concerned, vis-a-vis, the suit khasra numbers, and, vis-a-vis, the plaintiff, rather suffers from a gross frailty, and, infirmity, obviously sparked by an evident deepest breach, of, the afore mandatory statutory provisions, being made, by the authority concerned.

11. Be that as it may, even if the aggrieved defendants had contended, vis-a-vis, the cancellation, of, the afore grant, vis-a-vis, the suit khasra numbers, being a sequel, of, non-deposit, of, lease money by the plaintiff. However, with the defendants, despite, holding all the records appertaining therewith, (i) yet theirs omitting to place them before the learned trial Court concerned, (ii) and, rather when only upon, their adduction or production hence before the Court below, the afore contention, would acquire both vigor and succor, (iii) whereas theirs omitting to adduce, the, afore apposite best evidence qua therewith, rather galvanizes an inference qua the defendants intentionally, and, deliberatively, withholding, the, afore records, from, the sight of the learned Courts below, merely for ensuring, qua, upon its being adduced, and, produced before the Court below, the afore contention becoming blunted, and, maimed.

12. In view of the above, there is no merit in the appeal, and, the same is accordingly dismissed. No question of law, much less, a, substantial question of law hence arises for determination. The impugned verdicts are maintained and affirmed. Records be sent back. All pending applications stand disposed of accordingly.

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

State of Himachal Pradesh .....Appellant
Versus
Raju ....Respondent.

Cr. Appeal No. 681 of 2008
Reserved On : 9.9.2019
Decided on: 12.9.2019

Indian Penal Code, 1860 –Sections 279 & 337 – Rash and negligent driving – Proof – Appeal against acquittal recorded by first appellate court after setting aside judgment of conviction – Held, offending truck had already ascended the hilly road and was at the plateau - Truck was loaded one and the witnesses stating before the court that it was in slow speed – Truck was visible to the driver of Santro car – It was incumbent on the driver of Santro car to stop his vehicle so as to avoid collision and enable the truck driver to take a pass from any moving or stationary vehicle occurring at site of occurrence – Evidence also contradictory as to manner of accident – No ground to interfere with judgment of first appellate court. (Paras 12 & 13)

For the Appellant: Mr. Vikrant Chandel, Deputy Advocate General.
For the Respondent: Mr. Anup Rattan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the verdict of acquittal pronounced by the learned Sessions Judge Hamirpur, upon, Criminal Appeal No. 48 of 2007, upon, the latter being preferred therebefore, hence, by the accused/respondent herein (for short "accused"), against, the order of conviction and consequent thereto sentence, as, recorded, by, the learned Chief Judicial Magistrate, Hamirpur, H.P, upon, Criminal Case No. 184-I of 2005/61-II of 2006, and, vis-a-vis, the accused, for, notice of accusation put under Section 279, and, under Section 337, of, the IPC.

2. The brief facts of the case are that on March, 2005, a telephonic message was received at 6.05 p.m. which was entered in Rapat Ex.PW-7/A to the effect that one Truck and car were involved in an accident near Mair. So, the Investigating Officer went to the spot and recorded the statement of the complainant Smt. Shail Sood under Section 154 of Cr.P.C Ex.PW-3/A. It was reported that she is a shopkeeper at 66, the Mall Shimla. On March, 1, 2005 she alongwith her husband and son Shail Sood were proceeding from Palampur to Shimla in their Santro Car bearing registration No. HP 62-0182. Salil was driving the car. When they reached at about 5.00 p.m. near Mair, Truck No. HP-20A-2267 came from the opposite side hit the car which driving the truck rashly and negligently. They sustained injuries in the accident. The matter was reported to the police. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused, challan was prepared and filed in the Court.

3. Notice of accusation under Section 279 and 337, was, put to the accused, whereto which he pleaded not guilty and claimed trial.

4. In order to prove its case, the, prosecution examined 12 witnesses. On closure of prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure was recorded, wherein, he pleaded innocence, and, claimed false implication.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction, against, the accused, for, offences punishable under Section 279, and, under Section 337, of, the I.P.C. However, in an appeal, preferred therefrom by the aggrieved, before the learned first appellate Court, the latter Court, while setting aside the verdict of conviction, and, consequent therewith sentence, as, recorded, by, the learned trial Court, rather acquitted, the, accused, for, the charged offences.

6. The learned Deputy Advocate General has, concertedly and vigorously contended, qua the findings of acquittal, recorded by the learned first appellate Court, standing, not based, on a proper appreciation of evidence on record, rather theirs standing sequelled by gross mis-appreciation, by it, of the relevant material on record. Hence, he contends qua the findings of acquittal, warranting reversal by this Court, in the, exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

7. The learned counsel appearing for the accused, has, with considerable force, and, vigour contended, qua, the findings of acquittal, recorded by the learned first appellate Court, standing based, on a mature and balanced appreciation, of, evidence on record, and, theirs not necessitating interference rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel, on either side, has with studied care and incision, evaluated the entire evidence on record.

9. The learned Deputy Advocate General, has contended (i) that with the site plan borne, in, Ex. PW-8/B making clear depiction, vis-a-vis, the offending truck occupying the inappropriate side of the road, and, rather the santro car occupying, the, appropriate side of the road, (ii) hence it was insagacious, for, the learned first appellate Court, to, omit, to, mete any credence thereto, (iii) and, thereafter he contends, that, discardings of, the, probative vigour, of, the afore potent documentary evidence, hence by the learned first appellate Court, rather hence constraining this Court, to, make an interference with the order of acquittal, as, recorded by the learned Sessions Judge, Hamirpur.

10. This Court would concur with the afore submission addressed, before this Court, by the learned Deputy Advocate General, (i) upon, the ocular testification(s), vis-a-vis, the relevant occurrence, as, embodied in the depositions, of, PW-2 (Sushil Kumar), and of PW-3(Shail Sood), and, of PW-4 (Salil Sood), all making imminent bespeakings, hence bearing absolute concurrence, vis-a-vis, the depictions, as, cast in the site plan. However, upon, there existing any incongruity inter-se the testifications rendered, by the, afore ocular witnesses qua the occurrence, vis-a-vis, the, reflections cast, in, the site plan embodied in Ex. PW-8/B, (i) thereupon the elicitations, as, borne in the site plan, would not hold sway, and, this Court, also would not mete any credence thereto. Even though PWs 2, 3 and 4, all ocular witnesses to the occurrence, in their respective examination(s)-in-chief, do depose, with the absolutest inter-se, and, intra-se corroboration, vis-a-vis, the offending truck, during, the process of its apposite overtaking(s), it, hence proceeding on to, the inappropriate side of the road, and, hence it colliding with the santro car, driven at the relevant site, by the son of PW-2. However the afore rendered testifications, hence with the absolutest inter-se, and, intra-se corroboration, are, perse not sufficient, to constrain this Court, to, mete the absolutest credence thereto, (i) as, their respective echoings, as, borne in their respective cross-examinations, are, also enjoined to be read, in, conjunction therewith.

11. Resultantly, and, importantly, with, the testification of PW-3, as, occurring in her cross-examination, rather unveiling qua the offending vehicle, after, completing the ascending drive, it, arriving, on to the plateau, and, also it, embodying echoings, qua it, being loaded, and, also its, though, making echoings, qua the afore truck attempting, to, overtake, the, purported stationary vehicle, (i) however when she has thereafter, deposed, qua hers rather at the relevant site of occurrence hence not sighting any stationary or moving vehicle, for apposite purported overtakings whereof, the, driver of the offending vehicle hence maneuvered the truck, on to, the inappropriate site, of, the road.

12. Resultantly, the afore deposition of PW-3, as, occurring in her cross-examination, has telling effects, qua it, being clearly connotative qua the afore loaded truck, after completing the ascent, in, a loaded condition, it arriving slowly, onto, the plateau, as, occurring at the site of occurrence, (i) and, hence obviously at the afore stage, it being not driven, at, abrazen or at a rash pace, (ii) besides when on its completing its ascent, it, arrived at the plateau, as, occurs at the site of occurrence, and, hence, rather was sightable, from, the opposite side, rather by the driver of the santro car, (iii) vehicle whereof, was already occupying, a, position located on the plateau, as, occurring at the site of occurrence, and, hence obviously, and, reiteratedly capacitated its driver to sight, the, arrival of the offending truck, at, the relevant site (iv) thereupon it was incumbent, upon, the driver of the santro car, to, for avoiding, the occurrence, of, a collision inter-se the latter, and, the offending truck, rather await the endeavor, if any, of the driver of the offending truck, to take a pass, from any stationary or moving vehicle hence purportedly occurring at the site of occurrence. However, the afore endeavor remained unrecoursed by the driver of the santro car, thereupon, and,

alongtherewith hence coagulating, the, factum qua PW-3 in her cross-examination also volunteering to state, vis-a-vis, hers not, sighting any moving or stationary vehicle, at the site of occurrence, (i) thereupon, the further derivable inference therefrom is qua the testifications, of all, the afore ocular witnesses, qua, in the process, of, the driver of the truck endeavoring to take a pass, his hence colliding, it, with the santro car, hence being falsified, and, nor thereupon, his for the afore assigned reasons, being hence negligent, thereupon the reflections borne in the site plan, are, also concluded to be concomitantly falsified.

13. In view of the above, there is no merit in the appeal, and, the same is accordingly dismissed. Impugned judgment is maintained and affirmed. Records be sent back. All pending applications stand disposed of accordingly.

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

Devender Kumar ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.M.P(M) No. 1567 of 2019
Reserved on: 13.9.2019
Decided on : 30.9.2019

Code of Criminal Procedure, 1973 – Section 439 – Regular bail – Grant of in a murder case – Accused relying upon statement of daughter of deceased recorded during trial for nullify the efficacy of dying declaration of deceased which assigned inculpatory role to accused - Held, evidentiary value of deposition of witness and of dying declaration of deceased is to be looked into by the trial court – Petitioner can not be granted bail merely on statement of witness recorded during trial of the case – Petition dismissed. (Para 2 & 3).

For the Petitioner: Mr. N.K Thakur, Sr. Advocate with Mr. Divya Raj Singh, Advocate.

For the Respondent-State: Mr. Hemant Vaid, Additional Advocate General with Mr. Vikrant Chandel, and Mr. Yudhveer Singh Thakur, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petition, stands instituted, by the petitioner, under Section 439 Cr.P.C, for his being ordered to be released, from, judicial custody, wherein he is extantly lodged, for his allegedly committing offences punishable, under, Section 302, 201 of I.P.C registered with Police Station, Haroli, District Una, H.P., in case FIR No. 188/18 of 5.7.2018.

2. Bail application bearing No. 1815 of 2018, was, dismissed as withdrawn, under, orders recorded on 4.1.2019, and, the instant petition is cast subsequent thereto, (i) and, the requisite changed circumstances, since, the, dismissal, as withdrawn, of, the earlier petition, and, the institution of the instant petition (ii) are, espoused to be comprised, in, the daughter of the deceased while stepping into the witness box as PW-2, rather making a statement, hence, belying the efficacy, of, the recitals embodied in the dying declaration, authored by the deceased, (iii) wherein the latter ascribes an inculpatory role, vis-a-vis, the petitioner herein, (iv) and, therethrough the learned counsel for the petitioner, makes an espousal before this Court, qua no credence being meted thereto, hence, the bail applicant being entitled, to, the grant of bail.

3. Be that as it may, at this stage, it would not be appropriate to impute, or, disimpute any credence, to, the dying declaration, as, authored by the deceased, hence imputing penal ascriptions qua the petitioner, (i) rather merely on anvil, of, the testification of PW-2, hence belying the recitals borne therein, hence echoing qua hers being at the relevant time available alongwith, the, accused, as, PW-1 has contrarily thereto, supported the recitals borne, in the dying declaration, and, when in gauging their comparative evidentiary worth, this Court would be in appropriately arrogating, to itself, the, duties of the learned trial Judge, in, the latter rather befittingly discerning their comparative evidentiary worth.

4. In sequel, this Court is constrained, not to allow, the instant petition, and, the same is accordingly dismissed. However, the learned trial Judge, is directed, to, within three months, conclude the trial arising, from, case FIR No. 188/2018.

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

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

Himat Singh ...Appellant.
Versus
Kashmir Singh and Others ...Respondents.

RSA No. 203 of 2008
Reserved on: 17.9.2019.
Decided on : 30.9.2019

Indian Evidence Act, 1872 – Section 68 – Will- Suspicious circumstances – Held, mere non – joining of persons residing in the proximity of testator as marginal witnesses to Will executed by him, by itself is not a suspicious circumstance. (Para 14)

For the Appellants: Ms. Seema Guleria, Advocate.
For the Respondents: Mr. Ajay Chandel, Advocate, for respondent No.1.
Respondents No. 7 to 10, 12,21, 22 and 25 deleted.
Respondents No. 2,3,5,6,11,13 to 16, 19, 20, 23 and 26 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed, against, the verdict pronounced by the learned first appellate Court i.e Presiding Officer, Fast Track Court, Mandi, District Mandi H.P, upon, Civil Appeal No. 2/2001, 98/2004, wherethrough it set aside, the, verdict of dismissal of the plaintiff's suit No. 38/1996, as, rendered by the learned Sub Judge, 1st Class, Sarkaghat, District Mandi, H.P, and, hence it validated, the, testamentary disposition, as, propounded by the plaintiff, and, borne in Ex. PW-3/A, and, invalidated, the, testamentary disposition, as, propounded by the defendants, and, as, embodied in Ex. D-1, and, it also dismissed, the, cross-objections reared by the defendants.

2. The brief facts of the case are that land detailed in para 1(a) to para 1(d), of the plaint, was owned and possessed by the deceased Smt. Shankari to the extent mentioned therein, who was mother of the plaintiff, and, the deceased was residing with him, for, the last, more than 26 years. The plaintiff had three brothers and one of them namely Roshan Lal had died about 26 years ago all the brothers separated from each other and are residing separately since then. The deceased was residing with the plaintiff. The plaintiff has been rendering all the services to the deceased, and, had been maintaining her till her death. The deceased Smt. Shankari on account of natural love and affection and for the services rendered by the plaintiff, voluntarily executed a valid testamentary disposition qua her property on 7.7.1989 in favour of the plaintiff, which also stood registered in the Office of Sub Registrar concerned. The deceased suffered paralysis and died on 10.7.1993. The defendants setup a false and fictitious will dated 26.3.1993, which was never executed by the deceased, as, she was not in a position to come to the office of the Sub-Registrar, Sarkaghat, and, thus the will set up by the defendants is the result of mis-representation and cheating, and, therefore, the same is false and fictitious. The defendants never looked after and maintained the deceased.

3. The suit filed by the plaintiff was contested by the defendants No. 1, 2, and, proforma defendant No.5, by filing written-statement, and, have taken preliminary objections qua cause of action, maintainability and valuation. It is admitted by the afore defendants that the land as detailed in para 1(a) to para-1 (d) of the plaint, was, owned and possessed by

deceased Smt. Shankari to the extent mentioned therein. It is denied by them that the deceased was residing with the plaintiff, and, the plaintiff was looking after her. They averred that the deceased was looked after by the defendants and their family members. On account of the services being rendered by the defendants, the deceased executed a testamentary disposition on 26.3.1993 in favour of the defendants. It is also denied that the any will has been executed by the deceased in favour of the plaintiff. It is also denied that the deceased died on 10.7.1993, however, stated that the deceased died on 10.7.1995.

4. In the replication, the plaintiff has reiterated, and, reasserted the contents, as, enumerated in the plaint, and, has controverted contention(s) raised, in, the written-statement.

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

1. Whether the deceased Shankari had executed last and valid will of suit property on 7.7.89 in favour of the plaintiff as alleged? OPP.

2. Whether the plaintiff is in possession of the suit property as alleged? OPP

3. Whether the defendants interferes in possession of the suit property? OPP

4. Whether the deceased Shankari executed last and valid will of suit property on 26.3.1993 in favour of the defendants as alleged? OPD

5. Whether the will dated 26.3.1993 is the result of cheating and fraud? OPP

6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, dismissed the plaintiff's suit. In an appeal, preferred therefrom, by the aggrieved, before the learned First Appellate Court, the latter Court, while setting aside the verdict recorded, by the learned trial Court, allowed the appeal, and, it also dismissed, the, cross-objections raised by the defendants.

7. Now the appellant herein/defendant No.5, has instituted the instant Regular Second Appeal, before this Court, wherein, he assails the findings recorded, in the impugned verdict, hence by the learned first appellate Court.

8. When the appeal came up for admission, on 5.3.2010, this Court, admitted the appeal, on the hereinafter extracted substantial questions of law:-

2. Whether merely proof of execution of Will will be sufficient holding a will to be valid without explaining the suspicious circumstances appearing against the due and proper execution of will Ex. PW-3/A?

4. Whether the judgment and decree of the ld. Appellate Court below is vitiated one on account of illegal and unwarranted approach of appreciation of evidence brought on record?

Substantial questions of law:-

9. Ex. PW-3/A, comprises the testamentary disposition, made by the deceased testator, and, is propounded by the plaintiff/respondent No.1 herein (for short "the plaintiff"), and, Ex. D-1 also comprises, a, testamentary disposition, made by the deceased testator, and, is propounded by the defendants.

10. Both the afore testamentary dispositions, are, registered testamentary dispositions. However, when Ex. PW-3/A is visibly recorded prior in time, vis-a-vis, the execution, of, Ex. D-1, and, obviously if Ex. D-1, is, proven to be validly and duly executed, hence within, the ambit, of, the statutory ingredients borne in Section 63 of the Indian Succession Act, provisions whereof, stand extracted hereinafter, (a) thereupon, Ex. D-1 would prevail, upon, the earlier executed thereto testamentary disposition, and, as comprised, in, Ex. PW-3/A.

" 63. Execution of unprivileged Wills-Every testator, not being a soldier employed in an expedition or engaged in actual warfare [or an airman so employed or engaged,] or a mariner at seal, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

11. In satiation of the afore peremptory statutory ingredients, the attesting witness, vis-a-vis, Ex. PW-3/A, in as much, as, PW-4 one Mr. D.D Verma, stepped into the witness box, and, rendered testification, with an animus possidendi, vis-a-vis, the deceased being known, to, him, and, in his presence, the, deceased, getting Ex. PW-3/A scribed, by PW-3 Prem Chand, (a) and, after the contents thereof being readover and explained to the deceased testator, the latter in his presence making her thumb impression, on, Ex. PW-3/A, (b) and, thereafter he further testifies qua his, and, the other marginal witnesses thereto, one Bhag Singh, both in the presence, of, the deceased testator, appending their respective signatures thereon. He has made a pointed communication, in his deposition, qua, in contemporaneity, vis-a-vis, the afore statutory acts, being completed, (a) the deceased testator being in a sound disposing state of mind, and, he also further proceeded, to, make a testification, qua Ex. PW-3/A, being presented, before the Sub Registrar, whereat, also contents thereof, being readover and explained, to the deceased testator, (b) and, after the Sub Registrar concerned, ensuring qua the deceased testator, fully comprehending them, hence his making, the, statutory endorsement, on, Ex. PW-3/A, and, whereunderneath the deceased testator has also embossed her thumb impression, (c) and thereunderneath the sub Registrar concerned, has appended his signatures, (d) and when the afore testification and, all the afore, hence, generates an inference qua therethrough, the, afore statutory ingredients, becoming fully satiated, (e) and, also when the statutory sealed endorsement made on Ex. PW-3/A, rather by the Sub Registrar concerned, and, whereat the deceased testator also stood identified, by the afore PW-4, hence holds a presumption of truth, conspicuously when the defendants, do not contest, the authenticity of the apposite thumb impression(s), occurring upon Ex. PW-3/A, (f) and made initially at the pre-registration stage, and, also in contemporaneity, vis-a-vis, its being ordered, to be registered by the Sub Registrar concerned, nor also when obviously any contest is raised, vis-a-vis, the identity, of, the deceased testator, being impersonated before the Sub Registrar concerned, (g) thereupon, reiteratedly the, lack of the afore contest(s) rather constrains this Court, to make, an invincible conclusion qua the statutory sealed endorsement, made on Ex. PW-3/A, hence by the sub Registrar concerned, holding an utmost solemn aura of veracity, (h) and, thereupon it is to be concluded qua the execution of Ex. PW-3/A, being proven to be validly made, hence, in the strictest adherence, being meted, vis-a-vis, the imperative statutory parameters, as, encapsulated in Section 63, of, the Indian Succession Act.

12. Be that as it may, the learned counsel appearing for the appellant/aggrieved defendant has contended, qua, with certain suspicious circumstances, surrounding the execution, of, Ex.PW-3/A, and, when the afore suspicious circumstances surrounding the execution of Ex.PW-3/A, remained inexplicated, (i) thereupon, dehors the afore conclusions drawn by this Court rather the execution of Ex.PW-3/A, coming under, a, shroud of doubt, and, it being not amenable, for, validation, by this Court.

13. The purported suspicion surrounding the execution of Ex. PW-3/A, stands espoused, to be comprised, in, a false averment embodied in Ex. PW-3/A, qua, the plaintiff serving, the, deceased testator. However, the afore espousal becomes fully blunted, given the testifications in support, of, the afore recitals, as, borne therein being rendered by the plaintiff, and, also the afore testification becoming fully corroborated, by, the respective testifications, of, PWs 2, 5 and 7.

14. Further there-on-wards, the, learned counsel, for the aggrieved defendant/appellant herein, also contended qua, the, non-association, of, marginal witnesses, vis-a-vis, Ex. PW-3/A, of, those persons hence holding abode in proximity, to, the abode, of, the deceased testator, also engendering suspicion, vis-a-vis, the authenticity, of, their

respective testimonies, as, made, in, purported satiation, of, the peremptory requirement, as, embodied in Section 63 of the Indian Succession Act. However, even the afore submission is not sufficient, to, constrain this Court, to benumb their inter-se corroborative testimonies, vis-a-vis, hence satiation being made, vis-a-vis, the peremptory mandate, borne in Section 63 of the Indian Succession Act, (a) as, both the marginal witnesses to Ex. PW-3/A, were subjected, to. a thorough, and, exhaustive cross-examinations, (b) and, yet each deposing with utmost inter-se corroboration, vis-a-vis, the preeminent factum, qua, the thumb impression of the deceased testator, occurring in PW-3/A, not being spurious, (c) whereas, only upon a valid, and, successful contest, vis-a-vis, thereto hence being raised, hence would render the afore espousal, to, galvanize vigour, (d) contrarily when the afore preeminent factum, remains uncontested, and, combining therewith, the afore factum qua the depositions, of, the marginal witnesses, to, Ex. PW-3/A, as, comprised, in, the respective examination(s)-in-chief, hence, remaining uneroded, during, the ordeal of their/his apt respective cross-examination(s), (e) thereupon the mere factum qua his/theirs not holding his/theirs abode in proximity, to the abode of the deceased testator, becomes underwhelmed, and, also looses its effect.

15. Lastly the aggrieved defendant/appellant herein, had contended with much vigour, before this Court, that with Ex.D-1, being the subsequently executed testamentary disposition, hence by the deceased testator, (a) thereupon, Ex. D-1 prevails, upon, the earlier thereto executed testamentary disposition, as, embodied in Ex. PW-3/A. However, the afore submission, would be acceptable, only upon, the learned counsel, for, the aggrieved defendant, making this Court transverse through the evidence, of, the marginal witnesses thereto, (b) and, therefrom it emerging qua the afore peremptory statutory mandate, as, carried in Section 63 of the Indian Succession Act, begetting the utmost satiation. However a perusal of Ex. D-1, makes underscorings therein, vis-a-vis, the afore Bhag Singh (DW-6), and, Karam Chand (DW-5) rather appending their signatures, as, marginal witnesses, to, Ex. D-1, and, DW-3 one Kewal Singh appending his signatures thereon, as, an identifier of the deceased testator. Consequently Ex. DW-3, cannot, be concluded to be holding the apt befitting capacity, to, testify, as, a marginal witness to Ex. D-1, nor, also he was enabled to make a testification, for, there through satiation being meted, vis-a-vis, the peremptory mandate embodied in Section 63, of, the Indian Succession Act, nonetheless dehors the afore, one Bhag Singh marginal witness to Ex. D-1, did step into, the witness box, for, his rendering a deposition, vis-a-vis, the valid, and, due execution of Ex. D-1. However a close scrutiny of his testification, unveils, that he omits to make any bespeakings, therein, qua, in contemporaneity, vis-a-vis, the deceased testator hence embossing her thumb impression, upon, Ex. D-1, (a) conspicuously at the preregistration stage, his seeing her, to do the afore act, and, also he omits to testify, vis-a-vis, his also, in, presence of the deceased testator, making his signatures upon Ex. D-1. Consequently, the afore omissions, in the testification of DW-6, a marginal witness to Ex. D-1, renders the latter, to, at the preregistration stage, becoming not proven hence, within the ambit of Section 63 of the Indian Succession Act, to be validity and duly executed rather by the deceased testator.

16. Even though Ex. D-1 alike Ex. PW-3/A, is, a registered testamentary disposition, and, upon minimal discrepancy(s), if any, vis-a-vis, the completest satiation, not being meted qua the statutory ingredients, cast under Section 63 of the Indian Succession Act, hence, at the pre-registration stage, rather would become subsumed, (a) upon, the statutory endorsement made, on Ex. D-1, hence by the Registering authority concerned, also not coming under a cloud. Both DW-5 and DW-6 are witnesses, to, the making, of, the apt sealed statutory endorsement, hence upon Ex. D-1, (b) and, whereunderneath the thumb impression, of, the deceased testator also occurs, and, also the signatures, of, both DW-5 and DW-6, are, testified to be made, in contemporaneity vis-a-vis Ex. D-1 becoming accepted for registration, (c) and, both testify qua validity, of, the statutory endorsement, made, on Ex. D-1, (d) however, therethrough the apposite sealed signatures borne in statutory endorsement, becomes tentatively rejuvenated, dehors the lack of completest statutory satiations, being meted, upon, Ex. D-1, vis-a-vis, the phase, of, its preregistration. However, even the corroborative testifications, of, DW-5 and DW-6, qua theirs, before the Registering officer, scribing their respective signatures, upon, Ex. D-1, become rather blunted, by, the factum qua there, occurring, rife intra-se, contradictions, inter-se, their testifications, (a) contradictions whereof are comprised in DW-5, rendering echoings in his examination-in-chief, qua at the preregistration stage, one Bhag Singh, in, presence, of, the deceased testator appending his signatures, upon, Ex. D-1, whereas, in, dire contradiction thereto Bhag Singh,

deposing, qua his appending his signatures, upon, Ex. D-1 rather only before the sub Registrar concerned .

17. Though the afore inter-se contradiction(s) appear, to, be extremely trivial. However, its impact is grave, and, critical, given hence with the afore, inter-se, contradiction inter-se the testifications of DW-5, and, DW-6, highlighting, the, trite factum qua the signatures of DW-6 Bhag Singh, as, borne in Ex. D-1, also not being made, before, the sub Registrar concerned, rather theirs being made elsewhere. Importantly when Ex. D-1 was a registered document, and, upon leave being granted, to, introduce it as a secondary evidence, it was hence proven, through, the testification, of, a registration clerk, (i) yet even when the registered copy of the Ex. D-1, is maintained in the records of the sub Registrar concerned, and, also comprises, the, original of the apposite registered testamentary disposition, (ii) and, when with the afore suspicion hence ingraining the making of signatures, by, both DW-5 and DW-6 in contemporaneity, vis-a-vis, the sealed statutory endorsement, being made thereon, by, the Sub Registrar concerned, and, whereat the thumb impression, of, the deceased testator, were also embossed hence, thereunderneath, the apposite endorsement, (iii) rather imperatively enjoined adduction, of, evidence both, for, dispelling the afore suspicion, and, for ensuring visiting, of, satiation, vis-a-vis, the mandate, of, Section 63 of the Indian Succession Act, (iv) besides, also to secure a conclusion qua it remaining unsuttled, and, comprised in the propounder of Ex. D-1, hence ensuring the stepping into the witness box, of, the Sub Registrar concerned, for, hence his making a deposition, qua only, in his presence, the, afore DW-5, and, DW-6, appending their signatures on Ex. D-1, (v) and, only when thereupon, the, effect of minimal discrepancies, vis-a-vis, the apt statutory compliance(s), hence at the pre-registration stage, would be deemed, to be overcome.

18. However, when the Sub Registrar, did not step into the witness box, and, hence when the afore skepticism, as, percolates, vis-a-vis, the testification of DW-6, qua his making his signatures, upon, Ex. D-1, only before the Sub Registrar concerned, (i) thereupon the vigour, of, the sealed statutory endorsement made upon Ex. D-1, by the Sub Registrar concerned, becomes scuttled, (ii) thereupon the sealed statutory endorsement made, upon, Ex. D-1, looses significance, and, hence it is concluded qua the peremptory statutory mandate, borne in Section 63, of, the Indian Succession Act, remaining thoroughly un-satiated.

19. In view of the above, there is no merit in the appeal, the same is accordingly dismissed. The impugned verdict is maintained and affirmed. Substantial questions of law are answered accordingly. All pending applications stand disposed of accordingly. Records be sent back.

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

Kishani Devi & others ...Appellants.

Versus

Birbal Singh and Others ....Respondents.

RSA No. 405 of 2004 a/w
Cross objections No. 499 of 2004
Reserved on:18.9.2019
Decided on : 30.9.2019

Indian Evidence Act, 1872 – Section 3 – Appreciation of oral evidence – Claim based on bequeath – Held, claim with respect to land based on bequeath must also be supported by revenue record. (Para 11 to 13)

For the Appellants: Mr. N.K Thakur, Sr. Advocate with Mr. Divya Raj Singh, Advocate.

For the Respondents: Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate, for respondents No. 1,3 and 4/cross-objector.
Mr. Kulwant Chauhan, Advocate, vice counsel, for respondent No. 6.
Respondents No. 2 (a) to 2 (c), 5(a) to 5 (f) and 7(a) to 7(d) ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The plaintiffs' suit bearing No. 91/87, preferred before the learned Sub Judge, Ist Class, Court No. II, Una, District Una, H.P., for, rendition of a decree, for, setting aside mutation attested, on, 24.10.1979, and, for rendition, of, a declaratory decree, vis-a-vis, theirs being declared owners in possession, vis-a-vis, the suit land, stood partly decreed, and, partly dismissed, in as much, as, the plaintiffs were declared, as, owners in possession of the old khasra No. 185 corresponding, to, new khasra Nos.412, 413, 416 and 417, and, were also declared to be owners of old khasra No. 307, corresponding to new khasra Nos.568, 569, 570, 571, 608, 609, 610, 616 and 618, situated in village Lakhroon, Tappa Muchhali, Tehsil Bangana, District Una, and, thereafter, the defendants were also directed, to, handover, the, vacant possession of old khasra No. 307, to, the plaintiffs.

2. The plaintiffs being aggrieved therefrom instituted, a, Civil appeal No. 39 of 2002, and, defendants also being aggrieved therefrom hence instituted a Civil appeal No. 41 of 2002, before the learned District Judge, Una, H.P., and, both the afore appeals were decided, under, a common verdict, being recorded thereon, on, 9.6.2004, (i) wherethrough, the plaintiffs' appeal, was partly allowed, and, defendants' cross appeal, stood dismissed, and, the verdict recorded by the learned trial Court was modified, in as much, as, (ii) the plaintiffs become declared to be owners, in possession, of, land comprised in old khasra No. 185 (new khasra No. 412,413,416 and 417), old khasra No. 307 (new khasra No. 568, 569,570,571,608,609,610,616,617 and 618, and, old khasra No. 273 (new khasra No. 601,603,647,655 and 656 situated in village Lakhroon, Tapa Muchhali, Tehsil Bangana, District Una, H.P., (iii) and, the entry to the contrary, showing the name, of, defendant, upon, the aforementioned suit land, stood declared, to be null and void, and, the defendants, are, further restrained, from, interfering in any manner, over, the possession of the plaintiffs, qua, the suit land.

3. The brief facts of the case are that the plaintiffs filed a suit for declaration to the effect that they are owners in possession of the land comprised in Khewat No. 29, Khatauni No. 31, Khasra Nos. 185 and 307 and half share in Khewat No. 61 min, Khatauni No. 191, khasra Nos. 273, 310 and 317 as per jamabandi for the year 1981-82 situated in village Lakhroon, Tappa Muchhali, Tehsil Bangana, District Una, (for short "the suit land"). On the basis of registered will of 20.3.1979 executed by Kirpa Ram, grand-father of the plaintiffs and defendant No.1 and the consequential mutation No. 436 of 20.10.1979 in favour of defendant No.1 in respect of suit land is void. In effective, with a permanent injunction restraining the defendants from interfering in any manner over the suit land. According to the plaintiffs, the suit land mearing 11 kanal 1 marlas was owned and possessed by Kirpa Ram, grandfather of the plaintiffs and father of defendant No.1 and said Kirpa Ram died in village Hatli on 27.4.1979. Sh. Kirpa Ram, during his life time on 20.3.1979 executed a will in favour of the plaintiffs and defendant No.1. Jaswant Singh and Dhyan Singh and on the basis of the said will Kirpa Ram bequeathed his lands and house situated in village Lakhroonbelow the "Sarak se Nichli" i.e. below the road of the plaintiffs whereas defendant No.1 was given land and houses above the road i.e. sarak se upparli. The other sons of Kirpa Ram, namely Jaswant Singh and Dhyan Singh were given land in village Hatli Patialian. The road dividing the property of the parties passes through khasra No. 272 and suit land is located, thus below the road. The defendant No.1 being an influential person, behind the back of the plaintiffs got attested mutation No. 436 dated 24.10.1979 wrongly in his favour whereas the land below the road has been bequeathed to the plaintiffs. Mutation No. 436 is wrong illegal and void. Emboldened by the wrong entries the defendant No.1 sold land measuring 3 kanal 6 marlas being half share out of the land measuring 6 kanal 12 marlas comprised in khasra No. 307 to defendants No. 2 to 4 vide sale deed of 21.1.1987. The said sale deed is a fictitious document and does not confer any title. Now the defendants No.1 to 4 are hurling threats of interference in the possession of the plaintiffs for the last one month. The defendants were asked to admit the claim of the plaintiff and to desist from interfering in their possession of the suit land but they declined to do so. Hence the suit.

4. The suit was resisted and contested by the defendants and defendant No.1 filed separate written-statement taking preliminary objections inter-alia the suit being bad for non-joinder of necessary parties, the suit being time barred, estoppel, maintainability etc. Defendant No.1 admitted the factum of will dated 20.3.1979 but denied the plea taken by the

plaintiffs regarding bequeathing of the suit property in their favour. The testator Kirpa Ram had bequeathed to the plaintiffs house property know as Rakkar Johr Wali over which the plaintiffs are in possession. The mutation has been sanctioned in favour of defendant No.1 in accordance with law and later on defendant No.1 has sold khasra No. 307 to defendants No. 2 to 4 through registered sale deed for valuable consideration. Defendants No.2 to 4 are bonafide purchaser for valuable consideration without notice after thorough enquiry on the basis of mutation and entry in the revenue record, as such are entitled to remain possession, as, owners. The defendants denied other averments made in the plaint. Defendants No. 2 to 4 did not file any written-statement, and, were declared to be proceeded against ex-parte in the trial Court order of 20.6.1987.

5. In the replication, the plaintiffs have reiterated, and, reasserted the contents, as, enumerated in the plaint, and, have controverted, the, contention(s) raised, in, the written-statement(s).

6. From the pleadings of the parties, the, following issues were framed by the learned trial Court:-

1. Whether the impugned mutation is not in accordance with will dated 20.3.1979? OPP

2. Whether the plaintiffs are owners in possession of the suit land? OPP

3. If issue No.2 is proved, whether the defendants No. 2 to 4 are bonafide purchaser for value of the land purchased by them? OPD

4. Whether the plaintiffs have no locus standi to sue? OPD

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

5-A Whether the suit is within limitation period? OPP

5-B Whether the suit is property value for the purpose of Court fee and jurisdiction? OPP

5-C Whether the plaintiff is estoped by his own act and conduct to file the suit? OPD

5-D Whether the suit is not maintainable? OPD

6. Relief.

7. On an appraisal of evidence, adduced, before, the learned trial Court, the learned trial Court, partly decreed and partly dismissed the plaintiffs' suit. In an appeal, preferred therefrom, by the aggrieved, before the learned First Appellate Court, the latter Court, while accepting the plaintiffs' appeal, and, while dismissing the cross appeal preferred, by the defendants, hence modified the judgment, and, decree, of, the trial Court.

8. The defendant No.1, being aggrieved therefrom hence, instituted the instant RSA before this Court, and, the plaintiff No.1, being aggrieved therefrom, also therewithin instituted, Cross objections No. 499 of 2004, before this Court.

9. When the appeal came, up for, admission, on 17.5.2005, this Court, admitted the appeal, on, the hereinafter extracted substantial questions of law:-

1. Whether the decree for possession in respect of the land in question could have been granted in favour of the respondents in view of their specific pleading that this land was in joint ownership and possession of the appellants-defendants and respondents/plaintiffs?

2. Whether the findings of the Courts below that the parties were not in separate ownership and possession of the land inherited by them under the Will of Kirpa ram are dehors the evidence on record?

Substantial questions of law

10. The predecessor-in-interest of the contesting litigants, made a will embodied in Ex. PW-2/A, wherethrough, he made a bequest, and, wherethrough, he constituted, the, plaintiffs, as, his legatees, vis-a-vis, the apposite property occurring below the road, and, also therethrough, he, constituted, the, defendant No.1, as, his legatees, vis-a-vis, his estate, hence occurring above the road.

11. Consequently, the entire lis is rested, upon, the occurrence(s), in, the revenue records, and, appertaining to estate, of, the deceased testator hence bearing conformity therewith, and, therefrom it is to be obviously fathomed, vis-a-vis, the reflected therein lands

occurring above the road, or, below the road, (a) for, thereafter making hence determination(s), vis-a-vis, the defendant No.1, or, the plaintiffs, holding the apt empowerment, to, claim a valid right, of, theirs, hence becoming owners in possession thereof, and, also thereafter, for, determining whether the apposite mutation attested, on, 24.10.1979, becoming validly attested.

12. For resting the afore conundrum hence besetting this Court, an allusion is to be made, vis-a-vis, an affirmative, and, conclusive order being made, upon, an application, cast under the provisions of Order 41 Rule 27, readwith Section 151 CPC, application whereof, stood instituted, before the learned first appellate Court, during, the pendency, of, the afore-stated Civil Appeals, (a) and, therein reflections are cast vis-a-vis khasra No. 411,426, 428, 424, 425, 69, 447, 652, 661, 657 and 658 standing reflected, as, "Gair Mumkin Sadak" (b) and the afore reflections, are, in concurrence with the therealongwith appended jamabandi Ex. PC, and, appertaining to the year 1996-97, (c) and, also wherealongwith jamabandi bearing Ex. P-14, stood appended, and, it makes reflections, vis-a-vis, old khasra No. 273, the corresponding thereto new assigned khasra numbers, being 601, 603, 647, 655, 654, and, besides thereto, the, afore jamabandi also denotes, vis-a-vis, old Khasra No. 310, the, newly assigned thereto khasra numbers being 583, 589, 591, 592, (d) and, vis-a-vis, old khasra no. 317, the newly assigned thereto khasra numbers being 564 and 565. Conspicuously, the plaintiffs, had laid a claim, to, old khasra No. 273, 310, 317, on, anvil of theirs' occurring below, the "Gair Mumkin Sadak", and, hence with theirs being constituted legatees qua therewith, hence, the order of mutation, being enjoined, to be corrected. Meeting(s), of, credence thereto, for the relevant purpose, is, befitting, as, the reflections, cast therein, are not rebutted through adduction of potent evidence.

13. However, the plaintiffs also apart therefrom, laid a claim qua khasra No. 273 and 310, on, anvil of the afore khasra numbers, rather falling below the road, and, hence theirs being legatees thereof, and, also theirs holding, a, valid title thereof hence as owners, in, possession.

14. Nonetheless, the afore made espousal of the plaintiffs is amenable for rejection, (i) as, a perusal of copy of Shajra Ex. P-12, and, also a perusal of copy of Aks Musavi, embodied in Ex. P-19, does not bear out, the, espousal of the plaintiffs, vis-a-vis, from old khasra No. 317, hence new khasra Nos. 564, and, Khasra No. 565 being carved, (ii) as reiteratedly theirs' qua therewith claim would be construed, to be validly made, upon, the afore new khasra Nos. 564 and 565, being precisely, depicted in Sajra Ex. P-12, to be falling below the "Gair Mumkin Sadak", and, whereas the afore depiction is grossly amiss therein, (iii) besides further thereonwards, the, further claim of the plaintiffs, vis-a-vis, old khasra No. 310, whereto hence, the newly assigned khasra Nos. 583, 589,591,592, is, also an invalid claim, and, warrants its rejections, as, Ex. P-12, does not, make, any, disclosure, vis-a-vis, the afore khasra numbers falling, below the road, (iv) and, yet, the, further espousal of the plaintiff, vis-a-vis, khasra Nos. 601, 603, 647, 655 and 654, being the newly assigned khasra numbers qua old khasra number No. 273, is however accepted, as, a perusal of Ex. P-12, rather makes vivid echoings, vis-a-vis, the afore khasra numbers, falling below, the road, and wherethrough, hence the plaintiffs, would, in concurrence with the testamentary disposition, be entitled to claim a relief, vis-a-vis, theirs being validly constituted legatees qua therewith. The afore reflections in the afore exhibit enjoy an aura, of, solemnity given no potent evidence, for, denuding, the reflections carried therein becoming adduced.

15. Consequently the claim of the defendants, vis-a-vis, their holding right of ownership, vis-a-vis, old khasra No. 273 does concomitantly, hence warrant rejection.

16. The upshot of the above discussion is that, the present appeal is dismissed, and, the impugned verdict, is, maintained, and, affirmed, and, consequently, the instant RSA, and, also, the, cross objections are dismissed. Substantial questions of law are answered accordingly. All pending applications stand disposed of accordingly. Records be sent back. No costs.

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

Smt. Meeran Devi and another ...Appellants.

Versus

Shri Daya Ram and Others ....Respondents.

RSA Nos. 123 and 124 of 2006
Reserved on: 12.9.2019
Decided on : 30.9.2019

Limitation Act, 1963 – Articles 64 & 65 – Adverse possession – Joint land – Exclusive possession of co-sharer – Effect – Held, without clear proof of ouster of other co-sharers not in actual possession of land, a co-sharer in its exclusive possession can not be held to have become owner by way of adverse possession. (Para 14)

Joint land – Suit for possession of land by co-sharer, who is out of its possession, whether maintainable?– Held, suit for possession by co-sharer in fact, is a suit for partition – Preliminary decree of partition as passed in appeal by District Judge, can not be interfered with. (Para 14).

Partition Suit – Principle of Owelty – Applicability – Held, in appropriate cases, court by applying principle of owelty, may grant monetary compensation to a co-sharer in lieu of his share in the undivided property. (Para 17).

For the Appellants: Mr. Bhupender Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate.

For the Respondents: Mr. B.P Sharma, Sr. Advocate with Mr. Arun Kumar, Advocate, for respondent No.1.
Mr. Varun Chandel, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The plaintiff's suit No. 15/1 of 1992, instituted before the learned Sub Judge, 1st Class, Ghumarwin, District Bilaspur, H.P, for, rendition of a declaratory decree, and, for rendition, of, a decree, of, permanent prohibitory injunction, vis-a-vis, the suit land, and, against the defendants, stood partly decreed, in as much, as, (i) the plaintiff was declared to be entitled, for, partition of the suit land measuring 5 biswas, comprised in Khasra No. 144, Khata/Khatoni No. 93/185, situated in village Ghumarwin, Pargna Tiun, Tehsil Ghumarwin, District Bilaspur, H.P., (ii) and, also the further espoused relief qua the defendants being restrained, from, raising construction, upon, the suit land, till the partition of the suit land by the competent Court of law, hence stood accorded.

2. However, the espoused relief of possession, was, declined, on, anvil qua it being grantable, only upon, the suit land becoming validly dismembered by metes and bounds, hence, by the competent Court of law.

3. The defendants No.1 and 2, being aggrieved therefrom instituted Civil Appeal No. 107/13 of 2004/1999, and, also the plaintiff, being aggrieved by declining to him, the, relief of permanent prohibitory injunction, till dismemberment, of, the suit land, occurs by metes and bounds, and, also his becoming aggrieved, against, the declining of the relief of possession, also instituted Civil Appeal No. 106/13 of 2004/1993, before the Additional District Judge, Ghumarwin, District Bilaspur, H.P., and, both the aforesaid appeals, were decided, under a common verdict, recorded on 18.11.2005, (i) wherethrough(s) the learned first Appellate Court after quashing the afore rendition, of, decree(s), vis-a-vis the plaintiff, (ii) had also pronounced a preliminary decree, of partition, with a declaration qua the plaintiff, being the joint owner in possession, of ½ share of the suit land, measuring 0.5 Biswas, comprised in Khasra No. 144, Khata/khatoni No. 93/185, situated in village Ghumarwin, Pargana Tiun, Tehsil Ghumarwin, District Bilaspur, H.P, (iii) and, the defendants No.1 and 2, were declared to be joint owners in possession, of, 9/20 shares, and, defendant No.3 was declared to be owner, in possession of 1/20 shares, in, the suit land. Further thereonwards the plaintiff was declared, to be entitled, for, exclusive possession, of, ½ share of the suit land, through, apt partition through metes and bounds, and, the mode of partition was directed to be prepared, by, the Local Commissioner, to be appointed with the consent, of, the parties, by, the learned lower Court.

4. Defendants No. 1 and 2/appellants herein, being aggrieved therefrom, hence, through the instant RSAs, preferred before this Court, strives to beget reversal thereof.

5. The brief facts of the case are that the plaintiff and the defendants are co-owners in khasra No. 144, Khata/Khatoni No. 94/185, situated in village Ghumarwin, Pargna Tiun, Tehsil Ghumarwin, District Bilaspur, H.P. (for short "suit land"). The plaintiff/respondent No.1 herein (for short "the plaintiff") was co-owner in possession of ½ share of the suit land. The suit land was purchased by the plaintiff and his sister Krishani

Devi. Defendants No.1 and 2/appellants herein (for short defendants No.1 and 2) inherited share of Smt. Krishani Devi, whereas defendant No. 3/respondent No.2 herein had purchased portion of the suit land from Smt. Krishani Devi. Shyam Lal son of Smt. Krishani Devi had also expired and his share was inherited by defendants No.1 and 2. The plaintiff and defendants had constructed a two storeyed house of two rooms in each storey on the suit land. The plaintiff and defendants No. 1 and 2 and their ancestors had also lived in the house in question situated on the suit land. The plaintiff had joined defense service and he used to visit home after one year. However, the plaintiff and Smt. Krishani Devi constructed another house in the vacant portion of the suit land. On 15.1.1992 when the plaintiff came on leave he came to know that the defendants had dismantled the old house and had started construction of a new house. The plaintiff prayed that he was entitled for separate possession of his ½ share in the suit land by partition. The plaintiff had sought a decree for declaration that he was entitled for separate possession of his ½ share of the suit land by way of partition from front side to back alongwith structure raised in the suit land in lieu of the material of the old dismantled house etc and in the alternative for possession of his ½ share of the suit land after demolishing the structure raised thereon.

6. The defendants by filing written-statement, contested the suit by taking preliminary objections qua suit being not properly valued for the purpose of Court fee and jurisdiction and the plaintiff being estopped from filing the suit. On merits, it stands averred that the plaintiff was not party with Smt. Krishani Devi in purchasing the suit land nor he had participated in construction of the house. The house was constructed only by Smt. Krishani Devi. The plaintiff never lived with Smt. Krishani Devi in the house constructed on the suit land. The plaintiff had made only plastering work etc. in one room, which was left in complete. Defendants No. 1 and 2 are owners in possession of the suit land except a portion which was sold to defendant No.3 by the husband of defendant No.1. Defendants have also claimed that they had become owners of the suit land by way of adverse possession. Thus the plaintiff was not entitled for separate possession of the suit land and the structure thereon by way of partition.

7. No replication was sought to be filed by the plaintiff.

8. From the pleadings of the parties, the following issues were framed by the learned trial Court:-

1. Whether the plaintiff is co-owner in possession of the suit land, if so, what are their share? OPP

2. Whether the suit not properly assessed for the jurisdiction and Court fee as alleged? OPD

3. Whether the plaintiff is estopped to file the suit from his conduct and deeds? OPD

3-A Whether the plaintiff is entitled to relief of possession as prayed? OPP

3-B Whether the plaintiff is also entitled to the recovery of mesne profits as alleged, if so to what amounts? OPP

4-A Whether the defendant has become owner of the suit land property by way of adverse possession as alleged? OPD

5. Relief.

9. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, partly decreed the plaintiff's suit. In the appeal(s) preferred therefrom, by the plaintiff, as well, as the defendants, before the learned First Appellate Court, the latter Court, while setting aside the verdict recorded, by the learned trial Court, had also pronounced a preliminary decree, of partition, with a declaration qua the plaintiff, being the joint owner in possession, of ½ share of the suit land, measuring 0.5 Biswas, comprised in Khasra No. 144, Khata/khatoni No. 93/185, situated in village Ghumarwin, Pargana Tiun, Tehsil Ghumarwin, District Bilaspur, H.P, (iii) and, the defendants No.1 and 2, were declared to be joint owners in possession, of, 9/20 shares, and, defendant No.3 was declared to be owner, in possession of 1/20 shares, in, the suit land. Further thereonwards the plaintiff was declared, to be entitled, for, exclusive possession, of, ½ share of the suit land, through, apt partition through metes and bounds, and, the mode of partition was directed to be prepared, by, the Local Commissioner, to be appointed with the consent, of, the parties, by, the learned lower Court.

10. Now defendants No. 1 and 2/appellants herein, being aggrieved therefrom, hence, through the instant RSAs, preferred before this Court, strives to beget reversal thereof.

11. When the appeal(s) came up for admission, on 18.6.2007, this Court, admitted the appeal(s), on, the hereinafter extracted substantial questions of law:-

> 1. Whether the joint ownership of the parties to the land reflected in the revenue record, was sufficient to raise presumption of joint ownership over the structure standing on the suit land, which was proved to have been raised by the predecessor-in-interest of the defendants-appellants exclusively and without any objection and contribution from the plaintiff? Have not both the Courts below exceeded their jurisdiction in granting the decree for partition of the house/structure by meets and bounds without appreciating the correct legal position.
>
> 2. Whether both the Courts below have committed grave procedural illegality and acted with material illegality and irregularity in not determining the value of the suit for the purpose of the Court fee and jurisdiction of the reliefs claimed? Was not it incumbent of the Courts below to have at the first instance determined the market value of the suit property on which the plaintiff was required to pay ad-velorum court fee, which was essential for determining the pecuniary jurisdiction of the trial Court as well as Appellate Court?
>
> 3. Whether the findings of both the Courts below on Issue No. 4-A whereby the defendants-appellants asserted their exclusive title to the suit property by way of adverse possession have been negatived? Has not there been sheer misreading of pleadings oral and documentary evidence and application of correct principles of law.

Substantial questions of law:-

12. Since, common questions of law in both the appeals arise, for, determination, hence both are liable to be disposed of, under, a common verdict being pronounced thereon.

13. Uncontroverdly the construction of a house, upon, the suit land, is, raised by one Shaym Lal, who, is related to co-defendant No.1 as, her husband, and, to co-defendant No. 2, as, her father.

14. Even though, the revenue entries appertaining, to, the suit land, and, embodied in the jamabandi, comprised in Ex.PA, (a) unfold(s) that the suit land is jointly owned, and, possessed, by the contesting litigants, (b) however, for rebutting or dislodging, the, presumption of truth, as, carried by the afore reflections, the, contesting defendants had reared a contention in the written-statement, qua, their acquiring title thereto, by adverse possession, and, had also strived, to, hence therethrough rather unsettle the claim of the plaintiff, to, seek dismemberment of the jointly recorded suit land, by, metes and bounds. However, the afore reared contention, is, highly fanciful, and, also is pretextual, and, deserves rejection as aptly done, by the both the Courts below, given (a) the afore reared contention, without the requisite animus possidendi, and also without it being averred, to commence with specific delineation, in time, though peremptorily required, nor, also when any evidence in concurrence therewith, stands adduced (b) besides when each of the recorded co-owners of the suit land, enjoys unity of title, and, of community of possession, vis-a-vis, every inch thereof, (c) dehors exclusivity of possession, if any, of the co-owners concerned, and, also when the plea of ouster reared by the co-owners concerned, anchored upon theirs holding exclusive possession of the suit land, and, qua, his/their therethrough, hence, completely ousting, the, participation, of, other co-owners, rather not holding physical possession, of, the undivided suit land, hence, for, holding validity also does require, the, strictest compliance, with, the law appertaining therewith (d) comprised, in, pleadings vis-a-vis their holding possession, with, an active animus possidendi hence sparked, from, precisely delineated phase(s), of, times, and, it, continuing, upto, the institution of the suit, (e) whereas the afore precisions with time, of, defendants No.1 and 2, commencing their possession, and, with an animus possidendi, vis-a-vis, the suit land, and, also hence therethrough completely ousting, the, recorded co-owners, from, enjoyments of, the, jointly recorded suit land, remain(s) unechoed, in, the apt written-statement, nor concurrent evidence therewith stands adduced, (f) thereupon, the other recorded co-owners, though, not holding any exclusive possession of the suit land, cannot be either barred, to, claim rendition, of, a decree of possession, and, also

cannot be barred to claim rendition, of, a decree of partition, (g) and, thereafter they are rather facilitated to ensure, the, drawing up, of, a mode of partition, for, in consonance therewith, hence valid dismemberment(s) of the suit land, rather occurring. Consequently the entries embodied in Ex. PA are enjoined, to be revered, and, thereupon prima-facie, all the recorded co-owners are entitled, to, rendition of a preliminary decree, of, partition being made, vis-a-vis, the suit land, and, also prima-facie, as, aptly ordered, by the learned first Appellate Court, hence after the preparation, of, an consensual mode of partition, they are entitled, in concurrence therewith, for, a valid complete dismemberment, of, the suit land.

15. Since this Court, for the reasons to be assigned hereinafter, makes a conclusion, that, the principle of owelty warrants qua deference being meted thereto, (a) thereupon it would not be apt and befitting for this Court, to, proceed to mete any computation, vis-a-vis, the substantial question, of, law appertaining, to, the suit land being not properly valued, for, the purpose of Court fee and jurisdiction, (b) in as much as, the plaintiff's suit being enjoined, to be valued, in commensuration, vis-a-vis, the market value of their shares in the suit land, and, also in consonance therewith advoleram Court fee, being, enjoined to be affixed thereon.

16. Be that as it may, the preeminent reason hence swaying this Court to, upon, adoption, of, the principle of owelty, rather compute monetary compensation, vis-a-vis, the defendants concerned, and, when the afore principle of owelty, adoption whereof, enjoins adherence being meted thereto, only upon, certain exigent, and, special circumstances, hence precluding the making of an order, for, ensuring a valid complete dismemberment of the suit land, hence occurring, (i) thereupon, this Court after partly setting aside, the, operative portion, of the, verdict pronounced by the learned first appellate Court, upon, the afore Civil Appeals, (ii) wherethrough, after rendition, of, a preliminary decree, of, partition, by the learned first appellate Court, vis-a-vis, the contesting litigants, it also had, ordered for drawing, of, a consensual mode, of, partition, and, thereafter in tandem therewith the apt dismemberment, of, the suit land was ordered (iii) hence, this Court after noticing, the, hereinafter alluded hence exigent and critical circumstances, rather forbidding adherence, being meted to the afore operative portion, of, the verdict recorded by the learned first appellate Court, rather adopts the principle of owelity, or, the principle of monetary compensation, being meted, to the plaintiff/defendant concerned (a) exigent cause(s) whereof are comprised in admission by the defendants concerned, in, the written-statement, that, the construction of the house, upon, the suit land occurring 12 years prior to the institution, of, the suit (b) no evidence existing on record, qua, during the time/phase when the defendants concerned proceeded to raise construction, upon, the suit land, the plaintiff ensuring the stalling of construction raised by the defendants concerned, upon, the suit land, through, his recoursing all the available legal mechanisms, (c) the effect of afore conclusion, does concomitantly, stall and estop him, to, contend that the construction, of, the house, upon, the suit land, and, as made by the defendants concerned, being without his consent, (d) contrarily, an inference is sparked, qua, the plaintiff acquiescing, vis-a-vis, the raising of a construction, by the defendants, dehors this Court rebutting the latters' contention qua their acquiring title, to, the undivided suit land, through, adverse possession, and, the further concomitant thereof sequel is qua the plaintiff also abandoning or waiving, his, rights in the suit land, (e) and, though the effect of the afore inference would not beget, the, making, of any inference therefrom qua the entries borne in Ex. PA, reflecting the suit land, being jointly owned, and, possessed, by the contesting parties, becoming belittled or underwhelmed, (f) nonetheless the effect thereof is qua, upon, a preliminary decree of partition, being meted, the, fullest deference, and, also upon it being carried forward, through, an order being made for a consensual mode of partition, being drawn, and, thereafter in concurrence therewith, the, suit land begetting dismemberment, rather would definitely ensure hardships being encumbered, upon, the defendants, (g) also, would beget, the, ill causality, and, also ill consequences, of, injustice being caused upon the defendants concerned, besides the further, ill, consequences, will ensue qua therethrough, the, plaintiff without expending any money, upon, the suit land, his becoming unjustly enriched.

17. In sequel, by, adopting the principle of owelity, hence, this Court is constrained, to, direct for computation of monetary compensation, vis-a-vis, the defendants No.1 and 2, (i) thereupon, this Court deems it fit, that in commensuration, with the market value, of, the share of the plaintiff, and, of co-defendant No.3, in, the suit land, would, rather comprise the apt owelty/the apt monetary compensation, being visited upon them, and hence this Court orders, that, the learned trial Court shall after eliciting, from the local

commissioner concerned, a, report vis-a-vis, the market value, of, the share of the plaintiff, and, of co-defendant No.3, in the suit land, shall, make in proportions, vis-a-vis, the share of the afore(s), in, the suit land, hence, computation(s), and, disbursement(s), of, monetary compensation, to them, emphatically within three months hereafter.

18. In view of the above, the appeals are partly allowed. The impugned judgment is modified accordingly. The pending applications stand disposed of accordingly. Substantial questions of law are answered accordingly. The parties are directed to appear before the learned trial Court on 25/x/2019,and, the latter shall within two months, comply with the orders made upon him. Records be sent back.

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

Narayan Chand ... Petitioner.

Versus

Sh. Chaman Lal through LRs and others. ....Respondents.

CMPMO No. 271 of 2018
Reserved on 19.9.2019
Decided on : 30.9.2019

Code of Civil Procedure, 1908 – Order XXXIX Rules 1 & 2 – Temporary injunction –Grant of-- Plaintiff seeking temporary injunction against defendant from raising construction on ground of suit land being joint inter- se parties – Held, joint land interse parties stood partitioned and they are recorded in possession of land(s) allotted to them – Land no more joint between parties – Mere filing of appeal against order of partition would not invalidate holding of separate possession over partitioned land – Plaintiff has no prime facie case and balance of convenience in his favour – He is not entitled for injunction - Petition dismissed. (Para 6 & 7)

For the Petitioner: Mr. Dalip K Sharma, Advocate.
For the Respondents: Mr. V.S Rathour, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petition, stands directed, by the aggrieved applicant/plaintiff/petitioner herein (for short "the plaintiff"), against, the verdict recorded, upon, CMA No. 03-NL/14 of 2018, by the learned Additional District Judge-I, Solan, District Solan, H.P., (a) and wherethrough the defendants' appeal, was partly allowed, and, concomitantly the order rendered by the learned Senior Civil Judge, on, 3.1.2018, upon CMA No. 7/6 of 2018, whereby it directed, the, contesting litigants, to, maintain status quo, vis-a-vis, the nature, construction, and, possession, of, the land measuring i.e (i) 5 bighas 17 biswas, and, borne in khasra nos. 338/12 (3-11), 340/12 (2-1), and, upon khasra No. 28 (0-5), as, comprised in khata/khatauni Nos. 6 Min/6; and (ii) and also qua land measuring 3 bighas 4 biswas, comprised in khata/khatauni Nos. 5 min/5 bearing khasra No. 339/12, situated, in the area of village kashmirpur Brahmana, Tehsil Nalagarh, District Solan, H.P. (for short "the suit land"), (iii) was rather modified into an order, being pronounced, upon, the appellants/defendants/respondents herein (for short "defendants"), from, interfering, vis-a-vis, the land borne, in, khasra No. 339 of 2012, however, vis-a-vis land comprised in khasra Nos. 338/12, 340/12, and, Khasra No. 28 , the, espoused relief was declined, vis-a-vis, the plaintiff/applicant.

2. The plaintiff had strived, for, rendition, of, an order, of, ad-interim injunction being pronounced, vis-a-vis, the suit land, through, an application cast, under, the provisions of Order 39 Rule 1 and 2 CPC, and, the afore application, was cast, during the pendency of the apposite Civil Suit, wherein also, an alike relief stood espoused.

3. The learned counsel for the plaintiffs', endeavor to constrain this Court, to, interfere with the impugned verdict, would succeed, upon, the apposite triplicate tests, hence, governing the granting and declining, of, relief of ad-interim injunction, being satiated, (i) triplicate tests whereof are embodied, in the, trite principles(s) qua prima-facie case being

loaded, vis-a-vis, the plaintiff, (ii) balance of convenience also being loaded, vis-a-vis, the plaintiff, (iii) and, rather irreparable loss and injury being encumbered upon the plaintiff, upon, the espoused relief becoming declined, vis-a-vis, him.

4. In settling, from, the apposite material, as, existing on record, vis-a-vis, therethrough, hence, the afore triplicate tests rather governing the granting or declining, of, the espoused relief, becoming satiated or not satiated, (a) the germane factum, for, accepting the espousal, of, the plaintiff, is, rested, upon, the suit land remaining joint inter-se the contesting litigants, and, concomitantly until valid dismemberment(s) thereof, (b) through metes and bounds, hence occurring, hence, thereupto none of the contesting litigants, holding any leverage, to use or appropriate any portion of the undivided suit land, vis-a-vis, their exclusive usage, (c) as, conspicuously, any ordering, of, an affirmative order, upon, the apposite application, hence, would encumber, an, inapt casualty, vis-a-vis, the trite rubric underlining, the, concept of joint ownership, and, rested on the principle, vis-a-vis, till a valid dismemberment, of, joint land occurs, hence, thereupto every co-owners, holding unity of title, and, community of possession, upon, every inch of the joint land, (d) unless any of the contesting litigants, has, already disturbed equities, through raising construction, within, his share, and, upon, a, valuable portion of the undivided suit land, (e) and, whereupon, his being debarred, to, claim injunction against the other co-owners, who, strive(s), to, make compatible therewith strivings, upon, the undivided suit land.

5. Be that as it may, a perusal of the relevant paragraph, of, the impugned verdict, rather makes imminent trite displays, (a) vis-a-vis, after the completest dismemberment, of, the undivided suit land, occurring amongst, the, contesting litigants, also, through, the, apposite mutation, standing recorded, by, the revenue authority concerned, (b) and, thereafter in concurrence therewith, entries being made, in, the revenue records concerned, and, when the afore records also display, vis-a-vis, the defendants, becoming owners in possession, of, khasra Nos. 338/12, 340/12 and 28, and, the plaintiff becoming exclusive owner, in, possession of land borne in khasra No. 339/12, (c) thereupon, with occurrence, of, the completest severance, of, the joint estates, amongst, the contesting litigants, hence it would, be unbefitting for this Court, to, proceeded to make any interference with the impugned order. Also hence all the afore apposite triplicate tests are wanting, in their apt satiation.

6. The learned counsel for the plaintiff, contends that the order attesting mutation, hence made by the A.C 1st Grade on 9.9.2008, has been challenged, before the appellate authority concerned. However, the mere institution, of, an appeal thereagainst, before the quarter concerned, would not, negate the effect of the afore inference, as, after delivery of physical possession, of, dismembered tract of land, vis-a-vis, the contesting litigants concerned, (a) rather the mere pendency of, an, appeal against the order made, on, 9.9.2008, by the A.C 1st Grade, before the learned appellate authority concerned would not perse invalidate, the holding, of, separate possession(s), of, the the dismembered tracts, of land, rather by each of the erstwhile co-owners concerned. Moreso, with its institution, occurring after a period of six years, elapsing therefrom.

7. In aftermath, the afore triplicate tests, do not, beget their apt satiation, and, also hence, there is no gross perversity or absurdity in the appreciation of the records, as, done by the learned appellate Court, and, thereupon this Court is constrained, to, uphold the impugned order, and, to dismiss the instant petition. Accordingly, the instant petition is dismissed alongwith all pending applications.

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

Rameshwar Kumar ....Appellant/defendant No.1.

Versus

Kanta Devi & another ...Respondents/plaintiffs.

RSA No: 25 of 2008
Reserved on: 03.07.2019
Decided on: 09.09.2019

Tort Law – Battery – Suit for damages – Acquittal of defendant by criminal court in a case arising out of same incident - Effect on suit – Held, findings returned by criminal court

acquitting accused (defendant) in a case arising out of same incident has no bearing as far as the adjudication of dispute raised in civil suit is concerned – In criminal case, benefit of doubt has to be given to accused and it is not so in a civil suit. (Para 24).

For the appellant : Mr. R.K. Gautam, Sr. Advocate, with Mr. Atul Verma, Advocate, for the appellant.

For the respondents : Mr. G.C. Gupta, Sr. Advocate, with Ms. Meera Devi, Advocate, for respondent No.1.
None for respondent No.2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, appellant has challenged the judgment and decree passed by the Court of learned Additional District Judge, Shimla, H.P., dated 07.09.2007, in Civil Appeal No.12-S/13 of 2005, titled as Smt. Kanta Devi Versus Rameshwar Kumar & another, vide which learned Appellate Court while setting aside the judgment passed by the Court of learned Civil Judge (Senior Division), Shimla, H.P., in Civil Suit No.174/1 of 1996, titled as Kumari Kanta Devi Versus Rameshwar Kumar & another, decided on 29.10.2004, whereby learned trial Court dismissed the suit for recovery of ₹75,000/-, filed by present respondent Kanta Devi, allowed the suit and decreed the same for a sum of ₹75,000/- with costs, against the present appellant.

2. Brief facts necessary for the decision of present appeal are that respondent/ plaintiff Kanta Devi filed a suit for recovery of ₹75,000/-, as damages against defendants Rameshwar Kumar and Chander Shekhar. Her case was that her father was owner-in-possession of the land comprised in khasra No.323, measuring 1.16 bighas, situated in village Rampur Keonthal. Same was mortgaged by grand-father of plaintiff with one Paras Ram. It was redeemed by her father about 12-13 years back after paying the mortgage money. The land was in possession of her father for last more than 20 years. On 30.08.1995, plaintiff alongwith her father and other family members were working in the fields upon the said land, when defendants armed with sharp edged weapon came on the spot, trespassed over the suit land and started quarreling with plaintiff and her father. Defendants gave severe beatings to plaintiff and her father. Defendant No.1 struck a sharp edged weapon on the right forearm of plaintiff, causing Ulmnar Nerve injury. The matter was reported to the police, which lead to registration of F.I.R. No.200/95. Plaintiff was taken to Deen Dayal Upadhey Hospital, Shimla, where she was treated by the doctor. Defendants tried to pressurize the doctor to issue a Medico Legal Certificate, to the effect that the injuries suffered by plaintiff were simple. Plaintiff took up the matter against the doctor with the Medical Council, for professional misconduct. Injury caused to her forearm by defendant No.1 was a grievous injury. She nitially got treatment for said injury from Indira Gandhi Medical College & Hospital at Shimla and then at Christian Medical College and Hospital, Ludhiana. She was operated for Ulmnar Nerve Injury at C.M.C., Ludhiana. She suffered physically as also mentally on account of injury, suffered by her, for which she had to undergo treatment for a period of more than nine months. Plaintiff was 25 years old when she suffered the injury, but on account of the same, she could not get engaged and found a suitable partner. Her treatment cost was ₹13,153.50/ at C.M.C. Ludhiana. On travelling, she spent an amount of ₹15,000/-. Besides this, she also spent more than ₹30,000/- on her treatment and medicines at other places. On these basis, she claimed damages to the tune of ₹75,000/- from defendants.

3. The suit was resisted by defendants. As per them, the suit was filed on account of enmity between father of plaintiff and defendant No.1, due to land dispute. As per defendants, the suit land was previously in possession of predecessor-in-interest of defendants, Smt. Chandi Devi, who gifted the same during her lifetime, to defendant No.1.

The same was never redeemed as alleged by plaintiff nor possession of the land was with the father of plaintiff. Suit land never remained in possession either of plaintiff or her father and injury suffered by plaintiff was a self inflicted injury, which she suffered while cutting grass with 'Darati'. Defendants denied that they had caused any injury to plaintiff or that plaintiff was entitled for any damages, as alleged.

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

> "1.) Whether the plaintiff is entitled for the recovery of suit amount on account of damages as alleged? OPP.
>
> 2.) Whether the suit in the present form is not maintainable? OPD.
>
> 3.) Whether the plaint lacks material particulars if so its effect? OPD.
>
> 4.) Relief".

5. On the basis of evidence led by the parties in support of their respective contentions, learned Trial Court returned the following findings on the issues so framed:-

> "Issue No.1 : No.
>
> Issue No.2 : Yes.
>
> Issue No.3 : No.
>
> Issue No.4 : Relief.
>
> The suit is dismissed without cost as per operative portion of the judgment".

6. The suit was dismissed by the learned trial Court. It held that statement of PW-4 Ram Chand father of plaintiff, proved that disputed land was still reflected in the name of Chandi Devi as mortgagee in the revenue record, which demonstrated that the suit land was not yet redeemed by the father of the plaintiff. Learned trial Court also held that plaintiff had also failed to establish possession of her father over the disputed land.

7. Learned trial Court also held that whereas the offence allegedly took place on 30.08.1995 and plaintiff was operated at C.M.C. Ludhiana in Janjary/February, 1996, there was nothing on record to link that plaintiff had been operated in C.M.C. Ludhiana with regard to the injury which she had suffered on 30.08.1995. Learned trial Court also held that even if it was to be assumed that damage was caused to the plaintiff, yet it was reimbursed to the father of plaintiff by his employer. It held that plaintiff had failed to prove that she was entitled to get damages from the defendants. Learned trial Court also held that the suit was not maintainable on the ground that the Criminal Court had not yet held defendants guilty in the Criminal Proceedings which had been put in motion by plaintiff. It held that though Civil and Criminal Proceedings were independent in nature and findings of the Criminal Court were not binding upon the Civil Court, yet as plaintiff had not been able to establish that her father had title over the suit property and she was in possession of the same, the suit, as framed, was not maintainable. On these basis, learned trial Court dismissed the suit.

8. The findings so returned by learned trial Court were set aside in appeal by learned Appellate Court, filed by plaintiff. While allowing the appeal, learned Appellate Court held that all the logics given by learned trial Court for dismissing plaintiff's suit were invalid, as the only point which learned trial Court was required to find out whether the injury to plaintiff's forearm was caused by defendants or not and if yes, then what amount of compensation, she was entitled to. Learned Appellate Court held that plaintiff had examined four eye-witnesses i.e. herself (PW-3), her father (PW-4) and two independent witnesses i.e. PW-5 Chet Ram and PW-6 Hem Singh, whose statements proved that injury on the body of plaintiff was inflicted by defendant No.1. Learned Appellate Court further held that plaintiff had clearly deposed in the Court that on 30.08.1995, she was cutting grass in the field and Yashodha was with her, who was also cutting grass. Her father and one Chet Ram were

carrying grass from the field and one Hira Singh was also there. She stated that defendants came at the spot. Rameshwar was armed with 'Kulharu' and Chander Shekhar was armed with a 'Darat'. They started hurling abuses on her and also starting questioning her as to why she was cutting grass from the field. When she replied that she was cutting grass from her own field, defendant Rameshwar aimed a 'Kulharu' blow on her head and she raised her arm to ward off the blow. The blow landed on her right forearm and injury was sustained by her. She also stated that 'Darat' blow was given to her by Chander Shekhar. Her father, Chet Ram and Hira Singh intervened. Her father was also beaten up by defendants. On this, Yashodha also intervened and on hearing her cries, some other persons also gathered on the spot and on this, defendants ran away from the spot. Learned Appellate Court held that PW-4 Ram Chand stated that he had just gone towards his house with a bundle of hay on his back when quarrel took place. When he returned back, he saw that defendants were quarreling with his daughter and in his presence Rameshwar gave a blow with 'Kulharu', while Chander Shekhar gave a blow with 'Darati'. Learned Appellate Court further held that PW-5 Chet Ram and PW-6 Hira Singh also deposed in the Court about arrival of defendants on the spot with sharp edged weapons. It further held that the evidence against Chander Shekhar was not satisfactory. Statement of PW-3 was not fully corroborated by other witnesses with regard to the role of Chander Shekhar. Learned Appellate Court held that even plaintiff's own father had made a shaky statement in this regard. Whereas plaintiff had stated that Chander Shekhar was having a 'Darat' in his hand and he gave her a 'Darat' blow, her father contradicted plaintiff by stating sometimes that Chander Shekhar gave 'Darat' blows and sometimes that Chander Shekhar gave blows with a 'Darati'. Learned Appellate Court held that if Chander Shekhar was having a 'Darat' in his hand, then he could not have given blows with a 'Darati' because 'Darat' and 'Darati' were not same and 'Darat' was bigger than a 'Darati'. It further held that PW-5 also stated that Chander Shekhar gave a 'Darat' blow, but it did not hit on any part of plaintiff's body. Learned Appellate Court observed that even PW-6 had not deposed about Chander Shekhar giving any 'Darat' blow on the body of plaintiff and all that this witness had stated, was that Rameshwar inflicted injury on the body of plaintiff. On these basis, it held that plaintiff had not proved that any injury was caused to her by Chander Shekhar. It further held that as far as Rameshwar was concerned, statements of the witnesses were quite consistent and the evidence on record was sufficient to prove that injury to plaintiff on her Ulmnar Nerve was caused by defendant Rameshwar.

9. On the question of quantum of compensation, learned Appellate Court held that there was evidence that ₹13,153/- was paid by plaintiff at C.M.C. Ludhiana. It also held that it could be believed that every time she was accompanied by some attendant. Learned Appellate Court also held that it had come in plaintiff's statement that in connection with her visits to Ludhiana, she had spent about ₹15,000/- and a sum of ₹30,000/- was spent by her on her treatment elsewhere. It, thereafter, concluded that even if the statement that plaintiff had spent ₹30,000/- on her treatment at places other than C.M.C. Ludhiana, was not to be believed, yet she must have spent some amount on her treatment. It held that plaintiff had claimed ₹75,000/- as compensation, which was inclusive of pain and suffering suffered by her. Learned Appellate Court held that plaintiff had been suffering for a quite long time and she certainly was entitled to a substantial amount on account of pain and suffering.

10. On these basis, learned Appellate Court held that the overall claim of ₹75,000/- claimed as compensation could not be said to be excessive and that plaintiff was entitled to recover a sum of ₹75,000/- from defendant No.1. Learned Appellate Court, thus, decreed the suit of plaintiff, for a sum of ₹75,000/- with costs, against defendant No.1, whereas it dismissed the suit against defendant No.2.

11. Feeling aggrieved, defendant No.1 has filed the present appeal.

12. This appeal was admitted on 28.07.2008, on the following substantial question of law:-

" Whether the Ld. First Appellate Court below misread and mis-appreciated the oral and documentary evidence with special reference to the statements of doctors PW-1, PW-7 and DW-3, thereby vitiating the impugned judgment and decree?"

13. Learned Senior Counsel for the appellant has argued that the judgment and decree passed by learned Appellate Court was not sustainable in the eyes of law as learned Appellate Court had erred in not appreciating that plaintiff had failed to prove on record that any injury was inflicted on her body by appellant. He argued that the judgment and decree passed by learned Appellate Court was a result of misreading and mis-appreciation of the evidence on record and compensation awarded by learned Appellate Court was not sustainable in the eyes of law, because the Criminal Court had acquitted the accused, which included present appellant, of the offence alleged against them by the plaintiff. He further argued that when learned Appellate Court had come to the conclusion and rightly so that plaintiff had not been able to prove any case against defendant No.2, the same analogy ought to have been applied for appellant also because plaintiff had made same allegation against both the defendants and same set of evidence was led to prove the guilt of both defendants. On these basis, he submitted that the impugned judgment and decree passed by learned Appellate Court was not sustainable in law.

14. On the other hand, learned Senior Counsel for respondent No.1/ plaintiff has argued that there was no perversity with the judgment and decree passed by learned Appellate Court and the same called for no interference. He argued that though it was not in dispute that in the Criminal Proceedings so initiated, the accused which includes present appellant, stood acquitted, however, decision of the Criminal Court was not material for the purpose of the adjudication of the civil lis filed by plaintiff, because Civil Suit was to be decided on the basis of evidence placed on record in the same and in Civil Suit, plaintiff had successfully proved that defendant No.1 had caused physical injury on the body of plaintiff and for same, she was rightly compensated by learned Appellate Court. He thus argued that as there was no merit in the appeal, the same be dismissed.

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

16. The findings which have been returned by learned Appellate Court against present appellant are based on the basis of appreciation of evidence by it, on the basis of which it came to the conclusion that it stood proved on record that the injury on the body of plaintiff was caused by defendant No.1.

17. A perusal of the plaint filed by plaintiff, demonstrates that in para 3 of the plaint, it was mentioned that on 30.08.1995, when plaintiff alongwith her father and other family members were working in the field over land comprised in khasra No.323, measuring 1 bigha 16 biswas "both the defendants armed with sharp edged weapons came on the spot and trespassing over the land of father of plaintiff started quarreling with plaintiff and her father. Both the defendants gave severe beatings to plaintiff and her father. Defendant No.1 struck a sharp edged weapon on the right forearm of plaintiff, causing Ulmnar Nerve injury".

18. The defence of defendants as is borne out from the written statement was that the land in question never remained in possession of plaintiff or her father; family of her father wanted to grab the land forcibly alongwith other villagers; plaintiff while cutting the grass with 'Darati', hurt herself.

19. Now in this background, when one peruses the statement of PW-3 i.e. plaintiff, same demonstrates that she stated in the Court that on 30.08.1995, at around 6.00 p.m., she was cutting grass over the suit land alongwith one Yashodha, when defendants Rameshwar and Chander Shekhar came to the spot. She stated that Rameshwar had a 'Kulharu' in his hand, whereas Chander Shekhar had a 'Darat' in his hand. Defendants started abusing plaintiff. She further stated that in response when she told defendants that she was just

cutting grass from her own land, Rameshwar tried to hit her with the 'Kulhari' on her hand and in order to save herself, she covered her head with her arms and as a result thereof, she suffered injury on her right arm on account of the blow given by Rameshwar.

20. Before proceeding further, it is relevant to take note of the fact that the factum of plaintiff having suffered injury has not been denied even by defendants. This is evident from the stand which has been taken by defendants in the written statement, wherein they have deposed that plaintiff suffered injury while cutting grass with a sickle. The factum of plaintiff receiving injury on account of a quarrel which ensued between plaintiff and defendants, has been proved on record by plaintiff not only by way of her statement, but also by way of the statements of her father (PW-4), as also the statements of PW-5 Chet Ram and PW-6 Hem Singh.

21. It is also duly borne out from the record that plaintiff was operated at C.M.C. Ludhiana with regard to the injury which she has mentioned in the plaint. There is nothing on record placed by defendants to demonstrate that plaintiff was operated in C.M.C.Ludhiana for injures other than those, which were inflicted on her body by defendant No.1, i.e. present plaintiff, on 30.08.1995. Dr. Vijay, who entered the witness box as PW-7, proved on record the factum of the plaintiff having been operated upon in C.M.C. Ludhiana with regard to the injury in issue.

22. In this backdrop, when one peruses the statement of DW-3 Smt. Suresh Sood, a perusal of the same demonstrates that patient was brought to her on 30.08.1995. In her cross-examination, she has stated that the injury suffered by plaintiff, from which bleeding was there, was suffered by her on her right forearm. She also admitted a suggestion given to her in her cross-examination to be correct that the injury which was mentioned by her as sustained by plaintiff in the Medico Legal Certificate issued by her, could have been inflicted by a 'Kulhari'. She also stated that it was possible that plaintiff had suffered an injury of Ulmnar Nerve.

23. In my considered view, in the light of what has been discussed above, it cannot be said that the judgment and decree passed by learned Appellate Court is a result of misreading and mis-appreciation of evidence on record. Whereas in order to prove her case, plaintiff besides examining herself and her father, had examined two independent witnesses, who corroborated her case and proved on record that the injury was inflicted upon the body of plaintiff by defendant No.1/ present appellant, did not lead any independent witness to prove his case. This circumstance completely belies the contention of appellant that he had not inflicted any injury on the body of respondent.

24. As far as the quantum of compensation granted by learned Appellate Court is concerned, it could not be demonstrated by learned Senior Counsel for the appellant that the amount of compensation so granted was either excessive or arbitrary arrived at. I would also like to point out, at this stage that this Court concurs with the findings returned by learned Appellate Court that the adjudication by a Criminal Court has no bearing as far as the adjudication of a dispute raised in a Civil Suit is concerned, because whereas in a Criminal Proceeding, it is not the complainant who is pursuing the case and further whereas in a Criminal proceeding, benefit of doubt has to be given to the accused, it is not so in a Civil Suit. On the contrary, in a Civil Suit, if a plaintiff is able to prove its case against defendant, then the suit so filed by plaintiff, can be decreed, even if, in the same dispute, there is a verdict in favour of defendant in the Criminal Proceedings. The substantial question of law is answered accordingly.

25. In view of the findings returned hereinabove, as this Court does not finds any merit in the present appeal, the same is accordingly dismissed. No order as to costs. Pending miscellaneous applications, if any, stand dismissed. Interim order, if any, also stands vacated.

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

Rama Sharma .....Petitioner.

Versus

State of H.P. through its Secretary Department of Social Justice and Empowerment, Shimla-2 & others .....Respondents.

CWP No.2824 of 2015
Date of decision: 18.09.2019

Constitution of India, 1950 – Articles 14 & 226 – Principles of natural justice – Applicability - Held, principles of natural justice envisage that no person should be condemned unheard – No order can be passed by any authority be it quasi-judicial or otherwise at the back of a person if said order is to have civil consequences qua the said party – Order passed by Director, Women and Child Development on representation of a person adversely affecting the service of petitioner behind her back, is arbitrary. (Para 12 & 13).

For the petitioner	Mr. Dinesh Kumar, Advocate.
For the respondents	Mr. Dinesh Thakur, Additional Advocate General with Ms. Seema Sharma, Mr. Amit Kumar Dhumal, Ms.Divya Sood, Deputy Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General, for the respondents No.1 to 4. Mr. Deepak Bhasin, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge. (Oral)

By way of this Petition, petitioner has prayed for following reliefs:-

"(i) That the respondent may kindly be directed to produce the entire record pertaining to the case before this Hon'ble Court.

(ii) That Annexure P-9 order dated 15.05.2015 passed by Director Woman and Child Development Officer, Shimla, H.P., respondent No.4 may kindly be quashed and set-aside.

(iii) That any other relief which this Hon'ble Court deems fit and proper in the facts and circumstances of the case may also be granted in favour of petitioner in the interest of justice."

2. Brief facts necessary for the adjudication of the present petition are that the private respondent (Sushila Devi) was initially appointed as Anganwari Helper in Anganwari Centre Hambot, Tehsil Ghumarwin, District Bilaspur, H.P., in March/April, 2013. Her appointment was challenged by present petitioner under Clause 12 of the Guidelines framed by the respondent/ State for engagement as Anganwari Helper/ Anganwari Worker, before the Appellate Authority. Vide order dated 27.05.2013 (Annexure P-1), Additional District Magistrate, Bilaspur, District Bilaspur, H.P. allowed the appeal by holding that income of the selected candidate was in excess of the maximum criteria contained in the Rules. The Appellate Authority further ordered the appointment of petitioner in place of the selected candidate within 45 days of the order. An appeal filed against the said order by Sushila Devi was dismissed by the Appellate Authority i.e. Deputy Commissioner, Bilaspur, H.P., vide order dated 20.12.2013 (Annexure P-2). CWP No.4406 of 2014 filed by her was dismissed as withdrawn vide order dated 07.10.2014 (Annexure P-3). Petitioner was offered engagement as an Anganwari Helper in place of the selected candidate i.e. private respondent herein.

3. Sushila Devi, thereafter, challenged the veracity of the Income Certificate of present petitioner by initiating proceedings before Naib Tehsildar, Sub-Tehsil, Bharari,

District Bilaspur, H.P. Vide order dated 04.07.2013 (Annexure P-4), the Income Certificate, on the strength of which, petitioner was offered appointment, was held to be bad in law.

4. An appeal filed by the petitioner against the same under para 28.21 of Chapter 28 of the H.P. Land Records Manual was dismissed by the Revenue Authorities i.e. Sub-Divisional Officer (Civil), Ghumarwin, District Bilaspur, H.P., vide order dated 24.03.2014 (Annexure P-5).

5. In terms of the observations made in order dated 04.07.2013, wherein liberty was given to present petitioner to obtain a fresh Income Certificate by following the procedure, she again obtained an Income Certificate (Annexure P-6), dated 22.08.2014 as on 22.02.2013, depicting the family income of petitioner to be Rs.14,500/- per annum.

6. In the meanwhile, as despite, the Income Certificate earlier issued to petitioner having been declared bad in law by Naib Tehsildar vide order dated 04.07.2013, she continued to be in service, private respondent filed CWP No.566 of 2015 before this Court. This Writ Petition was permitted to be withdrawn by this Court vide order dated 23.02.2015 (Annexure P-8), with liberty to private respondent herein to file a representation before the Respondent Authorities with further direction to respondents to examine the same and pass appropriate orders within six months. Thereafter, representation was filed before Director Women and Child Development, Himachal Pradesh who vide order dated 15.05.2015 (Annexure P-9), disposed of said representation of present private respondent by holding that as both the candidates i.e. petitioner and private respondent had become ineligible as on the date of interview for the post of Anganwari Helper in view of para 4 (d) of the Operational Guidelines, fresh interviews be conducted for the post of Anganwari Helper in issue by inviting fresh application.

7. Feeling aggrieved, petitioner has filed the present petition.

8. Learned counsel for the petitioner has argued that Annexure P-9 is not sustainable in the eyes of law as impugned order has been passed by the Authority concerned at the back of petitioner without hearing her. As per learned counsel, because the impugned order has civil consequences as far as petitioner is concerned, therefore, the same could not have been passed by the Authority concerned without hearing the petitioner.

9. On the other hand, learned counsel for the respondents have submitted that there was nothing bad in the order passed by the Authority i.e. Annexure P-9 dated 15.05.2015, because as it already stood held by Naib-Tehsildar concerned that the certificate, on the basis of which the petitioner was given appointment, was bad as on the date when the interview was held, her continuing as Anganwari Helper was bad in law and the Authority concerned vide Annexure P-9 only formally passed an order and rightly so that as petitioner as also private respondent were ineligible as on the date of interview, therefore, fresh interviews be held for engaging a fresh person on the said post.

10. I have heard learned counsel for the parties and have also gone through the impugned order as well as record of the case.

11. It is not in dispute that Annexure P-9 has been passed at the back of petitioner. In fact, learned counsel for the private respondent submits that even she was not heard before passing Annexure P-9, by Director, Women and Child Development, Himachal Pradesh.

12. It is settled law that justice should not only be done, but it should also seen to have been done. Article 14 of the constitution of India strikes at arbitrariness. A decision which is taken in violation of the principles of natural justice is said to be an arbitrary decision. The principles of natural justice envisage that no person should be condemned unheard. It is settled law that no order can be passed by any Authority be it Quasi-Judicial or otherwise at the back of a person, if said order is to have civil consequences qua said party.

13. A perusal of the impugned order demonstrates that before issuing the directions to conduct fresh interviews for the post of Anganwari Helper in Anganwari Centre Hambot, Tehsil Ghumarwin, District Bilaspur, H.P. the Authority returned findings that candidature of petitioner as also private respondent was as on the date when they appeared for the interview. In other words, the Authority has held that as on the date when the interviews took place, the candidates were ineligible to hold the post. This order undoubtedly, has civil consequences as far as petitioner is concerned. This I say for the reason because as per learned counsel for the petitioner, though the petitioner is not being permitted to perform her duties as Anganwari Helper, however, because her appointment as such has not been set aside by the Competent Authority, she has a right to continue to function against the said post.

14. In view of the fact that Annexure P-9 was passed at the back of petitioner as also private respondent, therefore, without commenting upon correctness of the order on merit, this petition is allowed by setting aside impugned order Annexure P-9 dated 15.05.2015 , on the ground that the same was passed in violation of the principles of natural justice. As order Annexure P-9 is being set aside by this Court on technicalities i.e. violation of the principles of natural justice, liberty is given to the Authority concerned to pass fresh orders on the representation so filed by the private respondent by adhering to the principles of natural justice i.e. by giving an opportunity of being heard both to the petitioner as well as private respondent and any other stake holder also.

15. Before passing any fresh order, an opportunity shall be given by the Authority concerned to the petitioner as also private respondent to place on record such documents as they may deem fit alongwith any written submissions in case they so desire to submit before the Authority in support of their respective contentions. It is clarified that in this regard only one opportunity shall be granted to the parties and in case they fail to avail said opportunity, then the Authority shall go ahead with passing of the order on said representation. It is clarified that the representation which the Authority has to decide, is the representation which private respondent filed pursuant to the permission for granting by this Court in CWP No.566 of 2015. Petition stands disposed of in above terms, so also pending miscellaneous applications if any. Interim order, if any, also stands vacated.

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

Satyapal Kashyap ....Appellant

Versus

P.P.S. Chhatwal ....Respondent.

RSA No. 451 of 2018

Decided on: 19.09.2019

Code of Civil Procedure, 1908 - Section 100 – Regular second appeal – Scope – Held, scope of interference by High Court in second appeal under Section 100 of Code, is only if there is a substantial question of law involved in it. (Para 16)

Case referred:

Ajudya Lal Versus Sandhya Devi and others, Latest HLJ 2006 (2) 943

For the appellant Mr. Ashwani Kaundal, Advocate.

For the Respondent Mr. Neeraj Gupta, Senior Advocate, with Ms Rinki Kashmiri, Advocate, for the respondent.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this appeal, the appellant/defendant has challenged the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Court No.1, Solan, District Solan, H.P. in Civil Suit No.147/1 of 2014, titled as P.P.S. Chhatwal Versus Satyapal Kashyap, decided on 30.05.2017, vide which learned trial Court decreed the suit filed by the respondent herein for recovery of an amount of ₹50,000/- alongwith interest at the rate of 6% per annum from 10.09.2011 till realization, as also the judgment and decree passed by the Court of learned District Judge, Solan, District Solan, H.P. in Civil Appeal No.33-S/13 of 2017, titled as Satya Pal Kashyap Versus P.P.S. Chhatwal, decided on 04.07.2018, whereby learned Appellate Court while dismissing the appeal filed by present appellant against the judgment and decree passed by learned trial Court, concurred with the findings returned by learned trial Court.

2. Brief facts necessary for the adjudication of the present appeal are that plaintiff filed a suit for recovery of ₹50,000/- alongwith interest at the rate of 18% per annum from 10.09.2011 till realization, on the ground that plaintiff and defendant were having good relations with each other and defendant, on account of some financial burden upon him due to construction work undertaken by him, had approached the plaintiff for financial assistance. Plaintiff lent an amount of ₹65,000/- on different dates to defendant between 10.02.2011 to 10.09.2011. Defendant executed a receipt/undertaking qua borrowing of the said amount from plaintiff on 10.09.2011. On 14.04.2011, defendant issued a cheque bearing No.092833 in favour of plaintiff to discharged part liability to the tune of ₹15,000/-, but the same was dishonoured. Plaintiff, thereafter, initiated proceedings against defendant under Section 138 of the Negotiable Instruments Act before the appropriate Court and therein the matter was compromised between the parties and defendant paid ₹15,000/- to plaintiff. However, balance amount of ₹50,000/- remained unpaid and despite various requests made by plaintiff, defendant failed to make good the said payment.

3. The suit was resisted by defendant *inter alia* on the plea that defendant had never borrowed ₹65,000/- from the plaintiff nor any receipt was executed by him, as alleged by plaintiff on 10.09.2011.

4. By way of replication, plaintiff reiterated his case.

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

> "1. Whether plaintiff is entitled for recovery of ₹50,000/- alongwith interest @ 18% per annum, as prayed for? OPP.
>
> 2. Whether the present suit is not maintainable, as alleged? OPD.
>
> 3. Whether plaintiff has suppressed material facts from the Court, as alleged? OPD.
>
> 4. Whether suit is time barred, as alleged? OPD.
>
> 5. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction, as alleged? OPD.
>
> 6. Whether plaintiff has no locus standi to file the present suit, as alleged? OPD.
>
> 7. Relief".

6. On the basis of evidence led by the parties in support of their respective contentions, learned Trial Court returned the following findings on the issues so framed:-

> "Issue No.1 : Yes.
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> Issue No.2 : No.
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> Issue No.3 : No.

Issue No.4 : No.

Issue No.5 : No.

Issue No.6 : No.

Relief : The suit of the plaintiff is decreed with costs as per operative part of the judgment".

7. Learned trial Court decreed the suit of plaintiff for an amount of ₹50,000/- alongwith interest at the rate of 6% per annum from 10.09.2011 till realization after holding that it stood proved from the record that an amount of ₹50,000/- was payable from the plaintiff to defendant. The contention of defendant that Ext.PW1/B was not the original receipt stood answered in negative by learned trial Court by holding that receipt Ext.PW1/B was original document and the objection raised by defendant against the same was bad, especially as defendant in the witness box had admitted in his cross-examination that signatures on said receipt were his. While returning said findings, learned trial Court relied upon a judgment of this Court in ***Ajudya Lal*** Versus ***Sandhya Devi and others***, reported in ***Latest HLJ 2006 (2) 943***, in which case, this Court has held that there could not be evidence stronger than admission by the parties in civil case.

8. Feeling aggrieved, defendant filed an appeal.

9. This appeal was dismissed by learned Appellate Court vide judgment and decree dated 04.07.2018. While dismissing the appeal, learned Appellate Court held that plaintiff was seeking recovery of ₹50,000/- alongwith *pendente lite* interest and Ext.PW1/B was the receipt/undertaking dated 10.09.2011, in which it was mentioned that defendant had borrowed an amount of ₹65,000/- from the plaintiff, out of which ₹15,000/- was paid by way of a cheque. Learned Appellate Court also took notice of the fact that defendant in his statement as DW-1 had clearly admitted his signatures on the said exhibit. On these basis, learned Appellate Court held that it was apparent that defendant was yet to pay an amount of ₹50,000/- to the plaintiff. Learned Appellate Court also held that plaintiff as PW-1, had tendered in evidence his sole affidavit Ext.PW1/A and the statement of plaintiff was strictly inconsonance with his pleadings and the factum of borrowing of the money by defendant from plaintiff also stood proved on the basis of receipt dated 10.09.2011. Learned Appellate Court further held that defence of defendant was of denial simplicitor and though he had alleged that receipt/undertaking Ext.PW1/B was a forged document, however, no evidence was led by defendant to substantiate said contention. On these basis, learned Appellate Court held that the view taken by learned trial Court was a reasonable view and the same did not suffer from any infirmity or perversity.

10. Feeling aggrieved by the judgments and decrees, so passed by both the learned Courts below, defendant has filed the present appeal.

11. Learned counsel for the appellant has argued that the judgments and decrees passed by both the learned Courts below are not sustainable in the eyes of law as the learned Courts below have erred in not appreciating that Ext.PW1/B was a false and fabricated document and a scanned copy of the same was exhibited and suit could have been decreed by relying upon the said exhibit. No other point was urged.

12. On the other hand, learned Senior Counsel for the respondent has argued that there was no perversity with the findings returned by learned Courts below because the findings so returned by learned Courts below were duly borne out from the record. He has further argued that as the allegation of defendant was that Ext.PW1/B was a forge document, onus was upon him to prove said fact, which he was not able to prove. Accordingly, he urged that as the appeal sans merit, the same be dismissed.

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

14. The suit filed by plaintiff was for recovery of an amount of Rs.50,000/- alongwith interest. The claim was denied by defendant on the ground that he had not taken any money from plaintiff. There are concurrent findings of fact returned by both the learned Courts below in favour of plaintiff and against defendant that defendant had borrowed an amount of Rs.65,000/- from the plaintiff, out of which Rs.50,000/- was still unpaid as on the date when the suit was filed. Whether Ext.PW1/B was a forged and fabricated document, both the learned Courts below have held in favour of plaintiff that same was neither a forged document nor a fabricated document.

15. The contention of defendant that Ext.PW1/B was not the original document, has also been dis-believed by both the learned Courts below in view of the fact that his signatures upon the same were not disputed even by defendant when he entered the witness box.

16. All these findings returned with regard to the veracity of Ext.PW1/B by both the learned Courts below are findings of facts. The scope of interference by the High Court in Second Appeal under Section 100 of the Code of Civil Procedure is only if the Court finds that there is substantial question of law involved in the appeal. In my considered view, in the facts of the present case, there is no question of law involved in this appeal, leave aside any substantial question of law. Learned counsel for the appellant has not been able to demonstrate that the findings returned by the learned Courts below are perverse and not borne out from the record of the case.

17. In this view of the matter, as no substantial question of law is involved in the appeal, the same being devoid of any merit, is dismissed. No order as to costs. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

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

Des Raj & another .....Petitioners.

Versus

Brahm Dass & another .....Respondents.

CR No.120 of 2019

Date of decision: 24.09.2019

Code of Civil Procedure, 1908 - Section 151 – Inherent powers – Nature of – Held, provisions of Section 151 of Code can not be invoked for such purposes qua which there are express provisions contained in the Code – Execution of decree/order has to be carried out in accordance with Order XXI and recourse to Section 151 of Code for it, can not be made. (Para 6).

For the petitioners : Ms. Devyani Sharma, Advocate.

For the respondents : Mr. Sanjay Jaswal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge. (Oral)

By way of this petition, petitioners have challenged order dated 26.12.2017, passed by the Court of learned Civil Judge (Junior Division), Nurpur, District Kangra, H.P., in miscellaneous application filed by respondent No.1/ Decree Holder, purportedly for implementation of the decree passed by the Lok Adalat dated 28.01.1995, in Civil Suit No.239/1994, titled Udho Ram Versus Braham Dass.

2. Learned counsel for the petitioners has argued that impugned order is being assailed in this Court on two counts:- (a) Maintainability; (b) Justiciability. Learned counsel further submits that before addressing her submissions on the issue of justiciability, she is

pressing the issue of maintainability as the impugned order *per-se* is not sustainable in the eyes of law as Decree Holder could not have had filed an application under Section 151 of the Code of Civil Procedure for the purported execution of a decree passed by a Lok Adalat as far back as on 28.01.1995. She has argued that limitation for the execution of a decree is 12 years. In the present case, the decree/ compromise decree was passed by the Lok Adalat admittedly on 28.01.1995. The application under Section 151 of the Code of Civil Procedure for enforcement of the said decree was filed by applicant Brahm Dass in the year 2017. Not only this, in view of the specific provisions of Order 21, as are contained in the Code of Civil Procedure, the execution of Decrees and Orders has to be inconsonance with the provisions of Order 21 of the Code of Civil Procedure and an application under Section 151 of the Code of Civil Procedure in this regard was not maintainable at all. On this short point, learned counsel for the petitioners submits that the impugned order deserves to be set aside.

3. Learned counsel for the contesting respondents, while supporting the impugned order has argued that though Order 21 of the Code of Civil Procedure envisages provisions for execution of Decrees and Orders, however, there is no bar that a decree passed cannot be imposed under Section 151 of the Code of Civil Procedure.

4. As this Court is going to adjudicate upon the present petition on the issue of maintainability of the application so filed before the learned Court below under Section 151 of the Code of Civil Procedure for the enforcement of decree, purposely it is not making any observation on the issue of justiciability/ merits of impugned order as was argued by learned counsel for the parties.

5. It is not in dispute that a Compromise Decree was passed by the Lok Adalat dated 28.01.1995, in Civil Suit No.239 of 1994, titled Udho Ram Versus Braham Dass. A perusal of the application filed under Section 151 of the Code of Civil Procedure by Shri Braham Dass for enforcement of the said award, which is appended with the present petition as Annexure P-7, demonstrates that it stands averred in the same that after the death of Shri Udho Ram, his legal representatives i.e. present petitioners are knowingly disobeying the decree passed by the Lok Adalat. This fact has been refuted by way of reply so filed before the learned Court below by the present petitioners.

6. Be that as it may, the moot issue is as to whether a decree can be enforced by filing an application under Section 151 of the Code of Civil Procedure or not? Section 151 of the Code of Civil Procedure confers inherent powers upon the Court and the said Section *inter alia* contemplates that nothing in the Code of Civil Procedure Code shall be deemed to limit or otherwise effect the inherent powers of the Court to make such orders, which are necessary for the ends of justice or to prevent abuse of the process of law. It is equally settled position of law that provisions of Section 151 of the Code of Civil Procedure cannot be invoked by a party for such purposes, qua which there are express provisions provided in the Act. The execution of a decree is expressly provided under Order 21 of the Code of Civil Procedure. In other words, because there is a specific provision provided in the Code of Civil Procedure, which deals with the execution of decrees and orders, a party/Decree Holder cannot approach an Executing Court under Section 151 of the Code of Civil Procedure for enforcement of the decree. Order 21 of the Code of Civil Procedure besides conferring rights upon the Decree Holder, also provides safeguards in favour of the Judgment Debtor. When a process is invoked under Order 21 of the Code of Civil Procedure for the execution of the decree, then the Executing Court is bound to follow the procedure which is envisaged therein before passing any order. However, when a simplicitor application under Section 151 of the Code of Civil Procedure is filed in this regard, then all those rigors of law, but natural get a go by. This is exactly what the Courts have deplored by holding that when express provisions are contained in the Code of Civil Procedure for doing a particular act, then for the purposes of doing that act, application under Section 151 of the Code of Civil Procedure is not maintainable. While passing the impugned order, learned Court below had erred in not appreciating this extremely important aspect of the matter. Learned Court below erred in

adjudicating on the issue raised by respondent No.1 herein, before it, in an application under Section 151 of the Code of Civil Procedure, for enforcement of a decree without realizing that enforcement of a decree can only be done as per the provisions of order 21 of the Code of Civil Procedure and by following the procedure provided therein. Therefore, as the order passed by the learned Court below, Annexure P-9, dated 26.12.2017, is a result of exercise of jurisdiction not vested in it, the same being bad in law is quashed and set aside.

7. It is clarified that this Court has not made any observation as far as the merit of this case is concerned. Learned counsel for the respondents submits that he may be granted liberty to proceed against the present petitioners in accordance with law. In my considered view, in case the respondents have any remedy in law, then for invoking the same, no liberty of the Court is required and the respondent can have recourse to such remedies as may be available in law, of course subject to the rights of the petitioners. Petition stands disposed of, so also pending miscellaneous applications, if any.

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

Amar Singh & another .....Appellants.

Versus

The State of Himachal Pradesh & another .....Respondents.

RSA No.649 of 2008

Date of decision: 26.09.2019

Code of Civil Procedure, 1908- Order XXII Rule 1- Death of a party to suit – Judgment /order of court unmindful of the death of a party – Effect – Held, judgment or order passed against dead person is a nullity. (Para 5)

Case referred:

Gurnam Singh (dead) through Legal Representatives and Others Versus Gurbachan Kaur (Dead) by Legal Representatives, 2017 (13) SCC 414

For the appellants. Mr. Rahul Mahajan, Advocate.

For the respondents Mr. Dinesh Thakur, Additional Advocate General with Ms. Seema Sharma, Mr. Amit Kumar Dhumal, Deputy Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge. (Oral)

When this case was taken up for consideration, learned counsel for the appellants submitted that the judgment and decree which stand assailed by way of present appeal are nullity, because one of the appellant before the learned Appellate Court namely Rumal Singh had died during the pendency of the appeal and yet the appeal stood decided against a dead person by the learned First Appellate Court.

2. Learned Additional Advocate General has argued that because Rumal Singh was one of the appellant before the learned Appellate Court, therefore, but natural, onus was upon legal representatives of deceased appellant therein to have had taken appropriate steps in this regard and for the acts and omission of legal representatives of deceased Rumal Singh, the State cannot to penalized.

3. I have heard learned counsel for the appellants as also learned Additional Advocate General. A perusal of the record demonstrates that the suit was filed by one Shri Amar Singh and Shri Rumal Singh, against the State for declaration that they were owners in

possession of the suit land and entries in favour of the government were bad in law and also for consequential relief of injunction. The suit was dismissed by the learned Court below.

4. Feeling aggrieved, both the plaintiffs i.e. Amar Singh and Rumal Singh preferred an appeal before the first Appellate Court. Shri Rumal Singh died on 09.08.2008, i.e. during the pendency of the first appeal, which was decided by the learned First Appellate Court on 28.08.2008. Thus, it is evident that the judgment and decree which stood passed by the learned First Appellate Court was against a dead person. Hon'ble Supreme Court in ***Gurnam Singh (dead) through Legal Representatives and Others Versus Gurbachan Kaur (Dead) by Legal Representatives***, ***2017 (13) SCC 414***, held that a judgment/ order which was passed either in favour of or against a dead person is a nullity.

5. It is correct that in the present case, onus was upon legal representatives of deceased Rumal Singh or other appellant before the learned First Appellate Court to have had taken appropriate steps to substitute deceased with his legal representatives. However, the fact of the matter still remains that despite the same not having been done, judgment stood passed by the learned First Appellate Court against a dead person. Accordingly, this Court has no option, but to declare the judgment and decree so passed by the learned First Appellate Court to be a nullity, in view of law laid down by Hon'ble Supreme Court in Gurnam Singh's case, supra. This appeal is accordingly, allowed by setting aside the judgment and decree passed by the First Appellate Court and the matter is remanded back to the learned First Appellate Court to proceed with the same in accordance with law. Pending miscellaneous applications if any, also stand disposed of. Interim order, if any, also stands vacated.

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

The New India Assurance Company Limited .....Petitioner.

Versus

Jasvir Kaur & others .....Respondents.

CMPMO No.354 of 2019
Date of decision: 26.09.2019

Code of Civil Procedure, 1908 – Order XVII Rule 1 – Adjournments – Closure of evidence – Justification – Held, Tribunal closed evidence of insurer on ground that its witness was not present despite service – However if witnesses do not turn up despite service of notices upon them, no fault can be attributed to parties who have summoned them – It is duty cast upon court to facilitate the party concerned to procure presence of witnesses – If witnesses do not turn up despite service then appropriate orders have to be passed by the court. (Para 5 & 6).

For the petitioner : Mr. Praneet Gupta, Advocate.

For the respondents : Mr. O.C. Sharma, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge. (Oral)

As per report of the Registry, respondents No.1, 2 and 4 stand served. Further, as per report of the Registry, notice issued to respondent No.3 is still awaited. Learned counsel for the petitioner submits that for the purpose of adjudication of the present petition, presence of respondent No.3 is not necessary. As none has put in appearance on behalf of respondents No.1 and 2, they are ordered to be proceeded against *ex parte*.

2. By way of this petition, petitioner has challenged order dated 10.05.2019, vide which evidence of present petitioner, who is a respondent before the learned Tribunal, has been closed by the learned Tribunal by passing the following order:-

> "Witness Amrit Pal dealing clerk RTO office Faridkot not present despite of service. Sh. V.K.Sharma, Advocate, for respondent No.3 vide his separate statement tender in evidence Policy Ext.RX, driving licence verification Mark-A, letter of investigator Mark-B and driving licence Mark-C on behalf of respondent No.3.The respondent evidence is closed by order of Court. Now put up the file for arguments on 29.5.2019".

3. Learned counsel for the petitioner has argued that the impugned order *per-se* is perverse and not sustainable in law as while passing the said order, learned Tribunal erred in not appreciating that all that could have been done by present petitioner to ensure presence of the witness was done and because the witness who was to depose in the Court was not the employee of present petitioner, petitioner could not have forced him to appear in Court. He further submitted that in case the witness was not responding to the notices, which were duly served upon him to appear in the witness box, then duty was cast upon the Court to have had secured his presence and for the acts or omission of the said witness, petitioner could not have been punished/ made to suffer as has been done by the learned Tribunal by passing the impugned order.

4. Learned counsel has relied upon the judgment passed by Hon'ble Coordinate bench of this Court in *CMPMO No.193 of 2015, dated 02.07.2015*, titled as *Yashwinder Singh Parmar Versus Sushil Kumar Sharma and others*.

5. Having heard learned counsel for the petitioner as also respondent No.4 and having perused the impugned order as well as other documents appended with the petition, as also the judgment passed by Hon'ble Coordinate Bench, in my considered view, the impugned order is not sustainable in the eyes of law. In case witnesses do not turn up despite service of notice upon them, then no fault can attributed to the parties who have summoned the said witnesses. In these circumstances, a duty is cast upon the Court, in the interest of justice, to facilitate the party concerned to procure the presence of the witness. This important aspect of the matter has been ignored by the learned Tribunal while passing the impugned order.

6. Accordingly, this petition is allowed. Impugned order dated 10.05.2019 is quashed and set aside with the direction that a date shall be fixed for recording evidence on behalf of the remaining witnesses of present petitioner and Court assistance for summoning the witnesses shall be provided and in case after service witness(s) do/does not turn up, then appropriate order(s) in this regard shall be passed by the learned Tribunal. Petition is disposed of. Pending miscellaneous applications if any, also stand disposed of in above terms. Interim order, if any, also stands vacated.

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

Suresh Kumar .....Petitioner.

Versus

The State of Himachal Pradesh through its Secretary (IPH) & others .....Respondents.

CWP No.2330 of 2019
Date of decision: 04.10.2019

Constitution of India, 1950 - Article 226 – Transfer to non-tribal area – Non-implementation of order for want of reliever – Held – State directed to provide reliever against the petitioner at

place of his posting in tribal area within stipulated period failing which he shall be at liberty to join at new place of posting without waiting for the reliever. (Para 4)

For the petitioner	Mr. Jagan Nath, Advocate.
For the respondents	Mr. Dinesh Thakur, Additional Advocate General with Ms. Seema Sharma, Mr. Amit Kumar Dhumal, Ms.Divya Sood, Deputy Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge. (Oral)

By way of this Petition, the grievance raised by the petitioner is with regard to the non-implementation of his transfer order dated 05.07.2018 (Annexure P-1), vide which the petitioner Shri Suresh Kumar after completion of his normal tenure in tribal area was ordered to be transferred at IPH Circle, Sundernagar against vacancy.

2. Despite opportunity having been granted, reply to the petition has not been filed.

3. Learned counsel for the petitioner submits that the reason as to why the transfer order is not being implemented is that till date no incumbent has been posted by the respondent department in place of the petitioner as his reliever. He further submits that because of the acts or omission in commission of the respondent department, the petitioner is begin made to suffer.

4. In view of the issue involved in the present writ petition, the same is disposed of with the direction that the State shall provide reliever against the petitioner at IPH Circle, Rekong Peo, on or before 31.10.2019 and in case the State fails to do so, then petitioner shall be at liberty to join IPH Circle, Sundernagar against the vacancy on 01.11.2019 without waiting for any reliever. Pending miscellaneous applications, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Tara Devi and another …Petitioners

Versus

Kumari Uma Devi and another …Respondents

Cr.MMO No. 178 of 2015.
Reserved on: 11.09.2019
Date of decision: 01.10.2019

Code of Criminal Procedure, 1973 – Sections 125 & 126 – Maintenance – Recovery of arrears - Death of father - Held, maintenance granted under Section 125 of Code to minor child is recoverable from the estate of father. (Para 29)

Code of Criminal Procedure, 1973 – Section 125(3) – Limitation of one year in claiming arrears – Held, limitation of one year as prescribed in Section 125(3) of Code is not applicable when such maintenance is sought to be recovered from estate of the deceased. (Para 30)

Cases referred:

Yugeshwar Nath Mishra v. Arpana Kumari and another, 2003 Cri.L.J 2625

Badshah v. Sou. Urmila Badshah Godse, (2014) 1 SCC 188,

Ramesh Chander Kaushal v. Veena Kaushal, AIR 1978 SC 1807

Prabhavati v. Sumatilal, AIR 1954 Bombay 546

Prithviraj Singh v. Pavanvir Kaur, 1986, Cr.iL.J 1432

Halimabee Quari Abdul v. Abdul Ahad Bukhari (D) through LRs., 2002 (3) RCR (Criminal) 360
Gangubai Bhagwan Kolhe v. Bhagwan Bandu Kolhe, 2007 (5) RCR (Criminal) 739

For the petitioners: Mr. Peeyush Verma, Advocate.
For the respondents: Mr. Pratap Singh Goverdhan, Advocate.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

Challenging the order of release of maintenance to minor children, born from another woman, granted to them during the lifetime of their father, his widow and son admittedly from the lawful marriage, have come up before this Court, by way of filing a petition under Section of 482 Cr.P.C. seeking reversal of the orders passed by Judicial Magistrate Kandaghat, Solan, HP, and affirmed by the Sessions Judge, Solan, HP, ordering the release of arrears to the children, payable from the Estate of their deceased father.

2. The facts apposite to decide the present controversy trace their origin to the Petition No.34/4 of 07/2005, decided on 17.9.2012, by Judicial Magistrate 1st Class, Kandaghat, District Solan, H.P. under Section 125 of the Cr.P.C. This petition under Section 125 of Cr.P.C. was filed by Leela Devi claiming herself to be the wife of Bhagwan Singh; and her two minor children, namely, Kumari Uma Devi and Master Narinder Singh, claiming themselves to have been born due to coitus between Bhagwan Singh and Leela Devi during the subsistence of their marriage. Leela Devi had stated in the said petition that she was married to Bhagwan Singh somewhere around the year 1988. The wedding was performed, as per customs of the village prevalent, between the parties. She further stated that during the subsistence of the marriage, two children were born. She also stated that the behavior of Bhagwan Singh started turning from bad to worse and he had become Alcoholic. She further stated that as she was unable to cope up with the cruel acts and habit of intoxication of Bhagwas Singh, she along with her children had no option but to take shelter in her maternal home. She further stated that Bhagwan Singh was drawing a salary from his Government service and also had income from the agriculture pursuits and thus, she claimed maintenance to the extent of ` 3,000/- per month, for each of the claimants.

3. In reply to the petition, Bhagwan Singh denied Leela Devi to be his legally wedded wife and also denied that the children mentioned earlier were born from their wedlock. Bhagwan Singh claimed that he was married to one Tara Devi, following Hindu rites. He alleged that Leela Devi had married one Sunder Singh, however, after some time, she had disserted him and without getting a legal separation or divorce from said Sunder Singh, had started living with one Inder Singh, who after some time, disserted her. He stated that he had helped Leela Devi in her pitiable condition because she had no roof to cover, no place to stay and no earnings to sustain, he gave her shelter on humanitarian grounds, and in return, Leela Devi used to do agriculture work under the supervision of Tara Devi, wife of Bhagwan Singh. He explicitly denied marriage between him and Leela Devi. Bhagwan Singh also stated that from the wedlock between him and his legally wedded wife Tara Devi, three children were born, out of whom, a son and a daughter survived.

4. In rejoinder, Leela Devi explained that Bhagwan Singh had brought Tara Devi much after he had married her. It was further stated that said Tara Devi was already married to one Keshav Ram at village Ghaar and the said marriage was subsisting and never annulled.

5. The Judicial Magistrate 1st Class, Kandaghat, Solan, HP, vide judgment dated 17.9.2012, passed in the said petition filed under Section 125 of CrPC, relying upon the proved facts that Tara Devi had filed a petition for bigamy against Bhagwan Singh in the year 1995 and also a petition under Section 125 of CrPC for maintenance, which was indelible

evidence, held that Tara Devi was legally wedded wife of Bhagwan Singh. In conclusion, Judicial Magistrate 1st Class held that Leela Devi could not prove herself to be the wife of Bhagwan Singh and as such, was not entitled to maintenance under Section 125 of CrPC. However, the Ld. Judicial Magistrate held that minor children, namely, Kumari Uma Devi and Master Narinder Singh were born due to coitus between Leela Devi and Bhagwan Singh and as such, Bhagwan Singh was under a statutory obligation to maintain them. Accordingly, the Ld. Judicial Magistrate partly allowed the application filed under Section 125 of CrPC and ordered Bhagwan Dass to grant maintenance @ ` 2,000/- per month, to each of his children, namely Kumari Uma Devi and Master Narinder Singh, until Uma Devi (daughter) gets married and the son Master Narinder Singh attains the age of majority. The maintenance was granted from the date of filing of the petition, which is 17.3.2005. This order was never challenged by Bhagwan Singh and has attained finality.

6. Despite these directions, Bhagwan Dass did not volunteer to pay the maintenance, and his children had to seek relief by invoking the provisions of Section 128 of Cr.P.C. This Petition was registered as Case No. 29-S/4 of 2012, dated 5.12.2012. The case set up by the minor children is that Bhagwan Singh never paid them even a single penny of maintenance during his lifetime.

7. During the pendency of this Petition, Bhagwan Dass expired. Ld. Judicial Magistrate 1st Class recorded the statement of the learned Counsel for the present respondents about the death of Bhagwan Singh. Bhagwan Singh expired after the pronouncement of the judgment dated 17.9.2012 and before 6.5.2013. The Order-sheets of Ld. Judicial Magistrate 1st Class, Kandaghat, Solan, HP, reveal that vide order dated 11.12.2013, Judicial Magistrate 1st Class Solan allowed the application filed under Order 22 Rule 4 read with Section 151 CPC and issued notice to his wife and his son, who were the legal representatives of deceased Bhagwan Singh, for enforcement of the order dated 17.9.2012.

8. The LRs of Bhagwan Singh contested this application on the grounds that the liability was personal liability of Bhagwan Singh and after his death, it has come to an end; secondly, that arrears could have been recovered only within a period of one year of its becoming due; and lastly, that around 15 days prior to his death, Bhagwan Singh had told them that he had paid all the arrears, as directed by the Court and nothing remains unpaid.

9. Ld. Judicial Magistrate did not agree with the contentions of the LRs of Bhagwan Singh and vide order dated 16.7.2014, passed in case No. 29-S/4 of 2012, directed the payment of the arrears of maintenance from 2005 till November 2012, payable from the estate of Bhagwan Singh.

10. The LRs of Bhagwan Singh challenged the said order by filing a revision petition before Sessions Judge, Solan, HP. The said revision petition was registered as Revision Petition No. 4ASJ-II/10 of 2014 and vide order dated 3.1.2015, Ld. Additional Sessions Judge dismissed the revision petition.

11. Challenging the dismissal of their revision petition, the petitioners have come up before this Court by filing the present petition under Section 482 of CrPC.

12. I have heard learned counsel for the parties and have also waded through the record of the case, including the impugned orders.

ANALYSIS & REASONING:

13. Section 128 of the Cr.P.C. reads as follows,

> *"128. Enforcement of order of maintenance. - A copy of the order of maintenance or interim maintenance and expenses of proceeding, as the case may be] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to [whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be,] is to be paid; and such order may be*

enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the [allowance, or as the case may be, expenses due".

14. The matter under adjudication confines to the claim of maintenance for the period March, 2005 to November, 2012. The case for consideration under this petition confined only to this limited period for which, according to the minor children, not even a single penny was paid by their biological father during his lifetime.

15. Bhagwan Singh was alive at the time of filing of the present petition in the Court of Judicial Magistrate and notices had been served on him. He did not tender any evidence in support of part payment to his minor children.

16. LRs of Bhagwan Singh contends that around fifteen days before his death, he had told them that no arrears were due and thus, had discharged all his liability towards maintenance. This statement is not convincing, and no reliance can be placed on this uncorroborated oral statement. Even if such lumpsum amount was paid, then there must be some withdrawal from the bank, and the evidence of mode and manner in which Bhagwan Dass had made the payments. Redemption of some deposit must have taken place for such amount and must have been paid in Court or through some bank instruments, like Demand Draft or Cheque. Therefore, this statement has been made by LRs to get rid of the liability, which according to Judicial Magistrate 1st Class, was recoverable from the estate of Bhagwan Singh.

17. Bhagwan Singh, the biological father of the respondents, was in Government service and also had income from Agriculture. Thus, he had the financial capacity to pay. After his death, his wife must be receiving family pension.

18. The proposition of law which involves in this case is as follows,

> "Whether the maintenance granted under Section 125 of CrPC to the minor children is recoverable from the estate of the deceased father or not?"

19. A father who abnegates all his responsibilities towards his minor and dependent children cannot run away from his liability even after escaping from this mortal world. The initiation of birth of a child is a voluntary act of the male, which for him, is ecstatic and leads to orgasm and his role in the birth of a child ends, but the role of upbringing and making of a child into a good human, begins. During the coitus, the sperm, without the need of the donor, makes its way down the fallopian tube and fertilizes the egg after penetrating it, which in turn, implants itself in the lining of the uterus, leading to the pregnancy. And it is the female partner, who bears the labor pain.

20. Yuvan Noah Harari, in his treatise, "Sapiens- A Brief History of Humankind", states,

> *"Natural selection consequently favoured earlier births. And, indeed, compared to other animals, humans are born prematurely, when many of their vital systems are still underdeveloped. A colt can trot shortly after birth; a kitten leaves its mother to forage on its own when it is just a few weeks old. Human babies are helpless, dependent for many years on their elders for sustenance, protection and education. This fact has contributed greatly both to humankind's extraordinary social abilities and to its unique social problems. Lone mothers could hardly forage enough food for their offspring and themselves with needy children in tow. Raising children required constant help from other family members and neighbours. It takes a tribe to raise a human. Evolution thus favoured those capable of forming strong social ties."*

21. In **Yugeshwar Nath Mishra v. Arpana Kumari and another**, ***2003 Cri.L.J 2625***, the Patna High Court observed that:

> "*15. A law reflects the ground realities prevailing in the society to which it is applicable and while interpreting law such ground realities are also to be taken into account, particularly when it is a piece of beneficial legislation. By and large unmarried daughters, having no property or personal income, have to be dependent for their maintenance upon their parents as without that protection most of them could be exposed to the dangers that stalk a female child in the society."*

22. In **Badshah v. Sou. Urmila Badshah Godse**, (***2014) 1 SCC 188***, the Hon'ble Supreme Court holds as under:

> *"The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purpose of the law."*

23. Coming to the contention of the petitioners that the claim abated on the death, a survey of the following judicial precedents will clarify the legal position.

24. In **Ramesh Chander Kaushal v. Veena Kaushal**, ***AIR 1978 SC 1807***, the Hon'ble Supreme Court holds that:

> *"9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15 (3) reinforced by Article 39."*

25. In **Prabhavati v. Sumatilal, *AIR 1954 Bombay 546***, Full Bench of the Bombay High Court, speaking through Chagla J., held as under:

> *"The intention of the Legislature was clear, and the intention was to cast an obligation upon a person who neglects or refuses to maintain his wife or children to carry out his obligation to wards his wife or children."*

26. In **Prithviraj Singh v. Pavanvir Kaur, 1986**, ***Cr.iL.J 1432***, Punjab and Haryana High Court observed as under:

> *"A comparative study of the provisions surfaces one important change. Whereas under section 488 (6) of the Old Code, all evidence under Chapter XXXVI was required to be taken in the presence of the husband or, when his personal attendance was dispensed with, in the presence of his pleader, the necessary sequence was that all evidence about the husband's failure to comply with maintenance order without sufficient cause had also to be taken in the presence of the husband because such provision was in the said Chapter XXXVI; now under the New Code though the method of recording evidence is the same, as is clear from section 126(2) but such method is only applicable to proceeding in which payment of maintenance is proposed to be made and not every proceeding under the chapter. In other words, it is not mandatory to take*

evidence in proceedings under section 125(3) of the New Code in the presence of the husband or his pleader, as the case may be. The Magistrate may, on ex-parte proof rendered by the wife take recourse to section 125(3) of the New Code and issue the necessary warrants to have the maintenance order obeyed and it is for the husband to come and oppose the process by pleading that he had sufficient cause not to comply with the order. Till that step is taken, it is logically follows that the version of the wife that the husband has cause is enough to confer the jurisdiction on the Magistrate to issue failed to comply with the order without sufficient cause a requisite warrant. The view afore-expressed would presently become more clear.

5. A Division Bench of the Calcutta High Court in Ead Ali v. Lal Bibi, AIR 1914 Calcutta 172 took the view that an order of the Magistrate passed under section 488 of the Code for maintenance is not enforceable after the death of the person against whom the order was passed, against his estate. The ratio is based on the following extract from the precedent :-

In order that a warrant may be issued under section 488 sub-section (3), for lying the amount due, it must be found that there had been a wilful neglect to comply with the order and to enable a Magistrate to find that there had been a wilful neglect, evidence has to be taken under sub-section (6), section 488 and that sub-section says that "all evidence under Chapter 36, shall be taken in the presence of the husband or the father as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader and shall be recorded in the manner prescribed in the case of summons cases." From the language of the sub-section, it is quite clear that in the mind of the legislature the instance of a deceased person against whose estate arrears of maintenance may be claimed was never present, That, of course, is merely a surmise that we express and we cannot say anything more; but the law as it stand is quite explicit in regard to the necessity for the presence of the party against whom evidence is being taken and it has been pointed out by the learned vakil, who has appeared in support of the rule, that the man against whom the order was passed, being dead, there is no claim that can be now enforceable under section 488 of the Code against the estate of the deceased."

It is this view which was followed by the Peshawar Judicial Commissioner's Court in Hari Singh's case (supra) and the precedent was understood by observing as follows :-

"The ruling chiefly relies on the fact that, after his death, a deceased husband cannot be taken to have failed, without sufficient reasons, to comply with the order as laid down in clause (3) of section 488, Criminal Procedure Code, 1973 and that evidence could not be recorded in the presence of the husband as required by clause (6) of that section when the husband had died."

And both the above views were endorsed by a Single Bench of the Nagpur High Court in Ambadas Bajirao's case (supra).

6. The pivot on which the aforesaid three decisions revolve is that a deceased husband cannot, after his death, be present to participate in an enquiry under sub-section (3) of section 488 to the Old Code when sub-section (6) of that section requires his presence or that of his lawyer, and further by his death, the husband cannot be taken to have failed, without sufficient reasons, to comply with the order as conceived of in sub-section (3) of section 488 of the Old Code. As expressed earlier, there is a noteworthy change in the scheme of legislation, for, now in an enquiry under sub-section (3) of section 125 of the New Code of Criminal Procedure, the presence of the husband or his lawyer at the time of recording of evidence in not absolutely necessary. And as long as

the husband is alive, he is capable of approaching the Court pleading sufficient reasons which occasioned failure on his behalf to comply with the order. The fact that he had, without sufficient reasons, failed to comply with the order, has not now necessarily to be determined in his presence and as observed earlier, on a prima facie proof in that regard the Magistrate can set the law in motion for the recovery of the arrears of maintenance unless and until the husband comes forth pleading and proving that he had sufficient cause or reasons for not complying with the order. Unless such an objection is raised, the criminal Court would be well within its right to assume absence of such sufficient reasons or cause by the mere fact that arrears of maintenance are due. And this assumption can validly last till the date of the death of the husband. It is only on the demise of the husband that he becomes immune of showing sufficiency of cause and an order of maintenance becomes unenforceable, for the opportunity provided under the law becomes dead with his death. Thus, his estate, as is my considered view, cannot be burdened with the enforceability of the maintenance order under the Criminal Procedure Code for any period beyond the date of the husband's death but is enforceable against it for the period till the husband's death.

7. At this stage, the observations of the Supreme Court in Captain Ramesh Chand Kaushal's case (AIR 1978 SC), which have been very helpful to arrive at the above view, need be reproduced here :-

"This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant woods with social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children much inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause - the cause of the derelicts:"

8. Considerable strength also is desirable from the provisions of section 70 of the Indian Penal Code. Section 125(3) of the New Code of Criminal procedure takes aid of the provisions of section 421 where under methods for recovery of fine have been mentioned. Section 70 of the Indian Penal Code provides that fine is normally leviable within six years after the passing of the sentence and that the death of the offender (the person who have to pay the fines) does not discharge from the liability any property which would, after his death, be legally liable for his debts. The process of recovery of fine remaining the same, death of the person liable to pay does not ipso facto stop recovery in the context of the case in hand. It can safely be said that accumulation of arrears of maintenance stops on the date of the death of the husband and the accumulated arrears are recoverable as fine from his estate after his death.

9. Before conclusion an English case, cited by the learned counsel for the petitioner, of the Chancery Division reported in Bidie v. General Accident, Fire and Life Assurance Corporation Ltd, and others, 1948(1) All England Reporter 1885, is and of the Court of Appeal report in Re-Bidie (deceased), Bidie v. General Accident, Fire and Life Assurance Corporation Ltd., 1948 (2) All. England Report 995 need barely be mentioned to say that the principle evolved therein are valid to the statutory law existing in that country and can be of no assistance towards the interpretation of the provisions of the Code of Criminal Procedure, relating to the maintenance of wives and children, which are mainly directed towards prevention of vagrancy and for proving some succour to the destitute wives and children, and now parents, unable to maintain themselves.

10. In view of the aforesaid discussion, I hold that the arrears of maintenance due up to the date of the death of the husband are recoverable from his estate in whichever hands it is found to be. Thus, this petition files and is hereby dismissed.'

27. In **Halimabee Quari Abdul v. Abdul Ahad Bukhari (D) through LRs**., ***2002 (3) RCR (Criminal) 360***, the Bombay High Court observed as under:

"It is to be noted that section 125(1) clearly casts a burden on the husband to pay maintenance allowance in case of his failure to maintain the wife or negligence on his part to maintain his wife pursuant to an application, complaining about such negligence and refusal, by the wife and after satisfying other ingredients of the said section. In other words, during the lifetime of the husband he is liable to pay the maintenance allowance to his wife in case of his neglect or refusal to maintain her. Being so, the sufficient reasons for not complying with the order of maintenance passed under section 125(1) are to be considered in relation to the period for which the maintenance allowance granted under a particular order. In other words while considering the aspect of sufficiency of the reasons for non-compliance of the order of maintenance it will have to be seen whether the husband had such sufficient cause not to comply with the order prior to his death. In case of failure to disclose sufficient during such period certainly estate of the husband can be burdened."

28. In **Gangubai Bhagwan Kolhe v. Bhagwan Bandu Kolhe**, ***2007 (5) RCR (Criminal) 739***, Bombay High Court observed that:

"So in my opinion, once there is a valid order of the Court thereby giving right to the wife to recover maintenance from the husband and as per the provision of Criminal Law she is entitled to proceed even against the assets of the husband for the recovery of such maintenance, then, in order to see that fruits of the order passed under section 125 of Criminal Procedure Code are received by the wife, charge can be kept on the assets of the husband."

29. The above discussions lead to a conclusion that the maintenance granted under Section 125 of CrPC to the minor children is recoverable from the estate of the deceased father.

30. Coming to the contention of the petitioners, that the claim could not have been claimed before a period of one year, has no substance because the arrears of maintenance were claimed within one year from the date of the order granting the maintenance. Moreover, the Proviso to Section 125 (3) of Cr.P.C., prescribing the limitation of one year, has no application, if such maintenance is claimed from the Estate of the deceased, who during her/his lifetime was directed to maintain the person mentioned in 125(1) of CrPC, because the deterrence of imprisonment vanishes with the death.

31. It is unfortunate that due to the legal jargons and the pendency of the proceedings, the system failed to provide the timely payment to the minors at the time when they needed it the most.

32. Given the above discussion, there is no ground to interfere in the impugned orders, and thus the present petition is dismissed. All pending applications, if any, are closed.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Smt. Krishna Kumari. .....Petitioner.

Versus

State of H.P. & others. .....Respondents.

CWP No. 2872 of 2018
Date of decision: September 10, 2019.

Limitation Act, 1963 – Section 5 – Applicability before quasi-Judicial authority – Held, provisions of Section 5 of Act are not applicable in proceedings before quasi-judicial authority unless same are specifically made applicable by relevant rules/notification /scheme/ guidelines etc. (Para 7)

For the petitioner Mr. Paresh Sharma, Advocate, Mr. V.S. Rathore, Advocate.

For the respondents Mr. Vikas Rathore, Addl. AG, for respondent Nos. 1 to 3.
Mr. Nitin Thakur, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge *(Oral)*

In this writ petition, order dated 19.6.2018 Annexure P-7 passed by Ld. Additional District Magistrate, Kangra at Dharamshala in Appeal No. 01/17 preferred by the petitioner herein against the appointment of respondent No. 4 as Anganwari Worker in Anganwari Centre, Thakurdwara,Tehsil Dehra, District Kangra has been sought to be quashed and his appointment as Anganwari worker in the said Centre being meritorious and fulfilling all the eligibility criteria to be made.

2. Petitioner and respondent No. 4 appeared before the Selection Committee for interview on 11.5.2017. It is respondent No. 4 who was selected and appointed as Anganwari Worker in Anganwari Centre, Thakurdwara on 19.5.2017. The petitioner has challenged the appointment of respondent No. 4, as such, in Appeal No. 01/17 on 5.6.2017 before the Appellate Authority-cum-Additional District Magistrate, Kangra at Dharamshala.

3. The respondent No. 4 when put to notice filed reply to the appeal on 7.10.2017 raising therein the question of limitation. According to her the time prescribed for filing the appeal had already expired and the memorandum of appeal filed on 5.6.2017 by the petitioner was beyond the period of limitation.

4. In rejoinder, the petitioner came forward with the version that she had visited the office of the Appellate Authority on 22.5.2017 for filing the appeal. It is, however, the Reader who informed her that the Appellate Authority was out of station on that day. She was directed to come on some other day with copy of the appointment order. She went to the office of Child Development Project Officer, the third respondent, for obtaining copy of the order of appointment of respondent No. 4. She was, however, informed that the copy can only be supplied vide order to be passed in an application under the RTI Act.

5. Learned Appellate Authority on going through the pleadings of the parties has concluded that the appeal filed on 5.6.2017 was barred by six days while placing reliance on the ratio of the judgment dated 17.5.2010 of this Court in *CWP No. 1096/2010,* titled *Raksha Devi* versus *State of H.P and others*. The appeal has, therefore, been dismissed being time barred vide impugned order Annexure P-7.

6. It is the order Annexure P-7 which is under challenge in this writ petition on the ground of limitation and also on merit. The merit of the case, however, can only be taken into consideration only after the question of limitation is decided.

7. The law on the question of limitation for filing appeal in a matter in which the appointment of Anganwari Worker/Helper is under challenge is no more *res integra*. This Court while deciding a bunch of writ petitions and letters patent appeals with lead case *CWP No. 438 of 2017* titled *Praveena Devi* versus *State of H.P. and others* on 2.8.2019 has discussed the entire gamut of 'limitation' prescribed for filing appeals before the Appellate Authority challenging thereby the selection and appointment of Anganwari Worker/Helper under Anganwari Schemes framed from time to time and held as under:-

(i) The provisions contained under Section 5 of the Limitation Act are applicable only to the proceedings pending in the Courts alone and not before the quasi judicial authorities like the Appellate Authority under the Scheme.

(ii) The Appellate Authority under the Scheme where there is provisions of 15 days for filing the appeal from the date of issuance of the

result or the date of appointment, as the case may be, is not competent to condone the delay and the person aggrieved should prefer appeal within 15 days from the date of declaration of the result/appointment of the selected candidate. The Appellate Authority in order to verify the factual position is competent to requisition the record pertaining to the selection so made.

(iii) Since in the Scheme framed by the respondent-State, there is no provision for condonation of delay, therefore, the person aggrieved is not entitled to invoke Section 5 of the Limitation Act and rather to file the appeal well within the time prescribed under the Scheme.

(iv) In few of the schemes where no period of limitation is prescribed for filing an appeal, the aggrieved person must file the appeal within reasonable time to be determined on taking into consideration the facts of each case.

(v) In an appeal preferred against the order of the first Appellate Authority i.e. the Deputy Commissioner to the Divisional Commissioner irrespective of there is no requirement under the scheme to file certified copy of order nor any procedure prescribed for filing the same, the question that certified copy of impugned order is required to be filed along with the memorandum of appeal or it is sufficient to mention the date of such order is left open to be considered in due course, if arises in any of the writ petitions/LPA which have to be heard separately.

8. It is thus seen that Section 5 of the Limitation Act cannot be invoked by a person aggrieved from an order of selection/appointment of someone else as Anganwari Worker/Helper in view of there being no provision for condonation of delay if occurred in filing the appeals under the Anganwari Schemes so framed. Therefore, it is now well settled that the appeal has to be filed well within the period of limitation, if any, prescribed under the Scheme(s) and within a reasonable time in case no time limit is prescribed. The quasi judicial Appellate Authority, therefore, has no jurisdiction to condone the delay if occurred in filing the appeal.

9. If the impugned order is seen in the light of the given facts and circumstances and also the law laid down, though learned Appellate Authority has held that the appeal is time barred, however, without taking note of the Scheme in vogue when respondent No. 4 was appointed as Anganwari Worker and there being any provision of limitation prescribed for filing the appeal. As a matter of fact, the Appellate Authority was required to have considered the Scheme which was prevalent in the year 2017 when respondent No. 4 was selected and appointed as Anganwari Worker and also the provisions, if any, therein prescribing the period of limitation for filing an appeal before the Appellate Authority by the person aggrieved from such selection/appointment. Merely to refer to the judgment of this Court in *Raksha Devi's* case, cited supra, and taking note of the question of limitation raised in the reply filed on behalf of respondent No. 4 was not sufficient to dismiss the appeal being time barred.

10. Interestingly enough, the stand of the petitioner in rejoinder to the reply filed on behalf of respondent No. 4 that she went to the office of the Appellate Authority on 21.5.2017 for filing the appeal, however, apprised by the Reader that the Appellate Authority was out of station and that to come along with the copy of the order has not been considered except for a passing reference that such statement does not hold water. Such an approach on the part of the Appellate Authority is not at all appreciated. As a matter of fact, efforts should have been made to find out the correctness of the averments so made by the petitioner at least by calling upon the comments of the Reader qua this aspect of the matter. The Appellate Authority, therefore, has not only committed illegalities but also irregularities while deciding the appeal vide order Annexure P-7. The same, therefore, deserves to be quashed and set aside and the appeal remanded to the Appellate Authority for fresh disposal in the light of the observations hereinabove and also in accordance with law.

11. The petitioner, however, is not entitled to seek her appointment as Anganwari Worker in Anganwari Centre, Thakurdwara because the respondent No. 4 has been appointed and presently working as such there. Unless and until her appointment is quashed and set aside, the petitioner cannot seek a direction to appoint her as Anganwari worker in the Centre in question. She is also not entitled to seek a direction for quashing the appointment of respondent No. 4.

12. In view of what has said hereinabove, this writ petition succeeds partly and the same is accordingly allowed. Consequently, the impugned order Annexure P-7 is quashed and set aside and the case is remanded to the Appellate Authority-cum-Additional District Magistrate, Kangra at Dharamshala for fresh disposal in the light of the observations made in this judgment and also in accordance with law.

13. The parties through learned counsel representing them are directed to appear before the Appellate Authority on *31.10.2019.*

14. The writ petition is accordingly disposed of, so also the pending application(s), if any.

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

Roshan Lal (now deceased) through legal representatives
Prakasho and another ....Appellants.

Vs.

Smt. Shusheela and another .....Respondents.

RSA No.: 374 of 2016
Date of Decision:14.10.2019

Code of Civil Procedure, 1908 – Order XX Rules 12 & 18 – Partition suit - Final decree of partition on basis of report of commissioner – Appeal against dismissed by appellate court – RSA – Held, no party had filed any objection despite opportunities to the mode of partition suggested by local commissioner - No error on the part of court in approving mode of partition as proposed by the commissioner – Infirmities now sought to raised to mode of partition ought to have been raised by way of objections before trial court so that it could have applied its mind to such objections – Such objections can not be raised in second appeal. (Para 8).

For the appellants: Mr. R.L. Chaudhary, Advocate.

For the respondents: Mr. Satyen Vaidya, Senior Advocate, with Mr. Varun Chauhan, Advocate, for respondent No. 1.
Respondent No. 2 is *ex parte*.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral):*

By way of this appeal, the appellants have challenged the judgment and decree, dated 31.03.2014, passed by the Court of learned Additional District Judge(II), Mandi, District Mandi in Civil Appeal No. 63/2012, titled as *Roshan Lal and another Vs. Smt. Shusheela*, vide which, learned Appellate Court while dismissing the appeal filed by the predecessor-in-interest of the appellants, namely, Roshan Lal, upheld the final decree for partition passed on 30.06.2012 by the Court of learned Civil Judge (Senior Division), Mandi in CMA No. 40-VI/2007 filed in Civil Suit No. 14/2003, in which, a preliminary decree stood passed by the learned Trial Court on 01.09.2005.

2. Brief facts necessary for the adjudication of the present appeal are that Civil Suit No. 14/2003 was filed by respondent No. 1 herein for partition of the suit land, in which, a preliminary decree for partition of land comprised in Khata No. 516/504, Khatauni No. 858, Khasra Nos. 737 and 739, Kitas 2, measuring 51.09 sq. metres, situated in Muhal Samkhetar/366/3, Tehsil Sadar, District Mandi, H.P. was passed on 01.09.2005. After passing of the preliminary decree, Tehsildar Sadar, Mandi was appointed as Local Commissioner to suggest the mode of partition and the same was done by him by way of submission of his report to the learned Trial Court. The terms of the suggested mode of partition find mention in para-3 of order, dated 30.06.2012, passed by the learned Trial Court, which are reproduced hereinbelow:

> *"3. As per mode of partition, Khasra No. 737/3, 'gair mumkin gali' 739/1, 'Gair Mumkin Dukan' area measuring 25.66 Sq. metres is allotted to applicant Smt. Susheela, while, Khasra No. 737/1 'gair mumkin gali', Khasra No. 739/3 'gair mumkin dukan' area measuring 12.74 Sq. metres is allotted to respondent No. 2 Smt. Shanta Devi, w/o Hans Raj. Similarly, Khasra No. 739/2 'gair mumkin dukan', Khasra No. 737/2 'gair mumkin gali' area measuring 12.69 Square metres, was allotted to respondent No. 1 Roshan Lal."*

3. A perusal of the record demonstrates that no objections were filed against the said suggested mode of partition either by the plaintiff-decree holder or the defendants therein, i.e., the appellants herein. Thereafter, on an application filed under Order XX, Rule 12 of the Code of Civil Procedure, a final decree was passed by the learned Trial Court on the basis of mode of partition as suggested by the Local Commissioner by ordering that report of the Local Commissioner shall form part of the final decree. This order was passed on 30.06.2012. While passing the said order, in para-4 thereof, learned Trial Court observed that neither plaintiff nor respondents, i.e., defendants before the learned Trial Court filed objections against the mode of partition, as suggested by the Local Commissioner despite opportunities having been afforded.

4. An appeal was filed by the appellants against the final decree of partition, dated 30.06.2012, passed by the Court of learned Civil Judge (Senior Division), Mandi in CMA No. 40-VI/2003 in Civil Suit No. 14/2003. Final decree of partition stood assailed on the ground that the same was against law and facts, as learned Trial Court had ignored the fact that Local Commissioner had committed serious illegalities and material irregularities while partitioning the joint property. According to the appellants, the spot position as well as possession of the defendants over the suit property deserved to be preserved which was not done by the Commissioner and this aspect of the matter stood ignored by the learned Trial Court.

5. The appeal was dismissed by the learned Appellate Court vide judgment, dated 31.03.2014. While upholding the order passed by the learned Trial Court vide which the mode of partition by metes and bounds as suggested by the Local Commissioner was approved, learned Appellate Court observed that neither the plaintiff nor respondents had filed any objections against the mode of partition, as was suggested by the Local Commissioner despite opportunities in this regard having been afforded to them by the learned Trial Court. It further held that this clearly demonstrated that principles of natural justice stood complied with. It rejected the contention of the appellants that objections were given to the Local Commissioner by way of statements made by the defendants by holding that objections, if any, against the suggested mode of partition ought to have been filed before the learned Trial Court, which admittedly was not done despite opportunities having been granted by the learned Trial Court. On these grounds, learned Appellate Court dismissed the appeal by holding that no ground for interference with the order passed by the learned Trial Court was made out.

6. Feeling aggrieved, the appellants-defendants filed this appeal, which was admitted on 02.08.2016 on the following substantial questions of law:

> *"1. Whether the judgment and decree passed by both the Ld. Courts below are sustainable in the eyes of law, wherein the land of common use of parties has been partitioned without taking into consideration the possession of parties and without taking into consideration spot position?*
>
> *2. Whether both the Learned Courts below have rightly non-suited the appellant/defendant and proforma respondent on the ground that no appeal has been preferred against the preliminary decree?*
>
> *3. Whether both the learned Courts below have rightly appreciated and discussed the entire oral as well as documentary evidence adduced by the*

parties as required as per the ratio laid down by the Hon'ble Apex Court, reported in (2005) 5 SCC 652?

7. I have heard learned counsel for the parties and have also gone through the order passed by the learned Trial Court as well as the judgment passed by the learned Appellate Court and also perused the record of the case.

8. It is clearly borne out from the record that after the preliminary decree was passed by the learned Trial Curt and Tehsildar, Sadar Mandi was appointed as Local Commissioner to suggest the mode of partition, upon receipt of the mode of partition by way of a report from him, despite opportunities having been granted, no objections whatsoever to the report of the Local Commissioner were filed by the appellants. During the course of arguments, learned counsel for the appellants could not dispute this fact. That being the case, no error can be attributed to the order which was passed by the learned Trial Court on 30.06.2012, vide which, it approved the mode of partition by metes and bounds, as suggested by the Local Commissioner. In the absence of the suggested mode of partition being objected to by the parties, learned Trial Court but natural was to approve the same. Infirmities, if any, in the suggested mode of partition should have been pointed out by the parties by way of filing objections, which admittedly was not done in the present case. In the absence of the same, even the findings returned by the learned Appellate Court to the effect that no ground of interference with the order passed by the learned Trial Court was made out, are correct findings. The very purpose of affording opportunity to the parties to file objections to the suggested mode of partition is to allow the parties to bring into the notice of the Court discrepancies, if any, in the suggested mode of partition. After receipt of any such objections, the Court has to apply its judicial mind on the objections filed vis-a-vis the mode of partition. In the absence of any objections filed to the suggested mode of partition, but obvious, the inference which the Court has to draw is that none of the parties has any objection to the suggested mode of partition. In this background, learned Trial Court on an application which may be filed before it under Order XX, Rule 12 of the Code of Civil Procedure, has but to approve the suggested mode of partition if the same is in order. A perusal of the mode of partition otherwise also demonstrates that it cannot be said that the same was perverse. The suggested mode of partition finds mention in para-8 of the judgment passed by the learned Appellate Court and as I have already held hereinabove, perusal thereof demonstrates that Tehsildar Sadar has suggested the mode of partition in an equitable and fair manner. In the absence of there being any objections being filed to the suggested mode of partition that the same was prepared without taking into consideration the possession of the parties as also the spot position, this Court cannot draw any such inference. Similarly, in the absence of there being any objections filed against the suggested mode of partition, the valid presumption, but obvious, is that the appellants were not aggrieved by the suggested mode of partition, otherwise nothing stopped them from filing objections to the same. Therefore, both the learned Courts below have rightly non-suited the appellants on the ground that in the absence of objections having been filed to the suggested mode of partition, the defendants could not be permitted to object to the final decree of partition. During the course of arguments, learned counsel for the appellants did not address any submission qua substantial question of law No. 3. Substantial questions of law are answered accordingly.

9. In view of the observations made hereinabove, as this Court finds no merit in this appeal, the same is dismissed, so also pending miscellaneous applications, if any. No order as to costs.

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

State of H.P. .....Appellant

Versus

Yoginder Pal .....Accused/Respondent.

Cr. Appeal No.534 of 2008
Date of Decision: 4.10.2019

Indian Penal Code, 1860 – Section 504 – Intentional insult – Proof – Held, mere statement of complainant that accused misbehaved with him without revealing the actual words/ abuses hurled by him does not constitute offence under Section 504 of code. (Para 9). T

Case referred:
C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645

For the appellant: Mr. Sanjeev Sood, Additional Advocate Generals and Mr. Kunal Thakur, Deputy Advocate General.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant appeal filed under Section 378 Cr.PC, lays challenge to judgment dated 30.4.2008, passed by the learned Presiding Officer, FTC, Hamirpur, District Hamirpur, H.P., in Criminal Appeal No. 12 of 2007, reversing judgment of conviction dated 31.1.2007, passed by the learned JMIC Nadaun, in Criminal Case No. 106-II-2002, RBT No. 164-II-2003, whereby learned court below while holding the accused guilty of having committed offence punishable under Section 504 IPC convicted and sentenced him with Simple Imprisonment till the rising of the court and fine of Rs. 3,000/- and in default of payment of fine, to further undergo simple imprisonment for one day.

2. Briefly stated facts, as emerge from the record are that Police Station Nadaun received a complaint from medical officer PHC Dhaneta alleging therein that on 30.5.2002, at about 3:15 pm, respondent-accused namely Yoginder Pal (herein after referred to as "the accused") came to the hospital at Dhaneta and not only misbehaved with the patients, but also obstructed the complainant PW1 Dr. Sukhpal from checking the patients. Complainant also alleged that accused hurled abuses at Smt. Savitri Devi, w/o Sh. Julfi Ram and when aforesaid Julfi Ram questioned the accused, he was also abused by the accused. Complainant also alleged that the accused also abused Smt. Sharda Devi, staff nurse of the Hospital and obstructed/prevented her from discharging the public duty. On the basis of aforesaid complaint made by the complainant PW1, formal FIR Ext.PW8/A came to be registered against the accused under Sections 353 and 504 of IPC. After completion of investigation, police presented the challan in the competent court of law, who on being satisfied that prima facie case exists against the accused, put notice of accusation to him for having committed offence under Section 504 of IPC, to which he pleaded not guilty and claimed trial. Prosecution with a view to prove its case examined as many as eight witnesses, whereas accused in his statement recorded under Section 313 Cr.PC, denied the case of the prosecution in toto. He also led evidence in his support.

3. Learned trial Court on the basis of evidence collected on record by the prosecution though acquitted the accused for commission of offence punishable under Section 353 of IPC, but convicted and sentenced him till the rising of the Court under Section 504 of IPC.

4. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the court below, accused preferred an appeal in the Court of learned Presiding Judge FTC, Hamirpur, H.P., who while setting aside the judgment of conviction recorded by the court below acquitted the respondent-accused for having committed offence punishable under Section 504 of IPC. In the aforesaid backdrop, appellant-State has approached this

Court by way of instant proceedings, seeking therein conviction of the respondent-accused after setting aside the judgment of acquittal recorded by the court below.

5. Having heard learned counsel for the parties and perused material available on record, this Court finds no force in the argument raised by learned Deputy Advocate General that impugned judgment of acquittal is not based upon proper appreciation of evidence, rather this court on perusal of evidence available on record is of the view that learned first appellate Court has dealt with each and every aspect of the matter meticulously and there is no scope left with this Court to interfere with the same.

6. It is not in dispute that respondent accused was acquitted of offence alleged to have been committed by him under Section 353 IPC and no appeal, whatsoever, ever came to be filed by the appellant-State against the same, rather appeal, if any, came to be filed on behalf of the accused against his conviction recorded by the learned trial Court under Section 504 IPC and as such, this Court at this stage, is only required to see the correctness of findings returned by the court below with regard to offence alleged to have been committed by the accused under Section 504 of IPC.

7. Having carefully perused evidence available on record, be it ocular or documentary, this Court finds that though there is some evidence to the effect that on the date of the alleged incident, accused caused obstruction to public servants in discharge of their public duty, but as has been noticed herein above, accused already stands acquitted under Section 353 IPC, which finding has attained finality and as such, there is no occasion for this Court to examine the evidence from that angle.

8. Dr. Sukhpal while deposing as PW1 deposed that on 13.5.2002, when he was on duty in the OPD at PHC Dhaneta, at about 3:15PM, accused came there and asked him to check/examine him. Complainant checked/examined him and thereafter, accused left the hospital. He further deposed that after about ten minutes, accused again came and asked him to check him again. Since at that time, another patient namely Savitri was being checked up by the complainant, accused allegedly asked above named patient to stand up from the stool and when she refused to do so, accused allegedly misbehaved with her. This witness further deposed that accused also misbehaved with Smt. Sharda Devi, staff nurse of the hospital, whereafter he reported the matter to the police vide Ext.PW1/A. This witness also admitted that few days back, accused was medically examined by him at the instance of the police and he had rendered opinion vide MLC Ext.PW1/B.

9. Interestingly, careful perusal of version put forth by this witness nowhere discloses offence, if any, under Section 504 IPC because main allegation of this witness is that while he was checking the accused, accused misbehaved with him. He has nowhere stated that what kind of abuses were hurled at him. Moreover, if aforesaid version of this witness is read juxtaposing his initial complaint Ext.PW1/A, there are lot of contradictions and inconsistencies. In complaint Ext.PW1, this witness simply alleged that accused abused him without stating therein that what sort of abuses were hurled upon him by the accused, whereas this witness while deposing before the court below simply stated that he was asked by the accused to check him twice and he misbehaved with him. If the statement of the complainant made before the court is perused, this Court is in total agreement with the finding returned by the learned first appellate Court that mere statement of the complainant that the accused misbehaved with him is not enough to hold the accused guilty of having committed offence punishable under Section 504 IPC. In order to constitute an offence under Section 504 IPC, complainant is /was necessarily required to state/disclose kind of abuses hurled at him.

10. PW2 Julfi Ram, husband of Savitri Devi (patient) deposed that the accused started arguing with him when he asked him that why accused asked his wife to get up from the stool. He also failed to mention that what sort of abuses came to be hurled upon him by the accused.

11. PW4 Smt. Sharda Devi i.e. staff nurse of the hospital stated that accused was hurling abuses at the complainant, but this witness also failed to depose specifically with regard to kind of abuses allegedly hurled by the accused upon the complainant.

12. PW5 Smt. Savitri Devi, who happened to be wife of PW2 also made a general statement that the accused abused the complainant.

13. Aforesaid statements made by these witnesses, if are read in conjunction juxtaposing each other, clearly suggest that accused requested the complainant to check him twice since he was not satisfied with the treatment given to him at the first instance. Statements made by these aforesaid prosecution witnesses reveal that complainant-doctor was humiliated/misbehaved by the accused, but that is not sufficient to constitute offence punishable under Section 504 IPC. There are material contradictions and inconsistencies in the statement of PW1 (complainant) and as such, no much reliance could be placed upon the same while determining the guilt, if any, of the accused.

14. Having carefully perused the evidence available on record, this Court is persuaded to agree with the contention of learned counsel representing the respondent-accused that since there are material contradictions in the statements made by prosecution witnesses, learned court below rightly did not place reliance upon same. Reliance is placed on Judgment passed by the Hon'ble Apex Court in ***C. Magesh and Ors. v. State of Karnataka*** (2010) 5 SCC 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasise, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Suraj Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14)***
> ***"14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses."***

15. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court sees no reason to differ with the well reasoned judgment passed by the learned first appellate Court below which otherwise appears to be based upon the proper appreciation of evidence adduced on record and the same is accordingly upheld. Accordingly, the appeal is dismissed being devoid of any merits.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Oriental Insurance Co. Ltd. ....Appellant
Versus
Parkash Singh & others ....Respondents

FAO (ECA) No. 199/2012
Decided on:15.10.2019

Workmens' Compensation Act, 1923 - Section 21 – Territorial jurisdiction – Held, Section 21 of Act does not debar filing of claim petition by dependents of deceased at a place where they ordinarily reside or where employer has his registered office. (Para 4)

Case referred:
Morgina Begum vs. MD, Hanuman Plantation Ltd., (2007)11 SCC 616

For the appellant Mr. Jagdish Thakur, Advocate.
For the respondents Mr. Raghunandan Chaudhary, Advocate, for respondents No. 1 & 2.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

The Insurance Company has preferred this appeal against the order dated 31.03.2012, passed by the learned Commissioner, Employee's Compensation, Una, District Una, whereby claim petition instituted on 17.01.2001, was allowed and a compensation amount of Rs. 2,19,950/- along with interest @ 9% per annum from 26.08.2000 and Rs. 1000/- towards funeral expenses was granted. Compensation amount was to be deposited within one month, failing which, interest was to be calculated @ 12% per annum. Liability to pay the compensation was fastened on the appellant-Insurance Company

2. This appeal was admitted on 12.06.2012 on following substantial questions of law:-

1. Whether the learned Commissioner below has wrongly taken the monthly income of the deceased as Rs. 2000/- per month in view of the statement of respondent No.3, the employer.

2. Whether the learned Commissioner was wrong in awarding the interest for the period w.e.f. 5.8.2003 to 29.1.2010 and also the penal interest.

3. Whether the assumption of jurisdiction of the learned Commissioner was violative of Section 21 of the Employee's Compensation Act, 1923 and also bad for non-issuance of notice under Section 10 of the aforesaid Act.

Reasons:

3. In my considered view, this appeal merits rejection. All the three questions of law as extracted above are being answered against the appellant-insurance company for the following factual reasons(the parties are hereinafter referred as they were before the learned Commissioner below):-

(i) The owner of the vehicle/employer has admitted that he had employed deceased Sh. Makhan Singh, son of the claimants, as driver on truck bearing registration No. HR-38A-6132.

(ii) It is undisputed that on 25.07.2000, truck bearing No. HR-38A-6132, loaded with goods, was being driven by the deceased as an employee of respondent No.1 to Maharashtra. It was parked at Transport Nagar Chhikli Lucky Vasan Kata, Dehu Road, Police Station, Maharashtra.

(iii) While spreading tarpaulin over the loaded truck, the deceased was electrocuted due to the electric current passing through the wires of electric pole adjacent to the parked truck. Post mortem report of deceased (Ext. P-1) conducted at Maharashtra Medical & Health Service, Pimpri, recorded cause of death as cardio-respiratory failure and cerebral hemorrhage due to electric shock. Reports prepared by Investigating Agency, Punne (Ext. P-2 to P-4), the inquest reports also corroborate this fact.

(iv) Respondent No.1/owner of the vehicle /employer has not disputed the above factual aspects. He has admitted that:- the deceased Sh. Makhan Singh was employed by him as a driver; deceased died while discharging his duties; he has also stated that deceased was in possession of valid and effective driving licence; he had seen the original driving licence of the

deceased and got a photocopy of the same; he had employed the deceased as driver after taking his (deceased's) actual driving test.

(v) The evidence on record, in particular Character Certificate (Ext.P-2/A) and the Middle Standard Certificate of the deceased, proves his date of birth as 12.07.1977. RW-2 Sh.Vishal Vashisht has also proved the date of birth of deceased as 12.07.1977 by producing on record the admission and withdrawal register of the school. There is no evidence to the contrary. Thus, it is to be concluded that deceased was 23 years old when he met with the fatal accident.

(vi) The parents' contention was that deceased was earning Rs. 3000/- per month as a driver of respondent No.1 plus Rs. 100/- per day was being given to him by his employer as allowances for his diet. Thus, total wages of deceased Makhan singh were claimed to be Rs. 6000/- per month by the claimants. However, no documentary evidence in this regard was produced. Whereas, respondent No.1/employer stated that deceased was getting Rs. 1000/- per month as salary plus Rs. 20 per day as daily diet. However, in cross-examination, respondent No.1, stated that no written agreement was executed between him and deceased in respect of said salary. No record in respect of salary register or statement of account was produced.

In the absence of any documentary and reliable oral evidence in respect of salary of the deceased, learned Commissioner was justified in taking the salary of the deceased to be not less than Rs. 3000/- per month. This assessment was made on the basis:- that the deceased was working as driver and, therefore, will be paid wages higher than that of casual/manual labourer; The minimum wages of the labourer declared by the State of H.P. at the relevant time were approximately Rs. 70/- to Rs. 80/- per day. Also, no infirmity can be found with the observation of the learned Commissioner in taking the daily diet allowance of the deceased at Rs. 50/- per day, in the facts and circumstances of the case. Total monthly wages of deceased were thus taken as Rs. 4500/-.

4(i) Question of Law No.1:- (Quantum of wages)

The accident occurred in the year 2000. Explanation-2 of Section 4 of the Workmen's Compensation Act as it existed prior to its amendment in 2010 provided that when the monthly wages of a workman exceeded Rs. 2000/- then the same shall be deemed to be Rs. 2000/-only. Though, learned Commissioner calculated the total monthly wages of the deceased at Rs. 4500/-, however, in view of Section 4 of the Act as it existed at the relevant time, learned Commissioner calculated the compensation amount payable to the claimants by treating the monthly wages of deceased at Rs. 2000/-. Final calculations were arrived at in accordance with Section 4 of the Act by taking 50% of the monthly wages i.e. Rs. 1000/- and multiplying it by factor 219.95 as per Schedule-IV of the Act. Thus, question of law No.1 is redundant as despite holding that petitioner was getting monthly wages at Rs. 4500/- per month, actual calculation has been made only by treating the wages at Rs. 2000/- per month in accordance with the provisions of Workmen's Compensation Act.

4(ii) Question of Law No.2:- (Interest)

No infirmity can be found in the order of learned Commissioner whereby interest at the rate of 9% from 26.08.2000 was awarded on compensation amount of Rs. 2,19,950/- till the realization of entire amount. It was only in case of failure to deposit the compensation amount along with interest at the rate of 9% within a period of one month from the date of announcement of the award (31.03.2012) that the interest was to be 12% per annum. Question of law is answered against the appellant-Insurance Company.

4(iii) Question of Law No.3:-

4(iii)(a) Regarding notice under Section 10 of the Act.

This question also does not arise for adjudication as the instant case is covered by the Workmen's Compensation Act. Respondent No.1/ owner / employer of the deceased, stated in his

examination-in-chief that immediately after the accident, respondent No.2 was informed and requested to settle the matter regarding compensation. RW-1 has not been cross-examined

on this aspect of the matter. This fact has not been denied by the insurance company in its reply. No evidence whatsoever has been led by the insurance company.

4(iii)(b) Jurisdiction vis-a-vis Section 21 of the Act.

Section 21 of the Workmen's Compensation Act does not debar filing of the claim petition by the dependents of deceased at a place where they ordinarily reside or where the employer has his registered office. Reference in this regard can be made to ***(2007)11 SCC 616*** titled as ***Morgina Begum*** *vs.* ***MD, Hanuman Plantation Ltd.***, wherein, it was held as under:-

> ***"5.*** *There is no dispute that the accident in the present case took place at Nagaon and hence the Commissioner, Workmen's Compensation at Nagaon also had jurisdiction to entertain the claim petition. However, in the present case the claim petition was filed at Tezpur because both the claimants, i.e., the father and mother of deceased Md. Rajik Ahmed, started residing at Tezpur with their son-in-law after the death of their son Md. Rajik Ahmed. The question to be decided in the present case is when the accident took place at Nagaon and the claimants were residing at the time of the death of their son at Nagaon but after the death of their son Md. Rajik Ahmed, they had shifted to Tezpur can me Commissioner, Workmen's Compensation at Tezpur legitimately entertain the claim petition.*
>
> ***6****. Section 21 (1) (b) of the Act clearly provides that the claim petition may be filed by the claimant where the claimant ordinarily resides. In our opinion, the expressesion `ordinarly resides' means where the person claiming compensation normally resides at the time of filing the claim petition. The proviso to Section 21 (1) which is also relevant for the present controversy, provides that in case the Commissioner, other than the Commissioner having jurisdiction over the area in whcih the accident took place, entertains the claim petition then he shall give a notice to the Commissioner having jurisdiction over the area and the state Government concerned. The Amended Section 21 has been specifically introduced in the Act by amending Act No. 30 of 1995 with effect from 15th September, 1995 in order to benefit and facilitate the claimants. The Statement of Objects and Reasons for the amendment of the Act, a copy of which has been produced before us, clearly mentions that the amendment has been brought about for benefits of the claimants viz. either the workmen or their dependents. The relevant portion of the Statement of Objects and Reasons, reads as under:-*
>
> *"It is also proposed to introduce provision for facilitating migrant workmen to file compensation claims before the Commissioners having jurisdiction over the area where they or their dependents ordinarily reside. Provision for transfer of compensation from one Commissioner to another has also been made."*
>
> ***7.*** *The idea behind introduction of this amendment is that migrant labourers all over the country often go elsewhere to earn their livelihood. When an accident takes place then in order to facilitate the claimants they may make their claim not necessarily at the place where the accident took place but also at the place where they ordinarily reside. This amendment was introduced in the Act in 1995. This was done with a very laudable object, otherwise it could cause hardship to the claimant to claim compensation under the Act. It is not possible for poor workmen or their dependents who reside in one part of the country and shift from one place to another for their livelihood to necessarily go to the place of the accident for filing a claim petition. It may be very expensive for the claimants to pursue in such a claim petition because of the financial and other hardship. It would entail the poor claimant traveling from one place to another for getting compensation. Labour statutes are for the welfare of the workmen."*

In the instant case, claimants in their claim petition had prayed for sending the intimation to the concerned Commissioner, Pune, Maharashtra. Steps were also taken in this regard. The record shows that umpteenth number of times, the matter was sent by learned Commissioner to the Workmen Commissioner, Pune, Maharashtra. Finally, interrogatories were sent to him, which were answered by Workmen Commissioner, Pune,

Maharashtra on 16.11.2009. Provisions of Section 21 of the Act were complied with. Question of law is accordingly answered in favour of the claimants and against the appellant.

Accordingly, there is no merit in this appeal, hence, the same is dismissed. Pending application(s), if any, also stand disposed of.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Shri Devinder Singh ....Appellant

Versus

Shri Raj Kumar & others ...Respondents

FAO No. 259/2019
Reserved on: 14.10.2019
Decided on: 16.10.2019

Motor Vehicles Act, 1988 - Section 166 – Motor accident - Rash and negligent driving – Requirement of proof – Held, in proceedings instituted under Section 166 of Act, claimant must prove that accident in question had occurred because of rash and negligent driving on part of driver of offending vehicle – Absence of such proof will disentitle him to claim compensation from the owner /insured of offending vehicle. (Para 5)

Cases referred:

Mangla Ram vs. Oriental Insurance Co. Ltd. & Ors., (2018) 5 SCC 656

Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz, (2013) 10 SCC 646

For the appellant :Mr. Tek Chand Sharma, Advocate.

For the respondents :Respondent No.1, *ex parte*.
Mr. Naresh Sharma, Advocate, for respondent No. 2.
Mr. Deepak Basin, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

Instant appeal has been preferred against the dismissal of the claim petition by the learned Motor Accident Claims Tribunal (III), Shimla in MAC Petition No. 104-S/2 of 2012/10.

2. Facts:-

2(a) Claim petition was preferred by the appellant under Section 166 of the Motor Vehicles Act, praying for compensation of Rs. 2,50,000/- along with interest @ 12% per annum from the date of accident till the realization of the amount.

2(b) The case as set up in the claim petition was that appellant was carrying 2-3 passengers from Shimla to Delhi on 08.11.2008 in his Maruti Car bearing Registration No.HP-01A-9495, when at a place near Gannaur, Shane Punjab Hotel, District Sonipat, Haryana, this vehicle met with an accident on account of rash and negligent driving by respondent No.2 of L.T.V.(Tata) bearing Registration No. HR-46-3169. It has been alleged in the petition that at the place of accident, respondent No.2 without giving any signal turned the truck to its right side and thereby struck it on the front side of the appellant's vehicle. Because of this negligent driving of respondent No.2, the accident occurred, which could have been avoided, had respondent No.2 taken due care and caution while driving the ill-fated truck. The compensation was primarily claimed on account of alleged damage to the vehicle and alleged loss of business for 60 days.

2(ii) Respondents No. 1 & 2, i.e. owner and driver of the Vehicle bearing No. HR-46-3169, filed reply to the claim petition, wherein accident though was admitted, but it was denied that the same was caused by rash and negligent driving of respondent No.2. Rather, it was pleaded that the appellant was himself driving his vehicle in rash and negligent manner; was over speeding and had tried to wrongly overtake the truck driven by respondent No.2.

Various other objections were also taken, which are not relevant for the purpose of adjudication of the present appeal.

2(iii) Claim petition was also opposed by respondent No.3, i.e. the Insurer of Vehicle bearing No. HR-46-3169.

2(iv) The evidence was led by the parties in respect of their respective contentions. After considering the pleadings and the evidence, learned Motor Accident Claims Tribunal (III), Shimla, vide award dated 08.05.2015, dismissed the claim petition primarily on the ground that the appellant failed to prove on record that the alleged damage caused to his car was because of rash and negligent driving of the truck by respondent No.2.

3(i) Feeling aggrieved against the impugned award dated 08.05.2015, instant appeal has been preferred.

I have heard Mr. Tek Chand Sharma, learned counsel for the appellant, Mr. Naresh Sharma, and Mr. Deepak Basin, learned counsel for the respondents and with their assistance gone through the record.

Evidence:

3(ii) In respect of his contentions that the accident had occurred on account of rash and negligent driving by respondent No.2, the **appellant** himself stepped into the witness box as **PW-4**. He stated that the accident occurred on account of rash and negligent driving of vehicle bearing No. HR-46-3169 by respondent No.2, which was coming from the opposite direction and collided with his vehicle; FIR Ext. PW-3/A was lodged by him regarding this accident; he as well as the passengers travelling in his car suffered injuries in the accident; he carried his damaged vehicle to Goel Motors, Shimla; whereafter, it was further taken by him to Chandigarh for repairs; the repair bills were Ext. PW-2/A to Ext. PW-2/D. He denied the suggestion that respondent No.2 was driving the truck in normal speed and that the accident had taken place because of his (appellant's) over speeding the vehicle bearing No. HP-01A-9495.

3(iii) **Sh. Anil Saini, PW-1**, stated that he was travelling in vehicle bearing No. HP-01A-9495 on 08.11.2008 and that accident occurred as the truck driver/respondent No.2 had turned his vehicle towards right side without giving any indicator, as a result of which, the Alto Car suffered damage; Injuries were also caused to all the passengers in the car; In cross-examination, he stated about having been treated in the hospital at the place of accident, however, denied remembering the name of the hospital; He admitted that his presence in the vehicle was not in the capacity of a passenger; He also admitted the suggestion that vehicle bearing No. HR-46-3169 was being driven in front of their vehicle in another lane; he also admitted that he did not even remember the date of accident and had brought the information about it in writing; According to him, front portion of the appellant's car had hit the back portion of truck driven by respondent No.2; He further stated in cross-examination that their vehicle had struck the left side of the truck.

3(iv) **PW-3 ASI Kuldeep Singh**, brought the record regarding FIR No. 325/08 (Ext. PW-3/A), registered on 09.11.2008 at Police Station Gannaur, District Sonipat, Haryana. He also stated that respondent No.2 had been acquitted in this case on 02.03.2013.

3(v) **Sh. Harbhajan Singh**, owner of workshop appeared as **PW-2** and stated that:- vehicle was repaired in his workshop; bills Ext. PW-2/A to PW-2/D were issued in this regard; he further stated that vehicle was brought with the help of crane.

3(vi) In defence, **respondent No.2**, (driver of truck) appeared as **RW-1**, who stated that he was working as driver with respondent No.1 for about 12 years and was driving vehicle bearing No. HR-46-3169 on the date of accident; he denied that the truck was being driven by him rashly or negligently rather he was driving this vehicle in normal speed and had given the indicator before turning the vehicle; appellant was driving his vehicle at great speed, as a result of his over speeding the vehicle, the accident occurred; the vehicle was insured with respondent No.3.

Observations:

4(i) Evidence led by the appellant is contradictory to his factual pleadings regarding alleged mode and manner in respect of description of accident. In the claim petition, it was pleaded that accident occurred because of failure on part of respondent No.2 in giving any signal for turning the truck to the right side, whereas, in the witness box, the appellant stated that truck driven by respondent No.2 was coming from the opposite side and

that is why, the vehicle suffered so much damage. The accident in question has not been disputed by the respondents, however, their case is that respondent No.2 was driving the truck in normal speed and was turning it towards right side after giving proper indicator when the car driven by the appellant in great speed in rash and negligent manner struck with the truck and resultantly suffered some damage. The FIR Ext. PW-3/A was registered a day later. It is not in dispute that respondent No.2 stands acquitted in the said case.

4(ii) Learned counsel for the appellant relied upon judgment in ***Mangla Ram*** vs. ***Oriental Insurance Co. Ltd. & Ors.*** reported in (2018) 5 SCC 656, wherein relying upon ***Dulcina Fernandes & Ors.*** vs. ***Joaquim Xavier Cruz***, reported in ***(2013) 10 SCC 646,*** it was held that evidence of claimant ought to be examined by the Tribunal on the touch stone of preponderance of probability and the standard of proof beyond reasonable doubt cannot be applied.

4(iii) There cannot be any dispute with the above settled legal position, however, in the instant case:-

(i) It is significant to notice that claim is on account of damage caused to the vehicle. Admittedly no damage has been claimed by the appellant from the Insurer of his own vehicle;

(ii) The mode of rashness and negligence pleaded by the petitioner is absolutely contrary to his statement in the witness box. It has been pleaded that truck was turned towards right side by respondent No.2 without giving any indicator because of which accident occurred, whereas, in the witness box, it was stated by the appellant that accident occurred on account of head on collision. Statement of PW-1 in this regard is contrary to the statement of PW-4;

(iii) The persons alleged to be the passengers travelling in appellant's car and alleged to have suffered injuries in the accident, have not been examined;

(iv) PW-1 Sh. Anil Saini, was admittedly not travelling in the car in the capacity of passenger. He does not even remember the date of the accident. He, though, says that he was treated in the hospital along with other passengers on the day of accident, but does not even remember the hospital.

(v) PW-2 Harbhajan Singh, has proved on record the repair bills Ext. PW-2/A to Ext. PW-2/D, however, these bills are of January, 2009, whereas, the accident in question is of 8th November, 2008. As per appellant, PW-4, the vehicle was brought from the place of accident in District Sonipat, Haryana to Goel Motors, Shimla, from where, this vehicle was taken to Chandigarh to the workshop of PW-2, whereas, as per statement of PW-2, Harbhajan Singh, the vehicle was brought to his workshop with the help of crane, however, appellant does not say anything about the mode and manner of bringing the vehicle from the place of accident to Shimla and from Shimla to Chandigarh. Both the witnesses contradict each other on this material aspect also.

5. In view of the above, learned Tribunal below was justified in not believing that accident occurred due to rash and negligent driving of the truck by respondent No.2. The appellant has not been able to prove that damage has been caused to his vehicle on account of rash and negligent driving of the truck driven by respondent No.2, by leading cogent and reliable evidence. Since this appeal is being dismissed, therefore, there is no need to advert to various other pleas taken by the learned counsel for the respondents including the plea advanced by learned counsel for respondent No.3 that even otherwise as per Section 147 of the Motor Vehicle Act read with terms and conditions of Insurance Policy, respondent No.3 cannot be held liable to pay more than a sum of Rs. 6000/-as alleged claim at best was a case of third party property damage; and the plea taken by learned counsel for respondent No.2 that the claim petition was not maintainable as the claimant had not impleaded his own Insurance Company. Accordingly, there is no merit in this appeal, hence, the same is dismissed. Pending application(s), if any, also stand disposed of.

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

Gagan Singh & another .... Petitioners

Versus

Hem Raj & others .....Respondents

Civil Revision No.147 of 2018
Date of Decision: 10th September, 2019

Indian Evidence Act, 1872 – Section 65 – Proof of sale deed by secondary evidence – Leave of court – Held, where original documents are not produced at any point of time nor any factual foundation is laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence - Secondary evidence relating to contents of a document is inadmissible if non-production of original is not accounted for. (Para 13).
Indian Evidence Act, 1872 – Section 66 – Notice to opposite party to produce document – Non- issuance of - Effect – Held, filing of application to lead secondary evidence itself is a notice to opposite party to produce document if it is in its possession.(Para 18)
Cases referred:
Surinder Kaur Vs. Mehal Singh and others, 2014 (1) RCR (Civ) 467
Rakesh Mohindra versus Anita Beri and others, 2016 (16) SCC 483
H. Siddiqui (dead) by Lrs. Versus A. Ramalingam, AIR 2011 SC 1492
U.Sree versus U. Srinivas, (2013) 2 SCC 114

For the Petitioners: Mr. Ajay Sharma, Senior Advocate with Mr. Amit Jamwal, Advocate.
For the Respondents: Mr. Vijender Katoch, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, is directed against the order dated 16.8.2017 passed by learned Civil Judge (Junior Division), Indora, District Kangra, H.P., in CMA No.233 of 2017, whereby an application having been filed by the petitioners ***(hereinafter referred to as the plaintiffs)*** under Section 65 of the Indian Evidence Act ***(for short 'Act')***, seeking therein permission to prove sale deed dated 15.12.1986 by way of secondary evidence, came to be rejected.

2. Briefly stated facts, as emerge from the record are that the plaintiffs filed a suit, seeking therein declaration that the plaintiffs and defendant No.2 are owners in possession of the suit land, detail whereof is given in the plaint, on the basis of the sale deed executed by defendant No.1 in favour of the plaintiffs and defendant No.2 on 8.12.1986. In the suit, as referred hereinabove, plaintiff also sought consequential relief of injunction.

3. Defendant No.1 by way of written statement refuted the claim of the plaintiffs. He also filed counter claim ***(Annexure P-3).***

4. During the pendency of the suit, an application under Section 65 of Indian Evidence Act ***(Annexure P-4)*** came to be filed on behalf of the plaintiffs, averring therein that original copy of sale deed is not traceable and same is presumed to be in possession of defendant No.1. Plaintiff further averred in the application that original document is out of reach of the plaintiffs and they are unable to produce the same for adducing the evidence and as such, they may be permitted to prove the same on the basis of certified copy of the sale deed by way of secondary evidence. Plaintiff categorically averred in the application that they have obtained the certified copy of the sale deed dated 15.12.1986 from the office of Sub Registrar, Indora and want to adduce the evidence by way of secondary evidence.

5. Aforesaid application filed by the plaintiffs came to be opposed on behalf of defendant No.1, who specifically denied that the original sale deed is in his custody. Defendant No.1 in reply to the application sated that as per the averments contained in para-6 of the plaint, plaintiff himself has mentioned that the applicant/plaintiff had given the copy of original sale deed to the Revenue Officials for entrance and attestation of mutation. Defendant No.1 also averred in the reply to the application that the plaintiff has filed the present suit on the basis of certified copy of the sale deed and as such, he has no right to adduce the evidence on the basis of the alleged certified copy, when he specifically failed to produce the original or certified copy of the same.

6. Learned Court below vide order dated 16.8.2017 dismissed the application having been filed by the plaintiffs primarily on the ground that it was incumbent upon the plaintiffs to issue notice to the opposite party before filing application under Section 65 of the Act. In support of aforesaid finding learned Court below placed reliance upon the judgment rendered by Hon' ble High Court of Punjab and Haryana in case titled ***Surinder Kaur Vs. Mehal Singh and others,*** 2014 (1) RCR (Civ) 467 as well as case titled ***Hari Singh Vs. Shish Ram,*** 2002(4) RCR (Civ) 830, wherein it has been held that before a party is permitted to adduce secondary evidence to show that the documents is in existence, it is necessary to issue notice under Section 66 of the Act to the party in whose custody the document is kept. In the aforesaid background, plaintiffs have approached this Court in the instant proceedings with a prayer to set aside the impugned order dated 16.8.2017 and to permit them to prove the documents in question by way of secondary evidence.

7. Having heard learned counsel representing the parties and perused the material available on record, this Court is not in agreement with the reasoning assigned by the learned Court below while dismissing the application filed by the plaintiffs under Section 65 of the Act.

8. Careful perusal of the averments contained in the plaint ***(Annexure P-1***), clearly reveals that plaintiffs have categorically averred that plaintiffs and defendants after getting the sale deed executed, gave copy of original sale deed to concern revenue authorities, so that mutation on the basis of the same is attested in their favour.

9. In para-4 of the application filed under Section 65 of the Act, plaintiffs while seeking permission to prove the sale deed in question by way of secondary evidence has specifically averred that they have obtained certified copy of the above document from the office of Sub Registrar, Indora and want to lead the same in evidence by way of secondary evidence. It is not the case of the plaintiffs that the document sought to be proved by way of secondary evidence is in the possession of the respondents/defendants and as such, reasoning assigned by the learned Court below that it was incumbent upon the applicants/plaintiffs to issue notice to the opposite party to produce the original sale deed is totally contrary to the pleadings adduced on record by the respective parties.

10. Section 65 of the Act deals with the circumstances under which secondary evidence relating to documents may be given to prove the existence, condition or contents of the documents. Provision of Section 65 of the Act, if read in its entirety, it clearly suggests that secondary evidence can be led if the original document has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time. Party intending to produce secondary evidence requires to establish non production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted. In this regard, reliance is placed upon the judgment rendered by the Hon' ble Apex Court in ***Rakesh Mohindra versus Anita Beri and others,*** 2016 (16) SCC 483, wherein it has been held as under:-

> "14. Section 65 of the Act deals with the circumstances under which secondary evidence relating to documents may be given to prove the existence, condition or contents of the documents. For better appreciation Section 65 of the Act is quoted herein below:- "65. Cases in which secondary evidence relating to documents may be given: Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-
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> (a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
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> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
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> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not

arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force 40[India] to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court and the fact to be proved it the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted.

16. The High Court in the impugned order noted the following :(Anita Beri vs. Rakesh Mohindra SCC Online HP 4258 para-9)

> "9. There is no averment about Ext. DW-2/B in the Written Statement. The Written Statement was filed on 19.2.2007. DW-2/B infact is only a photocopy. The plaintiffs are claiming the property on the basis of a registered will deed executed in her favour in the year 1984. It was necessary for the defendant to prove that in what manner the document dated 24.8.1982 was executed. The defendant while appearing as AW-1 has admitted in his cross-examination that except in his affidavit Ext. AW-1/A, he has not mentioned in any document that the letter of disclaimer was executed by Justice late Sh. Tek Chand in his presence. The statement of DW-2 does not prove that Ext. DW-2/A, ever existed. DW-2 Sh. Gurcharan Singh, has categorically admitted in his cross-examination that he has not brought the original of Ext. DW- 2/B. He has also admitted that on Ext. DW-2/B, the signatures of P.C. Danda were not legible. Volunteered that, those were not visible. The learned trial Court has completely misread the oral as well as the documentary evidence, while allowing the application under Section 65 of the Indian Evidence Act, 1872, more particularly, the statements of DW- 2 Gurcharan Singh and DW-3 Deepak Narang. The applicant has miserably failed to comply with the provisions of Section 65 of the Indian Evidence Act, 1872. The learned trial Court has erred by coming to the conclusion that the applicant has taken sufficient steps to produce document Ext. DW- 2/B."

17. The High Court, following the ratio decided by this Court in the case of J. Yashoda vs. Smt. K. Shobha Rani, AIR 2007 SC 1721 and H. Siddiqui (dead) by lrs. vs. A. Ramalingam, AIR 2011 SC 1492, came to the conclusion that the defendant failed to prove the existence and execution of the original documents and also failed to prove that he has ever handed over the original of the disclaimer letter dated 24.8.1982 to the authorities. Hence, the High Court is of the view that no case is made out for adducing the secondary evidence.

18. The witness DW-2, who is working as UDC in the office of DEO, Ambala produced the original GLR register. He has produced four sheets of paper including a photo copy of letter of disclaimer. He has stated that the original

documents remained in the custody of DEO. In cross-examination, his deposition is reproduced hereinbelow:-

> "xxxxxxxx by Sh. M.S. Chandel, Advocate for the plaintiff No.2. I have not brought the complete file along with the record. I have only brought those documents which were summoned after taking up the documents from the file. As on today, as per the GLR, Ex.DW- 2/A, the name of Rakesh Mohindra is not there. His name was deleted vide order dated 29.8.2011. I have not brought the original of Ex.DW-2/B. It is correct that Ex.DW-2/D does not bear the signatures of Sh. P.C. Dhanda. Volunteered.: These are not legible. Ex.DW-2/C is signed but the signatures are not leible. On the said document the signatures of the attesting officer are not legible because the document became wet. I cannot say whose signatures are there on these documents. On Ex.DW-2/E the signatures at the place deponent also appears to have become illegible because of water. Ex.DW-2/F also bears the faded signatures and only Tek Chand is legible on the last page. It is incorrect to suggest that the last page does not have the signatures of the attesting authority. Volunteered: These are faded, but not legible. The stamp on the last paper is also not legible. There is no stamp on the first and second page. In our account, there is no family settlement, but only acknowledgement of family settlement. I do not know how many brothers Rakesh Mohindra has. It is correct that the original of Ex.DW-2/H does not bear the signatures of Sh. Abhay Kumar. I do not know whether Sh. Abhay Kumar Sud and Rakesh Mohindra are real brothers. The above mentioned documents were neither executed nor prepared in my presence. It is incorrect to suggest that the above mentioned documents are forged. It is incorrect to suggest that because of this reason I have not brought the complete file."

19. In Ehtisham Ali v. Jamma Prasad 1921 SCC OnLine PC 65 a similar question came for consideration as to the admissibility of secondary evidence in case of loss of primary evidence. Lord Phillimore in the judgment observed:(SCC Online PC)

> " It is, no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be, deposed to its loss, unless there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed."

20. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law."

11. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court in **H. Siddiqui (dead) by Lrs. Versus A. Ramalingam,** AIR 2011 SC 1492, wherein it has been held as under:

> "10. Provisions of Section 65 of the Act, 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof.

> Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon."

12. Further the Hon'ble Apex Court in ***U.Sree versus U. Srinivas,*** (2013) 2 SCC 114, has held as under:-

> "13. Before we dwell upon the tenability of the conclusions of desertion and mental cruelty, we think it condign to deal with the submission whether the photostat copy of the letter alleged to have been written by the wife to her father could have been admitted as secondary evidence. As the evidence on record would show, the said letter was summoned from the father who had disputed its existence. The learned Family Court Judge as well as the High Court has opined that when the person is in possession of the document but has not produced the same, it can be regarded as a proper foundation to lead secondary evidence.
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> 14. In this context, we my usefully refer to the decision in ***Ashok Dulichand v. Madahavalal Duber,*** *11(1975)4 SCC 664*, wherein it has been held that:(SCC p.666, para7)
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> "7.....according to clause (a) of Section65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it.'
>
> Thereafter, the Court addressed to the facts of the case and opined thus:- (Ashok Dulichand case,11(1975) 4 SCC p.667, para 7)
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> "7. In order to bring his case within the purview of clause(a) of Section 65, the appellant filed application on July 4, 1973, before Respondent 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case Respondent 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of Respondent No.1. There was also no other material on the record to indicate that the original document was in the possession of Respondent No.1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent 1 in his affidavit denied being in possession of or having anything to do with such a document.
>
> Be it noticed, in this backdrop, the High Court had recorded a conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy and this Court did not perceive any error in the said analysis."

13. Careful perusal of aforesaid exposition of law clearly suggest that where original documents are not produced at any point of time, nor any factual foundation is laid for giving secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence, meaning thereby secondary evidence relating to the contents of a document is inadmissible, until the non- production of the original is accounted for.

14. In the case at hand, plaintiffs by averring in the plaint that the plaintiffs and defendants after getting the sale deed executed gave the copy of original sale deed to the revenue authorities have duly established the existence of sale deed sought to be proved by

way of secondary evidence. Hence, finding recorded by learned Court below that plaintiffs have failed to show that document sought to be proved by way of secondary evidence is not in existence. In para-2 of the written statement filed by defendant No.1, sale deed, as referred hereinabove, has been termed to be not legally valid and genuine document, but there is no specific denial, if any, to its existence. Question whether sale deed sought to be proved by way of secondary evidence is forged document or not can only be decided at later stage when both the parties would be afforded an opportunity for leading evidence. At this stage, while considering the application filed under Section 65 of the Act, Court is not required to go into the merits of the case, rather it is only required to go into the question with regard to existence of the document intended to be proved by way of leading secondary evidence.

15. As has been taken note hereinabove, applicants/ plaintiffs in para Nos. 6 and 7 of the plaint have categorically averred that they both plaintiffs and defendants after getting the sale deed executed gave the copy of original sale deed to the concern revenue authorities, but such assertion has not been categorically refuted by defendant No.1. Defendant No.1 has simply stated that he is owner in possession of the suit land. Certified copy of sale deed sought to be proved by way of secondary evidence stands duly placed alongwith the application and authenticity and genuineness of which never came to be challenged by the defendants in their reply to the application. In the judgment referred hereinabove, Court has categorically observed that if parties wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. Hon'ble Apex Court has further held that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law. Even in the case at hand, if application for proving the document is allowed no prejudice, if any, would be caused to the defendants, who otherwise in any eventuality would get an opportunity to rebut the same.

16. In the case at hand, if the averments contained in the application are read in its entirety, it clearly reveal that the plaintiffs sought permission of the Court to prove the sale deed dated 15.12.1986, by leading secondary evidence. As has been noticed herein above, factum with regard to existence of sale deed dated 15.12.1986, never came to be refuted specifically, rather on the basis of the same defendants have applied for partition proceedings on the basis of same sale deed.

17. At this stage, provisions of S.66 of the Act may be usefully extracted herein below:

> **"66. Rules as to notice to produce**
>
> Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 46[or to his attorney or pleader,] such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:
>
> Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:-
>
> (1) when the document to be proved is itself a notice ;
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> (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
>
> (3) When it appears or is proved that the adversary has obtained possession of the original by fraud or force;
>
> (4) when the adverse party or his agent has the original in Court;
>
> (5) when the adverse party or his agent has admitted the loss of the document;
>
> (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

18. Careful perusal of aforesaid provisions of law suggests that the very purpose of notice under S.66 is only to put other party to notice to produce the document, in whose possession or power, document is, so as to afford opportunity to the party by producing same to secure best evidence of its defence. Though, in the case at hand, there i**s** no specific

averment, if any, in the application that document sought to be proved by way of secondary evidence is in the possession of the defendants, rather it has been stated that document in question was handed over to the revenue authorities for attesting the mutation, but even otherwise, mere filing of the application under Section 65 of the Act, was sufficient notice to the defendants to produce the document in question, if it was in their possession. Non-issuance of notice under Section 66 of the Act could not be a reason for the Court below to reject the application, especially when it was not the specific case of the plaintiffs that document sought to be proved by way of secondary evidence is in possession of the defendants. Hence, this Court has no hesitation to conclude that the plaintiffs by placing on record certified copy of the sale deed in question has proved the existence of document purported to be given by them to the revenue authorities for attesting the mutation.

19. In view of the detailed discussion made herein above and law laid down by the Hon'ble Apex Court (supra), the present petition is allowed and order dated 16.8.2017, passed by the learned Civil Judge (Junior Division), Indora, District Kangra, H.P., in CMA No.233/17 is set aside. Application filed by the plaintiffs for leading secondary evidence under Section 65 of the Act, is allowed.

20. Pending applications, if any, are disposed of. Interim direction, if any, is vacated. Record, if received, be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE L. NARAYANA SWAMY, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Dalip Singh .....Petitioner.

Versus

State of H.P. & Others .....Respondents.

CWP No. 2490 of 2019.

Decided on: 14th October, 2019

Constitution of India, 1950 – Article 226 – Transfer of employee on basis of D.O Note of elected representative - Validity – Held, an elected representative has no right to claim that a particular employee be transferred to a particular station – Such choice is left with Administrative Head(s) i.e, with Executive and not with Legislators - Administrative Head has to apply his mind and take decision regarding transfer of an employee uninfluenced by the recommendation of a political executive. (Para 4)

Cases referred:

Sanjay Kumar versus State of Himachal Pradesh and others, 2013(3), Shimla Law Cases 1373

Amir Chand versus State of Himachal Pradesh 2013(2) Him. L.R. 648

Ashok Kumar Attri versus Himachal Pradesh Power Corporation Limited, 2013 (3) Shim.LC 1594

For the Petitioner: Mr. H.S. Rangra, Advocate.

For the respondents: Mrs. Rita Goswami&Mr. AshwaniSharma,Addl. A.Gs. for respondents No.1 to 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J (oral).

Challenge in the instant writ petition is to the order dated 11.09.2019 (Annexure P-1), whereby the petitioner, a JBT Teacher, has been transferred from Government Primary School, Hansu, under Education Block, Aut to Government Primary School, Trail, under Education Block, Aut, on the basis of a D.O. Note.

2. **Facts:**

2(i). The transfer order has been challenged on the grounds that the petitioner had joined his duties at Government Primary School Trail under Education Block Aut District Mandi on 31.01.1998 and thereafter in the year 2001 transferred to Government Primary School, Roopa under Education Block Drang at Padhar, District Mandi. The place Roopa,

within the meaning of the transfer policy, is a hard area. The petitioner remained/served there for more than 15 years and in August 2016 was transferred to Government Primary School, Hansu, the present place of posting. Thereafter, on 11.9.2019, the petitioner has been transferred from that School vide impugned order Annexure P-1.

2(ii). In the month of July 2019, respondent No.4 was transferred from Government Primary School Chahatigarh to Government Primary School Trail under Education Block Aut. She instead of joining in the said School had challenged the said order of her transfer by filing O.A. No.7907 of 2019 before the erstwhile H.P. Administrative Tribunal, which was disposed of with a direction to her to file detailed representation to respondent No.2. Respondent No.2, on receipt of the representation, deferred the transfer of respondent No.4 and thereafter she managed to get D.O./U.O. Note in her favour from local MLA for her adjustment. Respondents No.1 to 3, just to accommodate respondent No.4, have adjusted her at the present place of posting of the petitioner and transferred him from that place to Government Primary School, Trail, vide impugned order Annexure P-1, on the basis of D.O. Note.

3. **Record**

3(i). In view of one of the allegations levelled in the writ petition regarding transfer order having been issued on the basis of D.O. Note, we had called for and perused the record pertaining to the transfer of petitioner.

3(ii). Record reveals that respondent No.4, who was under transfer to Government Centre Primary School, Seri Chahatigarh to Government Primary School Tarail u/c Primary School (Balu) Education Block Aut, District Mandi, on the basis of U.O. Note, received from office of the Chief Minister, was ordered to be adjusted without TTA/JT either at GPS (Hansu) vice Shri Daleep Singh (the petitioner), JBT or GPS Ghalauhati vice Smt. Suman Kumari JBT, in relaxation of ban on transfers.

4. Whether the order of transfer of the petitioner in view of the law laid down by this Court in **Sanjay Kumar** versus **State of Himachal Pradesh and others, 2013(3), Shimla Law Cases 1373;** and **Amir Chand** versus **State of Himachal Pradesh 2013(2) Him. L.R. 648;** is legally sustainable or not, is a question which has engaged our attention in this case. The answer thereto in the given facts and circumstances, however, would be in negative for the reason that as per the legal principles settled in the judgments supra, an elected representative has no right to claim that a particular employee is transferred to a particular station. Such choice has been left to be exercised by the Administrative Head(s) i.e. the executive and not by the legislators. Whether an employee has to be transferred and posted out, as per the ratio of the law laid down in these judgments has to be decided by the administration. This Court has also expected from the Administrative Head(s) to apply their mind and take a decision to issue order of transfer of the employees independently and uninfluenced by the recommendations, if any, made by the political executive i.e. merely on asking by MLA or Minister. Not only this, but in the event of any recommendation is received from the political executive, the Administrative Department can always make a back reference stating therein as to why the recommendations so made cannot be accepted. In **Amir Chand**'s judgment cited supra, it has further been held that whenever transfer of an employee is not ordered by the departments but on the recommendations of Minister or MLA, in that event also, before the order of transfer is issued, views of Administrative Department should be obtained. Only thereafter the transfer can be ordered, if approved by the Administrative Head(s). The law so laid down is reproduced as under:-

> "[81] In addition to the directions issued in the individual writ petitions, we are of the considered view that certain general directions are required to be issued. We have collated the various directions issued by us in different cases which have not been complied till today. After taking into consideration the entire scenario, we issue the following directions:
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> > 1. The State must amend its transfer policy and categorize all the stations in the State under different categories. At present, there are only two categories, i.e. tribal/hard areas and other areas. We have increasingly found that people who are sent to the hard/tribal areas find it very difficult to come back because whenever a person is posted there, he first manages to get orders staying his transfer by approaching the political bosses and sometimes even from the Courts. Why should the poor people of such areas suffer on this count. We are, therefore, of the view that the Government should categorize all

the stations in the State in at least four or five categories, i.e. A, B, C, D and E also, if the State so requires. The most easy stations, i.e. urban areas like Shimla, Dharamshala, Mandi etc. may fall in category A and the lowest category will be of the most difficult stations in the remote corners of the State such as Pangi, Dodra Kawar, Kaza etc. At the same time, the home town or area adjoining to home town of the employee, regardless of its category, otherwise can be treated as category A or at least in a category higher than its actual category in which the employee would normally fall. For example, if an employee belongs to Ghumarwin, which is categorized in category B, then if the employee is serving in and around Ghumarwin, he will be deemed to be in Category A.

2. After the stations have been categorized, a database must be maintained of all the employees in different departments as to in which category of station(s) a particular employee has served throughout his career. An effort should be made to ensure that every employee serves in every category of stations. Supposing the State decides to have four categories, i.e. A, B, C, D, then an employee should be posted from category A to any of the other three categories, but should not be again transferred to category A station. If after category A he is transferred to category D station, then his next posting must be in category B or C. In case such a policy is followed, there will be no scope for adjusting the favourites and all employees will be treated equally and there will be no heart burning between the employees.

3. We make it clear that in certain hard cases, keeping in view the problems of a particular employee, an exception can be made but whenever such exception is made, a reasoned order must be passed why policy is not being followed.

4. Coming to the issue of political patronage. On the basis of the judgments cited hereinabove, there can be no manner of doubt that the elected representative do have a right to complain about the working of an official, but once such a complaint is made, then it must be sent to the head of the administrative department, who should verify the complaint and if the complaint is found to be true, then alone can the employee be transferred.

5. We are, however, of the view that the elected representative cannot have a right to claim that a particular employee should be posted at a particular station. This choice has to be made by the administrative head, i.e. the Executive and not by the legislators. Where an employee is to be posted must be decided by the administration. It is for the officers to shows their independence by ensuring that they do not order transfers merely on the asking of an MLA or Minister. They can always send back a proposal showing why the same cannot be accepted.

6. We, therefore, direct that whenever any transfer is ordered not by the departments, but on the recommendations of a Minister or MLA, then before ordering the transfer, views of the administrative department must be ascertained. Only after ascertaining the views of the administrative department, the transfer may be ordered if approved by the administrative departments.

7. No transfer should be ordered at the behest of party workers or others who have no connection either with the legislature or the executive. These persons have no right to recommend that an employee should be posted at a particular place. In case they want to complain about the functioning of the employee then the complaint must be made to the Minister In charge and/or the Head of the Department. Only after the complaint is verified should action be taken. We, however, reiterate that no transfer should be made at the behest of party workers."

5. In the case in hand, as noticed supra, no doubt, the Chief Minister, Himachal Pradesh has approved the transfer of respondent No.4 either vice Daleep Singh, the petitioner or one Smt. Suman Kumari, JBT posted in Government Primary School Chalauhati and the matter was forwarded to the 2nd respondent. Nothing is there in the record produced before us that in the office of 2nd respondent, the matter was examined to ascertain the justification of the transfer of the petitioner approved by an elected representative. Again nothing is there on record to show that the office of respondent No. 2 has examined the matter and the said respondent recorded its satisfaction qua the desirability of the transfer of the petitioner in the interest of administration or larger public interest. Therefore, obviously, respondent No.2 has issued the order of transfer merely on the D.O. note of the Chief Minister which is not legally permissible as the law laid down by this Court deprecate such practice of transfer of an employee.

6. Admittedly, the petitioner was transferred and posted at the present place of his posting in the month of August 2016. Now, he has again been transferred to Government Primary School, Trail, under the same Education Block i.e. Aut vide order under challenge. What is the distance between Government Primary School, Hansu and Government Primary School, Trail, nothing has come on record. The Administrative Head i.e. respondent No.2 may transfer the petitioner, however, strictly in accordance with law and in the interest of Administration and not on the basis of D.O. note alone and at the behest of political executive.

7. The competent authority i.e. the 2nd respondent on receipt of approval for transfer of the petitioner should have examined the same independently, uninfluenced by the recommendation, if any, of the elected representative and issued the order of transfer thereafter. The issuance of order of transfer of the petitioner by the 2nd respondent, therefore, is not in the interest of administration or public interest and rather colourable exercise of power. Being so, the impugned order, in all fairness and in the ends of justice, is not legally sustainable. The same, as such, deserves to be quashed and set aside. A Co-ordinate Bench of this Court in **Ashok Kumar Attri** versus **Himachal Pradesh Power Corporation Limited, 2013 (3) Shim.LC 1594**, under similar set of facts and circumstances has held as under:-

> "6. Taking overall view of the matter, therefore, we not only quash and set aside the office order, dated 31st August, 2013, but also direct respondent No.1 to reconsider the issue of posting of petitioner and respondent No.3 afresh, taking into account all aspects of the matter and that decision should be taken in accordance with the extant transfer policy and not under dictation or influence of the D.O. letters received form the office of the Chief Minister, which has no value and if that is taken into account, it would be nothing short of extraneous consideration by the Appropriate Authority of respondent No.1."

8. In view of the legal principles settled in the judgments cited supra, we are in agreement with the submissions made by Mr. H.S. Rangra, learned counsel representing the petitioner that order of transfer, Annexure P-1 is not legally sustainable.

9. For all the reasons hereinabove, this petition succeeds and the same is accordingly allowed. Consequently, the order under challenge in this writ petition, Annexure P-1 is quashed and set aside. We, however, leave it open to the Competent Authority (respondent No.2), to transfer of the petitioner, if so required, strictly in accordance with law and as per the Transfer Policy.

10. With the aforesaid observations, the writ petition stands disposed of, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE L. NARAYANA SWAMY, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Kimtu Devi. .....Appellant.

Versus

State of Himachal Pradesh & ors. .....Respondents.

LPA No. 38 of 2019

Date of decision: October 15, 2019.

Letters Patent Appeal – Held, order framing issues on application having been filed under Order VII Rule 11 of Code of Civil Procedure, is interim in nature – Letters Patent appeal against it is not maintainable. (Para 4).

For the appellant : Mr. S.S. Mittal, Senior Advocate with Mr. Ajay Kumar Dhiman, Advocate.

For the respondents : Mr. Ajay Vaidya, Senior Addl. AG with Mr. J.K. Verma and Mr. Adarsh Sharma, Addl. AGs for respondents No.1 and 2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge *(Oral)*

This appeal is directed against the order passed by learned Single Judge in OMP No. 120 of 2019 (COMS No. 34 of 2018). The challenge to the impugned order is on the grounds, *inter-alia*, that since the defence of the defendants (respondents herein) in the main suit stand struck off, therefore, the application under Order 7 Rule 11 CPC was not maintainable. Also that the impugned order could have not been passed by learned Single Judge without deciding the application registered as OMP No. 121 of 2019 filed under Order 8 Rule 10 CPC by the appellant-plaintiff with a prayer to close the defence of the respondents-defendants as they failed to file the written statement within the stipulated period. As per the provisions contained under Order 14 Rule 1 CPC the issues could have not been framed in the absence of pleadings.

2. On hearing Mr. S.S. Mittal, Sr. Advocate assisted by Mr. Ajay Kumar Dhiman, Advocate and learned Senior Additional Advocate General and also going through the impugned ordr, we find that the issues have not been framed in the main suit and rather in the application registered as OMP No. 113 of 2019 filed by respondent No. 2 under Order 7 Rule 11 CPC for rejection of the plaint. The appellant-plaintiff has admittedly fled reply thereto. Therefore, it is on the basis of the pleadings of the parties, the issues have been framed in the application OMP No. 113 of 2019 vide order under challenge in this appeal. The appellant-plaintiff has confused herself while submitting that issues have been framed in the main suit without there being the written statement filed by the respondents-defendants.

3. We are also not satisfied with the submission that without deciding the application OMP No.121 of 2019 filed by the appellant-plaintiff under Order 8 Rule 10 CPC, the order under challenge could have not been passed for the reason that the prayer in the said application has been made to struck off the defence of the respondents-in the main suit. Otherwise also, the order under challenge not decides the application under Order 7 Rule 11 CPC finally which as as matter of fact will stand disposed of finally after taking on record the evidence of the parties and affording to them the opportunity of being heard. In this view of the matter also, the present appeal filed under Clause 10 of Letters Patent is not maintainable.

4. Learned Single Judge on the basis of the pleadings of the parties in the application under Order 7 Rule 11 CPC has framed issues and the matter has now been fixed for admission/denial of the documents and also fixation of the date for recording evidence of the applicant in the application. The order under challenge is an interim order. The appeal under Clause 10 of Letters Patent against such order is not maintainable. Otherwise also, the appellant (plaintiff in the suit) at this stage cannot be said to be aggrieved in any manner whatsoever by the order under challenge. The appeal, as such, is dismissed being not maintainable, so also the pending application(s), if any.

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

ICICI Lombard General Insurance Company Limited ....Appellant.

Vs.

Smt. Bhawani and another .....Respondents.

FAO No.: 368 of 2012

Date of Decision: 16.10.2019

Employees Compensation Act, 1923 – Section 22 - Motor accident – Death case – Defence of invalid/ fake driving licence – Relevancy – Commissioner allowing claim application of dependents of driver and fastening liability on insurance company – Appeal against by insurer on ground that driving licence of deceased driver was fake and it has no liability – Held, insurance company can absolve itself only if it is proved that driving licence of driver was fake and the owner of vehicle had its knowledge yet he permitted the driver to drive it. (Para 16 & 17).

Case referred:
Ram Chandra Singh Vs. Rajaram and others, (2018) 8 Supreme Court Cases 799

For the appellant:	Mr. Jagdish Thakur, Advocate.
For the respondents:	Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 1. Ms. Kiran Dhiman, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral):*

By way of this appeal, the appellant-Insurance Company has assailed Award dated 16.05.2012, passed by learned Employee's Compensation Commissioner, Lahaul & Spiti at Kullu, H.P. in Case No. 11 of 2007, titled as *Smt. Bhawani Vs. Sh. Sanjay Kumar and another,* vide which, an application filed under Section 22 of the Employee's Compensation Act was allowed by the learned Commissioner in the following terms:

> *"25. In view of my findings on the aforesaid issues, the application is allowed and compensation of Rs.3,20,355/- alongwith interest at the rate of 12% per annum from the date it becomes due till payment is awarded in favour of the applicant from the respondent No. 2. The applicant is also entitled to penalty to the extent of 50% on the amount of compensation from the respondent No. 1, the employer of the deceased. The respondents are directed to deposit the said amount within sixty days from today."*

2. Brief facts necessary for the adjudication of the present appeal are that an application was filed under Section 22 of the Employee's Compensation Act by Smt. Bhawani, wife of late Shri Krishan Negi for grant of compensation, *inter alia,* on the grounds that deceased Krishan Negi, husband of the claimant, was engaged as a Driver by Shri Sanjay Kumar (respondent No. 1 before the learned Commissioner) to ply vehicle No. HP-01A-1185. In the course of said employment of his, deceased lost his life on 24.08.2007 in an accident which took place at Khyog Nallah near Saroha, Tehsil Chachiot, District Mandi, H.P. At the time when the accident took place, the vehicle was being driven by the deceased. It was the case of the claimant that at the time of his death, monthly wages of the deceased were Rs.4000/- and in addition, he was also being paid Rs.50/- daily diet money. The deceased was 24 years old at the time of his death. The employer was duly sent a notice. The factum of the accident as also the death of the deceased workman was in the knowledge of the employer. The vehicle was insured by the employer with the Insurance Company-appellant (respondent No. 2 before the learned Commissioner). Employer had also carried out the insurance of the deceased under the Employee's Compensation Act with the Insurance Company. As employer had failed to indemnify the claimant, hence the claim petition was filed.

3. The claim was resisted by the respondents. Employer though admitted that deceased Krishan Negi was his employee and was engaged as a Driver to ply the vehicle in issue, who died on 24.08.2007 while driving the said vehicle, however, as per him, monthly

wages of the deceased Driver were Rs.3000/- per month and not Rs.4000/- as alleged by the claimant. It was further the case of the employer that as the vehicle in issue was fully insured with the Insurance Company, therefore, liability to pay compensation, if any, was that of the Insurance Company.

4. Insurance Company vide separate reply resisted the claim, inter alia, on the ground that there was gross violation of the terms and conditions of the Insurance Policy. The factum of the deceased being paid an amount of Rs.4000/- as monthly wages and Rs.50/- as daily diet money was also denied.

5. On the basis of pleadings of the parties, learned Commissioner framed the following issues:

> "1. Whether the deceased was a workman within the meaning of workmen's compensation Act? OPP
>
> 2. Whether the accident arose out of and in the course of employment? OPP
>
> 3. Whether the petitioner is entitled for compensation as alleged? OPP
>
> 4. Whether the petitioner is legal heir/dependent of deceased? OPR-2
>
> 5. Whether the deceased was not holding a valid driving licence at the time of accident? OPR-2
>
> 6. Whether the petition is bad for non-joinder of necessary parties? OPR-2
>
> 7. Whether the respondent No. 1 is guilty of gross violation of Insurance Policy terms and conditions? OPR-2
>
> 8. Whether notice under Section 10 of the workmen compensation Act was given? OPR-2
>
> 9. Relief."

6. On the basis of evidence which was led on record by the parties, the issues so framed were answered as under:

"Issue No. 1:	Yes.
Issue No. 2:	Yes.
Issue No. 3:	Yes.
Issue No. 4:	No.
Issue No. 5:	No.
Issue No. 6:	No.
Issue No. 7:	No.
Issue No. 8:	No.
Relief:	The application is allowed per operative portion of the judgment."

7. The claim petition was accordingly allowed by the learned Commissioner by awarding an amount of Rs.3,20,355/- alongwith interest at the rate of 12% per annum from the date it became due till its payment. Claimant was also held entitled to penalty to the extent of 50% on the amount of compensation from respondent No. 1,i.e., the employer of the deceased.

8. The Award so passed by the learned Commissioner has been challenged by way of this appeal by the Insurance Company. The same does not stands assailed by the employer. This appeal was admitted on 13.09.2012 on the following substantial question of law:-

"Whether the insurance company is liable to indemnify the insured and the renewal of the driving licence wold assume the character of a valid driving licence when its original was fake?

9. Learned counsel for the appellant has argued that the Award passed by the learned Commissioner *per se* is not sustainable in the eyes of law, as the findings which stand returned by the learned Commissioner while answering Issue No. 5 are contrary to the record. By referring to the documents produced on record by the appellant, learned counsel has argued that as it was writ large on the face of the record of the case that the driving licence of the deceased, as it existed before its renewal in the year 2006, was a fake licence, the liability to pay compensation could not have been shifted upon the Insurance Company, because in view of breach of the terms and conditions of the Insurance Policy, the insurer was not bound to indemnify the insured.

10. No other point was urged.

11. On the other hand, learned counsel for the respondents have argued that there is no infirmity in the Award passed by the learned Commissioner, as the findings which have been returned while deciding Issue No. 5, are clearly borne out from the record of the case. They submit that it is a matter of record that deceased was in the profession of driving for the last so many years and was an efficient Driver. They further submit that it is also a matter of record that as on the date when the unfortunate accident took place, the vehicle in issue was duly insured with the Insurance Company and deceased Krishan Negi was having a valid driving licence to drive the kind of vehicle, which was involved in the accident and said licence of his was valid from 12.06.2006 to 11.06.2009. They further argued that it is not the case of the appellant-Company that it is intra these dates that the licence of the deceased being relied upon was found to be a fake licence.

12. I have heard learned counsel for the parties and have also gone through the Award under challenge as well as the record of the case.

13. A perusal of the record of the case demonstrates that Issue No. 5 which stood framed by the learned Commissioner was whether the deceased was not holding a valid driving licence at the time of accident? It is borne out from the record that as on the date when the accident took place, i.e., 24.08.2007, there was a driving licence being possessed by the deceased. It has not been disputed that in terms of the driving licence, which was valid from 12.06.2006 to 11.06.2009, the deceased was authorized to drive the vehicle which was involved in the accident. Now, in this background, what this Court has to see is as to whether the contention of learned counsel for the appellant that the Award is liable to be set aside on the ground that there was material on record to demonstrate that before its renewal, the licence was a fake licence is sustainable or not.

14. I repeat that the date of accident is 24.08.2007. The validity of the licence which stood issued in favour of the deceased as on the date when the accident took place was from 12.06.2006 to 11.06.2009. In my considered view, while answering the substantial question of law, which has been framed, what this Court has to see is as to whether there was any express and willful breach of the terms and conditions of the Insurance Policy on the part of the insured or not. The Insurance Policy is on record as Ex. D-2. The same was valid from 10.04.2007 to 09.04.2008. Now the Driver who was plying the vehicle and who unfortunately lost his life in the accident was possessing a licence

15. Had Insurance Company placed on record any material to demonstrate that despite having any knowledge of the fact that the driver was not having a valid driving licence to drive the vehicle, which stood handed over by the owner to the driver, then but obvious, the Commissioner could not have fastened the liability to indemnify the insured upon the Insurance Company. However, this is not so in the present case. There is no evidence on record that owner was having the knowledge that licence of the driver was a fake licence. Besides, a perusal of the cross-examination of the owner of the vehicle by the insurer

demonstrates that no such suggestion was put to the owner of the vehicle that he was aware of the fact that either the driver was in possession of a fake driving licence which was subsequently got renewed or that on the date when the accident took place, he was having knowledge of the fact that the driver was not having a valid driving licence.

16. Hon'ble Supreme Court in ***Ram Chandra Singh*** Vs. ***Rajaram and others***, (2018) 8 Supreme Court Cases 799 has held that if the owner was aware of the fact that the licence was fake and still permitted the driver to drive the vehicle, then the insurer would stand absolved. However, the mere fact that the driving licence is fake, *per se,* would not absolve the insurer.

17. In view of the law declared by the Hon'ble Supreme Court, the only conclusion which can be arrived at is that even if it is to be assumed that the licence being possessed by the driver was initially a fake licence, yet till the Insurance Company proved in the Court that this fact was in the knowledge of the owner, who despite being aware of said fact that the licence being possessed by the driver was a fake licence, permitted the driver to drive the vehicle, it could not be absolved of its liability. As there is nothing on record to demonstrate that the owner of the vehicle in the present case at any stage was aware of the fact that the licence being held by the driver was initially a fake licence, it cannot be said that the learned Commissioner has erred in fastening the liability to indemnify the insured upon the insurer. Substantial question of law is answered accordingly.

18. Accordingly, as this Court finds no merit in the present appeal, the same is dismissed, so also pending miscellaneous applications, if any.

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

Rajender Kumar .....Appellant

Versus

Shyam Lal and Anr. .....Respondents

FAO No. 97 of 2015

Reserved on: 5.9.2019

Decided on: 16.10.2019

Workmens' Compensation Act, 1923 - Section 22 – Employer – employee relationship – Proof – Absence of appointment letter/salary slip etc- Effect – Held, normally owners of taxi do not issue appointment letter(s) or salary slip(s) to person(s) engaged by them as drivers- Fact that claimant is known as driver of owner in the bazar area is sufficient proof of employer – employee relationship between them particularly when owner had not filed any complaint for unauthorised use of his vehicle against the driver (Para 11 & 12)

Motor Vehicles Act, 1988 – Section 10 - Driving licence –Validity of – Held, holder of LMV licence can drive all light motor vehicles including light transport vehicle. (Para 13).

Cases referred:

National Insurance Co. Ltd v. Mubasir Ahmed and Anr. (2007) 2 SCC 349

Pratap Narain Singh Deo v. Srinivas Sabata & Anr (1976) 1 SCC 289

Kerala State Electricity Board and Anr. V. Valsala K. and Anr (1999) 8 SCC 254

Oriental Insurance Company Ltd. v. Siby George and Ors (2012) 12 SCC 540

Raj Kumar v. Ajay Kumar and Anr (2011) 1 SCC 343

Ved Prakash Garg v. Premi Devi and Ors, 1998 (1) ACJ 1

For the Appellant	:	Mr. Ashwani Pathak, Senior Advocate with Mr. Sandeep K. Sharma, Advocate.
For the Respondents	:	Mr. Vikrant Chandel, Advocate, for respondent No.1. Mr. Deepak Bhasin, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Present appeal filed under Section 30 of Workmen's Compensation Act, 1923 (in short "the Act"), lays challenge to the judgment/award dated 8.1.2015 passed by the learned Additional Chief Judicial Magistrate-1, Mandi, exercising powers of the Commissioner under the Act in case No.223/13, whereby claim petition having been filed by the petitioner under Sections 4, 15 and 22 of the Act, seeking therein compensation, came to be dismissed.

2. Briefly stated facts, as emerge from the record are that claimant filed petition under Sections 4, 15 and 22 of the Act, seeking therein compensation to the tune of Rs. 5,50,000/- besides other reliefs on account of injury suffered by him during his employment as driver with taxi bearing No.HP-01K-0210 (maruti van), which allegedly met with an accident on 14.7.2007, while claimant was driving it and had reached at Siram Nala near Village Patron. In the aforesaid accident, allegedly claimant suffered multiple grievous injuries and remained admitted in Zonal Hospital Mandi, from where he was further referred to the IGMC Shimla. As per record, claimant remained indoor patient w.e.f. 16.7.2007 to 3.9.2007. Claimant further claimed that prior to the incident, he was earning sum of Rs. 7,000 pm, i.e. Rs. 4,000/- as salary and Rs. 1500 per month as diet money including daily expenses. He also averred that apart from above, he was earning Rs.1500 pm from agriculture.

3. Respondents contested the aforesaid claim petition filed by the claimant on the ground of maintainability. Respondent No.1, who happened to be owner of the vehicle, specifically denied the relationship of employer and employee between him and claimant and claimed that accident did not take place during the course of the employment. He also averred that in case, claimant is found entitled for compensation, respondent No.2 may be held liable because the vehicle in question was insured with respondent No.2 at the time of alleged incident vide policy No. 263202/2007/1991. Respondent No.2-Insurance Company also opposed the aforesaid claim of the claimant on the ground that the petitioner was not holding effective and valid license to drive the category of vehicle. It also claimed that since there was no employer employee relationship between the claimant and respondent No.1, respondent No.2 is under no obligation to indemnify respondent No.1. On the basis of pleadings adduced on record by the respective parties, court below framed following issues:-

1. Whether the petitioner is workman with respondent No.1?OPP

2. Whether the petitioner is entitled for compensation? OPP

3. Whether the opposition party are liable to pay such compensation? OPP

4. Whether the petitioner was holding valid driving license to drive the category of vehicle insured at the time of the accident? OPP

5. Whether the accident has taken place during the course of employment? OPP

6. Relief.

4. Subsequently, vide judgment dated 8.1.2015, court below dismissed the claim petition filed by the claimant on the ground that claimant has been not able to prove that he was employed by respondent No.1. Learned court below further held that it is not discernable from the evidence on record that accident took place while claimant had been driving taxi and he was employed as driver by the owner-respondent No.1. In the aforesaid background, claimant has approached this Court in the instant proceedings, seeking therein compensation in terms of provisions contained under the Act after setting aside the impugned award.

5. This Court vide order dated 1.4.2015, admitted the instant appeal on following substantial questions of law:-

A. Whether claim of workmen/employee can be rejected on the ground that there existed no appointment letter, hence, presumption to the effect that there is no relationship of employer and employee?

B. Whether benefits of social welfare legislation could be denied on hyper technical grounds of appointment of workmen not governed by strict procedure of appointment in private sector?

C. Whether owner of a Taxi could be allowed to escape liability of his employee and to say that Taxi was being driven without his consent in the absence of any FIR or other overt and covert act against his employee?

D. Whether the person having driving licence to drive like motor vehicle can be said invalid to drive Maruti Van as Taxi.

E. Whether the persons sitting in the Taxi could be presumed as gratuitous passengers without any proof?

6. Having heard learned counsel for the parties and perused material available on record, be it oral or documentary, this Court finds that it is not in dispute that on account of injuries suffered by the petitioner-claimant in the alleged accident, he remained admitted, firstly at Zonal Hospital Mandi and thereafter at IGMC Shimla w.e.f. 16.7.2007 to 3.9.2007. PW1 Dr. Baldev Kumar has specifically stated that he was a member of the Disability Board, wherein disability of the petitioner was assessed @75% permanent. He also proved disability certificate (Ext.PW1/A) issued by the Board. Similarly, Dr. Jatin Sharma (PW5), who examined claimant after the accident also proved the MLC Ext.PW5/A. Factum with regard to lodging of FIR qua the alleged accident also stands duly proved. Suresh Kumar, VRK (PW2) tendered in evidence copy of FIR No. 310 of 2007 dated 15.7.2007, under Sections 279 and 337 registered at PS Sadar (Ext.PW2/A).

7. Claimant-Rajender Kumar (PW3) while deposing as PW3 categorically stated that he was employed by respondent No.1 as a driver to drive his vehicle bearing HP-01K-0210. He stated that on 14.7.2007, while he was driving the vehicle in question from Manali to Samloun, being hired by one Dhameshwar, it met with an accident. He in his evidence tendered copy of matriculation certificate Ext.PW3/B, driving licence Ext.PW3/C and copy of Pariwar Register Ext.PW3/D. He in his cross-examination admitted that respondent No.1 had not issued any appointment letter to him, but specifically denied that he was not appointed as driver. In his cross-examination, he also stated that no receipt qua the salary ever came to be issued to him. He also stated that he cannot say as to in whose presence, he was appointed as driver, but everyone in Bazar knows it. He denied the suggestion that he had borrowed vehicle from respondent No.1 and had come with person namely Dhameshwar and his fiancée.

8. PW4 Dhameshwar Ram, deposed that he had hired the aforesaid taxi from Manali to Samloun, which was being driven by the claimant. He also stated that claimant-Rajender suffered grievous injuries and as such, is entitled to receive compensation. In his cross-examination, he admitted that though he himself is a taxi driver, but feigned ignorance with regard to salary received by the petitioner stating that he was not employed by respondent No.1 in his presence. He specifically denied the suggestion put to him that petitioner borrowed the vehicle for the purpose of his journey with his fiancée.

9. Respondent No.1 Shayam Lal, while deposing as RW2 categorically deposed that he is the registered owner of vehicle bearing No. HP-01K-0210 and had never employed petitioner as a driver. He stated that rather, person namely Dev Raj, S/o Jeet Ram R/o Vashishat, was the driver employed on the vehicle. He stated that vehicle was duly insured with respondent No.2 w.e.f. 13.8.2006 to 12.8.2007. In his cross-examination, he stated that factum with regard to accident came to his knowledge after 25 days of incident because at that time, he was at Leh. He also admitted that he did not make any complaint that the complainant Rajender Kumar was not his driver. He also admitted that he did not institute any suit or issue a notice to the petitioner qua his being not driver hired by him. Inder Singh, Jr. Assistant in the office of RLA, Mandi (RW1) deposed that petitioner was issued a driving license on 16.10.2006 vide No. D/L N 827/06, whereby he was authorized to drive M/C, S/C with gear, light motor vehicle non transport and the same was valid from 16.10.2006 to 15.10.2026. He specifically stated that claimant was not authorized to drive the transport vehicle.

10. Careful reading of impugned judgment reveals that the claim petition having been filed by the claimant came to be dismissed primarily on two grounds, firstly, petitioner failed to prove employer employee relationship inter-se him and respondent No.1, secondly, petitioner was not having valid driving license to drive the category of vehicle allegedly met

with accident. Since the petitioner failed to prove the employer and employee relationship, issue with regard to accident allegedly took place during the course of the employment also came to be decided against the claimant. Learned court below solely on the statement of RW1 Shayam Lal, who happened to be owner of the ill-fated vehicle proceeded to conclude that at no point of time, the petitioner claimant was employed as taxi driver in the ill fated vehicle, but having carefully perused evidence adduced on record by the petitioner workman, this Court finds aforesaid conclusion drawn by the court below to be erroneous. If the statement of claimant is read in its entirety, juxtaposing statement of RW2, Shayam Lal (owner of the vehicle in question), it clearly emerges that the petitioner workman successfully proved on record that at the time of the alleged incident, he was engaged as a driver by respondent No.1

11. True, it is that petitioner claimant was unable to place on record appointment letter, if any, issued by the respondent No.1 to prove his appointment, but this court cannot lose sight of the fact that normally, no written appointment letters are issued by the owners of the taxis to the drivers. The petitioner has very candidly admitted in her cross-examination that no appointment letter was issued, but he further qualified his aforesaid admission by stating that factum with regard to his being appointed as driver is very much in the knowledge of the people living in the bazaar area. Similarly, he has admitted that no receipt ever came to be issued to him on account of salary given by the owner (respondent No.1), but factum with regard to his being appointed as driver in the vehicle in question by respondent No.1 stands duly substantiated with the statement of Dhameshawr Ram PW4, who himself is a taxi driver. He in his cross-examination categorically stated that he had hired taxi from Manali to Samloun and same was being driven by the claimant. He also stated that claimant suffered grievous injuries and is entitled to receive compensation. He specifically denied suggestion put to him that the petitioner had borrowed the vehicle in question with a view to use it for the purpose of his journey with his fiancée. By putting aforesaid suggestion to the petitioner claimant as well as PW4, stand taken by respondent No.1 that vehicle in question was unauthorisedly used by the petitioner-claimant has virtually fallen to the ground because aforesaid suggestion itself suggest that vehicle in question was taken by the claimant with the consent of respondent No.1, who otherwise at no point of time lodged FIR against the petitioner for unauthorized use of his vehicle by the claimant.

12. Interestingly, in the case at hand, respondent No.1, who happened to be owner claimed that factum with regard to accident came to his knowledge after 25 days, but evidence available on record clearly reveals that immediately after accident, father of the respondent No.1-owner, got the vehicle released. But interestingly, respondent No.1, who claimed that he had never employed the claimant as driver, never lodged a report against the claimant for driving vehicle in question unauthorisedly without there being any permission from the respondent. He categorically admitted in his cross-examination that he he did not institute any suit or issue notice to the petitioner for his illegal act. Aforesaid omission, if any, on the part of the respondent certainly compels this Court to agree with contention of Mr. Pathak, learned Senior Counsel that the petitioner claimant was employed as driver in the ill-fated vehicle by respondent No.1, but he apprehending fastening of liability on him, took a false stand. Moreover, person namely Dev Raj, who allegedly was appointed as driver by respondent No.2, never came to be examined by respondent No.1. Factum with regard to petitioner-claimant holding Driving License at the time of alleged incident is not in dispute, rather dispute, if any, is with regard to competence, if any, of the petitioner-claimant to drive transport vehicle on the strength of driving license possessed by him, which was admittedly meant for plying light motor vehicle (non-transport).

13. The Hon'ble Apex Court in Civil Appeal No. 5826 of 2011 titled ***Mukund Dewangan v. Oriental Insurance Company Limited***, which has been further followed by this Court while delivering judgment titled ***Kamal Dev v. Tulsi Ram and Ors., in FAO No. 153 of 2014*** decided on 12.9.2017 has categorically held that Section 10 of the Motor Vehicle Act requires a driver to hold driving licence with respect to type of vehicle and not with respect to a class of vehicle. While interpreting Section 10 of the Act, Hon'ble Supreme Court has clearly held that in one class of vehicles, there may be different types of vehicles but if they fall in the same class of vehicles, no separate endorsement is required to drive such vehicles. Hon'ble Apex Court has further held that a holder of light motor vehicle licence can drive all the vehicles of the class including transport vehicles and any other interpretation would be repugnant to the definition of "light motor vehicle" in Section 2(21) and the provisions of Section 10(2)(d), Rule 8 of the Rules of 1989. In view of the aforesaid categorical finding returned by the Hon'ble Apex Court as well as this Court, finding returned by the

learned court below qua issue No.4, whereby it held that petitioner was not competent to drive the taxi, is wholly untenable and deserves to be set-aside.

14. In view of the detailed discussion made herein above, this Court has no hesitation to conclude that Tribunal below has fallen in grave error while rejecting the claim petition filed by the claimant. It stands duly proved on record that at the time of the alleged incident claimant was employed as a taxi driver by respondent No.1 and as such, this Court is of the definite view that the petitioner claimant is entitled to compensation on account of injuries allegedly suffered by him in the accident in question.

15. In the case at hand, though petitioner-claimant claimed that he was earning Rs.7,500/- (i.e. Rs.4,000/- as salary and Rs. 1500 per month as diet money including daily expenses as well as Rs. 1500/- pm from agriculture, but since he has not been able to prove income as claimed by him by leading cogent and convincing evidence, this court is in agreement with Mr. Deepak Bhasin, learned counsel for the Insurance company that aforesaid amount claimed by him cannot be taken into consideration while determining the compensation.

16. Question, which needs to be examined at this stage is that on what basis monthly income of workman is required to be assessed and next question which needs to be examined is that in the absence of specific proof with regard to income what should be the criteria for this court to determine the compensation.

17. Before exploring the answers to aforesaid questions, it would be apt to take note of Section 41(1) of the Act.

<table>
<tr><td colspan="2">“Section 4(1): Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-</td></tr>
<tr><td>a) Where death results from the injury</td><td>an amount equal to (fifty per cent) of the monthly wages of the deceased (employee) multiplied by the relevant factor

or

an amount of eighty thousand rupees, whichever is more;</td></tr>
<tr><td>(b) Where permanent total disablement results from the injury</td><td>an amount equal to sixty per cent of the monthly wages of the injured workman multiplied by the relevant factor,

or

an amount of ninety thousand rupees, whichever is more</td></tr>
<tr><td colspan="2">: (Provided that the Central Government may, by notification in the Official Gazette, from time to time, enhance the amount of compensation mentioned in clauses (a) and (b).)</td></tr>
<tr><td colspan="2">Explanation I.- For the purposes of clause (a) and clause (b) “relevant factor” in relation to a workman means the factor specified in the second column of the Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the workman on his last birthday immediately preceding the date on which the compensation fell due. Explanation II.- Where the monthly wages of a workman exceed four thousand rupees, his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be four thousand rupees only.”</td></tr>
</table>

18. From the reading of the above, it is clear that the compensation for the death of the workman, is an amount equal to 50% of the monthly wages of the deceased or an amount of eighty thousand rupees, whichever is more. However, Explanation-II clearly

specifies and restricts the monthly wages of a workman to be four thousand rupees only even if it exceeds rupees four thousand.

19. Subsequently, by Notification, dated 21.5.2010, by Act 45 of 2009, the above Section has been amended (w.e.f.18.1.2010) as follows:

a) Where death results from the injury	*an amount equal to (fifty per cent) of the monthly wages of the deceased (employee) multiplied by the relevant factor* *or* *an amount of one lakh and twenty thousand rupees, whichever is more;*
(b) Where permanent total disablement results from the injury	*an amount equal to sixty per cent of the monthly wages of the injured workman multiplied by the relevant factor,* *or* *an amount of one lakh and forty thousand rupees, whichever is more*
Explanation I.- For the purposes of clause (a) and clause (b) "relevant factor" in relation to a employee means the factor specified in the second column of the Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the employee on his last birthday immediately preceding the date on which the compensation fell due.	
Explanation II omitted by Act 45 of 2009, S.7 (w.e.f. 18.1.2010)"	

20. It is also not in dispute that vide Notification dated 31.05.2010 S.O.1258(E), in exercise of the powers conferred by sub-section (1b) of Section 4 of the Employees Compensation Act, 1923 (8 of 1923), the Central Government has specified Rs.8,000/- as minimum wages for the purpose of sub-section (1) of Section 4.

21. From the bare perusal of aforesaid provisions of law as well as subsequent Notification dated 31.05.2010, it is explicit that for the death of the employee, an amount equal to 50% of his monthly wages multiplied by relevant factor or Rs.1,20,000/- (Rs.one lakh and twenty thousand) whichever is more, has to be awarded towards compensation and for the purpose of computing such compensation, monthly wages at a sum of Rs.8,000/- has to be considered. It is pertinent to mention here that prior to aforesaid amendment, the said wages were fixed at a sum of Rs.4,000/- and Explanation-II specifically restricted the amount to be Rs.4,000/- only even if it exceeds. However, by virtue of Act 45 of 2009, the restriction as referred above came to be omitted and in its place, a sum of Rs.8,000/- has been substituted by way of Notification taken note hereinabove. It is not in dispute that while amending the said clause, no restriction has been attached or specified that if the monthly wages of the deceased employee exceeds Rs.8,000/- whether it should be considered at Rs.8,000/- only and, as such, there appears to be considerable force in the arguments of learned counsel appearing for the claimants that since no restriction is imposed in case the monthly wages of the deceased employee exceeds to Rs.8,000/- liberal interpretation has to be made especially when the Act itself is a beneficial legislation.

22. At this stage it would be appropriate to refer para-4 of the "Statement of Objects and Reasons" mentioned in the Bill for amending the Workmen's Compensation Act, 1923 (22nd December, 2009), as follows:-

> *"Statement of Objects and Reasons:- 4. The Central Government has decided to introduce the Workmen's Compensation (Amendment) Bill, 2009, on the lines of the Workmen's Compensation (Amendment) Bill, 2008 introduced in the 14th Lok Sabha incorporating therein certain recommendation of the Standing Committee proposing to amend the Workmen's Compensation Act, 1923 which inter alia, makes provision,-*

(a) for amendment in long title and the provisions of the aforesaid Act so as to substitute "Workman" by the "employee";

(b) for enhancement of the minimum rates of compensation payable to a worker from eighty thousand rupees to one lakh twenty thousand rupees for death and from ninety thousand rupees to one lakh forty thousand rupees for permanent disability and to empower the Central Government to enhance the minimum rates of the said compensation from time to time.

(c) to confer power upon the Central Government to specify the monthly wages in relation to an employee for the purpose of the aforesaid compensation."

23. Bare perusal of aforesaid 'Statement of Objects and Reasons' suggests that the amendment came into force while empowering the Central Government to enhance the minimum rates of the said compensation from time to time as well as to specify the monthly wages in relation to an employee for the purpose of the aforesaid compensation, meaning thereby fixing the minimum wages by way of amendment at Rs.8000/- is only for the purpose of determining the compensation under the Workmen's Compensation Act and there is scope of further enhancement from time to time. Although, the Act is a beneficial one and, thus, deserves liberal construction with a view to implement the legislative intent, but, it is trite that where such beneficial legislation has a scheme of its own and there is no vagueness or doubt therein, the court would not travel beyond the same and extend the scope of the statute.

24. In the case at hand, since the intent of the legislature is clear while amending the Act to enhance the minimum rates of the compensation from time to time as well as to specify the monthly wages in relation to an employee for the purpose of the said compensation, liberal interpretation beyond the prescription made in the Act, is not at all required. It is pertinent to note here that while amending the Act, the legislature has consciously in its wisdom, omitted the Explanation-II of Section 4-A of the Act only with a view to enhance the minimum rates of compensation.

25. Though by way of amendment as has been taken note herein above, Central Government has specified Rs. 8,000/- as minimum wages for the purpose of sub-section (1) of Section 4 of the Act, but since such amendment came into force w.e.f. 31.5.2010, this Court in agreement with Mr. Bhasin, learned counsel for the Insurance Company that sum of Rs. 4,000/- which was fixed by the Central Government prior to aforesaid amendment, is required to be taken into consideration while assessing the amount of compensation. It is not in dispute that prior to aforesaid amendment, explanation-II, which came to be omitted vide Act 45 of 2009, S.7 w.e.f. 18.1.2010, restricted the monthly wages of a workman to be Rs. 4,000/- only. Hence, for all intents and purposes, wages of workman in the case at hand, who has allegedly suffered permanent disability on account of injuries suffered by him in the accident happened on 14.7.2007, i.e. prior to amendment, (came into force w.e.f. 31.5.2010), can be considered to be Rs. 4,000/- for determining the compensation.

26. From the bare reading of Section 4 (1) (b) (un-amended), it is quite apparent that workman allegedly suffered permanent disablement on account of injuries suffered by him in the accident, is entitled to amount equal to 60 percent of the monthly wages multiplied by the relevant factor or an amount of Rs. 90,000/- whichever is more. Since in the case at hand, accident took place prior to the amendment, compensation is required to be determined on the basis of un-amended provisions. As per Section 4A of the Act, compensation was required to be paid/deposited as soon as it fell due. In the present case, the accident occurred on 14.7.2007, meaning thereby, amount in terms of Section 4 of the Act, was to be deposited by the employer/insurer on or before 13.8.2007, but admittedly, neither amount qua the compensation, if any, in terms of Section 4 of the Act came to be deposited by the owner nor by the insurance company being insurer of the vehicle owned by respondent No.1 and as such, claimant is also entitled to interest qua the delayed deposit.

27. However, at this stage, Sh. Deepak Bhasin, learned counsel representing the insurance company, while placing reliance upon the judgment rendered by the Hon'ble Apex Court in case titled ***National Insurance Co. Ltd v. Mubasir Ahmed and Anr. (2007) 2 SCC 349***, contended that interest, if any, qua the delayed deposit would only reckon from the date of adjudication of the claim, not from the date of the accident. Careful perusal of aforesaid judgment rendered by the Hon'ble Apex Court (supra) suggests that Hon'ble Apex Court while interpreting expression "falls due" as provided under Section 2 of Section 4A held that

legislature has not used the expression 'from the date of accident' and as such, unless there is an adjudication, question of an amount falling due, does not arise. Relevant para of the aforesaid judgment is reproduced herein below:

> *"9. Interest is payable under Section 4A(3) if there is default in paying the compensation due under this Act within one month from the date it fell due. The question of liability under Section 4A was dealt with by this Court in Maghar Singh v. Jashwant Singh1. By Amending Act, 14 of 1995, Section 4A of the Act was amended, inter alia, fixing the minimum rate of interest to be simple interest @ 12%. In the instant case, the accident took place after the amendment and, therefore, the rate of 12% as fixed by the High Court cannot be faulted. But the period as fixed by it is wrong. The starting point is on completion of one month from the date on which it fell due. Obviously it cannot be the date of accident. Since no indication is there as when it becomes due, it has to be taken to be the date of adjudication of the claim. This appears to be so because Section 4A(1) prescribes that compensation under Section 4 shall be paid as soon as it falls due. The compensation becomes due on the basis of adjudication of the claim made. The adjudication under Section 4 in some cases involves the assessment of loss of earning capacity by a qualified medical practitioner. Unless adjudication is done, question of compensation becoming due does not arise. The position becomes clearer on a reading of sub-section (2) of Section 4A. It provides that provisional payment to the extent of admitted liability has to be made when employer does not accept the liability for compensation to the extent claimed. The crucial expression is 'falls due'. Significantly, legislature has not used the expression 'from the date of accident'. Unless there is an adjudication, the question of an amount falling due does not arise."*

28. After passing of aforesaid judgment, Hon'ble Apex Court on 2.11.2018, in Civil Appeal No. 7470 of 2009, in case titled ***North East Karnataka Road Transport Corporation v. Smt. Sujatha***, while taking note of judgment rendered by four Judges Bench of the Hon'ble Apex Court in case titled ***Pratap Narain Singh Deo v. Srinivas Sabata & Anr*** (1976) 1 SCC 289, has held that employer becomes liable to pay compensation as soon as the personal injury is caused to the workman in the accident. In the aforesaid judgment, the Hon'ble Apex Court has reiterated that it is the date of the accident and not date of adjudication of the claim, which is material while determining the interest, if any, payable on account of delayed payment. It would be apt to reproduce relevant paras of the aforesaid judgment herein below:-

> *"19.The question relates to grant of interest on the awarded amount and further, from which date, it is to be awarded to the claimant (respondent).*
>
> *20. The grant of interest on the awarded sum is governed by Section 4A of the Act. The question as to when does the payment of compensation under the Act "becomes due" and consequently what is the point of time from which interest on such amount is payable as provided under Section 4A (3) of the Act remains no more res integra and is settled by the two decisions of this Court.*
>
> *21. As early as in 1975, a four Judge Bench of this Court in Pratap Narain Singh Deo Vs. Srinivas Sabata & Anr. (1976) 1 SCC 289: AIR 1976SC 222 speaking through Singhal, J. has held that an employer becomes liable to pay compensation as soon as the personal injury is caused to the workman in the accident which arose out of and in the course of employment. It was accordingly held that it is the date of the accident and not the date of adjudication of the claim, which is material.*
>
> *22. Another question analogues to the main question arose before the Three Judge Bench of this Court in the case of Kerala State Electricity Board &*

Anr. Vs. Valsala K. & Anr. (1999) 8SCC 254: AIR 1999SC 3502 as to whether increased amount of compensation and enhanced rate of interest brought on statute by amending Act 30/1995 with effect from 15.09.1995 would also apply to cases in which the accident took place before 15.09.1995. Their lordships, placing reliance on the law laid down in Pratap Narain's case (supra) held that since the relevant date for determination of the rate of compensation is the date of accident and not the date of adjudication of the claim by the Commissioner and hence if the accident has taken place prior to 15.09.1995, the rate applicable on the date of accident would govern the subject.

23. After these two decisions, this Court in two cases (both by the Two Judge Bench) viz. National Insurance Company Ltd vs. Mubasir Ahmed & Anr. (2007) 2 SCC 349 and Oriental Insurance Company Ltd. vs. Mohmad Nasir & Anr. (2009) 6 SCC 280 without noticing the law laid down in Pratap Narain and Valsala cases (supra) took a contrary view and held that payment of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made.

24. This conflict of view in the decisions on the question was noticed by this Court (Two Judge Bench) in Oriental Insurance Company Ltd vs. Siby George and others (2012) 12 SCC 540. Justice Aftab Alam speaking for the Bench referred to aforementioned decisions and explaining the ratio of each decision held that since the two later decisions rendered in the cases of Mubasir and Mohmad Nasir (supra) which took contrary view without noticing the earlier two decisions of this Court rendered in Pratap Narain and Valsala cases (supra) by the larger Benches (combination of four and three Judges respectively) and hence later decisions rendered in Mubasir and Mohmad Nasir cases (supra) cannot be held to have laid down the correct principles of law on the question and nor can, therefore, be treated as binding precedent on the question.

25. In other words, the law laid down in Pratap Narain and Valsala cases (supra) was held to hold the field through out as laying down the correct principle of law on the subject. The Two Judge Bench in Oriental Insurance Company Ltd vs. Siby George and others (supra) accordingly followed the principle of law laid down in Pratap Narain and Valsala cases (supra) and decided the case instead of following the law laid down in Mubasir and Mohmad Nasir cases (supra) which was held per incuriam.

29. Aforesaid judgment passed by the Hon'ble Apex Court clearly reveals that Hon'ble Apex Court while rendering judgment in **Mubasir Ahmed's case** (supra) inadvertently failed to take note of its earlier decision rendered by four Judges Bench in case titled ***Pratap Narain Singh Deo v. Srinivas Sabata & Anr (1976) 1 SCC 289*** and ***Kerala State Electricity Board and Anr. V. Valsala K. and Anr (1999) 8 SCC 254*** and as such, in case titled ***Oriental Insurance Company Ltd. v. Siby George and Ors (2012) 12 SCC 540,*** two Judges Bench of the Hon'ble Apex Court having noticed aforesaid conflicting view, held that since court in cases titled ***Mubasir Ahmed and Mohmad Nasir's cases*** (supra), took contrary view without noticing earlier decisions of this Court rendered in **Pratap Narain and Valasala's** cases supra, passed by the larger Benches (combination of three or four judges respectively), later decisions rendered in **Mubasir and Mohamad**

Nasir's cases cannot be held to have laid down the correct principles of law in question and nor therefore, can be treated as binding precedent on the question.

30. It is quite apparent from the judgment rendered by the Hon'ble Apex Court in ***North East Karnataka Road Transport Corporation v. Smt. Sujatha's case*** (supra) that interest in terms of Section 4-A of the Act becomes due from the date of accident and not the date of adjudication of the claim as has been held by the Hon'ble Apex Court in ***Mubasir Ahmed's*** case (supra). Hence in view of the aforesaid judgment, claimant is also entitled to interest under Section 4A(3)(a) on account of delay in deposit of amount payable by the owner of the offending vehicle from the date of accident.

31. Since this Court has held the claimant entitled for compensation on account of accident, next question, which needs to be determined is with regard to quantum of compensation. Before ascertaining quantum as referred herein above, it would be apt to take note of judgment rendered by the Hon'ble Apex Court in case titled ***Raj Kumar v. Ajay Kumar and Anr (2011) 1 SCC 343,*** wherein Hon'ble Apex Court has prescribed factors to be taken into consideration before awarding compensation. Para Nos. 12 to 15 of the aforesaid judgment are reproduced as under:

> *12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence:*
>
> *(i) whether the disablement is permanent or temporary;*
>
> *(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement,*
>
> *(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person.*
>
> *If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.*
>
> *13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.*
>
> *14.For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of*

earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of `loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may."

32. In the case at hand, careful perusal of Ext.PW1/A, which has been duly proved by PW1 Dr. Baldev Kumar, BMO, Specialist Orthopedic Surgeon at Regional Hospital, Kullu, H.P., clearly reveals that in the alleged accident, claimant suffered disability to the extent of 75%. In the disability certificate, it has been categorically mentioned that the claimant has suffered traumatic paraparesis (partial paralysis) affecting his both legs and arms. Certificate, as referred herein above, further reveals that disability suffered by the claimant is not likely to improve and same is non progressive. PW1 doctor in his examination in chief has categorically stated that disability described in the certificate Ext.PW1/A will affect the walking of the claimant. Aforesaid version put forth by PW1 has remained un-rebutted in the cross-examination conducted by the respondents. Similarly, PW5 Dr. Jatin Sharma, who had an occasion to examine the claimant at the first instance, has also proved on record MLC Ext.PW5/A, perusal whereof also reveals that in preliminary investigation, aforesaid doctor also found the complainant to have suffered traumatic paraparesis in the alleged incident. It stands duly proved on record that claimant, who is/was driver by profession suffered 75% disability on account of alleged accident. As per medical evidence available on record, both legs and arms of the claimant have been affected, as a result of which, he would not be able to carry out aforesaid profession any more. PW1, who issued disability certificate has categorically stated that on account of type of injury suffered by the claimant i.e. traumatic paraparesis, walking of the claimant would be affected.

33. Having regard to the nature of job being performed by the claimant prior to the alleged incident, it can be safely concluded that claimant is totally disabled from earning any kind of livelihood. Hence, 75% disability as assessed by the medical board is required to be considered as total incapacitation of claimant to earn his livelihood, especially, in view of the nature of injury and work to be done as a driver.

34. In the aforesaid background, now compensation is determined as under

1.	Completed year of age on the last birthday of the claimant immediately proceeding the date on which the compensation fell due	26 years
2.	Relevant factor to calculate Compensation.	215.28
3.	Wages of Workman	Rs. 2400/- (i.e. 60% of Rs.4,000/-)
4.	Compensation amount due	215.28x2400=Rs.5,16,672/-
5.	Interest @12% p.a. on account of delay in making the payment in terms of Section 4-A(3) (a).	To be calculated by the Commissioner below.
6.	Interest @ 12% per annum	On the total compensation

		amount from the date of filing of claim petition till its payment.

35. Hon'ble Apex Court in case titled **Ved Prakash Garg v. Premi Devi and Ors, 1998 (1) ACJ 1**, has held that payment of interest and penalty are two distinct liabilities arising under the Workman Compensation Act; penalty is not a part and parcel of the legal liability of the employer to compensate his employee and since the insurer is under contractual obligation to indemnify the employer for his legal liability, the insurer is not liable to pay the penalty. So far as the amount of penalty imposed on the inured employer under contingencies contemplated by Sections 4A(3) (a) and (b) of the Act is concerned, same is payable by the employer, not by the insurer. However, in the case at hand, neither specific prayer, if any, was made for grant of penalty nor ground, if any, has been set out in the present appeal. Moreover, careful perusal of order dated 24.9.2019, passed by this Court reveals that learned counsel on the instructions of the claimant has virtually abandoned/waived aforesaid claim by stating that claimant has not raised any claim with regard to penalty and as such, there is no occasion for this court to issue show-cause to the respondent-owner before imposition of penalty in terms of Section 4(3)(a) (ii) of the Act. In view of the aforesaid statement made by the learned counsel for the claimant, this Court sees no reason to award penalty, if any, under Section 4(3)(a) (ii) of the Act.

36. Consequently, in view of the detailed discussion made herein above as well as law relied upon, present appeal is allowed and judgment dated 8.1.2015 passed by the learned court below is quashed and set aside. Though respondent-insurance Company and respondent-owner are jointly held liable to pay the compensation to the claimant as quantified herein above alongwith interest @12%p.a. from the date of filing of the petition till its realization, but total amount of compensation would be paid by the respondent-insurance company. It may be observed that interest awarded @12% on account of delay in making the payment under Section 4-A (3) (a) is separate from the interest awarded @12% on the total amount of compensation. Commissioner is directed to work out the total amount payable to the claimant in terms of instant judgment. Learned counsel for the parties undertake to cause presence of their respective clients before the Commissioner concerned on **5.11.2019**, on which date, the Commissioner will proceed to calculate the total amount payable to the claimant in terms of instant judgment enabling the respondent-insurance company to deposit the same within a period of one month for being paid to the claimant after due verification. Accordingly, the present appeal is disposed of alongwith pending application(s), if any.

****

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

United India Insurance Company Limited ...Appellant

Versus

Rakesh Bala & Others ....Respondents

FAO(MVA) No. 360/2016

Date of decision: September 26, 2019

Motor Vehicles Act, 1988 - Section 166 – Motor accident – Death case – Compensation under heads 'Future prospects', 'Funeral expenses' etc. Deceased was self employed – As such, additions of 40% on account of 'future prospects' could have been made on his proved income- Further only sum of Rs. 15,000/- towards 'funeral expenses' can be awarded – No sum can be granted under head 'loss of love and affection' – Appeal partly allowed – Award modified. (Para 14).

Cases referred:

National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157

Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639

For the appellant : Mr. J. S. Bagga, Advocate

For respondents No.1 to 3: Mr. Ashwani Kaundal, Advocate

The following judgment of the Court was delivered:

Sandeep Sharma, Judge. (Oral)

Instant appeal under Section 173 of the Motor Vehicles Act (As amended by Act 1994), lays challenge to Award dated 6.4.2016 passed by learned Motor Accident Claims Tribunal, Una, Himachal Pradesh in M.A.C. Petition No. 78/2014 titled as Rakesh Bala and others vs. Harmesh Singh and others, whereby learned Tribunal below, while allowing the claim petition having been filed by respondents No. 1 to 3 (hereinafter referred to as 'claimants'), proceeded to award a sum of Rs.11,55,000/- as compensation alongwith interest at the rate of 7.5% per annum from the date of filing of the petition till actual realization of the amount in favour of the claimants. Vide aforesaid award, MACT below held the appellant-Insurance Company liable to pay aforesaid amount of compensation.

2. Precisely, the facts of the case as emerge from the record are that the claimants filed a petition under S.166 of the Act, seeking therein compensation to the tune of Rs.40.00 Lakh from the appellant-Insurance Company on account of death of late Sh. Vivek Sambhar, who allegedly died in accident. On 29.3.2014 while deceased was riding Scooty bearing No.HP-20C-3165, a loaded truck bearing registration No.HP-20-5766 owned by respondent No.5 and driven by respondent No.4 came in rash and negligent manner and struck with the scooty, as a consequence of which deceased suffered multiple injuries on all parts of his body. Unfortunately, deceased died on his way to PGI Chandigarh. The claimant alleged that accident occurred due to rash and negligent driving by respondent No.4 but respondents No.4 & 5 being influential persons succeeded in getting the FIR registered against deceased Vivek Sambhar, who at the time of accident was driving Scooty bearing regn. No.HP-20C-3165. The claimant claimed that deceased was sole bread earner of the family having responsibility of mother, brother and sister and as such, they are entitled to compensation to the tune of Rs.40 lakh. Respondents No.4 & 5 by way of joint reply refuted the aforesaid claim raised by the claimant and claimed that accident took place due to rash and negligent driving of scooty being driven by deceased. Respondents No.1 & 2 further claimed that FIR was registered against the deceased and, as such, story put forth by the claimant deserves to be rejected outrightly being concocted. Respondents No.1 & 2 also sought rejection of the claim petition on the ground of non-joinder of the owner and insurer of the vehicle involved in the accident. Appellant-Insurance Company also refuted the claim of the claimants on the ground that driver of vehicle bearing No. HP-20-5766 was not holding a valid and effective driving licence at the time of accident and, as such, there was violation of terms and conditions of Insurance Policy and, as such, it is not liable to indemnify the insurer. The appellant-insurance company also claimed that deceased was driving the scooty in rash and negligent manner and, as such, claimants are not entitled to any compensation.

3. Learned Tribunal below, on the basis of the pleadings adduced on record by the respective parties, framed following issues on 20.4.2015::

"Issue No. 1. Whether deceased Vivek Sambhar died on 29.3.2014 at Mehatpur, Tehsil and District Una HP because of rash and negligent driving of respondent No.1 of vehicle bearing regn. No. HP-20-5766, as alleged? OPP

Issue No. 2. If issue No.1 is proved in affirmative whether the petitioners are entitled to the compensation, if so and to what amount and from whom? OPP.

Issue No. 3. Whether the petition is not maintainable? OPR.

Issue No.4. Whether respondent No.1 was not having a valid effective driving licence at the relevant time to drive the vehicle involved in the accident, if so, its effect? OPR-3

Issue No.5. Whether the vehicle in question was being plied at the relevant time in violation of the terms and conditions of the Insurance Policy and provisions of M. V. Act, as alleged? OPR-3

Issue No.6. Whether the vehicle in question was being plied at the relevant time without RC, route permit and fitness certificate, if so, its effect? OPR-3

Issue No.7. Whether the petition is bad for non-joinder of necessary parties, as alleged? OPR-3

Issue No.8. Relief.

4. Subsequently, learned Tribunal below, vide Award dated 6.4.2016, allowed the claim petition and awarded a sum of Rs.11,55,000/- alongwith interest at the rate of 7.5% per annum from the date of filing the petition till the payment is made in favour of the claimants.

5. Being aggrieved and dissatisfied with the aforesaid Award passed by learned Tribunal below, the appellant-Insurance Company, who otherwise came to be saddled with the compensation, has approached this Court in the instant proceedings, praying therein to set aside the impugned Award.

6. Before ascertaining the correctness of the impugned award passed by learned Tribunal below vis-à-vis grounds raised in the appeal and submissions made by learned counsel representing the parties,, it may be noticed that, while perusing impugned award, this Court noticed that learned Tribunal below has committed arithmetical error, while calculating total loss of dependency. Learned Tribunal below, in para Nos. 30 and 31, after making necessary deductions from the income of the deceased, held that annual income of the deceased was Rs.90,000/- and applied multiplier of 16, thus arriving at a figure of Rs.10,80,000/-, which seems to be incorrect on the face of it, since product of annual income and multiplier, would Rs.14,40,000/- (90,000x 16 = 14,40,000). Faced with the aforesaid situation, this Court could either remand back the matter for the limited purpose of carrying out arithmetical corrections, or to rectify the same here. Taking stock of the plight of the claimants, who are litigating since 2014, this Court opts for the latter. Necessary adjustments in the final amount so derived, thus, will be included while assessing the total amount of compensation in the concluding part of the judgment.

7. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned Tribunal below while allowing claim petition, this Court finds no force in the argument of learned counsel for the appellant-Insurance Company that learned Tribunal below has failed to appreciate the evidence in its right perspective while returning findings qua issues Nos. 1 to 7, rather this Court is fully convinced and satisfied that Court below while awarding compensation in favour of the claimants have dealt with each and every aspect of the matter meticulously and, as such, there is no scope left for the Court to interfere in the impugned award.

8. Statement of PW-2 Smt. Rajnish Sharma, who happened to be an eye witness of the accident, clearly proves beyond doubt that on 29.3.2014 deceased was hit by truck bearing regn. No.HP-20- 5766 on account of rash and negligent driving by respondent No.4. This witness has categorically stated that she had gone to Industrial Area, Mehatpur and when she was returning from there, at about 11/12 A.M., a truck came in a high speed and hit the Scooty on wrong side of the road, as a result of which the Scooty driver fell on the road and sustained injuries. She also stated that many people had gathered on the road and injured was removed to hospital.

9. Careful perusal of the cross-examination conducted upon this witness, nowhere suggests that the respondents were able to shatter the testimony of aforesaid witness, who during her cross-examination stuck to her statement given in examination in

chief. Though in the case in hand, the appellant-insurance company made an attempt to carve out a case that due to rash and negligent driving of deceased himself, who was allegedly driving the Scooty in a rash and negligent manner, accident occurred but evidence on the record completely belies the case of the respondents.

10. In support of the aforesaid, claim/denial, respondents examined RW-1 H.C. Nirmal Singh, who proved the FIR Ext.RW1/A and stated that untrace report was prepared in the case and put in the Court. RW-2 Sh. Harmesh Singh, who is respondent No.1 though lodged FIR but the version put forth by him was rightly not taken into consideration by the Court, because respondent No.1 being driver of the truck, which caused the accident, is an interested witness and his version could not have been taken into consideration by the Court in the absence of corroboration, if any, by any independent witness. The respondents, save and except the aforesaid witnesses, have not examined any independent witness to corroborate the version put forth by RW-2 Harmesh Singh (respondent No.4).

11. PW-7 Gaurav, who happened to be brother of deceased categorically deposed that respondents No.4 & 5 being influential persons got the FIR registered against the deceased and when they came to know about the FIR registered against the deceased, they made a complaint to the Superintendent of Police, Una. This Court cannot loose sight of the fact that in the alleged accident, deceased had suffered multiple injuries and, as such, the Court below rightly concluded that in view of the critical condition of the deceased, priority of the family was not to lodge FIR but to save the life of deceased, who ultimately succumbed to his injuries while going to PGI, Chandigarh.

12. Since no evidence ever came to be associated at the behest of respondents No.4 & 5 to discard the testimony of PW-2 Smt. Rajnish Sharma, there appears to be no reason to disbelieve the version put forth by this witness, who in any manner, is not related or known to the claimants. There is no dispute that deceased Vivek Sambhar died on account of injuries suffered by him in a rash and negligent, rather copy of post mortem report Ext.PW4/A clearly suggests that deceased Vivek Sambhar died on account of injuries suffered by him in the alleged accident. Though the appellant-insurance company has raised a ground that at the time of accident, respondent No.4 was not holding a valid driving licence, but respondent No.1 while deposing as RW-2 himself placed on record a copy of driving licence Ext.R-1 and Ext. RY. The genuineness of the document referred to above has not been disputed by the Insurance Company and, as such, the issue framed by the Court below with regard to validity of driving licence possessed by respondent No.1 rightly came to be decided against the appellant-insurance company.

13. Similarly, this Court finds that there is no force in the argument of learned counsel for the appellant-Insurance Company that the compensation awarded by the Court below is on higher side because admittedly at the time of death, the deceased was 31 years old. Testimonies of PW-5 & PW-6 clearly prove that the deceased prior to his death was running a business of disposable cup plates. Since no return of income tax and sales tax came to be placed on record on behalf of the claimants, the Court below having taken note of the statements made by PW-5 and PW-7 took the income of deceased at the rate of Rs.10,000/- per month, which by no stretch of imagination can be said to be on higher side.

14. However, having carefully perused the recent law laid down by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157, this Court is an agreement with the submissions made by learned counsel for the appellant-Insurance Company that since the deceased was self-employed, addition of 40% on account of future prospects could have been made to the proved income of the deceased, instead of 50%. Similarly, this Court finds that only a sum of Rs.15,000/- could have been awarded by learned Tribunal below on account of funeral expenses whereas, learned Tribunal below has awarded Rs.25,000/- under the aforesaid head. Learned Tribunal below has further erred in awarding a sum of Rs.50,000/- on account of love and affection towards the

deceased, because as per aforesaid judgment rendered by the Hon'ble Apex Court, no money can be granted on account of love and affection.

15. At this stage, it would be profitable to reproduce following paragraphs of aforesaid judgment herein below:

> "47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs.5,000/- for transportation of the body, Rs.10,000/- as funeral expenses and Rs.10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs.5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs.10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs.1,00,000/- towards loss of consortium and Rs.25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-
>
> "17. ... In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."
>
> 60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The

aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i). The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii). As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii). While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv). In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v). For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi). The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii). The age of the deceased should be the basis for applying the multiplier.

(viii). Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs.5,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

16. It is quite apparent from the law laid down by the Hon'ble Apex Court that only 40% increase to actual income on account of future prospects ought to have been made instead of 50% in the case of deceased, who was admittedly self employed. However, so far multiplier is concerned, same has rightly been applied by learned Tribunal below, keeping the age of the deceased, which was 31 years at the time of accident. In view of the law laid down in **Pranay Sethi** (Supra), loss of dependency /compensation ought to have been calculated in the following manner:

Average monthly income	**Rs.10,000/-**
Deduction towards self maintenance @ 50%	**10,000x50/100= 5000**
Net income after deduction =	**Rs.5000**
Addition of 40% on account of future prospects	**5000x 40/100=2000**

Net income after adding 40%	**=Rs.7000**
Annual income	**7000x 12 =84000**
Total loss of dependency after applying multiplier of 16	**84000x 16= 13,44,000/-**

17. Similarly, learned Tribunal below ought to have awarded a sum of Rs.15,000/- on account of funeral expenses in terms of law laid down by Hon'ble Apex Court in **Pranay Sethi** (supra), as such, amount awarded on account of funeral expenses is liable to be modified to Rs.15,000/-.

18. Similarly, no amount under the head of loss of love and affection could be awarded and, as such, the award needs to be modified to that extent also.

19. Learned counsel for the claimants has raised another issue i.e. no amount has been granted under the head of loss of estate and as such this Court also deems it fit to grant an amount of Rs.15,000/- under the head of 'loss of estate'. Otherwise also, the Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, has held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. It would be profitable to reproduce following para of the judgment herein:-

> "Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 CPC can be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer."

20. Consequently, in view of the modifications made herein above, claimants are held entitled to following amounts under various heads:

1.	Loss of dependency /compensation	**Rs. 13,44,000**
2.	Loss of estate	**15,000**
3.	Funeral charges	**15,000**
	Total	**Rs.13,74,000**

21. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld. Apportionment amongst the claimants shall remain as has been done by learned Tribunal below.

22. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award passed by learned Tribunal below is modified to the above extent only.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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BEFORE HON'BLE MR. JUSTICE L.NARAYANA SWAMY, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Komal Chand .....Petitioner.

Versus

State of H.P. and others. .....Respondents

CWP No. 507 of 2019.

Decided on: 15.10.2019

Constitution of India, 1950 – Articles 14 & 226 – Equality before law – Regularization from back date – Entitlement – Respondents declining regularization of petitioner from back date by rejecting medical certificate produced by him showing his bonafide absence from work, on ground of its late production and having been issued by a private medical practitioner – Writ against – Held, respondents could not have discriminated against petitioner by rejecting his medical certificate issued by a private practitioner and denying regularization from back date when similarly placed employees "PS' & "JR" were also regularized in similar circumstances . (Para 7)

For the petitioner: Mr. Diwan Singh Negi, Advocate.

For the respondents: Mr. Adarsh Sharma, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, Judg*, (Oral)*

The petitioner, presently working as Peon in the Office of Range Forest Officer, Sunni, District Shimla has filed this writ petition with a prayer to quash order dated 24.12.2015 (Annexure P-7) whereby his claim for conferment of work charge status in terms of the judgment of this Court **in CWP No. 2735 of 2010 titled Rakesh Kumar Vs. State of H.P. & ors.** has been rejected and in the alternative for regularization of his services as Peon on completion of 8 years on daily wage basis with all consequential benefits.

2. As a matter of fact, this case has a chequered history. The petitioner, initially engaged as Beldar on daily wage basis in the year 1998 had filed CWP No. 1541 of 2009 against the action of the respondents whereby they refused to regularize the period of his absence from 1.8.1998 to 15.9.1998 and 1.5.2002 to 30.6.2002 on account of delayed production of medical certificate on 6.8.2007 issued by a Private Practitioner and regularization of his services. The writ petition was disposed of vide judgment dated 12.9.2012 directing thereby the respondents to consider the medical certificate supplied by the petitioner and regularize him as Class-IV employee. Consequently, the services of the petitioner were regularized on and w.e.f. 13.9.2012 vide order Annexure P-3. Aggrieved by his regularization not on completion of 8 years continuous service and rather from a subsequent date, he preferred CWP No. 8723 of 2013 in this Court. The same was transferred to State Administrative Tribunal and registered as TA No. 5782 of 2015. It was allowed vide judgment Annexure P-6 directing thereby the respondents to consider the case of the petitioner for conferment of work charge status on completion of 8 years service by him with all consequential benefits. In compliance to the judgment Annexure P-6, the respondent-Department has considered the matter and passed the impugned order Annexure P-7. The petitioner has not been held entitled to conferment of work charge status.

3. It is the order Annexure P-7 which has been challenged by the petitioner in this writ petition on the grounds inter alia that he is entitled to conferment of work charge status immediately on completion of period of 10 years in view of the judgment of the Apex Court in ***Mool Raj Upadhyaya's case*** and in the alternative for regularization on completion of 8 years of service in view of the judgment of this Court in **CWP No. 2735 of 2010 titled Rakesh Kumar Vs. State of H.P. & ors.**

4. The respondents have resisted and contested the claim of the petitioner on all counts while submitting that the petitioner could have not been brought on work charge establishment nor regularized from a back date as his absence w.e.f. 1.8.1998 to 15.9.1998 and 1.5.2002 to 30.6.2002 has rightly been declined to be regularized for the reason, firstly that the medical certificate he submitted was issued by a Private Practitioner and secondly that the same was produced after 6 years i.e. on 6.8.2007. Therefore, up to the year 2002, he never completed 240 days in a calendar year. His services, therefore, were rightly regularized in terms of the policy on and w.e.f. 13.9.2012 vide order Annexure P-3. However, no reply is forthcoming to the averments in the writ petition that the persons junior to the petitioner and similarly situated were regularized much before him with retrospective effect while regularizing the period of their absence on the basis of similar medical certificates produced by them also at a belated stage. Therefore, on 11.6.2019, following order came to be passed in this Writ Petition:

> "Learned Deputy Advocate General has placed on record the written instructions which reveal that the services of the petitioner stand regularized w.e.f. 13.09.2012. He, however, is seeking his regularization from an early date while counting the period on daily wage basis from 1.8.1998 to 15.9.1998. The written instructions further reveal that during the period from 1998 to 2002, he failed to complete 240 days in each calendar month and the medical certificate he produced at belated stage on 6.8.2007 was not taken into consideration. Prima-facie the relief to which the petitioner is entitled has already been granted to him. Any how, learned counsel seeks time to have instructions in the matter. Allowed. List on 18.07.2019."

5. The matter when heard further on 18.7.2019, further information was sought to be produced by the respondent-State. The order dated 18.7.2019, reads as follows:

> "Heard for sometime. Let learned Additional Advocate General to produce the mandays chart in respect of the petitioner and also order No. 620/2007 whereby medical certificate issued for regularization of the alleged period of ailment w.e.f. 1.8.1998 to 15.9.1998 and 1.5.2002 to 30.6.2002 was rejected by the competent authority. List on 20.8.2019."

6. Consequently, the respondent-State has filed he supplementary affidavit. A bare perusal of the same reveals that similarly situated persons, namely, Jai Ram had preferred CWP No. 5844 of 2010 whereas Prem Singh had preferred CWP No. 5607 of 2010. The writ petitions they preferred were disposed of by this Court with a direction to consider their cases in the light of the judgment of this Court in **CWP No. 2735 of 2010 titled Rakesh Kumar Vs. State of H.P. & ors.** after taking into consideration the medical certificates they already supplied for regularization of the period of their absence. The supplementary affidavit further reveals that Prem Singh aforesaid engaged in the year 1997 remained absent from duty w.e.f. 1.4.2002 to 23.4.2002. The medical certificate he furnished on 4.11.2008 for continuity in service was accepted and his services regularized on completion of 8 years continuous service with 240 days in a calendar year in the year 2009. Similarly, Jai Ram aforesaid engaged on daily wage basis in the year 1998 also submitted the medical certificate of a Private Practitioner for regularization of the period of his absence w.e.f. 4.1.2000 to 10.1.2000, 1.1.2002 to 22.1.2002, 1.7.2002 to 15.7.2002 and 1.10.2002 to 25.10.2002 and 7.11.2002 to 12.11.2002 (75 days) in the year 2001 for continuity in service and he was also regularized in the year 2009.

7. In view of the factual details so brought on record by the respondent-department itself, the petitioner, who is similarly situated to Prem Singh and Jai Ram aforesaid could have not been discriminated in the matter of his regularization from a later date by rejecting the medical certificate dated 6.8.2007 he produced for regularization of the period of his absence from duty on the ground of delayed production and the same having

been issued by a Private Practitioner. The period of his absence, therefore, has to be regularized as the respondents did in the case of Prem Singh and Jai Ram aforesaid.

8. If it is so and the petitioner admittedly was engaged in the year 1998, he had completed the period of 8 years in the year 2006. He therefore, is entitled to regularization on completion of 8 years of service and at least in the year 2009 when the services of Prem Singh and Jai Ram were regularized because they were also engaged as Beldars in the year 1997 and 1998, respectively. The petitioner, though has claimed his regularization immediately on completion of 8 years of service, however, in the given facts and circumstances when his senior Prem Singh and Jai Ram also engaged on daily wage basis in the year 1998 like the petitioner, similarly situated, have been regularized in the year 2009, therefore, he is also entitled to his regularization from the date in the year 2009 when they both were regularized with all consequential benefits.

9. In view of the above, this petition succeeds and the same is accordingly allowed. Consequently, the respondents are directed to regularize the services of the petitioner as Class-IV from the date in the year 2009 when Prem Singh and Jai Ram, similarly situated (Beldars) were regularized with all consequential benefits. The due and admissible arrears be paid to him within three months from today, failing which, together with interest @ 6% per annum. In that event, the amount to be paid to him by way of interest will be recovered from the erring officer/official(s). The writ petition is accordingly disposed of, so also the pending application(s), if any.

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

Reliance General Insurance Co. Ltd. .....Petitioner

Versus

Kaushalya Devi & others .....Respondents.

CMPMO No. 579 of 2017

Decided on : 16.10.2019

Code of Civil Procedure, 1908 - Order XVII Rule 1- Closure of evidence - Justification – Held, Tribunal had ordered service of witness through bailable warrants – Insurance company had complied the order by depositing requisite money with nazarat – Therefore, closure of evidence without awaiting for execution of bailable warrants was wrong – Petition allowed - Order set aside. (Para 3)

For the petitioner: Mr. Jagdish Thakur, Advocate.

For the respondents: None.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Even though, co-respondent No.8, remains unserved, for want, of, the, requisite completest steps becoming taken, by, the counsel, for, the petitioner(s), however, since the afore is the driver, of, the offending vehicle concerned, and, even assumingly, upon, the insurer, of, the latter vehicle, hence proving, through adducing cogent evidence, qua, the insurance policy, being patently breached, (i) thereupon also, may be, the apposite indemnificatory liabilit(ies), rather, on the principle of "liability of master, for, tort of servant", would hence become conjointly saddled, upon, them, (ii) hence it is deemed not necessary, to, insist, upon, the counsel for the petitioner, to, take the requisite steps, for causing effectuation, of, valid service, upon, co-respondent No.8.

2. Be that as it may, the insurer was enjoined, to, adduce cogent evidence, vis-a-vis, the issue, appertaining, to, the driving licence, of, the driver, of, the offending vehicle, being forged, or, being fictitious, and, the best witness hence to make, a, testification, qua, therewith, is, the clerk, working in the RLA office concerned. Though, the counsel for the insurer had been granted repeated opportunities, for, ensuring, the, stepping into witness box, of, the afore clerk, yet, under orders recorded, on 6.12.2017, the learned MACT-II, Solan, hence has closed the afore evidence, of, the petitioner.

3. Though this Court would not be inclined, to, interfere with the impugned order, (a) as, a reading of the order(s), made prior thereto, by the learned MACT concerned, unveil(s) qua the latter granting several unavailed opportunities rather, for, the requisite purpose, to, the insurer, (b) however, the conspicuous facet which rather constrains this Court, to, make interference(s) with the impugned order(s), is the fact, that the learned Tribunal concerned, though had ordered for summoning, of, the witness concerned through bailable warrants, and, moreso, when for the afore purpose, the requisite monies, was/were, deposited by the counsel, before the establishment, of, the learned MACT concerned, (c) hence despite, any, asking for service being caused, upon, the afore witness, through dasti mode, rather, enjoined, upon, the learned Tribunal, to, ensure, the, execution, of, bailable warrants, upon, the afore witness, (d) however, the learned Tribunal concerned, without awaiting for execution, of, bailable warrants, upon, the witness concerned, rather proceeded to close, the, evidence of the petitioner, merely, hence upon a, flimsy reason qua, for, want of, the requisite steps, being taken, by the counsel, for, the insurer, for, service through dasti mode, becoming caused, upon, the witness concerned, per-se though, only, an, alternative or a substitutary mode, vis-a-vis, the afore. All the afore infirmities hence constrain this Court, to, set aside the impugned order, of, 6.12.2017. The learned Tribunal concerned, is, directed to grant, one, more opportunity, to the counsel for the insurer, to, ensure, the, stepping into witness box, vis-a-vis, the clerk of the RLA concerned, and, further in case there is, yet, a refusal on the part of the witness concerned, to, make compliance therewith, thereupon, the learned Tribunal concerned, may, in accordance with law, ensure his stepping into the witness box, through, his being summoned, by execution upon him, the apposite non-bailable warrants. The parties, are, directed to appear before the learned Tribunal concerned, on **11.11.2019**.

4. In view of the above, the instant petition is disposed of. All pending applications, if any, also stand disposed of.

5. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case, and, the learned Tribunal concerned, shall decide the matter uninfluenced, by any observation made hereinabove.

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

Saugata Gupta & another ...Petitioners.

Versus

State of Himachal Pradesh through its Labour Inspector. ...Respondent.

Cr.MMO No. 338 of 2019

Reserved on: 25.09.2019

Date of Decision: October 16, 2019

Factory Act, 1948 – Section 106, Proviso – **Code of Criminal Procedure,1973** – Section 473 – Time limitation in taking congnizance – Held, period of six months as provided in the Proviso to Section 106 of the Act for filing complaint is attracted only when either there is no response of compliance to the written orders of the Inspector or despite response of compliance, he (Inspector) noticed discrepancies / violation as mentioned in written order

after fresh inspection, to be still continuing – Only in that eventuality, it can be said that there is violation of written order of the Labour Inspector. (Para 8 & 10)

For the Petitioners: Mr. K.D. Sood, Senior Advocate with M/s Ashim Aggarwal, Atul Aggarwal and Sukrit Sood, Advocates.

For the Respondent: Mr. Desh Raj Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Present petition has been filed against taking cognizance of the offence by learned Additional Chief Judicial Magistrate, Nalagarh, District Solan, H.P., in complaint bearing registration No.22 of 2019/101/3 of 2019, titled as *State of H.P. vs. Saugata Gupta & another,* filed by Inspector, appointed under Section 8 of the Factories Act, 1948 (hereinafter referred to as the 'Act'), against petitioners being Occupier and Factory Manager of the establishment, for alleged violation of various provisions of the Act and the Rules framed thereunder, punishable under Section 92 of the Act.

2. Main ground for assailing the institution of complaint dated 11.02.2019against the petitioners is that as per complaint (Annexure P-3), same has been filed for alleged violation of the provisions of the Act and Rules made thereunder, noticed during course of inspection dated 17.10.2018, and as such, cognizance of the said complaint, by learned Magistrate on 11.02.2019, is in violation of provisions of Section 106 of the Act, wherein it is provided that no Court shall take cognizance of any offence, punishable under the Act, unless complaint thereof, is made within three months of the date on which alleged commission of the offence came to the knowledge of an Inspector.

3. Referring judgment dated 10.07.2019, passed by this Court in Cr.MMO No. 183 of 2018, titled as *Hemant Mohan and another vs. State of H.P.,* learned arguing counsel for the petitioners, has submitted that present case is squarely covered by the said judgment as, according to him, in present case, complaint (Annexure P-3) has been filed by the Inspector on 11.02.2019 for violation of relevant provisions of law noticed by him during course of inspection conducted on 17.10.2018, whereas, limitation provided under Section 106 of the Act of three months, for taking cognizance of the complaint so preferred, had expired on 17.01.2019.

4. It is further submitted on behalf of petitioners that communication dated 20.10.2018 (Annexure P-1), was never served upon the petitioners, but was received by them through their Head Office on 05.11.2018, whereafter, response thereto, indicating compliance of all shortcomings/violations noticed on 17.10.2018, ordered to be complied with vide communication dated 20.10.2018 (Annexure P-1), were reported, by petitioner No.2 Ram Adarsh Darash Mishra, to have been complied with and the said communication was personally received by the Inspector on 22.11.2018, but despite reporting compliance of communication dated 20.10.2018, Inspector, has proceeded to file complaint against the petitioners on 11.02.2019, which is contrary to not only law, but also the facts for concealing response of petitoners submitted to Inspector on 22.11.2018 about compliance of the communication dated 20.10.2018. It is pointed out out that though, reference of compliance order dated 20.10.2018, has been given in complaint (Annexure P-3), but the complaint is completely silent about the compliance report submitted by the petitioners in compliance thereof on 22.11.2018, despite the fact that complaint has been filed as late as in February 2019, after receiving prosecution sanction from the Chief Inspector of Factories vide order dated 04.02.2019, and therefore, it is pleaded that for the reason that petitioners had already complied with compliance of written order dated 20.10.2018, complaint is not maintainable at

all, and the complaint has been preferred, without referring the compliance report, only to harass the petitioners.

5. In response, it is canvassed by learned Additional Advocate General that it is true that complaint was filed after expiry of three months from 17.10.2018 on which date, discrepancies/violations of the Act and relevant Rules were noticed by the Inspector, but keeping in view the proviso to Section 106 of the Act, which provides that for disobeying a written order made by an Inspector, complaint of such discrepancies may be made within six months of the date on which the offence is alleged to have been committed, and thus complaint in present case, is within limitation period of six months, as the Inspector had issued written order dated 20.10.2018 (Annexure P-1) to the petitioners for removing discrepancies, noticed by him on 17.10.2018, within ten days from the receipt of said order and even if it is considered that said written order (Annexure P-1) was received by petitioners on 05.11.2018, petitioners had failed to respond to the same by removing discrepancies within ten days thereafter, as the reply to this written order dated 20.10.2018, though dated as 20.11.2018, was submitted to the Inspector on 22.11.2018, which is beyond period of ten days even after 05.11.2018.

6. It is also submitted that as there is limitation to file complaint within three months, time of ten days, granted in the written order for compliance to remove discrepancies, is also reasonable time, but petitioners have failed to remove the discrepancies within the said reasonable time and therefore, it is also contended that in view of explanation to Section 106 of the Act, in case of continuing offence the period of limitation shall be computed with reference to every point of time during which the offence continues and as the petitioners had failed to respond and to remove the discrepancies within the stipulated period of ten days granted to them, offence remained continue at least till 22.11.2018 and from the said date, complaint is within the limitation period as three months after 22.11.2018 would have expired on 22.02.2019.

7. Perusal of record of complaint, filed by the Inspector, received from learned Magistrate, it reveals that complaint has been filed on the basis of not only inspection dated 17.10.2018, but also referring issuance of communication dated 20.10.2018, referring it a written order for compliance, stating further that despite issuance of said compliance order, the employer had not reported any compliance to ratify the violations by submitting their compliance report. From the averments made in complaint and list of documents relied upon therein, it is evident that Inspector has not given any reference with respect to the response received by him from petitioners on 22.11.2018, wherein petitioners had claimed the total compliance of written order dated 20.10.2018. It is not the case of Inspector that response filed by the petitioners to the written order for compliance, was unsatisfactory and on further inspection by the Inspector, after receiving response, discrepancies noticed on 17.10.2018, in violation of the Act and relevant Rules, were found to be existing even after submitting the compliance report.

8. No doubt, issuance of written order dated 20.10.2018 by the Inspector, had entitled him to file complaint within six months of the date on which offence is alleged to have been committed, as provided in proviso to Section 106 of the Act, but the said proviso unambiguously provides that such complaint can be filed for disobeying the written order made by the Inspector and for disobedience of the written order, either there would be no response of compliance of the said order or despite filing a response of compliance, the Inspector should have noticed continuation of the discrepancies/violations mentioned in the written order and in such eventualities only, it can be said that there is disobedience of written order, whereas in present case, despite receiving the compliance report on 22.11.2018, the Inspector has neither reported the said response in the complaint nor conducted further inspection/investigation, after receiving said response, with regard to continuation of violation or disobedience of the written order dated 20.10.2018 issued by him. Therefore, without ascertaining the deficiency, if any, receiving the response filed by the

petitioners and/or pointing out continuation of discrepancies/violations of the Act and Rules, even after claiming removal thereof in the response, by conducting inspection of the establishment again, it is impermissible for the respondent-State to justify action of the Inspector to file a complaint for alleged discrepancies and violations and/or continuation thereof. Therefore, despite having limitation period of six months, after issuance of written order and provision for filing complaint even thereafter, in case of continuing offence, for absence of reference of any disobedience found by the Inspector after inspection or issuance of written order thereafter, particularly after receiving the response of compliance from the petitioners, present complaint is not maintainable, as the Inspector has not uttered even a single word about shortcomings in the response of the petitioners in compliance of written order and/or after conducting inspection again for verification of the compliance.

9. So far as contention of learned Additional Advocate General with regard to continuing offence is concerned, which provides computation of period of limitation from every point of time during which offence continues, there must be some reference of relevant evidence on record to indicate that the offence was continuing even after issuance of compliance order and submission of compliance report, such reference as well as evidence is also missing in the complaint, therefore, explanation of Section 106 of the Act is also of no help to the respondent-State.

10. Proviso to Section 106 of the Act, providing six months' limitation for filing complaint from the date of commission of offence shall come into force only where offence consists of disobeying a written order made by an Inspector and for that purpose, compliance report if any, submitted by the offender is definitely required to be considered , referred and verified by the said Inspector and in case such disobedience is found, only then, benefit of proviso shall be available which is lacking in the present case.

11. In report dated 17.10.2018 as well as in written order dated 20.10.2018, issued for compliance, Inspector has referred seven discrepancies/violations of the Act and Rules and petitioners, in their response dated 20.11.2018, received by the Inspector on 22.11.2018, have reported compliance of all seven discrepancies/ violations of the Act, if so there was no occasion for the Inspector to proceed to file a complaint unless, on verification, compliance report was found false.

12. Plea of learned Additional Advocate General is that case was submitted by the Inspector for prosecution sanction on 19.11.2018, whereas, response was submitted by the petitioners on 22.11.2018, and therefore, after receiving prosecution sanction in furtherance to the letter dated 19.11.2018 seeking permission for prosecution sanction, there was no other alternate with the Inspector to file a complaint, and thus, he has committed no irregularity or illegality in filing the complaint, after receiving belated response of compliance, which was submitted after expiry of stipulated period of ten days. This plea is not sustainable for reasons discussed hereinafter. Firstly, perusal of order granting prosecution sanction indicates that in this order, prosecution sanction was granted for prosecution against six persons and these prosecution sanctions were granted in response to the requests submitted by the Inspector vide letters dated 19.11.2018 and 03.01.2019. Prosecution sanction granted in present case is in the last at Sl.No.6 and the last letter requesting grant of prosecution sanction appears to be of the date 03.01.2019. Therefore, it appears that application seeking prosecution sanction against the petitioners was submitted on 03.01.2019 and not on 19.11.2018 i.e. on a date after receiving the response of the compliance from the petitioners. Even it is considered that request for prosecution sanction was made earlier to receiving the response of compliance, then also, submission of application for prosecution sanction or grant of prosecution sanction against a person, is not a gunshot, which cannot be reversed, but is a procedure being followed to file a complaint for commission of an offence and in case where there is a complete compliance of the written order issued for compliance, complaint should not be filed only for the sake of filing complaint ignoring subsequent events only for the reason that process for seeking sanction was initiated

prior to receiving the response, rather, in such a situation, Inspector, after reported back to the Sanctioning Authority with complete detail of subsequent events after conducting inspection of the establishment and verifying claim of petitioners made in the response filed by and/or on behalf of the establishment, should decide further course of action.

13. The Factories Act is a special Statute dealing with a specific field and provides taking cognizance of certain offences related to violation of the Act as well as Rules made thereunder and specific period of limitation has been provided under Section 106 of the Act for taking cognizance of the offences. Explanation thereto also describes manner in which limitation shall be calculated in continuing offence. However, there is no specific provision with regard to extension of period of limitation as provided under Section 473 of the Code of Criminal Procedure (in short 'Cr.P.C.'). Cr.P.C. is a Statute general in nature and Section 4(2) of Cr.P.C., provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to provisions of Cr.P.C., but subject to any enactment for the time being in force regulating manner or place of investigation, inquiring into, trying or otherwise dealing with such offence. In the Factories Act, there is specific provision providing limitation for taking cognizance of commission of offence, including continuing offence, but there is no provision of extension of time of period of limitation, corresponding to Section 473 Cr.P.C.

14. Therefore, in my opinion, in any case, in a complaint filed under the Act, Court may take cognizance of an offence, after expiry of period of limitation, if it is satisfied in the facts and in the circumstances of the case that delay has been properly explained or that it is necessary to do in the interest of justice as provides under Section 473 Cr.P.C. In such eventuality, learned Magistrate, at the time of taking cognizance by extending limitation period must indicate that he was satisfied on the facts and circumstances of the case that delay has been properly explained and/or it was necessary to do so in the interest of justice. However, it is not a case in present petition as petitioners herein is not banking upon only expiry of limitation period but also upon claim of compliance of violation/discrepancies pointed out by the Inspector noted on 17.10.2018 and directed to be rectified vide written order dated 20.10.2018, compliance whereof was reported on 22.11.2018.

15. In view above discussion, impugned order dated 07.03.2019 (Annexure P-4) is set aside and proceedings arising out of complaint filed by the Inspector, pending before learned Additional Chief Judicial Magistrate, Nalagarh, District Solan, registration No.22 of 2019/Case No.101/3 of 2019, titled as *State of H.P. vs. Saugata Gupta & another,* are quashed. Petition is disposed of in the aforesaid terms. Pending application(s), if any, also stand disposed of. Record be returned forthwith.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

CWP No. 5741 of 2014:

The Executive Engineer, Baijnath Division,
HPPWD, Baijnath, District Kangra ....Petitioner
Versus
Shri Amar Singh ....Respondent

CWP No. 5855 of 2014:

State of H.P. & another ....Petitioners
Versus
Manoj Kumar ....Respondent

CWP No. 5741 of 2014 &
CWP No. 5855 of 2014.
Decided on:16.10.2019

Industrial Disputes Act, 1947 – Section 10 – Reference - Jurisdiction of Tribunal – Held, Tribunal is bound to confine its inquiry to questions specifically referred to it by way of

reference – It has no jurisdiction to make inquiry on questions which are not referred to it. (Para 4)

Industrial Disputes Act , 1947 - Section Reference 10 - Delay - Held, Industrial Tribunal gets its jurisdiction only on reference made by the Appropriate Govt – Therefore, it can not invalidate referencne on ground of delay – If State contends that claim of workmen is stale, then it must challenge reference by way of Writ on ground of non-existence of an industrial dispute. (Para 4)

For the petitioner(s) :Mr. Anil Jaswal and Ms. Rameeta Rahi, Additional Advocate Generals, for the petitioner(s).

For the respondent(s): Mr. Rahul Mahajan, Advocate, for the respondent(s).

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.(oral)

It is jointly submitted by learned counsel for the parties that CWP No. 5741 of 2014 & CWP No. 5855 of 2014, involve common questions of law and facts and, therefore, are being taken up together for adjudication.

2. Aggrieved against the awards passed on 07.08.2013 in CWP No. 5741 of 2014 and on 06.09.2013 in CWP No. 5855 of 2014 by learned Presiding Judge, Labour Court-cum-Industrial, Tribunal, Dharamshala, H.P., instant writ petitions have been preferred by the State of H.P.

3. For convenience, **facts** of CWP No. 5741 of 2014 are being referred hereinafter:-

3(i) Following reference was made by the appropriate Government for adjudication to learned Labour Court-cum-Industrial Tribunal, Dharamshala, H.P.:-

> *"Whether termination of the services of Sh. Amar Singh s/o Sh. Lachhiya Ram, r/o Village-Nanahar, P.O. Kandwari, Tehsil Palampur, District Kangra, H.P. by the Executive Engineer, HPPWD Division Baijnath, Distt. Kangra, from time to time during 2001 to 2007, without complying with the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"*

3(ii) After considering the pleadings of the parties as well as evidence adduced by them, learned Tribunal below, allowed the claim petition with following directions:-

> "28. *As a sequel to my findings on the various issues, the instant claim petition succeeds in part and the same is partly allowed. The breaks given by the respondent to the petitioner up-to 31.08.2007 being artificial/fictional are held to be wrong and illegal. He (petitioner) shall be entitled to the seniority and continuity in service from the date of his initial engagement except back wages. The respondent is also directed to consider the case of the petitioner for regularization of his services as per the policies framed by the State Government from time to time. It is made clear that if the services of any person junior to the petitioner have already been regularized, he (petitioner) shall be entitled to the regularization from the date/month of the regularization of the services of his junior(s). Parties to bear their own costs."*

4(i) It is against the above relief granted by learned Tribunal below that the State has preferred the instant writ petition. I have heard Mr. Anil Jaswal, learned Additional Advocate General for the petitioner(s) and Mr. Rahul Mahajan, learned counsel for the respondent(s) and with their assistance gone through the record.

Relief regarding regularization:

4(ii). A bare perusal of the reference vis-a-vis the above extracted relief granted by learned Tribunal, makes it apparent that the latter part of the relief in respect of directing the petitioner/State to consider the case of the claimant for regularization of his services; regularization from the date on which his alleged juniors were regularized, is beyond the terms of reference. In ***(2015)4 SCC 71***, titled ***Oshiar Prasad and others*** *vs.* ***Employers in***

Relation to Management of Sudamdih Coal Washery of M/s Bharat Coking Coal Limited. Dhanbad, Jharkhand, Hon'ble Apex Court, held as under:-

> *"**22**. It is thus clear that the appropriate Government is empowered to make a reference under Section 10 of the Act only when "industrial dispute exists" or "is apprehended between the parties". Similarly, it is also clear that the Tribunal while answering the reference has to confine its inquiry to the question(s) referred and has no jurisdiction to travel beyond the question(s) or/and the terms of the reference while answering the reference. A fortiori, no inquiry can be made on those questions, which are not specifically referred to the Tribunal while answering the reference."*

In view of the law laid down by Hon'ble Apex Court, the relief granted to the claimant/workman in respect of his regularization, being beyond the terms of reference, cannot be allowed to sustain. Accordingly, the directions contained in the impugned award in respect of regularization of the claimant are quashed and set aside. However, by way of abundant caution, it is made clear that in case the workman has been otherwise regularized by the State in accordance with law as per policy governing the field, then the same benefit shall not be withdrawn from him.

Relief regarding seniority and continuity in service from the date of initial engagement:-

4(iii) Learned Additional Advocate General has contended that:- the claimant could not be held entitled to seniority and continuity in service from the date of his initial engagement as he was engaged as per requirement of work and availability of funds; no such relief was claimed by the workman between the disputed period of years 2001 to 2007; the claimant had accepted the wages granted to him without any demur or protest; therefore, he cannot be allowed to raise a stale claim for grant of seniority and continuity of service w.e.f. 2001 to 2007.

4(iii) (a) The record shows that petitioner-State, in its reply to the claim petition, had not taken any such plea that the engagement of the workman was as per requirement of work and availability of funds. The only contention put-forth in reply was that claimant was an intermittent worker and used to report for duty as per his own convenience. The stand taken in the reply is falsified from the bare perusal of the muster roll Ext. RW-1/A, which reveals that the claimant has been marked present at intervals during the period 2001 to 2007. From 2008 onwards, claimant has been marked present continuously. Learned counsel for the respondent-workman submitted that after 2007, State had issued directions against giving fictional breaks. It cannot be believed that the claimant would remain absent for a month or two and thereafter will be allowed to work for the next month without issuance of any show cause notice in this regard to him. In the facts and circumstances of the case, there is no escape from conclusion that fictional breaks were given to the claimant by the authorities and that his services had been continuously engaged by the petitioner/State during 2001 to 2007. I,therefore, find no infirmity with the directions issued by learned Tribunal granting seniority and continuity in service to the claimant from his initial date of engagement.

Stale claim

4(iii) (b) In respect of second contention raised by the learned Additional Advocate General that the workman had raised dispute after a period of nine years, it is to be noticed that the reference had not been challenged by the State in accordance with law. Hon'ble Apex Court in ***(2007) 14 SCC 291***, titled as ***Karan Singh vs. Executive Engineer, Haryana State Marketing Board***, held as under:-

> **"12.** *In National Engg. Industries Ltd. Vs. State of Rajasthan it has been held vide para 24 that the High Court has jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute which could be the subject-matter of reference for adjudication to the Industrial Tribunal under Section 10. This is because existence of the industrial dispute is a jurisdictional fact. Absence of such jurisdictional fact results in the invalidation of the reference. For example, even under the Income Tax Act, 1961 as it stood earlier, the Income Tax Officer must have reason to believe escapement of income. This "reason to believe" is a jurisdictional fact, therefore, writ petitions were maintainable in cases where the High Court found absence of basic facts for reopening the assessment. The Industrial Tribunal under Section 10 gets its*

jurisdiction to decide an industrial dispute only upon a reference by the appropriate Government. The Industrial Tribunal cannot invalidate the reference on the ground of delay. If the employer says that the workman has made a stale claim then the employer must challenge the reference by way of writ petition and say that since the claim is belated, there was no industrial dispute. The Industrial Tribunal cannot strike down the reference on this ground."

In view of the above, no infirmity can be found with the learned Tribunal below in deciding the reference when the same was not challenged on point of delay by the State. Even otherwise, as is recorded in the impugned awards, issues No. 2 to 5, framed in this regard, were not pressed by the petitioner/State before the learned Tribunal. Hence, the same are not open to challenge now.

No other point was urged.

CWP No. 5855 of 2014

4(iv) It is jointly submitted by the learned counsel for the parties that but for difference in certain dates and some of the facts pertaining to workman in this petition, the questions of law and facts involved herein are common to those involved in CWP No. 5714 of 2014.The observations made in CWP No. 5714 of 2014, therefore, will also govern CWP No. 5855 of 2014.

In view of the above discussion, both the writ petitions are partly allowed. Impugned awards in both the writ petitions are modified to the extent indicated above. The writ petitions stand disposed of accordingly alongwith pending applications, if any.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Manish Choudhary ....Petitioner

Versus

State of H.P. & another ....Respondent

Cr. MMO No. 602 of 2019
Decided on: 18.10.2019

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers – Exercise of – Quashing of FIR pursuant to compromise in non-compoundable cases – Held, powers conferred by Section 482 of Code to quash criminal proceedings for non-compoundable offences can be exercised in matters having overwhelmingly and predominantly civil character particularly in cases arising out of commercial transactions or matrimonial relationship or family disputes, when parties have resolved the entire dispute amongst themselves. (Para 3).

Cases referred:
Gian Singh vs. State of Punjab, (2012) 10 SCC 303
Narinder Singh vs. State of Punjab, (2014) 6 SCC 466
Parbatbhai Aahir vs. State of Gujarat, (2017) 9 SCC 641
State of Madhaya Pradesh vs. Laxmi Narayan, (2019) 5 SCC 688

For the petitioner : Mr. Dheeraj Vashisht, Advocate.
For the respondent : Mr. Anil Jaswal, Additional Advocate Generals, for the respondent.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.(oral)

In the instant petition preferred under Section 482 of the Code of Criminal Procedure, petitioner is praying for quashing of FIR No. 134/19, dated 09.06.2019, under Sections 279, 337 of the Indian Penal Code read with Section 187 of the Motor Vehicles Act, registered at Police Station Haroli, District Una, H.P. and consequent proceedings, if any.

2. The facts may be noticed hereinafter:-

2(i) An accident took place on 09.06.2019, involving Motor Cycle No. HP 19D-6996, driven by the present petitioner allegedly injuring Ms. Bhawana minor daughter of Sh. Ravinder Kumar Verma (father) and Smt. Monika Verma (mother). This eventually led to registration of FIR No. 134/19 (Annexure P-1) by Smt. Monika Verma under Sections 279, 337 of the Indian Penal Code and Section 187 of the Motor Vehicles Act, at Police Haroli, District Una, H.P.

2(ii) The parties, i.e. the petitioner and the minor girl Ms. Bhawana through her mother & natural guardian Smt. Monika Verma, effected a compromise amongst themselves on 23.09.2019 to the effect that matter has been amicably settled between them; complainant/Smt. Monika Verma, does not want to proceed further with the above FIR; therefore she has no objection in case the same is quashed.

2(iii) The petitioner in this petition has placed on record the above-mentioned compromise dated 23.09.2019 (Annexure P-2). The petitioner Sh. Manish Choudhary, Ms. Bhawana daughter of Sh. Ravinder Kumar Verma & her mother-natural guardian Smt. Monika Verma, are present in the Court today and have been identified by their respective learned counsels. Smt. Monika Verma, has stated that compromise has been effected between the parties out of their own free will and without any pressure, fear, influence or coercion whatsoever. It is further stated that the parties are maintaining cordial relationship amongst themselves and that they do not want to pursue further with FIR No. 134/19.

3. The law laid down in respect of exercise of powers under Section 482 of the Code of Criminal Procedure for quashing or for refusing to quash the FIR and resultant proceedings on the basis of compromise effected by the parties laid down in ***(2012) 10 SCC 303*** titled ***Gian Singh*** *vs.* ***State of Punjab***; ***(2014) 6 SCC 466*** titled ***Narinder Singh vs. State of Punjab; (2017) 9 SCC 641*** titled as ***Parbatbhai Aahir*** *vs.* ***State of Gujarat,*** has been noticed again by Hon'ble Apex Court in ***(2019) 5 SCC 688***, titled as ***State of Madhaya Pradesh*** *vs***. *Laxmi Narayan***, with following observations:-

> *"**15**. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:*
>
> ***15.1** That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;*
>
> ***15.2.** Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;*
>
> ***15.3** Similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;*
>
> ***15.4** Offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed*

and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

15.5 *While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc."*

4. Applying the above guidelines to the instant case, I am of the considered view that the offences for which, the petitioner has been accused in FIR No. 134/19, cannot be *stricto-sensu* said to be the offences against the State or involving social impact. In view of the amicable settlement arrived at between the parties, no fruitful purpose will be served in continuing the proceedings in question; the present case does not fall within the exceptions carved out by the Hon'ble Apex Court when amicable settlement arrived at between the parties cannot be acted upon for quashing the FIR and the consequent proceedings; the possibility of conviction in such circumstances would be very very remote. The continuation of the proceedings will be to the great detriment of the petitioner causing him unnecessary harassment and injustice. When the private respondents do not want to hold the petitioner responsible, then quashing of such FIR would certainly be in the interest of justice.

5. Consequently, the present petition is allowed and the FIR No. 134/19, dated 09.06.2019, under Sections 279, 337 of the Indian Penal Code read with Section 187 of the Motor Vehicles Act, registered at Police Station Haroli, District Una, H.P. along with consequent proceedings, if any, is quashed. The petition stands disposed of accordingly.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Subhash Chand .....Petitioner

Versus

UOI and others. .....Respondent

CWP No. 2053 of 2016

Decided on:18.10.2019

Constitution of India, 1950 - Article 226 – Central Government Health Scheme (CGHS) - Scheme made applicable only to retirees residing in areas covered by CGHS that too on exercise of option by them - Extension to pensioners residing in non-CGHS areas -- Held, in view of judgment in Shankar Lal Sharma's case, retired employees residing in non-CGHS areas are also entitled for medical benefits available to retirees residing in areas covered by CGHS - Therefore, petitioner is also entitiled for benefits of the Scheme notwithstanding that he had opted for fixed medical allowance at time of his superannuation - He could not have opted for CGHS at that time as he was residing in non-CGHS area and opportunity to exercise such option was not available to him – Respondents directed to reimburse medical bills of petitioner towards his indoor patient treatment. (Para 5).

For the petitioner : Mr. Prem. P. Chauhan, Advocate.
For the respondents : Mr. Lokender Paul Thakur, Senior Panel Counsel.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.(oral)

Placing reliance upon the judgment passed by the Division Bench of this Court in Union of India and another vs. Shankar Lal Sharma, reported in 2015 (8) SLR 732,

petitioner is praying for reimbursement of indoor medical treatment expenses to the extent of Rs. 1,82,693/- along with interest.

2. **Facts may be noticed hereinafter**:-

2(i) Petitioner served in the Indian Army from April, 1963 to September 1970. In June, 1971, he joined respondents (Para military Forces) as Constable and superannuated on 31.10.1993.

2(ii) The petitioner admittedly belonged to an area not covered in Central Government Health Scheme (hereinafter referred to as CGHS in short). At the time of his superannuation, he availed the only given option of fixed medical allowances (FMA) of Rs. 500/- per month.

2(iii) In 2013, petitioner underwent treatment as an indoor patient in Fortis Hosptial at Kangra and thereafter at Alchemist Hospital, Panchkula. On account of treatment in these hospitals, he incurred expenses of Rs. 1,82,693/-. Petitioner prayed for reimbursement of these expenses from the respondents vide his application dated 08.11.2013 (Annexure P-1), enclosing therewith his entire medical record inclusive of bills. The request for reimbursement was turned down by the respondents vide memo dated 11.10.2013 (Annexure P-2) only for the reason that petitioner had suffered illness post his superannuation.

2(iv) The issue of medical reimbursement, in case of retired employees not covered under the CGHS Scheme at the time of their superannuation because of non-availability of any such option to them at the relevant time, came before this Court in CWP No. 4621 of 2011, filed by Union of India assailing the judgment passed by learned Central Administrative Tribunal. Operative directions from the judgment having great bearing on the facts and prayers made in the instant case, are extracted hereinafter:-

> ***"52****. It is the prime responsibility of the State Government to protect health and vigour of retired Government officials, this being their fundamental right under Article 21, read with Articles 39(3), 41, 43, 48A of the Constitution of India. The steps should be taken by the State to protect health, strength and vigour of the workmen. Non providing of postretirement medical care to retired Government official in a city not covered by CGHS at par with in service employee would result in violation of Article 21 of the Constitution of India. Moreover, employees need medical care most after their retirement. The State cannot call its own actions as wrong. We have clarified and explained O.M. dated 20.08.2004 and it is made clear that all the Central Government pensioners residing in non-CGHS areas would be covered either under the CS(MS) Rules, 1944 or CGHS as per their option to be sought for by the Central Government. In order to avoid litigation, this judgment shall apply to all the retired Government officials residing in non-CGHS areas. There should be equality of health benefits to retirees as well in their evenings of life. There cannot be any discrimination while extending the social benefits to in service and retirees. It is the prime responsibility of the State to protect the health of its workers. In view of the phraseology employed in O.M. dated 05.06.1998, Note 2 appended to Rule 1 is read down to extend the benefit of CS(MA) Rules, 1944 to retired Government officials residing in non-CGHS areas to save it from unconstitutionality and to make it workable. The higher Courts have to evolve new interpretive tools in changing times. The neo capitalism may concentrate wealth in the hands of few persons which would be contrary to the philosophy of the Constitution of India. Right to health is a human right. The action of the petitioner-Union of India not to reimburse the medical bills to the respondent and also not giving option to him and similarly situate persons residing in a city not covered under CGHS as per O.M. dated 5.6.1998 to either opt for CGHS Scheme or CS(MA) Rules, 1944, is illegal, arbitrary, capricious, discriminatory, thus, violative of Articles 14, 16 and 21 of the Constitution of India. The decision in matters pertaining to the health of the employee should be taken with utmost humane approach.*
>
> ***53.*** *Ordinarily we would have ordered the retired Government officials to refund the amount already received by them, but taking into consideration that this would be oppressive and cause undue hardship to them, we order the Union of India not to make recoveries from the respondent and similarly situate*

persons residing in non-CGHS areas in the event of their opting for CS(MA) Rules or CGHS.

***54**. Accordingly, the writ petition is dismissed. However, the Union of India is directed to seek the option from the respondent and similarly situated retired employees residing in non-CGHS areas for medical coverage either under CGHS Scheme or under CS(MA) Rules, 1994 as per Office Memorandum, dated 05.06.1998 within a period of six months. Henceforth, the pensioners should be given one time option at the time of their retirement for medical coverage under the CGHS Scheme or CS(MA) Rules, 1994. The Union of India is also directed to release a sum of 1,79,559/ incurred by the respondent on his treatment and a sum of 20,000/ incurred by the respondent towards post operation follow up, medicines and transportation charges within a period of three months from today, failing which, the respondent shall be entitled to interest @12% per annum. The miscellaneous application(s), if any, also stand(s) disposed of. No costs."*

2(v) The above extracted judgment unequivocally held that it was to be applied to all the retired employees, i.e. even to those residing in Non-CGHS areas; there cannot be any discrimination while extending social benefits to in-service and retirees; Note 2 appended to Rule 1 of O.M. dated 05.06.1998 was read down to extend the benefit of CS(MA) Rules, 1944 to retired Government officials residing in Non-CGHS areas to save it from unconstitutionality and to make it workable. Accordingly, the respondents herein were directed to seek options not only from the retired employee therein but also from all such similar situated retired employees residing in Non-CGHS areas for medical coverage either under CGHS Scheme or under CS(MA) Rules, 1994, as per office memorandum dated 05.06.1998, within a period of six months. Union of India was further directed to reimburse the expenses incurred by the retired employee (therein) on his medical treatment.

2(vi) After becoming aware of the aforesaid judgment, petitioner again requested the respondents through his representation dated 25.02.2016 (Annexure P-3) for reimbursement of his medical expenses. Failing to get any fruitful response, instant writ petition was preferred.

3. I have heard Mr. Prem P. Chauhan, learned counsel for the petitioner and Mr. Lokender Paul Thakur, learned Senior Panel Counsel for the respondents and with their assistance gone through the appended record.

Contentions for opposing the relief:-

4. The respondents have opposed the prayer on following grounds:-

(a) Petitioner had not joined CGHS facility at the time of his superannuation and had only opted for fixed medical allowance of Rs. 500/- at the time of his retirement. Therefore, no comparison can be drawn between the CGHS beneficiaries and fixed medical allowances beneficiaries.

(b) The benefit of judgment in Shankar Lal Sharma's, case supra, was to be made applicable only to the petitioner therein;

(c) Present petitioner was not similarly situated to Shankar Lal Sharma in CWP No. 4621/2011.

Reasoning:-

5. All the above contentions deserve to be rejected in view of the following reasons:-

5(a) A careful perusal of the judgment dated 28.12.2015, in particular, paragraphs 52 to 54 thereof, clearly reveals that the judgment had been held applicable to all the retired Government officials. It was thus applicable to even retired employees residing in Non-CGHS areas. The applicability of the judgment was, thus, not restricted only to the petitioner. The action of Union of India in not reimbursing the medical bills to the Government employee therein as well as not in giving them and other similarly situated persons residing in areas not covered under CGHS Scheme as per OM dated 05.06.1998, the option to opt either for CGHS Scheme or CS(MA) Rules, 1994 was declared illegal, arbitrary, capricious, discriminatory and violative of Articles 14, 16 and 21 of the Constitution of India. It was held as under:-

> ***"16***. *We do not accept the plea taken in the petition that O.M. dated 5.6.1998 was intra departmental communication. The decision dated 5.6.1998 was a conscious decision. It was a final order. The respondent and similarly situated persons have changed their position by getting themselves treated from various institutes legitimately expecting that they are covered under CS(MA) Rules. According to Office Memorandum, dated 20.08.2004, the view of all the Ministries/Departments of the Government of India were sought before a final decision could be taken. This Office Memorandum is dated 20.08.2004, but till date no material has been placed on record that O.M., dated 05.06.1998 was withdrawn, rescinded, superseded or any corrigendum was issued. The operation of O.M., dated 05.06.1998 has not been suspended. The only requirement as per O.M., dated 05.06.1998 was to work out the modalities in consultation with the Ministries/Department, that too, to avoid any hardship to the pensioners. It was to be followed by the Ministerial Act. The pensioners were to be given one time option at the time of their retirement either to opt for CGHS or under the CS(MA) Rules, 1944 for medical coverage. There was sufficient time for consultation with various Departments from 05.06.1998 to 20.08.2004. Though it is stated that the Department of Expenditure has categorically said that in view of huge financial implications, it is not feasible to extend CS(MA) Rules, 1944 to pensioners, but that decision has not been placed on record. The issue was with regard to the applicability of CGHS Scheme floated in 1954 and the applicability of CS(MA) Rules, 1944 to the retirees, who were not residing in the areas covered by CGHS Scheme. The O.M. dated 05.06.1998 cannot be stated to be a decision in isolation since it is based on the recommendations made by the 5th Pay Commission of the Central Government. The main objective underlined in the issuance of O.M. dated 05.06.1998 was to mitigate the hardships faced by the retired Government officials.*
>
> ***17***. *The Central Government must act like a model employer. Ours is a socialist welfare State. The difficulties faced by the retired Government officials have rightly been redressed by O.M. dated 05.06.1998. Thus, O.M., dated 05.06.1998 supplements the CS(MA)Rules by extending the scope of health coverage to retired Government Officials as well.*
>
> ***18.*** *The matter is required to be considered from another angle. There is a Scheme floated by the Central Government in 1954, whereby, the persons who have been enrolled under the Scheme can get themselves treated in 25 cities across the country. All the Government Officials who retired from the Central Government constitute a homogeneous class whether they are living in station 'A' or 'B' after their retirement. There is no reason assigned why the respondent and similarly situated person have been left out from the applicability of CGHS or CS(MA) Rules, 1944. it is a case of invidious discrimination. The CGHS facilities could not be restricted to specified places. The respondent and similarly situated person are to be treated at par with those persons who are residing at Delhi and other areas covered under CGHS. There is no intelligible differentia so as to differentiate the retired Government officials vis-a-vis some other retired persons only on the ground of residing in a particular place. The objective of the Scheme is to provide better health facilities to the retired Government officials. It is with the objective that O.M. dated 5.6.1998 was issued."*

5(b) It was not open for the petitioner at the time of his superannuation to opt for CGHS Scheme. He resided in an area, which was not covered in CGHS Scheme. No such option was granted to him by the respondents at that time. It was under such circumstances that the petitioner had opted for fixed medical allowance of Rs. 500/-. Though, as per rejoinder filed by the petitioner, which has not rebutted by the respondents, even this fixed medical allowance was not paid to him from the year 2005 to 2011.

5(c)(i) For determining the finality attached to the above extracted judgment, following order was passed in the matter on 12th July, 2019:-

> *"Heard for some time. It appears from the record that the petitioner superannuated on 31.10.1993 and the CGHS Secheme under CS(MA) Rules 1994, came into force subsequent to the superannuation of the petitioner.*

Perhaps, in view of this position, the option was not taken from the petitioner for applicability of CGHS Scheme. It is not in dispute that the petitioner, as per situation in existence at the time of his superannuation, had given the option for fixing monthly medical allowances of Rs. 500/-. In terms of judgment passed by a Division Bench of this Court on 28.12.2015, titled Union of India and Another vs. Shankar Lal Sharma, the following directions were issued in respect of the scheme:-

> *"54. Accordingly, the writ petition is dismissed. However, the Union of India is directed to seek the option from the respondent and similarly situated retired employees residing in non-CGHS areas for medical coverage either under CGHS Scheme or under CS(MA) Rules, 1994, as per Office Memorandum, dated 05.06.1998 within a period of six months. Henceforth, the pensioners should be given one time option at the time of their retirement for medical coverage under the CGHS Scheme or CS(MA) Rules, 1994....."*
>
> *Learned Central Government Counsel, to seek instructions in respect of:*
>
> *(i) finality;*
>
> *(ii) implementation and*
>
> *(iii) applicability of the above judgment to the case of the petitioner"*

5(c)(ii) In pursuance to the above directions, learned Sr. Panel Counsel has produced the instructions dated 10.10.2019 imparted to him by the respondents. These instructions reveal that subsequent to the judgment, the respondents have issued office memorandum dated 29.10.2016, where under, Central Government Pensioners have now been granted following options in respect of availing medical facilities:-

> *"**2.** It is further informed that the following options to avail medical facilities are available to Central Government pensioners:*
>
> *a) <u>Pensioners residing in CGHS covered areas</u>:*
>
> *1) They can get themselves registered in CGHS dispensary after making requisite contribution and can avail both OPD and IPD facilities.*
>
> *2) Pensioners residing in CGHS areas cannot opt out of CGHS and avail any other medical facility (i.e. Fixed medical Allowance). Such pensioners, if they do not choose to avail CGHS facility by depositing the required contributions, cannot be granted Fixed medical Allowance in lieu of CGHS.*
>
> *b) <u>Pensioners residing in non-CGHS areas</u>:*
>
> *1) they can avail Fixed Medical Allowance (FMA) @ Rs. 500/- per month.*
>
> *2) They can also avail benefits of CGHS (OPD and IPD) by registering themselves in the nearest CGHS city after making the required subscription.*
>
> *3) They also have the option to avail FMA, for OPD treatment and CGHS for IPD treatments after making the required subscriptions as per CGHS guidelines."*

It is, thus, clear that now i.e. subsequent to the judgment in Shankar Lal Sharma's case supra, option has been given by the respondents to its employees residing in non-CGHS areas for availing either the fixed medical allowance or the benefit of CGHS Scheme.

5(d). In case of petitioner, the stand taken by the respondents is contrary to the judgment passed in Shankar Lal Sharma's case. Petitioner did not have the liberty to exercise the option to become member of CGHS Scheme for IPD treatment at the time of his superannuation. Medical reimbursement cannot be refused to the petitioner on the ground that at the time of his superannuation, petitioner had opted for fixed monthly allowance. This option was made available to him only under office memorandum dated 29.9.2016, therefore, in my considered view, the present petition deserves to be allowed on the analogy of the judgment passed in Shankar Lal Sharma's case, which apparently has attained finality. The petitioner is similarly situated as was Shankar Lal Sharma in CWP No.4621/2011 and had

promptly requested the respondents for medical reimbursement by timely submitting his indoor treatment medical bills etc. Accordingly, this petition is allowed. Respondents are directed to reimburse a sum of Rs. 1,82,693/- incurred by the petitioner towards his medical treatment within two months from today, failing which, the amount shall carry interest @ 9% per annum from the date of filing of the petition till its realization.

Petition is disposed of along with pending application(s), if any.

****

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

Smt. Babli Chauhan .....Petitioner

Versus

M/S Mahindra and Mahindra Finance Services Limited .....Respondent

Cr. Revision No. 210 of 2015

Decided on: September 12, 2019

Negotiable Instruments Act, 1881 - Section 138 – Dishonour of cheque – Complaint – Proof – Held, accused admitting cheque having been signed by her – Also admitting that she had borrowed the sum as a vehicle loan from complainant and that was to be repaid in monthly installments – Accused not leading any evidence to rebut presumption of consideration attached with cheque – Plea of accused that blank cheque was misued by complainant, is not substantiated – She was rightly convicted of offence under Section 138 of the Act – Petition dismissed. (Para 8 to 13).

Cases referred:

Hiten P. Dalal v. Bartender Nath Bannerji, (2001) 6 SCC 16

M/s Laxmi Dyechem vs. State of Gujarat, 2013(1) RCR

For the petitioner: Mr. Onkar Jairath, Advocate.

For the respondent: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under S.397 CrPC, lays challenge to judgment dated 13.3.2015 passed by learned Sessions Judge, Shimla, Himachal Pradesh in Cr. Appeal No. 110-S/10 of 2011 affirming judgment of conviction and sentence dated 12.10.2011 recorded by learned Judicial Magistrate 1st Class, Court No. 3, Shimla, District Shimla, in Case No. 1423-3 of 10/09 titled M/s Mahindra and Mahindra Finance Services Limited vs. Smt. Babli Chauhan, whereby learned trial Court, while holding petitioner-accused (hereinafter, 'accused') guilty of having committed offence punishable under S.138 of the Negotiable Instruments Act (hereafter, 'Act'), convicted and sentenced her to undergo simple imprisonment for a period of one year and to pay compensation to the tune of Rs.3,50,000/- to the respondent-complainant (hereinafter, 'complainant').

2. Facts, as emerge from the record are that the complainant instituted a complaint under S.138 of the Act, in the Court of learned Judicial Magistrate 1st Class, Court No. 3, Shimla, alleging therein that the accused borrowed a sum of Rs.3,64,000/- from the complainant on 27.7.2005, vide loan agreement No. 332035, for the purchase of Mahindra Mini Bus. Loan amount was agreed to be repaid alongwith financial charges by the accused in 60 monthly installments of Rs.8,550/-, but the accused defaulted in repayment of loan, whereafter cheque bearing No. 617502 dated 2.6.2009, amounting to Rs.2,92,760/- came to be issued in favour of the complainant by the accused, in discharge of her debt drawn on an account maintained by her with the State Bank of India, Kholighat, District Shimla. However, the fact remains that the said cheque (Ext. CW-1/C) came to be dishonoured on account of

insufficient funds. Immediately, after receipt of return memo from the Bank, complainant served the accused with statutory notice, calling upon her to make good the payment within the stipulated period but since the accused failed to make good the payment within the stipulated period as prescribed in the notice, complainant approached learned trial Court in the proceedings filed under S.138 of the Act. Learned trial Court, in the totality of evidence led on record by respective parties, held the accused guilty of having committed offence punishable under S.138 of the Act and accordingly convicted and sentenced her, as per description given herein above.

3. Being aggrieved and dissatisfied with the judgment of conviction and sentence passed by learned trial Court, accused preferred an appeal in the court of learned Sessions Judge, Shimla, who vide judgment dated 13.3.2015, dismissed the appeal, as a consequence of which, judgment of conviction and sentence recorded by learned trial Court came to be upheld. In the aforesaid background, accused has approached this Court in the instant proceedings, seeking therein her acquittal after setting aside judgments of conviction and sentence recorded by learned Courts below.

4. On 8.7.2015, this Court suspended the substantive sentence imposed by learned trial Court, subject to petitioner's furnishing personal bonds in the sum of Rs.25,000/- and to pay amount of compensation within a period of two weeks. However, the fact remains that despite repeated opportunities, accused failed to make good the payment in terms of order dated 8.7.2015. On 21.8.2015, accused undertook before this Court to deposit amount in question on or before 30.9.2015 but again, complete payment in terms of judgment passed by learned trial Court has not been made. Orders passed by this Court from time to time reveal that this Court, with a view to accommodate the accused, afforded as many as 15 opportunities enabling her to deposit the amount in question.

5. On 29.5.2017, accused made payment of some amount, yet a sum of Rs.80,000/- still remains payable by her. Though, today the accused has brought a sum of Rs.15,000/-, but Mr. Gupta, learned Senior Advocate appearing for the complainant states that he has no instructions to receive the money and as such, accused may deposit the same with the complainant company. In view of the aforesaid conduct of the accused, whereby she, despite repeated opportunities given by this Court, failed to deposit the amount, this Court has no other option but to decide the present revision petition on its merit.

6. Having heard learned counsel for the parties and perused the material available on record, this court finds no illegality or infirmity in the judgments passed by learned Courts below. Though, Mr. Onkar Jairath, learned counsel appearing for the accused, made a serious attempt to persuade this Court to agree with his contention that learned Courts below have failed to appreciate the evidence in its right perspective, but this Court finds from the record that it stands duly proved on record that the cheque in question, Ext. CW-1/C was issued by accused towards discharge of her lawful liability. In nutshell, defence as set up by the accused is that she never filled in the amount in the cheque in question but since there is not dispute, if any, with regard to signatures on the cheque, Ext. CW-1/C, rather same stand admitted, learned Courts below have rightly held that benefit of presumption as envisaged under Ss.118 and 139 of the Act is available to the complainant being holder of cheque. Accused, in her statement under S.313 CrPC, has categorically admitted that she has borrowed a sum of Rs.3,64,000/- from the complainant. She also admitted that the said amount was to be repaid by her alongwith interest in 60 monthly installments of Rs.8,550/- each. Apart from above, though the complainant categorically denied the suggestion that ten blank cheques including cheque Ext. CW-1/C were obtained by it at the time of advancing loan to the complainant but, as has been noticed herein above, since there is no dispute with regard to the signatures of the accused on the cheque in question, defence set up by her, which is otherwise not probable, is of no consequence.

7. Complainant by successfully proving issuance of cheque Ext. CW-1/C, has discharged its onus as such, the onus to prove otherwise was very much upon the accused.

Evidence available on record clearly suggests that the complainant has successfully proved the ingredients of S.138 of the Act.

8. Mr. Mohinder Gautam (CW-1), while deposing before learned Court below, has categorically deposed that the accused had borrowed a sum of Rs.3,64,000/- from the complainant for the purchase of vehicle and the loan alongwith financial charges was required to be repaid by the accused in 60 monthly installments. He also proved the statement of account of the accused Ext. CW-1/B during his examination-in-chief. As per this witness, accused was irregular in making repayment of installments, as s consequence of which, she issued cheque Ext. CW-1/C drawn in favour of the complainant. He has categorically stated that on presentation, cheque Ext. CW-1/C was dishonoured on account of insufficient funds. This witness successfully proved issuance of statutory demand notice Ext. CW-1/F by stating that same was sent on the correct address of the accused, vide registered post as well as under postal certificate, Exts. CW-1/G and CW-1/H. During his examination, this witness denied the suggestion put to him that he is not authorised to appear on behalf the complainant. He further denied the suggestion put to him that blank cheques were obtained from the accused for security purpose at the time of advancing loan. Cross-examination conducted upon this witness nowhere suggests that the defence was able to extract anything contrary to what he has stated in his examination-in-chief, rather, close scrutiny of same suggests that the testimony of this witness remained un-shattered.

9. Accused, while appearing as DW-1, deposed that the blank cheques obtained from her by the complainant have been misused by it. She further stated that the contents of cheque Ext. CW-1/C were not filled in by her. In her cross-examination, she categorically admitted that the complainant had advanced loan to her for the purchase of vehicle. She also admitted due execution of loan agreement, Ext. P6. Most importantly, this witness categorically admitted her signatures upon the cheque Ext. CW-1/C.

10. Having carefully perused the evidence available on record, as has been discussed herein above, this Court is in total agreement with the complainant that the cheque in question, Ext. CW-1/C was issued by the accused for consideration in discharge of her debt/liability. Since presumption as referred to herein above has not been successfully rebutted by the accused, she rightly came to be held guilty of having committed offences punishable under S.138 of the Act.

11. Once signatures on the cheque are not disputed rather stand duly admitted, aforesaid plea with regard to cheque having not been issued towards discharge of lawful liability, rightly came to be rejected by learned Courts below. Reliance is placed upon **Hiten P. Dalal** v. **Bartender Nath Bannerji**, (2001) 6 SCC 16, wherein it has been held as under:

> "The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....."

12. S.139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

13. True it is that to rebut aforesaid presumption, accused can always raise probable defence either by leading positive evidence or by referring to material, if any, adduced, on the record by the complainant, but, in the case at hand, accused has miserably failed to raise probable defence, much less sufficient defence to rebut the presumption available in favour of the complainant under Ss. 118 and 139 of the Act. Close scrutiny of

material available on record compels this Court to agree with learned senior counsel for the complainant, that there is absolutely no evidence available on record to probabilise the defence so projected by accused that blank cheques were issued to the complainant and one of the cheques has been misused. Accused with a view to set up aforesaid plea was required to substantiate the same by leading cogent and convincing evidence but, in the case at hand, accused even during her statement under S.313 CrPC, has not denied the factum with regard to issuance of cheque but has taken a plea that ten blank cheques were procured by the complainant at the time of advancing the loan and one of the cheques has been misused. Mere statement of the accused is not sufficient to prove that the cheque in question has been misused, rather the accused, with a view to rebut the presumption available in favour of the holder, is/was under obligation to prove by leading positive evidence that the cheque in question was issued as a security.

14. Hon'ble Apex Court in **M/s Laxmi Dyechem** vs. **State of Gujarat**, 2013(1) RCR (Criminal), has categorically held that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. To raise probable defence, accused can rely upon the material submitted by the complainant. Needless to say, if the accused/drawer of cheque in question neither raises a probable defence nor is able to contest existence of a legally enforceable debt or liability, statutory presumption under S.139 of the Act regarding commission of the offence comes into play. It would be apt to reproduce following paras of judgment (supra) herein below:

> "23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.
>
> 24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.
>
> 25. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory

notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy."

15. Recently, Hon'ble Apex Court, having noticed various judgments passed on earlier occasions, reiterated the principles to be kept in mind while e xtending benefit of presumption under Ss. 118 and 139 of the Act *ibid*, in **Basalingappa** vs. **Mudibasappa,** Cr. Appeal No. 636 of 2019 decided on 4.9.2019. Hon'ble Apex Court held as under:

"23. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-

(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability. 27

(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 28 139 imposed an evidentiary burden and not a persuasive burden.

(v) It is not necessary for the accused to come in the witness box to support his defence.

24. Applying the preposition of law as noted above, in facts of the present case, it is clear that signature on cheque having been admitted, a presumption shall be raised under Section 139 that cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused."

16. In view of detailed discussion made above and the law laid down by Hon'ble Apex Court (supra), the petition at hand is dismissed being devoid of merit. Judgments passed by learned Courts below are upheld. Accused is directed to surrender before the learned trial Court to serve the sentence imposed upon her, forthwith.

Pending applications, if any, stand disposed of. Bail bonds, if any, furnished by the accused stand cancelled.

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

Geeta Devi .....Petitioner

Versus

Surinder Singh and another .....Respondents

Cr. Revision No. 79 of 2019

Decided on: September 12, 2019

Negotiable Instruments Act , 1881 - Sections 138 & 139 – Dishonour of cheque – Complaint – Held, signatures on cheque not disputed by accused – Issuance of said cheque in favour of complainant also stands admitted by her – There will be presumption that cheque was used by her for discharge of debt or any other liability. (Para 8 & 12).

Cases referred:

Hiten P. Dalal v. Bartender Nath Bannerji, (2001) 6 SCC 16

M/s Laxmi Dyechem vs. State of Gujarat, 2013(1) RCR

For the petitioner: Mr. S.D. Sharma, Advocate.

For the respondents: Mr. Vaibhav Tanwar, Advocate, for respondent No.1.

Mr. Sumesh Raj and Mr. Sanjeev Sood, Additional Advocates General, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Judgment dated 6.12.2018 passed by learned Additional Sessions Judge (I), Shimla, Himachal Pradesh in Cr. Appeal No. 12-S/10 of 2018, affirming judgment/order of conviction and sentence dated 11.1.2018/26.2.2018, passed by learned Judicial Magistrate 1st Class, Court No. VI, Shimla, Himachal Pradesh in Case RBT No. 266-3 of 2015/14, whereby petitioner-accused (hereinafter, 'accused') came to be convicted for the commission of offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter, 'Act'), is under challenge in the instant proceedings filed under S.397 CrPC filed by the accused, seeking therein her acquittal, after setting aside aforesaid judgments/order of conviction and sentence.

2. Briefly stated, facts of the case as emerge from the record, are that respondent-complainant (hereinafter, 'complainant') instituted a complaint under S.138 of the Act in the court of Judicial Magistrate 1st Class, Court No. VI, Shimla, alleging therein that in the year 2014, accused approached him seeking financial help of Rs.1,50,000/-, for making payments in other cases instituted against her under S.138 of the Act, which at the relevant time were pending in different courts. Complainant provided a sum of Rs.70,000/- on 16.4.2014 and another sum of Rs.80,000/- on 25.4.2014, after borrowing the same from his friends. Though the accused promised to repay the same within a period of one month, but subsequently, she with a view to discharge her liability, issued cheque bearing No. 076049 dated 18.6.2014 (Ext. CW-1/A) amounting to Rs.1,50,000/- in favour of the complainant, drawn on account No. 20163042399, maintained by her with the Allahabad Bank, Shimla. However, the fact remains that the aforesaid cheque on its presentation was dishonoured on account of insufficient funds in the account of the accused, vide memo dated 26.7.2014 (Ext. CW-1/B) After having received aforesaid memo, complainant served accused with legal notice (Ext. CW-1/C) calling upon her to make payment of Rs.1,50,000/- within the stipulated

period but since the accused failed to make good the payment within the period prescribed in the legal notice, complainant was compelled to initiate proceedings under S.138 of the Act.

3. Learned Judicial Magistrate 1st Class, vide its judgment dated 8.5.2017, dismissed the complaint and acquitted the accused. Complainant, being aggrieved and dissatisfied with the aforesaid judgment of acquittal recorded by learned Court below, approached this Court by way of Criminal Appeal No. 295/2017, on the following grounds:

> "(i) Section 139 of the NI Act does not lay down any presumption with respect to existence of the legally enforceable debt and presumption is merely in favour o the holder of the cheque and the complainant has to establish the existence of legally enforceable debt against the accused.
>
> (ii) The friends from whom the complainant allegedly borrowed Rs.50,000/- each and thereafter advanced to the accused not examined.
>
> (iii) Advancement of loan in violation of Section 269 SS of the Income Tax Act (for short, IT Act;), therefore, not recoverable.
>
> (iv) Loan not shown in Income Tax Return furnished by the complainant entitled the accused for acquittal."

4. This Court, after careful perusal of the record, set aside the judgment of acquittal passed by learned Magistrate and remanded the case back to learned Court below with the direction to decide the case afresh strictly as per its facts as well as in accordance with law. In the aforesaid background, complaint having been filed by the complainant came to be re-heard and decided by Judicial Magistrate 1st Class, Court No. VI, Shimla, who while holding accused guilty of having committed offence punishable under S.138 of the Act ibid, convicted and sentenced her to undergo simple imprisonment for one month and to pay compensation to the tune of Rs.2.00 Lakh.

5. Being aggrieved and dissatisfied with the aforesaid judgment/order of conviction and sentence recorded by learned judicial magistrate, accused preferred an appeal in the court of learned Additional Sessions Judge (1), Shimla, Himachal Pradesh, who vide judgment dated 6.12.2018, dismissed the same and upheld the judgment/order of conviction recorded by learned trial Court. In the aforesaid background, accused has approached this Court in the instant proceedings.

6. Having heard learned counsel for the parties and perused the material available on record, this Court finds no force in the arguments of Mr. S.D, Sharma, learned counsel for the accused that after passing of judgment dated 3.11.2017 by this Court in Cr. Appeal No. 295 of 2017, it was not open for the Court below to re-appreciate the evidence, on the basis of which it had already acquitted the accused. Careful perusal of earlier judgment rendered by this Court, clearly reveals that while remanding case back, this court categorically observed in para-12 that, "*from the aforesaid discussion, it is clearly established that learned trial Magistrate has not correctly applied the law and therefore, the order of acquittal as passed cannot withstand judicial scrutiny and deserves to be set aside. Ordered accordingly.*"

7. This Court, while setting aside order of acquittal also clarified that it has not gone into the relative merits of the case and Court below would try to decide the case afresh strictly as per its facts and in accordance with law. Close scrutiny of the material available on record vis-à-vis reasoning assigned in the judgment of conviction recorded by learned Court below, clearly suggests that learned trial Magistrate proceeded to decide the matter afresh on the basis of material available on record as well as law on the point. As per learned counsel for the accused, since learned trial Magistrate had already applied its mind and had passed judgment of acquittal, while deciding the matter afresh, it ought not have re-appreciated the evidence, especially on the aspect of source of money allegedly paid by the complainant to the accused. However, this Court is not impressed with the aforesaid argument advanced by learned counsel for the accused, for the reason that after remanding of the case back, learned

trial Magistrate was well within its jurisdiction to decide the matter afresh, taking note of the evidence, be it ocular or documentary, adduced by the respective parties.

8. Accused, while denying the case of the complainant, in her statement recorded under S.313 CrPC, categorically stated that a blank cheque was issued as a security as the complainant stood her surety in another case. Accused nowhere disputed her signatures on the cheque, rather, issuance of cheque in favour of the complainant stands duly admitted. Precisely, the defence of the accused is that the cheque in question was issued by her as a security because, complainant stood her surety in another case under S.138 of the Act and he had obtained blank cheque from her. Accused further made an attempt to carve out a case that the cheque in question subsequently came to be misused by the complainant, by filling in the amount. Since there is no dispute with regard to signatures of accused on the cheque, there is presumption under Ss. 118 and 139 of the Act in favour of the complainant being holder of cheque that the cheque was issued by the accused in favour of complainant in discharge of legally enforceable debt/liability. Onus is/was upon the accused to rebut the aforesaid presumption.

9. Complainant, while deposing before learned trial Magistrate, reiterated the averments made in the complaint. He sated that the accused is his sister-in-law i.e. wife of his elder brother. In April, 2014, she disclosed to him that she requires to pay some money in another case registered against her under S.138 of the Act and as such, demanded Rs.1.50 Lakh from him. Complainant gave Rs.70,000/- on 16.4.2014 and Rs.80,000/- on 25.4.2104, after borrowing the same from his friends. Accused issued cheque Ext. CW-1/A, but the same was dishonoured vide Ext. CW-1/B by the Banker of accused. Complainant issued demand notice, Ext. CW-1/C, through his counsel. Accused neither replied to demand notice nor made any payment within the period prescribed in the same. Aforesaid witness in his cross-examination categorically stated that he is working as a Carpenter in MES Jutogh and getting Rs.33,000/- per month. This witness also admitted that accused was facing criminal complaint under S.138 of the Act in Court No.2, Shimla, wherein he stood surety to the accused. This witness categorically stated that he obtained Rs.50,000/- from his friendsnamely Raju and remaining amount from another friend namely Stephen Deen. This witness also admitted that signature over cheque is in different ink and date is in different ink. He categorically denied the suggestion put to him that a blank cheque was given to him.

10. Accused, Geeta Devi, while deposing as DW-1, stated that the complainant, who is related to her, stood her surety in another case and obtained cheque as security in that case. She stated that the case Harbhajan Vs. Geeta was compromised by her and till date she is paying Rs.5,000/- from her salary. She tendered copy of statement of Bank, Ext. DW-1/A and copy of letter dated 4.6.2016, Ext. DW-1/B.

11. Accused deposed that the complainant had a quarrel with her husband and on account of that, he filled in the cheque and presented the same for encashment. Most importantly, this witness admitted that she had received the demand notice Ext. CW-1/C. In her cross-examination, she admitted that she is drawing salary of Rs.48,000/- and her carry home salary is Rs.27,000-28,000/-. Accused also admitted that she is facing 2-3 similar cases in other courts.

12. Though, in the case at hand, accused made an attempt to set up a case that the cheque in question never came to be issued towards lawful liability but as a security, however as has been noticed herein above, there is statutory presumption under Ss. 118 and 139 of the Act in favour of the holder of cheque i.e. complainant, which is undisputedly rebuttable. Once signatures on the cheque are not disputed, rather stand duly admitted, aforesaid plea with regard to cheque having not been issued towards lawful liability, rightly came to be rejected by learned Courts below. At this stage, reliance is placed upon a judgment rendered by Hon'ble Apex Court in **Hiten P. Dalal** v. **Bartender Nath Bannerji**, (2001) 6 SCC 16, wherein it has been held as under:

> "The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....."

13. S.139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

14. True it is that to rebut aforesaid presumption, accused can always raise probable defence either by leading positive evidence or by referring to material, if any, adduced, on the record by the complainant, but, in the case at hand, accused has miserably failed to raise probable defence, much less sufficient defence to rebut the presumption available in favour of the complainant under Ss. 118 and 139 of the Act. Close scrutiny of material available on record compels this Court to agree with Mr. Vaibhav Tanwar, learned counsel for the complainant, that there is absolutely no evidence available on record to probabilise the defence so projected by accused that the cheque was issued as a security. Accused with a view to set up aforesaid plea was required to substantiate the same by leading cogent and convincing evidence but, in the case at hand, accused even during her statement under S.313 CrPC, has not denied the factum with regard to issuance of cheque but has taken a plea that the cheque was given to the complainant as security. Mere statement of the accused is not sufficient to prove that the cheque in question was issued as a security, rather the accused, with a view to rebut the presumption available in favour of the holder, is/was under obligation to prove by leading positive evidence that the cheque in question was issued as a security. Interestingly, in the case at hand, legal notice issued by complainant was never replied by the accused.

15. Accused, with a view to substantiate her aforesaid plea, stated that since there was a dispute between the complainant and her husband, complainant, after filling in cheque given to him as a security, presented the same to the Bank concerned but, interestingly, the accused failed to examine her husband qua aforesaid aspect of the matter. Since there is no dispute, if any, with regard to issuance of cheque and accused failed to prove that the cheque was not issued in discharge of lawful liability, plea of the complainant that the cheque was issued in discharge of lawful liability, was rightly accepted to be correct by learned Courts below.

16. Hon'ble Apex Court in **M/s Laxmi Dyechem** vs. **State of Gujarat**, 2013(1) RCR (Criminal), has categorically held that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. To raise probable defence, accused can rely upon the material submitted by the complainant. Needless to say, if the accused/drawer of cheque in question neither raises a probable defence nor is able to contest existence of a legally enforceable debt or liability, statutory presumption under S.139 of the Act regarding commission of the offence comes into play. It would be apt to reproduce following paras of judgment (supra) herein below:

> "23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of

litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.

24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

25. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy."

17. Learned counsel for the accused also argued that learned Courts below have failed to properly appreciate the other defence raised by the accused that the complainant had no capacity to lend the money. While placing reliance upon recent judgment rendered by Hon'ble Apex Court in **Basalingappa** vs. **Mudibasappa,** Cr. Appeal No. 636 of 2019 decided on 4.9.2019, learned counsel for the accused further argued that once probable defence with regard to capacity of complainant to lend money was raised by the accused, onus was upon the complainant to prove that he had sufficient money to lend.

18. In the aforesaid judgment, Hon'ble Apex Court, reiterated that S.139 of the Act is an example of a reverse onus and the test of proportionality should guide the construction and interpretation of reverse onus clauses on the defendant-accused and the defendant accused cannot be expected to discharge an unduly high standard of proof. In the aforesaid

judgment, Hon'ble Apex Court having taken note of judgments passed by their lordships on earlier occasions, has summarized the principles in the following manner:

> "23. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-
>
> (i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability. 27
>
> (ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.
>
> (iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.
>
> (iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 28 139 imposed an evidentiary burden and not a persuasive burden.
>
> (v) It is not necessary for the accused to come in the witness box to support his defence.
>
> 24. Applying the preposition of law as noted above, in facts of the present case, it is clear that signature on cheque having been admitted, a presumption shall be raised under Section 139 that cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused."

19. Hon'ble Apex Court, in the case before their lordships, while applying principle of law as discussed herein above, observed that when signatures on cheque stand admitted, a presumption shall be raised under S.139 that the cheque was issued in discharge of debt or liability, but such presumption is rebuttable, if some probable defence is raised by the accused. Since in the case before Hon'ble Apex Court, complainant during his cross-examination, failed to give satisfactory reply qua his financial capacity to pay Rs.6.00 Lakh, Hon'ble Apex Court came to be convinced that probable defence of accused has been raised, which shifted the burden on the complainant to prove his financial capacity and other facts.

20. In the case at hand, though probable defence with regard to capacity of the complainant to lend money appears to have been taken very casually because, if statement of the accused recorded under S.313 CrPC as well as suggestions put to the complainant during his cross-examination are perused, same clearly suggest that the main defence of the accused is/was that she issued cheque as security, but even if such defence is tested on the basis of evidence led on record by respective parties, same deserves outright rejection. In the case at hand, careful perusal of the complaint filed by complainant under S.138 clearly suggests that he set up a case that he, after having arranged money from his friends namely Raju and Stephen Deen, gave it to the accused. Complainant again in his examination-in-chief and cross-examination categorically reiterated aforesaid factum with respect to his borrowing money from his friends, Raju and Stephen Deen. No suggestion worth the name ever came to be put to the complainant in the cross-examination with regard to source of money, which he allegedly lent to the accused. Similarly, there is no suggestion with regard to capacity of complainant to lend money, who otherwise is a Government employee. Complainant's

assertion made in examination-in-chief that he is working as a Carpenter in MES at Jutogh and drawing salary of Rs.33,000/- per month, remained totally un-shattered, because at no point of time, suggestion, if any, qua aforesaid aspect of the matter came to be put to the complainant.

21. Hon'ble Apex Court in **Rohitbhai Jivanlal Patel** vs. **State of Gujarat & Anr**, Cr. Appeal No. 508 of 2019, decided on 15th March, 2019, has held that in view of statutory presumptions as contemplated under Ss.118 and 139 of the Act, onus is shifted upon the accused and unless accused discharges said onus by leading evidence on record as to show preponderance of probabilities tilting in his favour, complainant's case cannot be disbelieved for want of evidence regarding source of funds for advancing as loan to the accused. Hon'ble Apex Court in the judgment (supra) has held as under:

> "17. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence.
>
> 19. Hereinabove, we have examined in detail the findings of the Trial Court and those of the High Court and have no hesitation in concluding that the present one was clearly a case where the decision of the Trial Court suffered from perversity and fundamental error of approach; and the High Court was justified in reversing the judgment of the Trial Court. The observations of the Trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the complainant and his witness, or that the witness of the complaint was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complaint to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 and 139 of the NI Act. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not. The other observations as regards any variance in the statement of complainant and witness; or want of knowledge about dates and other particulars of the cheques; or washing away of the earlier cheques in the 23 rains though the office of the complainant being on the 8th floor had also been of irrelevant factors for consideration of a probable defence of the appellant. Similarly, the factor that the complainant alleged the loan amount to be Rs. 22,50,000/- and seven cheques being of Rs.

3,00,000/- each leading to a deficit of Rs. 1,50,000/-, is not even worth consideration for the purpose of the determination of real questions involved in the matter. May be, if the total amount of cheques exceeded the alleged amount of loan, a slender doubt might have arisen, but, in the present matter, the total amount of 7 cheques is lesser than the amount of loan. Significantly, the specific amount of loan (to the tune of Rs. 22,50,000/-) was distinctly stated by the accused-appellant in the aforesaid acknowledgment dated 21.03.2017."

22. In the case at hand, accused has not been able to rebut the statutory presumption under Ss.118 and 139 of the Act in favour of holder of cheque i.e. complainant and as such, there appears to be no illegality or infirmity in the judgments/order of conviction and sentence passed by learned Courts below. All the ingredients of S.138 of the Act stand duly proved in the case at hand, as such, this Court finds no occasion to interfere with the judgments/order of conviction and sentence recorded by learned Courts below, as such, same deserve to be upheld.

23. In view of above, the petition at hand is dismissed being devoid of merit. Judgments passed by learned Courts below are upheld. Accused is directed to surrender before the learned trial Court to serve the sentence imposed upon her, forthwith.

Pending applications, if any, stand disposed of. Bail bonds, if any, furnished by the accused stand cancelled.

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

Shasikant and another ....Appellants.

Versus

Krishna @ Khrishan Singh ....Respondent.

RSA No.: 611 of 2008
Decided on: 17.09.2019.

Limitation Act, 1963 - Articles 64 & 65 – Adverse possession – Held, onus is on party pleading adverse possession to prove that its possession over suit land is open , peaceful and hostile for more than 12 years as against true owner. (Para 11)

For the appellants : Mr. R.K. Sharma, Sr. Advocate with Mr. Arun Kumar, Advocate.

For the respondent : Mr. Ashok Chaudhary, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this appeal, appellants/defendants have challenged the judgment and decree passed by the Court of learned Civil Judge (Sr. Divn.), Jawali, District Kangra, H.P. in Civil Suit No. 230/2003, decided on 17.04.2006, vide which, learned Trial Court decreed the suit filed by the present respondent/plaintiff for possession of suit land, as also the judgment and decree passed by the Court of learned District Judge, Kangra at Dharamshala, District Kangra (HP), in Civil Appeal No. 91-J/XIII/2006, dated 04.08.2008, whereby learned Appellate Court while dismissing the appeal filed by the present appellants/ defendants, upheld the judgment and decree passed by the learned trial Court.

2. Brief facts necessary for adjudication of the present appeal are as under:-

Plaintiff Krishna @ Krishan Singh filed a suit for possession against the defendants, i.e. present appellants, on the ground that she was owner of the suit land comprised in Khata No. 79 min, khatauni No. 202, Khasra No. 107, measuring 0-09-53 hectares, situated in Mohal Katholi, Mauza Nagrota-Surian, Tehsil Jawali, District Kangra, H.P. (hereinafter referred to as the 'suit land'). Defendants were the owners of the land

adjacent to the suit land and had no right, title or interest over the same. Despite this, defendants had forcibly obtained the possession of the suit land on 28.10.2002 without the consent of the plaintiff and when plaintiff protested, defendants assured to hand over the possession thereof to the plaintiff, however, subject to demarcation. Plaintiff obtained demarcation of the suit land on 27.07.2003, which demonstrated that defendants were in possession of the suit land. Thereafter, plaintiff requested the defendants to handed over the possession of the suit land back to him, but the defendants refused to do so, hence the suit was filed by the plaintiff.

3. Defendants opposed the suit of the plaintiff on the ground that they were in possession of the suit land since 1952, i.e. since the time of their predecessors and had become owners of the same by way of adverse possession. It was also their case that earlier a civil suit for injunction, i.e. Civil Suit No. 152/2003 was filed by the plaintiff, which was dismissed in Lok Adalat on 18.10.2003, therefore also, subsequent suit was not maintainable. It was also the stand of the defendants that the demarcation, on the basis of which, plaintiff pleaded that defendants were in possession of the suit land was not conducted in accordance with law.

4. On the basis of pleadings of the parties, learned Trial Court framed the following issues:-

"1. Whether the plaintiff is entitle4d for vacant possession of suit land on the demarcation report in case No. 108/RNT, as alleged? OPP.

2. Whether the defendants have become owners of suit land by way of adverse possession as alleged? OPD.

3. Whether the plaintiff is estopped by his act and conduct from filing the present suit, as alleged OPD.

4. Relief."

5. On the basis of pleadings and evidence led by the parties in support of their respective cases, the Issues so framed were answered by the learned Trial Court as under:-

"Issue No.1 : Yes.

Issue No. 2 : No.

Issue No. 3 : No.

Issue No.4 : The Suit is decreed as per operative part of the judgment."

6. The suit was decreed by the learned Trial Court by holding that it was not in dispute that plaintiff was the owner of the suit land as the said fact stood admitted even by the defendants in their cross examination. Learned Trial Court also held that the factum of the defendants being in possession over the suit land was also not in dispute, however, defendants had failed to establish by way of leading cogent evidence that they had become owners of the suit land by way of adverse possession. On these bases, learned Trial Court held that plaintiff was entitled for the relief of possession. Learned Trial Court also held that the assertion of the plaintiff in the previous suit regarding an attempt of dispossession would not amount to estoppel as the defendants were not made to act to their disadvantage on the said assertion which was a necessary ingredient of estoppel. On these bases, learned Trial Court decreed the suit of the plaintiff for possession.

7. In appeal, the judgment and decree so passed by the learned Trial Court was affirmed. Learned Appellate Court while dismissing the appeal filed by the defendants held that at no stage, defendants had proved that their predecessor-in- interest or they had taken over the possession of the suit land after having dispossessed the true owner in a manner that the defendants were in possession of the suit land in denial of the title of the plaintiff. Learned Appellate Court held that possession howsoever long could not be treated as adverse to the true owner unless the party was able to establish the ingredients of adverse possession. Learned Court also held that whereas plaintiff had proved on record that she was forcibly dispossessed of the suit land by the defendants in the year 2002, defendants had failed to prove that they had perfected their title by way of adverse possession. On these bases, learned Appellate Court while dismissing the appeal of the defendants, upheld the judgment and decree passed by the learned Trial Court.

8. Feeling aggrieved, the appellants/defendants have filed this appeal, which was admitted on 19.11.2008, on the following substantial questions of law:-

"(i). Whether the Ld. Courts below have failed to appreciate the plea of adverse possession in its right perspective as raised in Preliminary Objection No. 5.?

(ii) Whether the Ld. Courts below are justified in accepting the plea of demarcation when the person conducting the demarcation never appeared in the witness box and the demarcation was not in accordance with the rules prescribed for demarcation?

(iii) Whether the Ld. First Appellate Court has not misread the evidence when he observed that no person from the locality was produced by the defendant to prove his adverse possession while DW 2 Desh Raj has specifically stated in his cross examination that his land is adjoining to the land in dispute?"

9. I have heard learned Counsel for the parties and gone through the record of the case as well as the judgments and decrees passed by the learned Courts below:-

10. There are concurrent findings of facts returned by both the learned Court below against the present appellants that they had failed to prove on record that they had perfected their title over the suit land by way of adverse possession.

11. In case, a party is to succeed on the plea of adverse possession, then it has to establish that its possession over the suit land is open, peaceful and hostile for more than 12 years as against the true owner. In the present case, the suit was filed for possession by the plaintiff in October, 2003. The plea of the plaintiff was that she was dispossessed by the defendants of the suit land on 28.10.2002. While denying the said claim of the plaintiff, defendants took the plea of adverse possession.

12. In order to substantiate that the defendants had become owners of the suit land by way of adverse possession, defendant No. 1 entered the witness box and besides himself, he also examined Sh. Desh Raj as DW2. In his affidavit tendered in evidence, defendant No. 1 Shashi Kant, who was aged 40 years when the affidavit was filed, stated that the suit land was in the open, peaceful and hostile possession of his predecessor-in-interest, since the year 1952. He thereafter stated that after the death of his predecessor-in-interest, the suit land was in his possession.

13. DW2 Desh Raj in his affidavit deposed that he had seen the suit land, which was earlier in possession of Karam Chand and after his death, the same was in possession of the defendants. It was mentioned in his affidavit that defendants were in possession of the suit land for the last fifty three years. Now, it is not understood as to how a witness, who was 50 years old when he filed the affidavit in evidence, could swear in the Court that possession of the defendants was for the last 53 years, i.e. even qua the period when he was not even born. This clearly demonstrates that statement of this witness is not worthy of reliance. Besides him, no other witness has been examined by the defendants to establish that they had become owners of the suit land by way of adverse possession. To put it differently, defendants have not examined any witness to demonstrate and prove that the predecessor-in-interest of the defendants were in possession of the suit land since the year 1952 and their possession over the suit land was open, peaceful and hostile as against the true owner.

14. Therefore, there is no infirmity in the findings returned by both the learned Courts below that defendants were not able to prove that their possession over the suit land had matured into ownership by way of adverse possession. Further, it can not be said that learned first Appellate Court has misread the evidence while hoding that no person from the locality was produced by the defendants to prove adverse possession because statement of DW2 Desh Raj, as I have already mentioned above, is not worthy of reliance as when he was of 50 years of age when he entered witness box, he could not have had stated that he had seen the predecessor-in-interest of the defendants to be in possession of the suit land for the last 53 years. As far as the factum of the Officer who conducted the demarcation not entering the witness box is concerned, the same also, in the peculiar circumstances of this case, is not fatal to the case of the plaintiff for the reason that the factum of the suit land being in possession of the defendants is not in dispute. The very fact where they claimed that they had become the owners of the same by way of adverse possession means that they admit their possession over the suit land. Substantial questions of law are answered accordingly.

In view of above discussion, as this Court does not finds any merit in the present appeal, the same is dismissed accordingly. Pending miscellaneous application(s), if any, also stand disposed of. No order as to costs.

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

Sh. Sulajeet Singh and another ....Petitioners.

Versus

Sh. Kanshi Ram and others ...Respondents.

CMPMO No.: 300 of 2019.
Decided on: 18.09.2019.

Code of Civil Procedure, 1908 – Order VIII Rules 1 & 10 – Written statement - Filing of – Delay – Extension of time – Held, defendants could not file written statement as no counsel appeared on their behalf apparently for the reason that one of the plaintiff himself was a practicing counsel at that place – Suit stands transferred to another court by District Judge on transfer application of defendants – Written statement filed in transferee court on very first opportunity – Delay in filing written statement was beyond control of defendants – Procedure can not be used as a tool to throttle process of administration of justice - Order extending time for filing written statement not perverse. (Para 9 & 10).

For the petitioners Mr. Romesh Verma, Advocate.

For the respondents Mr. B.N. Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, petitioner has challenged order dated 20.04.2019 passed by the Court of learned Senior Civil Judge, Shimla, in CMA No. 290 of 2019 and in CMA No. 226-6 of 2018, vide which, learned Trial Court, while allowing the application filed by the defendants for extension of time for filing the written statement, dismissed the application filed by the plaintiff for striking off the defence of the defendants for not filing the written statement in time.

2. Brief facts necessary for the adjudication of the present petition are that the petitioners herein have filed a suit for declaration and injunction against the present respondents. This suit was initially filed before the Court of learned Civil Judge, Court No. 2, Rohroo, District Shimla, HP. The suit was instituted on 11.08.2017. After service, defendants appeared before the learned Court on 19.08.2017. On 21.08.2017, a request was made on behalf of the defendants before the learned Court below that they intended to file an application under Section 24 of the Code of Civil Procedure (hereinafter referred to as the 'Code' for short) for transfer of the case. Record demonstrates that an application under Section 151 of the Code for transfer of the case to the Court of learned District Judge, Shimla, was filed by the defendants before learned Civil Judge, Court No. 2, Rohroo, HP, which was dismissed on 19.09.2017 on the ground that power to transfer the case is vested with learned District Judge and the High Court under Section 24 of the Code. Record further demonstrates that simultaneously, an application under Section 24 of the Code for transfer of the case was also filed by the defendants before the Court of learned District Judge at Shimla. Record further demonstrates that on 23.6.2018, Court of learned Senior Civil Judge, Shimla passed an order, relevant part of which is quoted herein below:-

> *"The present suit/case file has been received on dated 14.06.2018 alongwith copy of order dated 24.05.2018 passed in CMA No. 197-S/6 of 2017 titled as Sh. Sulajeet versus Sh. Khushi Ram and others passed by the Court of Ld. District Judge, Shimla, H.P. from the Court of Ld. Civil Judge Court No. II, Rohroo, Shimla, H.P. and it has been put up before me today by the Ahlmad concerned.*
>
> *At this stage Sh. D.P. Chauhan, Advocate, has filed Power of Attorney on behalf of all the defendants which is placed on record.*
>
> *The perusal of the order dated 24.05.2018 passed by the Court of Ld. District Judge, Shimla, H.P. shows that the present suit/case file has been assigned to this Court. Therefore, the office to check and register and now, notice be issued to the plaintiffs returnable for 24.08.2018."*

3. Thereafter, on 24.08.2018, the case was ordered to be listed by the said Court for 24.09.2018 for the filing of the written statement by the defendants. It is pertinent to

mention that during the period the case was pending in the Court of learned Civil Judge, Court No. 2, Rohroo, defendants had been appearing in the said Court in person or through attorney as they were not able to engage any Counsel because no Counsel at Rohroo was willing to represent them in the Court, purportedly on account of influence of the plaintiffs.

4. Be that as it may, thereafter defendants filed their written statement on 25.09.2018, as is evident from the record of the case. When the case was thereafter listed before the learned Court below on 28.11.2018, an application was filed by the petitioners herein under Section 148 read with Section 151 of the Code of Civil Procedure for striking off the defence of the defendants. On the said date, case was adjourned for filing reply to the said application for 01.01.2019. Thereafter, the case was listed on 14.01.2019 and on the said date, alongwith reply filed to the said application, defendants also filed an application under Section 148 of the Code of Civil Procedure for enlarging the time for filing the written statement.

5. These applications stand disposed of vide impugned order whereby the application filed by the plaintiffs/petitioners has been dismissed whereas that filed by the defendants/respondents has been allowed.

6. Learned Counsel for the petitioners has argued that the impugned order, vide which learned Trial Court dismissed the application filed by the petitioners for striking off the defence of the respondents, is not sustainable in the eyes of law because while dismissing the application filed by the petitioners, learned Trial Court erred in not appreciating that as there was considerable delay in filing the written statement, the defence of the respondents/defendants deserved to be struck off as taking written statement on record at a belated stage had caused a great prejudice to the plaintiffs.

7. On the other hand, learned Counsel for the respondents has argued that there was no infirmity with the order passed by learned Trial Court because there was no intentional delay on the part of the respondents in filing the written statement and the same could not be filed earlier as is also evident from the averments made in the application filed by them before the learned Trial Court under Section 148 of the Code of Civil Procedure for reasons beyond their control.

8. I have heard learned Counsel for the parties and also gone through the order under challenge as also the record of the case.

9. The reasoning assigned by the learned Court below while passing the impugned order is self speaking and is being quoted in extensio herein below:-

> *"5. Perused case file carefully. The plaintiff had filed the present suit before the Ld. Civil Judge Court No. 2 Rohru and the defendants were summoned for 19.08.2017. The record reveals that on 19.08.2017 Advocate Sh. Bharat Bhushan appeared for the defendants by filing Memo of Appearance and case was adjourned to 21.08.2017 for filing P.O.A. and reply. On 21.08.2017 Sh. Bharat Bhushan appeared for defendants on the strength of GPA and stated at the bar that the defendants intend to move an application under Section 24 CPC for transfer of the case. Thereafter, the case was listed for further orders. The case file was received in this Court on 23.06.2018 after the disposal of transfer application by the Ld. District & Sessions Judge. On the said date P.O.A. was filed on behalf of the defendants by Advocate Sh. D.P.Chauhan. Since, the plaintiffs were not present on the said date, therefore, the case was listed for notice to plaintiffs for 24.08.2018, whereafter it was listed for filing of written statement by the defendants. Vide order dated 28.11.2018, it was observed that written statement has already been filed by the defendants on 25.09.2018. On the same date, the plaintiffs moved the present application under Section 148 read with Section 151 CPC. The defendants filed reply to the said application on 14.01.2019 and also filed an application under Section 148 read with Section 151 CPC seeking enlargement of time for filing of the written statement.*
>
> *6. Record also reveals that the GPA of the defendants Sh. Bharat Bhushan had filed a reply to the application under Order 39 rule 1 and 2 CPC on 21.08.2017 thereby disclosing intention to contest the matter.*
>
> *7. It is evident from the record that the defendants had put appearance before the court of Ld. Civil Judge Court No. 2 Rohru and disclosed their*

intention to move an application for transfer of the case, and in fact such application was moved and the matter was transferred and assigned to the present Court. It also reveals that during the time when the matter was being heard by the Ld. Civil Judge Court No. 2 Rohru, no Advocate was engaged by the defendants and they appeared in person. It is the plea of the defendants that since the plaintiff No. 2 is a practicing Advocate at Rohru, therefore, none appeared on their behalf and they were forced to move a transfer application. Admittedly, no effect order was passed by Ld. Civil Judge Court No. 2 Rohru when the transfer application was pending before the Ld. District & Sessions Judge Shimla, H.P. As per the record an Advocate appeared on behalf of the defendants only on 23.06.2018 and the written statement was filed on 25.09.2018."

10. During the Course of arguments, learned Counsel for the petitioners could not demonstrate that findings so returned by the learned Court below were perverse findings and are not based on record. The reasonings assigned by the learned Trial Court as have been quoted herein above clearly demonstrate that the reason as to why written statement could not be filed by the defendants when the matter was pending at Rohroo was that plaintiff No. 2 happens to be a practicing Lawyer at Rohroo and on this count, no practicing Lawyer at Rohroo appeared on behalf of the defendants. Defendants were forced to move the transfer application which was subsequently allowed by the Court of learned District Judge, Shimla and after the matter was transferred to other Court at Shimla, written statement was filed by the defendants. In these peculiar circumstances, this Court concurs with the findings returned by the learned Trial Court that delay on the part of the defendants in filing the written statement was for the reasons beyond their control. Even otherwise, in this case, it was after the written statement filed by the defendants was taken on record that an application was filed by the plaintiffs under Section 148 of the Code of Civil Procedure praying that the defence of the defendants be struck off. This clearly demonstrates the intent of the plaintiffs, who are the petitioners herein, that they want to take the benefit of the procedural tactics to deny the defendants even the right of putting forth their version before the learned Trial Court. In the process of fair adjudication of a case, procedure cannot be used as a tool to throttle the process of administration of justice.

Accordingly, as this Court does not finds any infirmity with the impugned order, this petition being devoid of any merit, is dismissed. Pending miscellaneous application(s), if any, also stands disposed of.

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

Sh. Jagdish Chand ....Appellant.
Versus
Sh. Jai Kishan ....Respondent.

RSA No.: 48 of 2008
Decided on: 19.09.2019.

Indian Evidence Act, 1872 – Section 68 – Will – Proof of - Suspicious circumstances – Held, mere execution of subsequent Will, written four months of execution of first Will and without mentioning in subsequent will about the execution of previous Will, is not a suspicious circumstance. (Para 12).

For the appellants : Mr. V.S. Chauhan, Sr. Advocate with Mr. Vivek Darhel, Advocate.
For the respondent : Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this appeal, appellant/plaintiff has challenged the judgment and decree passed by the Court of learned Civil Judge (Sr. Divn.), Baijnath, District Kangra, H.P. in Civil Suit No. 45/05, decided on 21.03.2005, vide which, learned Trial Court dismissed the suit filed by the present appellant/plaintiff for declaration, as also the judgment and decree passed by the Court of learned District Judge, Kangra at Dharamshala, District Kangra (HP),

in Civil Appeal No. 59-B/XIII/2005, dated 28.09.2007, whereby learned Appellate Court while dismissing the appeal filed by the present appellant/plaintiff, upheld the judgment and decree passed by the learned trial Court.

2. Brief facts necessary for adjudication of the present appeal are as under:-

Appellant/plaintiff Jagdish Chand filed a suit for declaration on the ground that he was the legal heir of deceased Kaulan Devi as per her Will dated 21.09.1992 and had thus become owner in possession of the suit land bearing Khata No. 5 min, Khatauni No. 10, Khasra Nos. 135, 136 and 139, measuring 0-04-89 hectares and of Khata No. 8, Khatauni No. 47, Khasra No. 134, measuring 0-01-40 hectares situated at Mohal-Madho Nagar, Mauja Lanod, Tehsil Baijnath, Distt. Kangra (HP) (hereinafter referred to as the 'suit land') and Will dated 11.01.1993 alleged to be executed by deceased Kaulan Devi in favour of defendant was wrong, illegal, null and void, result of fraud and misrepresentation and not binding on the plaintiff. It was further the case of the plaintiff that mutation Nos. 306, 316 and 318 attested on the basis of Will in the name of defendant were also null and void. Plaintiff also prayed that a consequential relief of permanent prohibitory injunction by restraining the defendant from taking forcible possession of the suit land or alienating the suit land.

3. The suit of the plaintiff was resisted by the defendant on the ground that Kaulan Devi was looked after and maintained by the defendant and accordingly, she executed her last and valid Will dated 11.01.1993 in his favour. As per him, Kaulan Devi had not executed any other Will in favour of anyone, except the defendant, and thus, he was the only successor of deceased Kaulan Devi. It was the case of the defendant that plaintiff was fully aware about the presentation of the Will dated 11.01.1993 before the Patwari and attestation of mutation in pursuance thereof and mutations have rightly been attested in favour of the defendant. According to the defendant, Will executed by deceased Kaulan Devi in his favour was a result of free will of the testator as she was served upon by the defendant and even her last rites were performed by the defendant.

4. On the basis of pleadings of the parties, learned Trial Court framed the following issues:-

"1. Whether the plaintiff is entitled for the relief of declaration, as prayed for? OPP

2. Whether the plaintiff is legal heir of deceased Kaulan Devi on the basis of Will dated 21.9.1992 and is exclusive owner in possession of the suit land, as alleged? OPP.

3. Whether the mutation No. 306 dated 3.12.1998 and mutation Nos. 316 and 318 dated 7.8.1999 sanctioned in favour of the defendant on the basis of Will dated 11.1.1993 are null and void and result of fraud and mis-representation and are not binding upon the plaintiff as alleged? OPP.

4. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for? OPP

5. Whether the suit is time barred? OPD

6. Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD

7. Whether the suit is vague and therefore liable to be dismissed , as alleged? OPD

8. Whether the suit is filed by unauthorised agent of the plaintiff, as alleged? OPD

9. Whether Kaulan Devi has executed a valid Will in favour of the defendant on 11.1.1993 out of her sweet Will, as alleged? OPD.

10. Relief."

5. On the basis of pleadings and evidence led by the parties in support of their respective cases, the Issues so framed were answered by the learned Trial Court as under:-

"Issue No.1 : No

Issue No. 2 : No.

Issue No. 3 : No.

Issue No. 4 : No.

Issue No. 5 : No.

Issue No. 6 : No.

Issue No. 7 : No.

Issue No. 8 : No.

Issue No. 9 : Yes.

Issue No.4 : The suit of the plaintiff is dismissed as per operative part of the judgment."

6. The suit was dismissed by the learned Trial Court by holding that it was not the case of the plaintiff that he was related to Kaulan Devi and was disinherited from the suit land by way of Will in issue. Learned Trial Court also held that defendant had produced on record trustworthy and unimpeachable evidence to establish genuineness and authenticity of the Will dated 11.01.1993. It held that there was nothing suspicious about the execution of the Will in question, and in fact, defendant had proved all the necessary conditions for the valid execution of the Will. Learned Trial Court held that a close scrutiny of Will Ext. DW3/A demonstrated that testator had put her thumb impression upon the same and the document was duly signed by the marginal witnesses. It held that cross examination of the witnesses of the defendant had not disclosed that Kaulan Devi was of feeble mind and that no Will was executed by her in favour of defendant. Learned Trial Court also held that undoubtedly the execution of Will Ext. PW2/A, which was executed by the testator in favour of the plaintiff, also stood proved, however, as the Will in favour of defendant dated 11.01.1993 was the last Will, therefore, it was the defendant who had become owner in possession of the entire estate of Kaulan Devi. Learned Trial Court also held that as mutations in issue were sanctioned on the basis of Will Ext. DW3/A, which was duly proved to be the last Will of the testator, therefore, it could not be said that the attestation of the mutations was bad in law. Learned Trial Court also held that plaintiff had failed to prove that he was the owner in possession of the suit land, and in fact, plaintiff was a stranger as far as the suit land was concerned and he had no right over the same.

7. In appeal, the findings so returned by the learned Trial Court were upheld. Learned Appellate Court while dismissing the appeal filed by the plaintiff held that it stood duly proved on record that Will Ext. DW3/A, dated 11.01.1993 was the last and final Will of deceased Kaulan Devi which was executed in favour of the defendant. Learned Appellate Court further held that defendant was entitled to succeed to the estate of deceased Kaulan Devi on the strength of the said Will and the mutations which stood attested in his favour on the basis of said Will were legal mutations. Learned Appellate Court also held that the findings recorded by the learned Trial Court were based on proper appreciation of evidence on record as also the legal provisions and the same did not call for any interference.

8. Feeling aggrieved, the appellant/plaintiff has filed this appeal, which was admitted on 29.02.2008, on the following substantial questions of law:-

"(i). Since both the wills have been held to be genuine and valid by the Ld. First appellate Court and will Ext. PW2/A is the registered will, whether presumption of genuineness is attached to registered will in view of section 60 of Registration Act.

(ii) Whether the the will Ext. DW3/A dated 11.10.1993 can be held to be valid and genuine will as the same had been executed within 4 months of the execution of will Ext. PW2/A dated 21.09.1993 and there is no mentioned of execution of earlier will.

(iii) Whether the Will Ext. DW3/A is the result of fraud, misrepresentation of facts and surrounded by suspicious circumstances and have been prepared just to grab the land in question.

9. I have heard learned Counsel for the parties and gone through the record of the case as well as the judgments and decrees passed by the learned Courts below.

10. Learned Senior Counsel appearing for the appellant in support of substantial questions of law has argued that judgments and decree passed by learned Courts below are liable to be quashed and set aside because both the learned Court below have erred in not appreciating that Will Ext. DW3/A was a result of fraud and misrepresentation and same was shrouded with suspicious circumstances as same was purportedly executed shortly after the earlier Will. No other point was argued.

11. On the other hand, learned Counsel for the respondent has argued that there was no infirmity with the judgments and decrees passed by the learned Courts below. He argued that simply because the subsequent Will was executed within four months of the earlier Will, the same did not lead to the inference that subsequent Will was a forged Will or was a result of any misrepresentation. He further argued that in law there is no requirement that the testator has to refer to any previous Will executed by him/her in case he/she subsequently executes a Will.

12. In the present case, there are concurrent findings returned by both the learned Courts below against the plaintiff and in favour of the defendant that Will dated 11.01.1993, Ext. DW3/A was a valid and genuine Will. A perusal of the record of the case demonstrates that in order to prove the said Will, defendant besides himself, examined DW2 Bikham Ram, scribe of the Will, as also DW3 Roshan Lal and DW4 Ishwar Dass, who were the marginal witnesses to the Will Ext. DW3/A. A perusal of the statement of these three witnesses demonstrates that they have unequivocally stated that Will was executed on 11.01.1993 at the behest of testator Kaulan Devi. The scribe after writing the Will as per the wish of Kaulan Devi, had read over the same to her and the testator appended her signatures upon the same after understanding the contents thereof. It is also apparent from the statements of the said three witnesses that thereafter marginal witnesses had appended their signatures upon the Will in issue. These facts clearly demonstrate that Will dated 11.01.1993 Ext. DW3/A stood proved on record to have been executed strictly in accordance with law. During the course of arguments, learned Counsel for the appellant could not draw the attention of the Court to any evidence on record from which it could be inferred that Will Ext. DW3/A was a result of fraud. Now when one peruses the plaint filed by the appellant, para 10 thereof demonstrates that the stand of the plaintiff before the learned Trial Court was that deceased Kaulan Devi had not executed any Will dated 11.01.1993 in favour of defendant and said Will was result of fraud and mis-representation. When the statement of the plaintiff categorically was that no Will was executed by Kaulan Devi in favour of the defendant, then the onus was upon the plaintiff to have had produced cogent evidence on record to demonstrate that the Will in issue was a forged Will. Plaintiff has miserably failed to do so. On the other hand, defendant has led cogent evidence on record to prove that Will Ext. DW3/A was duly executed by the testator in favour of the defendant. Execution of the Will stands duly proved by the scribe as also two marginal witnesses to the Will in issue. In these circumstances, it cannot be said that learned Courts below have erred in coming to the conclusion that Will dated 11.01.1993 was a valid and genuine Will. As far as the execution of the said Will within four months of the earlier Will by deceased Kaulan Devi is concerned, there is no law which prevents the testator from doing so. Similarly, in law, it is not necessary that in case a subsequent Will has been executed by the testator, then, in all circumstances, in the subsequent Will, reference has to be made of any previous Will, which might have been executed by the testator. Here, it is a peculiar case where neither plaintiff nor the defendant were related to Kaulan Devi. Thus, it is not a case where it could be said that there were suspicious circumstances surrounding the Will as by way of execution of the same, the natural successor stood disinherited from the property of the testator. As neither the plaintiff nor the defendant were in any manner related to Smt. Kaulan Devi, therefore, in this peculiar circumstance, if there is no reference of the previous Will in subsequent Will executed by Kaulan Devi, the same will not render the subsequent Will to be bad in law, especially when the specific stand of the plaintiff, as I have already mentioned hereinabove, was that no Will whatsoever was executed by Smt. Kaulan Devi in favour of the defendant and the Will being relied upon by the defendant was a forged Will, which the plaintiff miserably failed to prove. Substantial questions of law are answered accordingly.

In view of above discussion, as this Court does not finds any merit in the present appeal, the same is dismissed accordingly. Pending miscellaneous application(s), if any, also stand disposed of. No order as to costs.

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

M/s Kings Surgicals Memoodpur Mafi and others ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

CrMMO No. 509 of 2018
Decided on: September 19, 2019

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers – Quashing of complaint – Held, in exercise of its inherent powers under Section 482 of Code, High Court can quash proceedings if it comes to conclusion that continuation of such proceedings would be an abuse of process of law – Where discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on material which is wholly irrelevant or inadmissible or where complaint suffers from fundamental legal defects, High Court would be justified in quashing it, in exercise of its powers under Section 482 of Code. (Para 9 & 10)

Drugs and Cosmetics Act, 1940 – Sections 18 read with 27(d) - **Drugs and Cosmetics Rules, 1945 (Rules)** - Rule 124 (c), Schedule F (11) - **Medical Devices Rules, 2017** – 'Rolled Bandages'- 'Surgical Dressings' not conforming to the prescribed standards – Cognizance – Quashing of complaint – Held, rolled bandages were not of standards as prescribed under the Rules when samples were actually drawn – But before filing complaint, Medical Devices Rules came into existence, which exempted 'Rolled Bandages' from applicability of said Rules of 2017 and excluded them from definition of 'Surgical Dressings' – Offence if any was of technical nature as bandages were not found conforming to standards i.e, length, width etc – Omission if any, was not injurious to the health of public – Medical Devices Rules were curative or declaratory in nature and will have retrospective operation – Continuation of proceedings would amount to abuse of process of law – Petition allowed - Complaint quashed. (Para 22, 26, 29 to 31).

Cases referred:

State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335

State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699

Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293

Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330

Asmathunnisa v. State of A.P. (2011) 11 SCC 259

Krishan Gopal Sharma v. Govt. of N.C.T. of Delhi, (1996) 4 SCC 513

Ahmednagar Municipal Council, Ahmednagar v. Dullabhadas Haridas Patel, 2010 Cri.L.J. 2155 (Bom)

For the petitioners: Mr. Maan Singh, Advocate.

For the respondent: M/s Sudhir Bhatnagar, Sanjeev Sood and Sumesh Raj, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant petition filed under S.482 CrPC, lays challenge to summoning orders dated 30.5.2018 and 8.10.2018 issued by learned Chief Judicial Magistrate, Chamba, Himachal Pradesh in Case No. 03/2018 titled State of Himachal Pradesh vs. Parmesh Puri and others under S.18(a)(i) of Drugs and Cosmetics Act, 1940 (hereinafter, 'Act'), whereby notices came to be issued to the petitioners, who have been arrayed as accused Nos. 3 to 5 in the aforesaid case.

2. Precisely the facts of the case, as emerge from the record, are that on 24.5.2018, Drug Inspector, Chamba, filed a complaint under S.18(a)(i) of the Act in the court of learned Chief Judicial Magistrate, Chamba, against the petitioners as well as other persons namely Shri Parmesh Puri and Shri Suresh Kumar, alleging therein that on 15.10.2016, he (Drug Inspector) inspected premises of M/s Puri Medical Store, Chaugan Bazaar, Chamba, Tehsil and District Chamba, and took sample of rolled bandages un-sterilized 5cm x 2.5m, Batch No. 161, Manufacturing Date 06/2016 and manufactured by M/s Kings Surgicals, Memoodpur Mafi, Dhampur Road, Kant Dhampur, UP, under the provisions of the Act. Samples drawn by the Drug Inspector were sent to the Government

Analyst, Kandaghat, vide letter No. CBA/DI/2016-109 dated 17.10.2016, who vide report No. CTL-Drugs/2016-372, dated 21.1.2017, declared the samples of rolled bandages un-sterilized to be not of standard quality in respect of; (a) expiry date of the samples has not been mentioned in the sample, (b), average number of warps and wefts per dm is less than the prescribed limit; (c) average weight per metre square of the bandage is less than the prescribed limit and (d) width of the bandage was found less than the prescribed limit. Proprietor of M/s Puri Medical Store, in response to communication No. CBA/DI/2017-193-194 dated 7.2.2017 disclosed that he had purchased bandages in question from M/s S.K. Scientific Enterprises Pharmaceuticals Distributors, Jassur, Tehsil Nurpur, District Kangra, Himachal Pradesh. Vide communication dated 27.2.2017, M/s S.K. Scientific Enterprises Pharmaceuticals Distributors, Jassur claimed that the manufacturer of the rolled bandages is M/s Kings Surgicals Memoodpur Mafi, Dhampur Road, Kant, Dhampur, UP. Since petitioner No.1 i.e. M/s Kings Surgicals failed to produce any evidence to contradict the report submitted by Government Analyst, Drug Inspector, took up the matter with the State Government for launching prosecution. Permission to launch prosecution against all the accused came to be granted vide communication dated 14.6.2017 by State Drug Controller, Himachal Pradesh. In nutshell, complainant claimed before the trial court that after thorough investigation of the present case, it is evident that accused Nos. 1 and 2 had sold/distributed and accused Nos. 3 to 5 (petitioners herein) had manufactured /sold/distributed the drug, which is not of standard quality, to the public and acted against the interests of the public, as such, they are liable to be punished under S.27(d) of the Act and the provisions of Drugs and Cosmetics Rules, 1945 (hereinafter, 'Rules'), framed thereunder.

3. Taking cognizance of aforesaid complaint, learned Court below i.e. Chief Judicial Magistrate, Chamba, District Chamba, Himachal Pradesh, after having recorded its satisfaction to the effect that there exist sufficient grounds to proceed against the accused for the commission of offences punishable under S. 27(d) of the Act, issued notices to all the accused including present petitioners, as is evident from Annexure P-11. In the aforesaid background, petitioners, who are accused Nos. 3 to 5 before learned Court below, have approached this Court in the instant proceedings, praying therein to set aside the summoning orders dated 30.5.2018 and 7.7.2018 (Annexure P-11) and to quash the complaint (Annexure P-3).

4. I have heard learned counsel for the parties and perused the material available on record.

5. Before adverting to the factual matrix of the case, this Court deems it necessary to elaborate upon the scope and competence of this Court to quash the criminal proceedings while exercising power under Section 482 of Cr.PC. Hon'ble Apex Court in judgment titled **State of Haryana and others vs. Bhajan Lal and others,** 1992 Supp (1) SCC 335 has laid down several principles, which govern the exercise of jurisdiction of High Court under Section 482 Cr.P.C. Before pronouncement of aforesaid judgment rendered by the Hon'ble Apex Court, a three-Judge Bench of Hon'ble Court in **State of Karnataka** vs. **L. Muniswamy and others**, 1977 (2) SCC 699, held that the High Court is entitled to quash a proceeding, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. Relevant para is being reproduced herein below:-

> "7....In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very

> nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

6. Subsequently, Hon'ble Apex Court in **Bhajan Lal** (supra), has elaborately considered the scope and ambit of Section 482 Cr.P.C. Subsequently, Hon'ble Apex Court in **Vineet Kumar and Ors.** v. **State of U.P. and Anr**., while considering the scope of interference under Sections 397 Cr.PC and 482 Cr.PC, by the High Courts, has held that High Court is entitled to quash a proceeding, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to quashed. The Hon'ble Apex Court has further held that the saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In the aforesaid case, the Hon'ble Apex Court taking note of seven categories, where power can be exercised under Section 482 Cr.PC, as enumerated in **Bhajan Lal** (supra), i.e. where a criminal proceeding is manifestly attended with malafides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, quashed the proceedings

7. Hon'ble Apex Court in **Prashant Bharti** v. **State (NCT of Delhi)**, (2013) 9 SCC 293, while drawing strength from its earlier judgment titled as **Rajiv Thapar and Ors** v. **Madan Lal Kapoor**, (2013) 3 SCC 330, has reiterated that High Court has inherent power under Section 482 Cr.PC., to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charge, but such power must always be used with caution, care and circumspection. While invoking its inherent jurisdiction under Section 482 of the Cr.P.C., the High Court has to be fully satisfied that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts and the material adduced on record itself overrules the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice. In the aforesaid judgment titled **Prashant Bharti** v. **State (NCT of Delhi)**, (2013) 9 SCC 293, the Hon'ble Apex Court has held as under:-

> "22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under: (2013) 3 SCC 330, paras 29-30)
>
> > 29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for

later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/ complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

30.1 Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal - proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which

would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

8. Hon'ble Apex Court in **Asmathunnisa** v. **State of A.P.** (2011) 11 SCC 259, has held as under:

"12. This Court, in a number of cases, has laid down the scope and ambit of the High Court's power under section 482 of the Code of Criminal Procedure. Inherent power under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute.

13. The law has been crystallized more than half a century ago in the case of R.P. Kapur v. State of Punjab AIR 1960 SC 866 wherein this Court has summarized some categories of cases where inherent power can and should be exercised to quash the proceedings. This Court summarized the following three broad categories where the High Court would be justified in exercise of its powers under section 482:

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

14. In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736, according to the court, the process against the accused can be quashed or set aside :

"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like".

15. This court in State of Karnataka v. L. Muniswamy & Others (1977) 2 SCC 699, observed that the wholesome power under section 482 Cr.P.C. entitles the High Court to quash a proceeding when it comes to the conclusion

> that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice requires that the proceedings ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In this case, the court observed that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the Legislature. This case has been followed in a large number of subsequent cases of this court and other courts."

9. Hon'ble Apex Court in **Asmathunnisa** (supra) has categorically held that where discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like, High Court would be justified in exercise of its powers under S. 482 CrPC.

10. From the bare perusal of aforesaid exposition of law, it is quite apparent that exercising its inherent power under Section 482 Cr.PC., High Court can proceed to quash the proceedings, if it comes to the conclusion that allowing the proceedings to continue would be an abuse of process of the law.

11. Now in the light of the aforesaid exposition of law, this Court shall make an endeavor to examine the material available on record vis-à-vis impugned orders with a view to arrive at a conclusion that whether facts of the case warrant exercise of power by this court under Section 482 Cr.PC for quashing of summoning process or not?

12. In the case at hand, admittedly, the complaint has been filed under S.18(a)(i) of the Act with a prayer to punish the accused under S.27(d) of the Act and Rules framed thereunder. At this stage, it would be apt to take note of Ss. 18 and 27(d) of the Act as under:

> 18. Prohibition of manufacture and sale of certain drugs and cosmetics.—
>
> From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf—
>
> (a) [manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale] or distribute—
>
> > [(i) any drug which is not of a standard quality, or is misbranded, adulterated or spurious;
> >
> > [(ii) any cosmetic which is not of a standard quality or is misbranded or spurious;]
> >
> > [(iii) any patent or proprietary medicine, unless there is displayed in the prescribed manner on the label or container thereof [the true formula or list of active ingredients contained in it together with the quantities thereof];]
> >
> > (iv) any drug which by means of any statement, design or device accompanying it or by any other means, purports or claims 4 [to prevent, cure or mitigate] any such disease or ailment, or to have any such other effect as may be prescribed;
> >
> > [(v) any cosmetic containing any ingredient which may render it unsafe or harmful for use under the directions indicated or recommended;
> >
> > (vi) any drug or cosmetic in contravention of any of the provisions of this Chapter or any rule made thereunder;]

(b) [sell, or stock or exhibit or offer for sale,] or distribute any drug [or cosmetic] which has been imported or manufactured in contravention of any of the provisions of this Act or any rule made thereunder;

(c) [manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale,] or distribute any drug [or cosmetic], except under, and in accordance with the conditions of, a licence issued for such purpose under this Chapter:

Provided that nothing in this section shall apply to the manufacture, subject to prescribed conditions, of small quantities of any drug for the purpose of examination, test or analysis:

Provided further that the [Central Government] may, after consultation with the Board, by notification in the Official Gazette, permit, subject to any conditions specified in the notification, the [manufacture for sale, or for distribution, sale, stocking or exhibiting or offering for sale] or distribution of any drug or class of drugs not being of standard quality.

[18A. Disclosure of the name of the manufacturer, etc.—Every person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall, if so required, disclose to the Inspector the name, address and other particulars of the person from whom he acquired the drug or cosmetic.]

[18B. Maintenance of records and furnishing of information.—Every person holding a licence under clause (c) of section 18 shall keep and maintain such records, registers and other documents as may be prescribed and shall furnish to any officer or authority exercising any power or discharging any function under this Act such information as is required by such officer or authority for carrying out the purposes of this Act.]"

.....

.....

27. Penalty for manufacture, sale, etc., of drugs in contravention of this Chapter:

(a)..

(b)...

(c)...

(d) any drug, other than a drug referred to in clause (a) or clause (b) or clause (c), in contravention of any other provision of this Chapter or any rule made thereunder, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to two years 8 [and with fine which shall not be less than twenty thousand rupees]: Provided that the Court may, for any adequate and special reasons, to be recorded in the judgment impose a sentence of imprisonment for a term of less than one year."

13. Careful perusal of aforesaid provisions of law clearly suggests that no person can manufacture, for sale or for distribution or sell or stock or exhibit, any drug which is not of standard quality or is mis-branded, adulterated or spurious.

14. Ss.12 and 33 of Chapter IV of the Act empower Central Government to make Rules for the purpose of giving effect to the provisions contained in Chapter IV of the Act. Rule 124(c) specifies the standards for "surgical dressings", which otherwise stand laid down in Schedule F(II), which is reproduced herein below:

"PART IV

GENERAL

1. For the purpose of this Schedule any test or method of testing described in the British Veterinary Codex shall be deemed to be a method approved by the Licensing Authority.

2. The Licensing Authority shall publish in the official Gazette from time to time particulars of any test or method of testing approved by him.] 353 Drugs and Cosmetics Rules, 1945 1

[SCHEDULE F (II)

(See Rule 124-C)

STANDARDS FOR SURGICAL DRESSINGS

Synonyms: Bandage Cloth, Bleached Bandage Cloth, Rolled Bandage, Open Wove Bandage, Cotton Bandage Cloth.

Bandage Cloth consists of cotton cloth of plain weave made from machine spun yarn of suitable count to comply with a bleached count between 20 tex and 25 tex for warp and between 25 tex and 30 tex for weft. The fabric contains no filling, sizing or dressing material. It may be supplied uncut and folded or cut to suitable size and rolled. Description for uncut bandages:

Uncut bandages are cotton cloth of plain weave, in one continuous length showing no joints or seams, with well-formed selvedges. The cloth is bleached to a good white, is clean and odourless and reasonably free from weaving defects and from seed and leaf debris. Description for cut bandage:

Same as for uncut bandages, except for selvedges which shall not be included in cut bandages. In addition, both the extremes and edges of cut bandages shall be straight and evenly cut, with reasonable freedom and loose threads.

Threads per dm: – Warp not less than 150 and weft not less than 85.

Weight in g/m2 : - 57 ± 5.

Length and Width: - The length and width shall not be less than 99 per cent each of the length and width stated on the label. For cut bandages, each of the bandages in a packing complies with this requirement.

Foreign matter: - Not more than 2 per cent.

Fluorescence:

When viewed under screened ultra-violet light, not more than occasional points of fluorescence are observed.

Packing, Labelling and Storage:

Bandage Cloth shall be packed securely so as to allow normal handling and transport without tearing and exposing the contents. In packages of cut and rolled bandages, each bandage shall also individually be wrapped in a suitable paper. The net content is stated on the label in terms of length and width. Bandage Cloth must be stored in packed condition protected from dust. The packings of Bandage Cloth shall be labelled prominently with the words “Non-Sterile”.

15. Having carefully perused Schedule F(II) in Part IV of the Rules (Annexure P-3 of the reply filed by the respondent), there cannot be any dispute with regard to the fact that at the time of drawing samples of “rolled bandages” from M/s Puri Medical Store, same were not found conforming to the standards prescribed for “surgical dressings”, which fact otherwise has not been disputed by the petitioners, who are manufacturers of such rolled bandages. Petitioner No.1, in reference to communication sent by Drug Inspector, Chamba, vide communication dated 20.3.2017 (Annexure P-9), agreed with the report of the

Government Analyst, Kandaghat and assured that the offence committed by them would not be repeated in future. However, the fact remains that the aforesaid request made by the petitioners herein was not acceded to by the Drug Inspector, Chamba and complaint in question ultimately came to be filed before competent Court of law, which, after having taken note of the material placed before it, proceeded to issue summons to all the accused.

16. However, on 31.1.2018, Ministry of Health and Family Welfare, notified the Medical Devices Rules, 2017 (Annexure P-1 of reply filed by the respondents). Rule 90 of Chapter XII of the Medical Devices Rules, 2017 provides that the medical devices specified in the Eighth Schedule shall be exempted from the provisions of these Rules to the extent and conditions specified in the Schedule. Medicated dressings and bandages for first aid, which were otherwise prescribed at Sr. No. 2 of the Eighth Schedule also came to be exempted from the provisions of Medical Devices Rules, 2017 and in this background, petitioners have approached this Court in the instant proceedings for quashing of complaint as well as summoning orders.

17. Ministry of Health and Family Welfare, Government of India, vide communication dated 29.8.2018, further clarified that, "*the bandages which do not come in contact with wound, injured skin or tissue, but are used for providing support/compression are not covered under the category of "Surgical Dressing.""*, and as such, no manufacturing licence for the manufacture of such products is required from the State Government or Central Government.

18. In the aforesaid background, case of the petitioners is that since the Medical Devices Rules, 2017, came into force with effect from 1.1.2018, whereby rolled bandages came to be exempted from the provisions of the Medical Devices Rules, 2017 before filing of the complaint in question, learned Court below ought not have issued summons against the accused.

19. Mr. Maan Singh, learned counsel for the petitioners, while inviting attention of this Court to the Medical Devices Rules, 2017, vehemently argued that under the provisions of Rule 90 of the aforesaid Rules, medical devices specified in the Eighth Schedule have been exempted from the provisions of Medical Devices Rules, 2017 as such, discrepancies pointed out by the Drug Inspector in the complaint are of no consequence. Learned counsel for the petitioners further contended that in the case at hand, petitioners were duly licensed to manufacture rolled bandages and gauze but now in view of the Medical Devices Rules, 2017 and clarification issued by the Government of India, no manufacturing licence is required to be obtained for manufacture of rolled bandages, which do not come in contact with the wound, injured skin or tissue.

20. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly admitting the factum with regard to promulgation of Medical Devices Rules, 2017, strenuously argued that since samples were drawn much prior to promulgation of the aforesaid Rules, complaint filed by Drug Inspector, which admittedly pertains to the period prior to promulgation of Medical Devices Rules, 2017, deserves to be adjudicated by learned Court below, on its own merits.

21. Ministry of Health and Family Welfare, Department of Health and Family Welfare, Government of India, by way of Notification dated 31.1.2017, promulgated the Medical Devices Rules, 2017, relevant portion of which is reproduced herewith alongwith Rule 90 thereof:

"MINISTRY OF HEALTH AND FAMILY WELFARE

(Department of Health and Family Welfare)

NOTIFICATION

New Delhi, the 31st January, 2017 G.S.R. 78(E).—WHEREAS the draft of the Medical Devices Rules, 2016 was published, as required under sub-section (1) of Section 12 and Sub-section (1) of Section 33 of the Drugs and Cosmetics

Act, 1940 (23 of 1940), in the Gazette of India, Extraordinary, Part II, section 3, sub-section (i), vide notification number G.S.R. 983(E), dated the 17th October, 2016, by the Central Government, after consultation with the Drugs Technical Advisory Board, inviting objections and suggestions from all persons likely to be affected thereby, before the expiry of a period of thirty days from the date on which copies of the said Gazette containing the said notification were made available to the public; AND WHEREAS, copies of the Gazette containing the said notification were made available to the public on the 17th October, 2016; AND WHEREAS, all objections and suggestions received in response to the said draft notification have been duly considered by the Central Government; NOW, THEREFORE, in exercise of the powers conferred by section 12 and section 33 of the Drugs and Cosmetics Act, 1940 (23 of 1940), the Central Government, after consultation with the Drugs Technical Advisory Board, hereby makes the following rules, namely,- CHAPTER I PRELIMINARY 1. Short title and commencement.—(1) These rules may be called the Medical Devices Rules, 2017. (2) These rules shall, unless specified otherwise, come into force with effect from 1st day of January, 2018.

CHAPTER XII

MISCELLANEOUS

90. Exemption from provisions related to medical devices.—(1) The medical devices specified in the Eighth Schedule shall be exempt from the provisions of these rules to the extent and subject to the conditions specified in that Schedule. (2) The Central Government may, by notification, from time to time, amend or modify the entries in the Eighth Schedule.

22. No doubt, in the case at hand, rolled bandages manufactured by the petitioners were not found conforming to the standards prescribed under the Rules, when samples were drawn, as such, Drug Inspector was well within his right to launch prosecution, but this Court cannot lose sight of the fact that before such complaint could be filed in the competent Court of law, Medical Devices Rules, 2017 came into force. Chapter XII, Rule 90 clearly lays down that the medical devices specified in the Eighth Schedule would be exempted from the provisions of these Rules. It is not in dispute that the rolled bandages were specified in the Eight Schedule, as such, they are exempted from the provisions of the Medical Devices Rules, 2017.

23. Extent and conditions of exemption as mentioned in the Eight Schedule though suggest that medical dressing and bandages for first aid would be exempted from the provisions of Chapter II of these Rules, which require them to be covered by Sale Licence, subject to the condition that such products have been manufactured by a licensed manufacturer but, as has been taken note herein above, Central Government vide subsequent communication dated 29.8.2018, has clarified that the bandages, which do not come in contact with the wound, inured skin or tissue but are simply used for providing support and compression, are not covered under the category of “surgical dressings”. Standards prescribed in Schedule F(II) strictly deal with surgical dressings and not with rolled bandages.

24. No doubt, samples of rolled bandages were found not conforming to the prescribed standards hence, complaint made by the Drug Inspector cannot be said to be without any justification but, offence, if any, committed by the accused amounts to technical violation of standards prescribed under Schedule F(II), “Standards for Surgical Dressings:, wherein length and width etc. of the rolled bandages stand prescribed.

25. The next question raised before this Court is whether the Medical Devices Rules, 2017 will have retrospective effect or prospective effect. Mr. Sudhir Bhatnagar, learned Additional Advocate General vehemently argued that at the time when offence was committed,

Medical Devices Rules, 2017 had not come into force, as such, case of the petitioners deserves to be considered and decided under the Drugs and Cosmetics Act, 1940/Drugs and Cosmetics Rules, 1945, but having carefully perused Rule 90 of the Medical Devices Rules, 2017 and communication dated 29.8.2018, this Court is in agreement with Ms. Maan Singh, learned counsel for the petitioners that exemption under Rule 90 of Medical Devices Rules, 2017 has been purposely provided to correct the position of standards of surgical dressings with reference to the latest research on the subject.

26. In the case of the petitioners, length, width and average warps/wefts were admittedly not found conforming to the standards laid down in Schedule F(II) Part IV of the Rules but such omission on the part of the petitioners definitely cannot be said to be injurious to the health of the public, because, in view of promulgation of the Medical Devices Rules, 2017, rolled bandages have been taken out from the definition of "surgical dressings", especially those bandages, which do not come in contact with the wound, injured skin or tissue.

27. In a similar case, Hon'ble Apex Court, in **Krishan Gopal Sharma** v. **Govt. of N.C.T. of Delhi,** (1996) 4 SCC 513, has held addition of saccharin in the pan masala to be a technical violation and quashed the criminal proceedings in that case, subject to costs of Rs.7500/-. The Hon'ble Apex Court in the judgment (supra) held as under:

> "12. In the back drop of aforesaid exposition of law for offences under the Prevention of Food Adulteration Act it is necessary to consider the facts and circumstances of the case. In these appeals, there is no dispute that saccharin was not added to Pan Masala and Mouth Freshner. It is contended that even if addition of saccharin to the extent as stated to have been found by the Analyst is accepted to have been correctly determined, such addition, as a matter of fact, was neither injurious to health nor it degenerated the articles sold so that they could be branded as adulterated fact. The ban on the use of saccharin in Pan Masala and mouth Freshner was imposed on a misconception and erroneous view of its injurious effect on human system. But later on, it has been accepted by the Rule making authority that use of saccharin to the extent of 8000 ppm in pan masala will not be harmful for human consumption and Rule 47 of the Rules has been amended. As use of saccharin to the extent of 2000 and 2450 ppm was not injurious to health at any point of time, it must be held that even before amendment of Rule 47 such use of saccharin to the above extent did not constitute an offence for adulterating food with substances injurious to health.
>
> 13. In our view, at the relevant time, saccharin content in Pan Masala and Mouth Freshner to the extent of 2000 and 2450 ppm as found by the Analyst was not permissible under the Prevention of Food Adulteration Rules. We have indicated that such Rule was valid and operative at the relevant time. Hence, there had been violation of the Food Adulteration Act and the Rules framed thereunder in selling Pan Masala and Mouth Freshner with saccharin content to the extent of 2000 and 2450 ppm. Hence, the complaints made by the Health Department of Delhi Administration and initiation of criminal cases against the accused cannot be held to be without justification. It cannot also be contended that on the face of the complaint, no offence was prima facie committed. Hence, the impugned decision of the High Court in dismissing the applications under section 482 Cr.P.C. can not be held to be unjustified.

14. It, however, appears to us that even if the complaint is accepted to be correct, the only offence committed by the appellants amounts to technical violation of the mandate of Rule 47 for adding saccharin to the extent of 2000 and 2450 ppm in the Chutki Pan Masala and Mouth freshner. Such addition of saccharin cannot be held to be injurious to health because, considering later findings on research and analysis on the effect of saccharin on human system, addition of saccharin to the extent 8000 ppm in Pan Masala has been allowed by amending Rule 47. The articles sold are not alleged to be injurious to health and such allegations, even if made, cannot be accepted. There is no allegation that any other injurious substance was added to the articles sold making them potentially health hazards. It is also not the case that Pan Masala and Mouth Freshner were of inferior quality and sub-standard. In a case like this, the offence committed is on account of technical violation of Rule 47. It should be emphasized that strict adherence to Prevention of food Adulteration Act and Rules framed thereunder should be insisted and enforced for safeguarding the interest of consumers of articles of food. In the Constitution Bench decision in Tejani's case (supra) it has been indicated that in ordered to prevent unmerited leniency in the matter of awarding sentence for an offence under the Prevention of food Adulteration Act, the legislature by amendment has incorporated the provision of minimum sentence. But it was also been indicated that the court, for adequate and special reasons, may bring down the minimum sentence. The Constitution Bench has also observed that all violations of provisions of the Act and Rules need not be treated alike because "there are violations. In the special facts of these cases, it appears to us that a defferent punishment of imprisonment is not called for and imposition of fine of will meet the ends of justice. The criminal cases were initiated on the basis of samples taken in 1967. The accused appellants have already faced the ordeal of criminal trials for a number of years. In the aforesaid circumstances, further agony of criminal trial need not be prolonged. Conclusion of the criminal cases will also save time and expenditure of the respondent.

15. In that view of the matter, we direct for quashing the criminal cases in question on payment of costs at Rs.7500/- in each of these appeals as in our view, on conviction of the appellants in the criminal cases initiated against them, such fine would have met the ends of justice. The appeals are accordingly disposed of."

28. Regarding issue of retrospective effect of the Notification promulgating the Medical Devices Rules, 2017, this Court deems it fit to make a reference to the judgment rendered by Bombay High Court (Aurangabad Bench) in **Ahmednagar Municipal Council, Ahmednagar** v. **Dullabhadas Haridas Patel**, 2010 Cri.L.J. 2155 (Bom), wherein it has been held as under:

13. It is argued before this Court by learned advocate Shri Bedre that such amendment will not have retrospective effect. When the offence has taken place, saccharin was totally prohibited. Under the circumstances, it cannot be said that no offence is committed. Penal provision, which creates of offence has to be interpreted as prospective and not as retrospective. The learned advocate Shri Vijay Sharma (10) cited case of Krishan Gopal Sharma and Another V/s. Govt. of N.C.T. Of Delhi (1996) 4 S.C.C.513. In that case as observed in para 8 therein similar situation has arisen as in the present case. At the relevant time when samples of pan masala and the mouth freshner

were taken, the saccharin content as found by the public analyst in the said articles of good was in violation of Rule 47 of the Prevention of Food Adulteration Rules. The pan masala and the mouth freshner are undoubtedly within the meaning of 'food' under Section 2 (v) of the Prevention of Food Adulteration Act. In that case the validity of Rule 47 prior to amendment in 1993 restricting use of saccharin in pan masala was challenged on the ground that it was arbitrary, unjust and capricious by the rule making authority. The Supreme Court has held that rule as stood prior to the amendment was valid and it cannot be struck out as being arbitrary and capricious. It is observed in para 8 as follows:-

> "8. ..... It has not been demonstrated that despite widely accepted view by the experts about the effect on saccharin on human system on the basis of information flowing from research and analysis, the restriction of user of saccharin in pan masala or mouth freshner as imposed in Rule 47 of the Rules at the relevant (11) time was wholly arbitrary, unjust and capricious. Human knowledge is not static. The conception about the harmful effect of saccharin on human system has undergone changes because of information derived from further research and analysis. The knowledge about the effect of saccharin on human system as accepted today may undergo a change in future on the basis of further knowledge flowing from subsequent research and analysis and it may not be unlikely that previous view about saccharin may be found to be correct later on. If the rule- making authority on the basis of human knowledge widely accepted by the expert framed rule by imposing restriction of user of saccharin in pan masala or mouth freshner at a particular point of time, such exercise of power must be held to have been validly made, founded on good reasons; and challenge of the Rule on the score of arbitrary and capricious exercise of power must fail. ....."

In that case in para 12 facts of particular case were considered, which were similar to the case in hand and it is observed that there was no dispute that saccharin was not added to pan masala and mouth freshner. It is contended that even if addition of saccharin to the extent as stated to have been found by the analyst is accepted to have been correctly determined, such addition as a matter of fact, was neither injurious to health or it degenerated the articles sold, so that they could be branded as adulterated food. The ban on the use of saccharin in pan masala and mouth freshner was imposed on a misconception and erroneous view of its (12) injurious effect on human system. But, later on, it has been accepted by the rule-making authority that use of saccharin to the extent of 8000 p.p.m. in pan masala will not be harmful for human consumption and Rule 47 of the Rules has been amended. So, in para 14 and 15 of the said case it is further observed that in the special facts of those cases, a deterrent punishment of imprisonment is not called for and imposition of fine would meet the ends of justice. These criminal cases were initiated on the basis of samples taken in 1987. The accused-appellants had already faced the ordeal of criminal trials for a number of years. In the facts of the case, the accused were released on fine.

14. The point that was not raised in the case of Krishan Gopal Sharma (Supra) but which is raised before this Court is that whether such amendment will have retrospective effect. The learned advocate for the respondents relied upon certain observations in Zile Singh V/s. State of Haryana and Ors., (2004) 8 SCC, 1. The Supreme Court was considering whether disqualification for membership of municipality of a person having more than two children on and

[upto] the expiry of one year of commencement of Haryana Municipal Act, 1973, (13) has retrospective or prospective effect. It is held that it is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. However, it is further held that, the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. The presumption against retrospective operation is not applicable to curative or declaratory statutes. In this case amendment to Rule 47 is not declaratory, but it can be said to be curative statute, as it wants to correct the position of standard of saccharine with reference to the latest research on the effect of saccharine on human health and it wanted to permit saccharin to a particular extent.

15. Another case cited by Adv. Shri Vijay Sharma is Vijay V/s. State of Maharashtra and Others, (2006) 6 S.C.C. 289. In that case also it is laid down that general rule of construing statute is to have prospective effect. It does not apply to disqualifying, curative or clarificatory statutes. If on a plain or literal reading legislative intendment is clear that it is to have retrospective effect (14) and it does not produce any absurdity or ambiguity thereby, court will give effect thereto. Statute which takes away a right under the existing law is retrospective in nature. Statute enacted for the benefit of the community as a whole may be construed to have retrospective operation.

16. In the present case the saccharin was totally prohibited when the alleged offence took place, but pending the trial, the rule making authority under Section 23 of the Prevention of Food Adulteration Act, in its wisdom thought it right to allow saccharin to the extent of permissible limit. It is not disputed that when the rule was amended, trial of respondent Nos. 1 to 5 was pending. The amendment is for the benefit of community as a whole and it was not taking away any vested interest or creating any new obligation or creating new offence. It, in-fact, declared addition of saccharine to Supari within certain limits, as no more offence under the Prevention of Food Adulteration Act. So, relying on law laid down in paras 10, 11 and 12 of the case of Vijay (Supra), in my opinion, in the present case, Rule 47 can be considered as retrospective in as much as it wanted to declare saccharine contents in Supari to certain limits i.e. (15) 4000 p.p.m. as permissible in law and no more offence. I quote certain portion from paras 10 and 12 of Vijay (Supra) for ready reference :-

> "10. ..... The inhibition against retrospective construction is not a rigid rule. It does not apply to a curative or a clarificatory statute. If from a perusal of the statute, intendment of the legislature is clear, the court will give effect thereto. For the said purpose, the general scope of the statute is relevant. Every law that takes away a right vested under the existing law is retrospective in nature.
>
> .....
>
> 12. ..... It is not well settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislature, but to apply it in such a case is a doctrine of fairness. When a law is enacted for the benefit of the community as a whole, even in the absence of a provision, the statute may be held to be retrospective in nature. ....."

17. Since the rule was amended pending the Trial and since evidence of Public Analyst Mrs. Aparna Pinge showed that the saccharine contents were within permissible limit as per the amended Rule 47, in my opinion, it is not case where any interference with the order of acquittal is called for."

29. Bombay High Court in the aforesaid case, has held that the presumption against retrospective operation is not applicable to curative or declaratory statutes. In the case at hand also, statute in question is a curative statute hence, in view of aforesaid judgment, in the case at hand also, same principles would apply and Rules in question would apply retrospectively.

30. In the case at hand also, in view of promulgation of the Medical Devices Rules, 2017, there is only a technical violation on the part of the petitioners, which is not injurious to the heath of the patients using them, as such, no fruitful purpose would be served by continuing with criminal prosecution of the petitioners, rather same would be only an abuse of process of law.

31. In the peculiar facts and circumstances, it appears to this Court that no fruitful purpose would be served in case proceedings initiated against the petitioners at the behest of Drug Inspector are allowed to continue rather, petitioners would be unnecessarily put to ordeal of protracted trial.

32. Consequently, in view of above, present petition is allowed. Summoning orders dated 30.5.2018 and 8.10.2018 (Annexure P-11) issued by learned Chief Judicial Magistrate, Chamba, Himachal Pradesh against the petitioners herein (accused Nos. 3 to 5) in Case No. 03 of 2018 titled State of Himachal Pradesh vs. Parmesh Puri and others are set aside and quashed alongwith complaint (Annexure P-3), subject to payment of costs of Rs.20,000/-, to be deposited with the Drug Inspector, Chamba.

Pending applications, if any, stand disposed of. Interim directions, if any, stand vacated.

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

Bharti AXA General Insurance Company Limited .....Appellant

Versus

Smt. Sushila and others .....Respondents

FAO(MVA) No. 410 of 2014

Decided on: September 20, 2019

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Death case – Additions towards 'future prospects' – Held, deceased was engaged in a private job/ work – Additions towards his 'future prospects' are to be 40 % on his established income in view of Pranay Sethi's case AIR 2017 SC. 5157. (Para 8).

Motor Vehicles Act , 1988 – Section 166 – Motor accident – Death case – Funeral expenses – Held, only a sum of Rs. 15000/ - can be awarded towards funeral expenses. (Para 8).

Cases referred:

National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157

Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639

For the Appellant : Mr. Chandan Goel, Advocate.

For the Respondents : Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rajesh Kumar, Advocate, for respondents No.1 to 4.

Mr. Arvind Sharma, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant appeal under S.173 of the Motor Vehicles Act (hereinafter, 'Act') lays challenge to Award dated 2.1.2014 passed by learned Motor Accident Claims Tribunal-II, Solan, District Solan, Himachal Pradesh in M.A.C. Petition No. 30-S/2 of 2011, whereby learned Tribunal below, while accepting the claim petition under S.166 of the Act having been filed by respondents Nos. 1 to 4-claimants (hereinafter, 'claimants'), proceeded to award a sum of Rs.10,80,000/- as compensation and Rs.25,000/- on account of funeral charges alongwith interest at the rate of 9% per annum from the date of institution of the petition till payment.

2. Precisely, the facts of the case as emerge from the record are that the claimants filed a petition under S.166 of the Act, praying therein for compensation to the tune of Rs.20.00 Lakh from the appellant-Insurance Company and respondent No. 5, jointly and severally on account of death of Manmohan Sharma alias Bunty. Allegedly on 27.9.2011, at about 6.30 am, Manmohan Sharma, was going towards Saproon from Sabzi Mandi, Solan. In the meantime, a Truck bearing registration No. HP-12C-9657, owned and being driven by respondent No.2, came in a high speed and hit Manmohan Sharma, who died on the spot due to the injuries sustained by him. FIR No. 231 of 2011 under Ss. 279, 338, 201 and 304A IPC was registered against respondent No.5 at Police Station, Solan, Himachal Pradesh. Claimants claimed that the deceased was a brilliant and intelligent ITI diploma holder in electronics and had done short term courses like fitting and soldering, basic computer, digital electronics, basic measuring instruments, six months course of Module Inverter, voltage stabilizer and industrial drives, advance module repair and maintenance electronics test equipments and was a good electronics technician. Claimants further averred that the deceased was earning Rs.5,000/- per month by doing private electrical work and besides that, deceased was also earning Rs.80,000/- per annum from agriculture work.

3. Respondent No.5 as well as appellant-Insurance Company refuted the aforesaid claim by way of separate replies. Respondent No. 5 being owner and driver of the offending vehicle specifically denied any rashness or negligence on his part, while driving the vehicle but both the respondents categorically admitted the factum with regard to registration of FIR at Police Station Sadar, Solan, against respondent No.5 with regard to the accident in question.

4. Appellant-Insurance Company and respondent No.5 also denied that the claimants were dependent upon the deceased. They also denied the claim of the claimants with regard to educational qualifications of the deceased or his occupation as a private engineer and commission agent. Appellant-Insurance Company also raised objection with regard to possession of valid driving licence by respondent No. 1 as also flouting of terms and conditions of the insurance policy and claimed that it is not liable to pay any compensation on behalf of respondent No.5.

5. Learned Tribunal below, on the basis of the pleadings adduced on record by the respective parties, framed following issues on 4.1.2016::

"Issue No. 1 Whether Manmohan Sharma @ Bunty died in motor vehicle accident which took place near Bye Pass Kather, Solan on 27.9.2011 at about 6:30 a.m. due to rash and negligent driving of truck No. HP-12C-9567 being driven by respondent No. 1? OPP

Issue No. 2 If issue No.1 is proved in affirmative whether the petitioners are entitled for the grant of compensation, if so and to what amount and from which of the respondent? OPP.

Issue No. 3 Whether the vehicle involved in the accident was not insured with respondent No.2 at the time of accident? OPR-2.

Issue No.4 Whether the driver of the offending vehicle was not holding valid and effective driving licence at the time of accident? OPR-2"

6. Subsequently, learned Tribunal below, vide Award dated 2.1.2014, held the claimants entitled to a sum of Rs.10,80,000/- as compensation plus Rs.25,000/- as funeral charges alongwith interest at the rate of 9% per annum from the date of petition till realisation of the whole amount. Being aggrieved and dissatisfied with the aforesaid Award passed by learned Tribunal below, the appellant-Insurance Company has approached this Court in the instant proceedings, praying therein to set aside the Award.

7. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned Tribunal below while allowing claim petition, this Court finds no force in the argument of learned counsel for the appellant-Insurance Company that learned Tribunal below has failed to appreciate the evidence in its right perspective while returning findings qua issues Nos. 1 to 4. This Court finds no force in the argument of learned counsel for the appellant-Insurance Company that the claimants were not able to prove that at the time of accident, deceased was working and earning, rather, evidence adduced on record by the claimants clearly proves that the deceased was earning Rs.5,000/- per month from his profession as Electronic Technician. Statements having been made by respondents No. 2 and 5 clearly reveal that the deceased apart from rendering his services as an Electronic Technician was also earning handsomely, while rendering his services as a commission agent.

8. Having carefully perused the evidence led on record by claimants qua income of the deceased at the time of alleged accident, this Court finds no illegality or infirmity in the award passed by learned Tribunal below, whereby it took average monthly income of deceased as Rs.5,000/-. However, having carefully perused recent law laid down by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157, this court finds force in the argument of learned counsel for the appellant-Insurance Company that since the deceased was self-employed, addition of 40% on account of future prospects could have been made to the proved income of the deceased, instead of 50%. Similarly, this Court finds that only a sum of Rs.15,000/- could have been awarded by learned Tribunal below on account of funeral expenses, whereas, learned Tribunal below has awarded Rs.25,000/- under the aforesaid head.

9. At this stage, it would be profitable to reproduce following paragraphs of aforesaid judgment herein below:

> "47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also

been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-

"17. ... In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of selfemployed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant

where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

10. As per judgment (supra), only 40% increase to actual income on account of future prospects ought to have been added instead of 50%. However, so far multiplier is concerned, same has rightly been applied by learned Tribunal below, keeping the age of the deceased, which was above 19 years. In view of the law laid down in **Pranay Sethi** (Supra), loss of dependency /compensation ought to have been calculated in the following manner:

Average monthly income	**Rs.5,000/-**
Deduction towards self maintenance @ 50%	**5,000x50/100= 2500**
Net income after deduction =	**Rs.2500**
Addition of 40% on account of future prospects	**2500x 40/100=1000**
Net income after adding 40%	**=Rs.3500**
Annual income	**3500x 12 =42000**
Total loss of dependency after applying multiplier of 18	**42000x 18= 7,56,000/-**

11. Similarly, learned Tribunal below ought to have awarded a sum of Rs.15,000/- on account of funeral expenses in terms of law laid down by Hon'ble Apex Court in **Pranay Sethi** (supra), as such, amount awarded on account of funeral expenses is liable to be modified to Rs.15,000/-.

12. Learned counsel for the claimants has raised another issue i.e. no amount has been granted under the head of loss of estate and as such this Court also deems it fit to grant an amount of Rs.15,000/- under the head of 'loss of estate'. Otherwise also, the Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, has held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. It would be profitable to reproduce following para of the judgment herein:-

"Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 CPC can be pressed into service to make the award more effective or maintain the

award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer."

13. Consequently, in view of the modifications made herein above, claimants are held entitled to following amounts under various heads:

1.	Loss of dependency /compensation	**7,56,000**
2.	Loss of estate	**15,000**
3.	Funeral charges	**15,000**
	Total	**7,86,000**

14. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld. Apportionment amongst the claimants shall remain as has been done by learned Tribunal below.

15. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award passed by learned Tribunal below is modified to the above extent only.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Rohit Thakur ....Petitioner

Versus

Santosh Kaur ...Respondent

CMPMO No. 324 of 2019

Decided on: September 20, 2019

Code of Civil Procedure, 1908 – Order 1 Rule 10 – Suit for damages – Impleadment of co-defendant – Stage - Trial court dismissing application of plaintiff seeking impleadment of 'PS' as co-defendant – Petition against – Held, defendant in her written statement had taken preliminary objection as to non- joining of 'PS' as co-defendant in the suit – Despite that plaintiff, did not implead 'PS' at that stage – Evidence of parties stand recorded – Impleading 'PS' would result in reverting of case to the very initial stage and cause prejudice to defendant – Petition dismissed. (Para 7 & 8).

For the petitioner: Mr. Divya Raj Singh, Advocate.

For the respondent: Mr. Lakshay Parihar, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 22.5.2019, passed by learned Civil Judge, Court No. 2, Una, in CMA No. 1065/2019 in Civil Suit No. 361/2015, whereby application under Order I, rule 10(2) CPC, filed by the petitioner-plaintiff (hereinafter, 'plaintiff') for impleadment of Shri Prem Singh, ex-Pradhan, Gram Panchayat

Bhadauri, Tehsil Haroli, District Una, Himachal Pradesh, came to be dismissed, plaintiff has approached this Court in the instant proceedings filed under Art. 227 of the Constitution of India, with a prayer to set aside impugned order and allow application under Order I, rule 10(2) CPC.

2. Precisely, the facts as emerge from the record are that plaintiff filed a suit for recovery on account of damages against the respondent-defendant (hereinafter, 'defendant'), who was Secretary, Gram Panchayat Bhadauri at the relevant time. Plaintiff alleged that the defendant was signatory to the resolution, which being scandalous and defamatory, has lowered his image in the eye of general public and as such, she is liable to pay damages to the plaintiff on account of mental agony and harassment caused to him.

3. It is not in dispute that after recoding evidence of both the parties, application under Order I, rule 10(2) CPC on behalf of the plaintiff came to be filed seeking therein impleadment of Prem Singh, ex-Pradhan, Gram Panchayat Bhadauri. Plaintiff averred in the application that person namely Prem Singh, who is ex-Pradhan of Gram Panchayat Bhadauri, is required to be impleaded as defendant No.2 in the civil suit and no prejudice would be caused to the defendant if said person is impleaded as defendant No.2. Plaintiff further averred that the application has been filed in bona fide manner and good faith, however, aforesaid prayer made on behalf of the plaintiff came to be resisted by defendant, who categorically stated that preliminary objection with regard to non-joinder of parties was taken at the first instance at the time of filing of written statement. Defendant claimed that she in her written statement categorically stated that the person namely Prem Singh, who was Pradhan, of Gram Panchayat Bhadauri at the relevant time, is necessary party but despite that plaintiff chose not to file an application at that stage seeking therein impleadment of Prem Singh, as such, present application, which has been filed at such a belated stage, when trial is towards conclusion, is nothing but an attempt to delay the proceedings.

4. Court below having noticed pleadings adduced on record by the parties, dismissed the application by holding that impleadment of proposed defendant No.2 is unwarranted and would allow plaintiff to fill up lacunas in the case by leading additional evidence and impleadment of proposed defendant No.2 would revert the case to the stage of filing amended plaint and in this process, suit, which has come to a fag end, would stand vitiated.

5. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned in the impugned order, this court finds no illegality or infirmity in the impugned order, as such, same does not call for any interference.

6. Having carefully perused provisions of Order I, rule 10 CPC, this Court finds no force in the argument of Mr.Divya Raj Singh, learned counsel for the plaintiff, that in terms of provisions contained under Order I, rule 10(2) CPC, Court is under obligation to order for impleadment or deletion of any of the party(s) at any stage, rather careful perusal of aforesaid provision reveals that whenever it appears to the Court that impleadment/deletion of any of the party(s) is necessary for the adjudication of the case, it may order for impleadment/deletion of such party(s) at any stage of trial. Recording of satisfaction by the court to the effect that such impleadment/deletion of a party(s) is necessary, is a *sine qua non* for the same.

7. In the case at hand, it clearly emerges from the record that defendant at very first opportunity had raised objection with regard to non-joinder of the necessary party. It has been categorically stated in the written statement that person proposed to be impleaded as a defendant by way of application under reference is a necessary party but at that time, no steps ever came to be taken by the plaintiff for his impleadment, who is now stated to be a necessary party for proper adjudication of the civil suit.

8. This court finds from the record that before instituting suit at hand, plaintiff had also issued legal notice to Prem Singh, whose impleadment is now sought but,

interestingly, at that time, suit for damage only came to be filed against the defendant. It is not in dispute that by way of legal notice, (Annexure R-1 annexed with the reply filed by defendant), plaintiff had made certain imputations/allegations against the proposed defendant but, it is not understood, what prevented him from impleading him as a defendant in the civil suit in the very beginning. It is also not in dispute before me that evidence of both the parties stands recorded and as such, this Court is in full agreement with the reasoning assigned by learned Court below that in the event of impleadment of proposed defendant No.2, case would revert back to the stage of filing amended plaint and great prejudice would be caused to the defendant, who has already suffered agony of trial for almost three years.

9. Consequently, in view of above, present petition fails and is dismissed accordingly. Order passed by learned Court below is upheld. Pending applications, if any, stand disposed of. Needless to say observations made in the present judgment shall not be construed to be a reflection on the merits of civil suit, which shall be decided on its own merit. Further, learned Court below, while deciding suit at hand, would also take into consideration, provisions of Order I, rule 9 CPC, which specifically provides that no suit shall be defeated on account of mis-joinder or non-joinder of parties.

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

M/s Rikhi Ram Amar Nath .....Petitioner

Versus

Shri Vikas Sood and another .....Respondent

Civil Revision No. 124 of 2019

Decided on: September 23, 2019

Himachal Pradesh Urban Rent Control Act, 1987 – Section 14 (3) – Eviction suit on ground of 'bonafide requirement' – Death of landlord during pendency of proceedings – Effect – Held, even if landlord dies during pendency of eviction proceedings , 'bonafide need' can not be said to have lapsed. (Para 4)

Himachal Pradesh Urban Rent Control Act, 1987 – Order XXII Rule 3 – Death of petitioner landlord during pendency of eviction proceedings – Substitution of legal representatives vis a vis claim raised in main petition - Mode of disposal of application - Held, claim of 'bonafide requirement' is to be decided in main petition and not in application filed under Order XXII Rule 3 of Code for bringing on record his legal representatives. (Para 4)

Case referred:

Shakuntala Bai v. Narayan Das, AIR 2004 SC 3484

For the petitioner: Mr. R.K. Bawa, Senior Advocate with Mr. Prashant Sharma, Advocate.

For the respondent: Mr. Ajay Kumar, Senior Advocate with Mr. Sumeet Sood, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant petition filed under S.24(5) of the Himachal Pradesh Urban Rent Control Act, (hereinafter, 'Act') lays challenge to order dated 15.7.2019 passed by learned Rent Controller(2), Shimla, Himachal Pradesh, whereby an application having been filed by respondents under Order XXII, rule 3 read with S.151 CPC, for impleadment as petitioners/landlords in place of original tenant, Chamba Mal Bhagra, who died on 24.10.2018, came to be dismissed.

2. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned Rent Controller while allowing

application under Order XXII, rule 3 read with S.151 CPC, filed by the respondents herein for their impleadment as petitioners/landlords, this Court finds no illegality or infirmity in the impugned order, as such, same does not call for any interference.

3. It is not in dispute that the original petitioner/landlord, Chamba Mal Bhagra had filed a petition for eviction on two grounds viz. (a) building having become unfit and unsafe for human habitation and, (b) bona fide requirement for building/rebuilding. It is also not in dispute that the original landlord, Chamba Mal Bhagra expired on 24.10.2018, whereafter, an application under Order XXII, rule 3 CPC came to be filed on behalf of his grandsons Vishal Sood and Vikas Sood, on the basis of Will. Though, initially aforesaid application came to be resisted on behalf of tenants on the ground that neither copy of Will nor mutation, if any, entered in the names of the applicants, after death of original landlord, Chamba Mal Bhagra, has been placed on record but, it clearly emerges from the impugned order that during pendency of the application referred to herein above, both the documents i.e. Will as well as mutation, were supplied to the tenants. Applicants also placed on record death certificate disclosing therein the factum with regard to death of original landlord, Chamba Mal Bhagra. As per Will placed on record, ground floor of the building, 48/1, Lower Bazaar, Shimla, stands bequeathed in favour of respondents herein i.e. Vishal Sood and Vikas Sood both sons of Shri Ravinder Kumar Sood.

4. Mr. R.K. Bawa, Senior Advocate duly assisted by Mr. Prashant Sharma, Advocate, representing the tenants, vehemently argued that plea of building being bonafide required by the landlord is no more available to the landlord, as he has died. Mr. Bawa, learned Senior Advocate further argued that in view of death of the original landlord, application filed by the applicants/respondents is not maintainable. However, having notice the fact that by way of Will, property in question stands bequeathed in favour of the applicants/respondents herein, this Court finds no force in the aforesaid argument of Mr. Bawa, learned Senior Advocate appearing for the tenants because claim, if any, with regard to existence of ground i.e. building being bona fide required for personal use, is to be decided in the main petition and not in the application for impleadment. Moreover, issue with regard to availability of ground if bona fide requirement for personal requirement, after death of original landlord, is no more res integra in view of the judgment laid down by Hon'ble Apex Court in **Shakuntala Bai** v. **Narayan Das**, AIR 2004 SC 3484, wherein Hon'ble Apex Court has categorically held that even if landlord dies during pendency of the petition, bona fide need cannot be said to have lapsed.

5. Apart from above, in the case at hand, another plea i.e. building is unfit and unsafe for human habitation, has been also taken by the tenants, landlords, as such, learned Rent Controller below has rightly concluded that cause of action qua aforesaid ground can be inherited by the successors of the original landlord.

6. Consequently, in view of above, present petition is dismissed being devoid of merit. Order passed by learned Rent Controller below is upheld. Needless to say, question with regard to availability of ground raised in the petition, shall be decided in accordance with law, in the main petition by learned Rent Controller.

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

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

Karan Kumar ....Petitioner.

Versus

Mukhtiar Singh ...Respondent.

CMPMO No.: 220 of 2019
Decided on: 24.09.2019.

Code of Civil Procedure, 1908- Section 151 – Inherent powers – Exercise of - Held, procedural law is the for the furtherance of delivery of justice and the same should not be permitted to throttle the wheels of justice – Defendant who inadvertently did not examine himself as a witness, permitted to be examined at a later stage. (Para 4)

For the petitioner Mr. Ajay Sharma, Sr. Advocate with Mr. Ajay Thakur, Advocate.
For the respondent Mr. Rajesh Kumar Sharma, Advocate for the respondent.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, petitioner has challenged order dated 01.03.2019, passed by the learned Court below, vide which an application filed by the present petitioner under Section 151 of the Code of Civil Procedure, who is defendant No. 1 before the learned Trial Court, with the prayer that he may be permitted to examine himself as a witness as inadvertently the same could not be done when he was leading evidence, stands dismissed by the learned Court below on the ground that said defendant had closed his evidence on 10.10.2017, and therefore, at the stage, when the application was filed, the same could not be allowed as it would tantamount to opening the evidence again.

2. Learned Senior Counsel appearing for the petitioner has argued that though as far as the factual matrix as is contained in the impugned order is concerned, there is no dispute qua that, however, it was sheer inadvertence on the part of the present petitioner that he did not enter the witness box. Learned Senior Counsel has further argued that *bonafide* of the petitioner can be ascertained from the other evidence led by him. He submits that in the peculiar facts of the case, petitioner be permitted to step into the witness box because the same will facilitate the adjudication of the *lis* in an effective manner and further it will not cause any prejudice to the plaintiff as he will have the opportunity cross examine the defendant.

3. I have heard learned Counsel for the parties and also gone through the impugned order as well as other documents appended with the petition.

4. Though the reasons as are spelled out in the impugned order as to why the application filed by the petitioner under Section 151 of the Code of Civil Procedure seeking permission to examine himself as a witness, was dismissed, cannot be faulted with, yet, there appears to be substance in the submission of learned Senior Counsel for the petitioner because after all procedure is there for the furtherance of delivery of justice and the same should not be permitted to throttle the wheels of justice. The prayer of the defendant is that as inadvertently he could not examine himself as a witness in support of his case when he was leading evidence, he may be granted one opportunity to do the needful. This prayer of his can be considered sympathetically because the same will not cause any prejudice to the plaintiff, as, but natural, defendant No. 1 cannot depose in excess to what has been pleaded by him before the learned Court below and the plaintiff will get an opportunity to cross examine him.

5. Accordingly, this petition is allowed by setting aside order dated 01.03.2019, passed by learned Civil Judge, Court No. 4, Hamirpur, District Hamirpur, H.P. in CMA No. 335/2018, filed in Civil Suit No. 53 of 2015, by directing the learned Court below to afford one opportunity to the present petitioner to examine himself as a witness subject to payment of cost to the tune of Rs.5,000/- to the plaintiff. It is clarified that only one opportunity shall be granted to the petitioner to examine himself as witness and in case he fails to avail said opportunity, then no further opportunity, in any circumstance, shall be granted to him by the learned Trial Court. It is further clarified that grant of opportunity to examine himself to defendant No. 1 shall be subject to first the petitioner paying the cost to the tune of Rs.5,000/- to the plaintiff. Only after said cost is paid by the petitioner/ defendant No. 1 to the plaintiff by way of bank draft, learned Trial Court shall permit the petitioner to enter the witness box. Cost shall be paid to the plaintiff by defendant No. 1 on or before the next date of hearing.

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

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

Madho Dass @ Lakhvinder Singh Chela Shri Chetan Dass ...Petitioner

Versus

Mahant Jagat Dass Chela Mahatma Hans Dass ...Respondent

CMPMO's Nos. 278 and 288 of 2018

Decided on: September 24, 2019

Code of Civil Procedure, 1908 – Section 2 (11) Order XXII Rules 3 to 5 – Death of party – Substitution of legal representatives – Nature of inquiry – Held, while deciding application for bringing on record legal representatives of the deceased party, the court is required to see whether 'estate' of deceased is sufficiently represented or not ?- 'Legal representative' can be a person, who inter-meddles with 'estate' of the deceased - Rights of parties are not decided in such proceedings- Substitution of legal representative on basis of Prabandhaknama executed by deceased Mahant / Plaintiff in favour of applicant, is valid. (Para 11 & 12)

Cases referred:

Custodian, Branches of BANCO National Ultramarino v. Nalini Bai, AIR 1989 SC 1589

Kalu Ram v. Charan Singh, AIR 1994 Raj 31

For the petitioner: Mr. Sunil Mohan Goel, Advocate.

For the respondent: Mr. Ajay Sharma, Senior Advocate with Mr. Ajay Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Since both the petitions came to be tagged together and were being heard together, same are being disposed of vide this common judgment.

2. CMPMO No. 278 of 2018 has been filed under Art. 227 of the Constitution of India, laying therein challenge to order dated 13.12.2017, passed by learned Senior Civil Judge, Dehra, District Kangra, Himachal Pradesh, whereby CMA No. 404/17 in Civil Suit No. 153/12, filed under Order XXII, rule 3 CPC by the respondent/defendant (hereinafter, 'defendant'), came to be allowed.

3. Similarly, CMPMO No. 288 of 2018 has been filed under Art. 227 of the Constitution of India, laying therein challenge to order dated 13.12.2017, passed by learned Senior Civil Judge, Dehra, District Kangra, Himachal Pradesh whereby CMA No. 403/17 in Civil Suit No. 54/12, filed under Order XXII, rule 3 CPC by the respondent/defendant (hereinafter, 'defendant'), came to be allowed

4. Necessary facts, as emerge from the record are that *Mahant* Jagat Dass (since deceased) filed two suits in the court of learned Senior Civil Judge, Dehra, under Ss. 34, 38 and 39 of the Specific Reliefs Act, one seeking therein declaration that the plaintiff being *Mahant* /Manager of *Dhuna Sahib* Darbar Baba Ghati alone is entitled to manage the entire property of Shree *Dhuna Sahib* Darbar Baba Ghati, including all the bank accounts standing in and for the name and style of Shree *Dhuna Sahib*, in any bank or elsewhere and another seeking permanent perpetual prohibitory injunction against the defendant, restraining him from interfering in any manner in the management of Shree *Dhuna Sahib* and its property.

5. Before the aforesaid suits could be decided, original plaintiff *Mahant* Jagat Dass expired on 15.12.2015, whereafter, respondent Garib Dass claming himself to be Chela of *Mahant* Jagat Dass, filed applications under Order XXII, rule 3 in both the suits for his impleadment as plaintiff in place of *Mahant* Jagat Dass, on the basis of *Prabandhak Nama* dated 29.8.2012. Respondent Garib Dass claimed in the application that he is legal

representative of original plaintiff, Jagat Dass, who expired on 15.12.2015. He further stated in the application that *Mahant* Jagat Dass himself appointed him as *Chela* and his *Mohatmim* vide Prabandhak Nama dated 29.8.2012, which stands duly admitted by original plaintiff, Jagat Dass in the court on 25.8.2014. Garib Dass also claimed that since he has been appointed by original plaintiff *Mahant* Jagat Dass in the presence of devotees at Dera *Dhuna Sahib* Ghati, there is no legal representative except him and prayer made on his behalf for impleadment as plaintiff in place of Jagat Dass may be allowed.

6. Aforesaid prayer made on behalf of Garib Dass, came to be resisted on behalf of the defendant, who though admitted that the original plaintiff Jagat Dass has expired but specifically denied that Garib Dass is legal representative of Jagat Dass. He claimed that Jagat Dass was only a manager of the institution and as such, he had no power or any right to further appoint the manager or *Prabandhak*. He claimed that there is a *Bheikh* i.e. supreme body of *Sadhu Samaj*, which appoints *Mahant* after death of a *Mahant*/Manager of the institution. Defendant Madho Dass claimed that he is the only *Mahant* and succeeded Jagat Dass after his death. He claimed that he was appointed as *Mahant* of *Dhuna Sahib* on 31.12.2015 in the presence of other saints, believers and general public and since he is performing duties of *Mahant* of *Dhuna Sahib*, as such, he only has the right o manage the property of *Dhuna Sahib* after death of Jagat Dass. He further claimed that since original plaintiff was not competent or having any authority to appoint any person as Manager or *Prabandhak,* documents, if any, to that effect do not create any right of *Mahantship* in favour of Garib Dass. Defendant claimed that no Succession Act in such institutions applies and it is only *Sadhu Samaj* which is competent to appoint a *Mahant*.

7. Learned court below, on the basis of pleadings adduced on record by parties, allowed aforesaid applications vide impugned orders, both dated 13.12.2017. Being aggrieved and dissatisfied with the aforesaid orders of impleadment of Garib Dass as plaintiff, defendant has approached this Court in the instant proceedings.

8. Having heard learned counsel for the parties and perused the material available on record, this Court finds no illegality or infirmity in the impugned orders, as such, same do not call for any interference.

9. The Code of Civil Procedure defines "legal representative", which literally means a person, who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

10. In the case at hand, it is not in dispute that the original plaintiff *Mahant* Jagat Dass claiming himself to be *Mahant*/Manager of *Dhuna Sahib*, had filed two suits, seeking declaration to the extent that he alone is entitled to manage the entire property of *Dhuna Sahib* and for permanent perpetual prohibitory injunction restraining the defendant from interfering in any manner in the management of *Dhuna Sahib*. Replies to the applications as well as written statements filed by the defendant, nowhere suggest that the claim of *Mahant* Jagat Dass that he is Manager of the institution ever came to be disputed on behalf of the defendant, rather, case as set up by the defendant is that *Mahant* Jagat Dass was only a manager of the institution and as such, he had no power or right to further appoint any *Prabandhak* or Manager, meaning thereby it stands duly admitted that at the time of filing of suits, original plaintiff, *Mahant* Jagat Dass was managing the affairs of the institution.

11. At the time of deciding the application for impleadment, if any, filed after death of the original plaintiff, court is only required to see whether estate of the deceased plaintiff is sufficiently represented by somebody or not? "Legal representative" as defined in the Code of Civil Procedure provides that a person, who represents the estate of the deceased person or who intermeddles with the estate of the deceased, can be said to be a legal representative. In the case at hand, respondent Garib Dass by way of placing on record

Prabandhak Nama dated 29.8.2012, successfully established that he represents the estate of late *Mahant* Jagat Dass, who expired before decision of the suits filed by him, as such, learned Court below rightly held the respondent Garib Dass to be legal representative of the deceased *Mahant* Jagat Dass.

12. Question, whether *Mahant* Jagat Dass was appointed as *Mahant* by Supreme Body of *Sadhu Samaj* and he was further competent to appoint *Mahant* or *Mohatmim* can definitely be decided during trial in the main suit pending before it, in the totality of evidence adduced on record by the respective parties. Once, it stands admitted that the original plaintiff *Mahant* Jagat Dass was managing the affairs of the Institution in the capacity of *Mahant*, it can be safely presumed /inferred that at the time of filing suits, he was in control of the affairs of the Institution. Moreover, careful perusal of impugned orders passed by learned Court below nowhere suggests that learned Court below, while holding respondent Garib Dass to be legal representative of late *Mahant* Jagat Dass, the original plaintiff, proceeded to determine the rights of the parties finally, which otherwise could not be decided in the instant proceedings.

13. In the case at hand, applications came to be filed on behalf of a person, who claimed himself to *Chela* of original plaintiff, *Mahant* Jagat Dass, whereas, defendant by way of written statements to the suit, disputed the claim of the original plaintiff, *Mahant* Jagat Dass that he was *Mahant* of *Dhuna Sahib*. Defendant in his written statements has admitted that original plaintiff, *Mahant* Jagat Dass was only temporarily authorised to manage the affairs of the institution but he was never appointed as a *Mahant* but there is nothing on record to suggest that late *Mahant* Jagat Dass in the capacity of *Mahant* of the Institution was not in the helm of affairs of the Institution at the time of filing of suits.

14. This Court, in case **Munish Kumar alias Munsih Gir** Vs. **Baghla Mukhi Devi**, RSA No. 390 of 1989, decided on 6.8.1997 reported in 1997(2) CCC 543 (HP)has categorically held that after death of *Mahant*, successor of *Mahant* can continue the suit on the plea raised by the *Mahant*.

15. Hon'ble Apex Court in **Custodian, Branches of BANCO National Ultramarino** v. **Nalini Bai**, AIR 1989 SC 1589, has held that legal representative as defined in the Code of Civil Procedure means a person, who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The definition is inclusive in character and its scope is wide, it is not confined to legal heirs only instead it stipulates a person who may or may not be heir, competent to inherit the property of the deceased but he should represent the estate of the deceased person. It includes heirs as well as persons, who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression "legal representative". Hon'ble Apex Court has held as under:

> "4. After hearing learned counsel for the parties, we are of opinion that the learned Judicial Commissioner committed serious error of law in setting aside the order of the trial Judge. "Legal representative" as defined in Civil Procedure Code which was admittedly applicable to the proceedings in the suit, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The definition is inclusive in character and its scope is wide, it is not confined to legal heirs only instead it stipulates a person who may or may not be heir, competent to inherit the property of the deceased but he should represent the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by

the expression "legal representative". If there are many heirs, those in possession bona fide, without there being any fraud or collusion, are also entitled to represent the estate of the deceased. In the instant case it is not disputed that under the Portugees Law of Inheritance which was applicable to Goa at the relevant time Mrs. Nalini Bai had acquired "Meeira rights" according to which she had acquired half share in the estate left by the deceased Vinaique Naique and the remaining half share was inherited by sons and daughters of the deceased who were subsequently brought on record. On the admitted facts Mrs. Nalini Bai therefore represented the estate of the deceased Vinaique Naique. Once the name of Mrs. Nalini Bai was brought on record within time and the application for setting aside abatement was allowed by the trial Judge, the suit could proceed on merits and the mere fact that the remaining legal representatives were brought on record at a subsequent stage could not render the suit defective. The Custodian of the appellant Bank had no knowl- edge that there were other legal representatives of deceased defendant along with Mrs. Nalini Bai. He had filed affidavit that on making diligent and bona fide inquiry, he had come to know that Nalini Bai was the sole legal representative but later on he acquired knowledge that the deceased had left four sons and two daughters as legal representatives, along with Mrs. Nalini Bai, therefore, he made another application for bringing them on record. The trial Judge accepted the testimony of the Custodian, and placing reli- ance on the decision of Andhra Pradesh High Court in Mannem Venkataramaih v. M. Munnemma & Ors., AIR 1963 A.P. 406 he allowed the substitution application. The trial court com- mitted no error in law, instead he applied correct princi- ples of law.

5. In Daya Ram & Ors. v. Shyam Sundari, [1965] 1 SCR 231 this Court recognised the principle of representation of the estate by some heirs, where the defendant died during the pendency of the suit to enforce claim against him and all the heirs are not brought on record within time. This Court held that if after bona fide inquiry, some, but not all the heirs, of a deceased defendant, are brought on record the heirs so brought on record represent the entire estate of the deceased and the decision of the Court in the absence of fraud or collusion binds even those who are not brought on record as well as those who are impleaded as legal represen- tatives of the deceased defendant. In N.K. Mohd. Sulaiman v. N.C. Mohd. Ismail, [1966] 1 SCR 937 this Court rejected the contention that in a suit to enforce a mortgage instituted after the death of a Muslim, if all the heirs of the deceased were not impleaded in the suit and a decree was obtained, and in execution the property was sold, the auc- tion purchaser could have title only to the extent of the interest of the heirs who were impleaded, and he could have no title to the interest of those heirs who had not been impleaded to the suit. The Court held, that those who were impleaded as party to the suit in place of the deceased defendant represented the entire estate as they had share in the property and since they had been brought on record the decree was binding on the entire estate

6. In the instant case Mrs. Nalini Bai had admittedly hall share in the property left by the deceased defendant and as she was brought on record within time, she represented the estate of the deceased defendant and the suit could proceed on merit. In this view the impleadment of other legal repre- sentatives at a subsequent stage could not affect validity of the proceedings. In the result we allow the appeal and set aside the judgment and order of the Judicial Commission- er dated 30.6.1972, and restore the order of the trial Judge. Since trial of the suit has been delayed, we direct the trial court to make every effort to decide the suit expeditiously. The appellant is entitled to its costs throughout."

16. High Court of Rajasthan in **Kalu Ram** v. **Charan Singh**, AIR 1994 Raj 31, has again held that persons other than legal heir can also be legal representative. Even an

intermeddler with the estate of deceased can also be allowed to represent the estate for the purpose of pending proceedings before the court. It is true that all legal heirs ordinarily are the legal representatives, but the converse is not true, because, all the legal representatives are not necessarily legal heirs. The decision as to who is the legal representative for the purpose of proceedings is necessarily limited for the purpose of carrying on the proceedings and cannot have the effect of conferring of any right of heirship to the estate of the deceased. The decision on this issue also does not operate res judicata on the question of heir-ship in the subsequent proceedings. The High Court of Rajasthan has held as under:

> "6. Having given my careful consideration to the rival contentions raised before me, I am of the opinion that this Revision Petition merits acceptance. Section 2(11) of the C.P.C., which defines 'legal representative', makes it abundantly clear that the persons other than legal heir can also be legal representative. Even an intermeddler with the estate of deceased can also be allowed to represent the estate for the purpose of pending proceedings before the court. It is true that all legal heirs are, ordinarily, also legal representatives, but the converse is not true. All legal representatives are not necessarily legal heirs as will. The decision as to who is the legal representative for the purpose of proceedings is necessarily limited for the purpose of carrying on the proceedings and cannot have the effect of conferring of any right of heirship to the estate of the deceased. The decision on this issue also does not operate res judicata on the question of heir-ship in the subsequent proceedings. In view of this settled position of law, it must beheld that the enquiry into right to heirship is not the determining factor in deciding whether a person is or is not a legal representative for the purpose of proceedings before the court. What is required to be considered is whether the person claiming to represent the estate of the deceased for the purpose of lis has sufficient interest in carrying on litigation and is not any imposter. In case of rival claimants, it may also be necessary to decide that out of the rival claimants, who really is the person entitled to represent the estate for the purpose of particular proceedings. Even that determination does not result in determination of inter se right to succeed to property to the deceased and that right has to be established in independent proceedings in accordance with law.

17. Close scrutiny of impugned orders clearly reveals that learned Court below, while holding Garib Dass to be the legal heir of original plaintiff, *Mahant* Jagat Dass, has categorically held that contention of the defendant that deceased plaintiff *Mahant* Jagat Dass was neither competent nor had authority to further appoint any person as *Prabhandhak* cannot be seen /decided at this stage, rather, same would be decided on its own merit on the basis of evidence adduced on record by respective parties and as such, this Court is of the view that no prejudice is going to be caused to the parties.

18. In view of above, this court finds no merit in both the petitions, which are accordingly dismissed. Orders passed by learned Court below are upheld. Needless to say, observations made hereinabove, shall have no bearing on the merits of suits pending before learned trial Court, which shall be decide don their own merits. Record, if received, be sent back forthwith.

19. Parties through counsel, undertake to appear before learned Court below on **1.10.2019**, enabling it to proceed further with the matter.

Pending applications, if any, in both the petitions stand disposed of. Interim directions, if any, stand vacated.

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

The Himachal Pradesh State Forest Corporation Limited ....Appellant.

Versus

Shri Kuldeep Singh ...Respondent.

RSA No.: 230 of 2008
Decided on: 25.09.2019.

Indian Contract Act , 1872 - Sections 73 & 74 – Damages – Grant of-- Contract regarding extraction of resin – Plaintiff Corporation filing suit for recovery/ damages on ground of less extraction of resin by defendant – Lower courts denying plaintiff's claim – RSA- Held, agreement on basis of which suit was filed, is not proved on record by examining scribe or witness(es) thereto – Since very existence of contract inter -se parties is not proved, plaintiff not entitled for any amount towards shortfall in extraction of resin – RSA dismissed (Para 11 & 12).

For the appellant : Mr. Rajesh Verma, Advocate.
For the respondent : Mr. Raghunandan Chaudhary, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this appeal, appellant-Corporation has challenged the judgment and decree passed by the Court of learned Civil Judge (Sr. Divn.), Kangra at Dharamshala, District Kangra, HP, in Civil Suit No. 146 of 2001, decided on 02.09.2006, vide which, learned Trial Court dismissed the suit filed by the present appellant for recovery of `58,433/- against the present respondent, as also against the judgment and decree passed by the Court of learned District Judge, Kangra at Dharmshala, in Civil Appeal No. 144-D/XIII/2006, dated 17.01.2008, whereby learned Appellate Court while dismissing the appeal filed by the appellant, upheld the judgment and decree passed by the learned trial Court.

2. Brief facts necessary for adjudication of the present appeal are that appellant-Corporation filed a suit for recovery of `58,433/- alongwith interest against the present respondent/defendant. The case of the plaintiff was that forest Corporation through its Divisional Manager, Forest Working Division, Dharamshala, invited tenders of rates per quintal for resin extraction work and delivery thereof at specified roadside depots in respect of resin blazes pertaining to Dharamshala Forest Working Division of the plaintiff-Corporation. Lot No. 13-R/97/Palampur was also included in the tenders. Defendant offered rate of `421/- per quintal for the said lot. The bid of the defendant was accepted. Thereafter, an agreement was entered into between the plaintiff and the defendant qua the said lot on 10.04.1997. As per plaintiff, in terms of the conditions so incorporated in the said agreement, defendant-Labour Supply Mate was allotted 2500 blazes in lot No. 4-R/98/Palampur, for the purpose of extraction of resin. Defendant was required to extract 100 quintals of resin. It was agreed between the parties that if defendant failed to extract 100 quintals yield from the lot, then for shortfall, defendant shall have to compensate the Corporation @ `3100 per quintal. As per plaintiff, the work of extraction of resin which was carried out by the defendant was not satisfactory and post receipt of "*Sakki Report*" it was found that yield extracted by the defendant was 25.52 quintals less than the target fixed. Notices were served upon the defendant on 20.11.1999 and 17.2.2000 to make the loss good but as the same was not done by the defendant, suit stood filed by the plaintiff for recovery of an amount as per details given in the plaint.

3. The suit was resisted by the defendant *inter alia* on the ground that no agreement whatsoever, as alleged by the plaintiff, was entered into between the parties with regard to the lot in question. According to the defendant, his signatures were obtained by the officers of the plaintiff on blank papers. However, neither any agreement was entered into between the parties nor there were any conditions contemplated between the parties as were alleged in the plaint, nor the defendant was liable to pay any amount on account of alleged shortfall of extraction of resin yield to the plaintiff-Corporation. It was further the stand of the defendant that for the purpose of extraction of the resin, the defendant was only to provide the labour whereas other things including the tools and tin etc were to be provided by the Lot Incharge of the plaintiff-Corporation and in the lot in hand, the concerned Lot Incharge failed to provide requisite things well in time during the tapping season and same duly stood reported to the higher authorities by the defendant. According to the defendant, shortfall, if any, was on account of said omissions on the part of the plaintiff-Corporation and further for the reasons that during the tapping season, no work could be done as the entire area got

engulfed in fire due to summer season and on account of heavy fire, the extraction work was disturbed. This was followed by rainy season during which also extraction work could not be carried out. If there was any shortfall on account of said natural calamities, then defendant was not responsible for the same. Defendant also denied that plaintiff was entitled for recovery @ `3100/- per quintal for the alleged shortfall. Receipt of notice from the plaintiff was also denied by the defendant.

4. On the basis of pleadings of the parties, learned Trial Court framed the following issues:-

"1. Whether the plaintiff is entitled for the recovery of suit amount from the defendant? OPP

2. Whether the suit is not maintainable? OPD

3. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD

4. Whether the plaintiff has not come to the court with clean hands? OPD

5. Whether the plaintiff has got no cause of action? OPD

6. Relief."

5. On the basis of pleadings and evidence led by the parties in support of their respective cases, the Issues so framed were answered by the learned Trial Court as under:-

"Issue No.1 : No.

Issue No. 2 : No.

Issue No. 3 : Yes.

Issue No.4 : Yes.

Issue No. 5 : No.

Issue No. 6 : Suit dismissed with costs as per operative portion of this judgment."

6. Learned Trial Court dismissed the suit of the plaintiff-Corporation *inter alia* by holding that purported agreement entered into between the plaintiff and the respondent-Corporation , i.e. Ext. PW1/A, could not be taken into consideration as the same was not proved on record by the plaintiff-Corporation, in accordance with law. Learned Trial Court held that neither the scribe of the agreement nor any witness, in whose presence, said agreement was entered into was examined by the plaintiff-Corporation to prove the fact that agreement Ext. PW1/A was, in fact, an agreement entered into between the defendant and the plaintiff-Corporation. Learned Trial Court further held that even it is to be presumed that said agreement was entered into between the parties, yet, plaintiff was not entitled for any recovery because the "*Sakki Report*" i.e. report on the basis of which it could be deciphered that there was shortfall on account of omissions of the defendant, was never produced in the Court by the plaintiff-Corporation. Learned Court further held that as the plaintiff had not approached the Court with clean hands as it had failed to produce on record the relevant material, the plaintiff in fact was *estopped* even from filing the suit. On these bases, learned Trial Court dismissed the suit.

7. In appeal, findings so returned by the learned Trial Court were upheld by the learned Appellate Court. It held that plaintiff-Corporation had set up a case that defendant had executed agreement Ext. PW1/A in its favour. To prove the execution of the said document, plaintiff-Corporation examined PW1 Shri D.R. Kaushal, retired Divisional Manager of the forest Corporation. In his cross examination, this witness admitted that said agreement was neither executed in his presence nor the same bear his signatures. Learned Appellate Court observed that no witness to agreement Ext. PW1/A was produced and examined to prove the execution of the said agreement by the plaintiff-Corporation. It also observed that neither the original agreement was produced in the Court nor a photocopy of agreement Ext. PW1/A was proved from the original. Official, who executed said agreement on behalf of the Corporation, was not examined by the plaintiff. No evidence was led on behalf of the Corporation as to why the original of agreement Ext. PW1/A was not available with the plaintiff-Corporation or that the same was in fact lost. Learned Appellate Court also observed that no application even for adducing secondary evidence was filed on behalf of the Corporation and no evidence was led to demonstrate that either the official, who had executed the said agreement was/were not alive or their presence could not be procured in spite of

exercise of due diligence by the Corporation. On these bases, learned Appellate Court held that only option with the Court was to hold that plaintiff-Corporation had failed to prove valid execution of agreement Ext. PW1/A. Learned Appellate Court further held that in the absence of valid proof of execution of the said agreement, the corporation had no right to enforce the same against the defendant and findings which stood returned by learned Trial Court with regard to agreement Ext. PW1/A called for no interference. Learned Appellate Court also held that plaintiff-Corporation had not led any evidence to prove the fact that quantity of 100 quintals of resin could have been extracted from 2500 blazes but for the default of the defendant due to his negligence. It held that in the absence of proof of any such default or negligence on the part of the defendant, it could not be held that defendant was liable to pay any amount to the Corporation on account of loss or damages. Learned Appellate Court thus while concurring with the findings returned by the learned Trial Court dismissed the appeal.

8. Feeling aggrieved, the appellant-Corporation has filed the present appeal, which was admitted on 27.03.2009, on the following substantial questions of law:-

> *"1. Whether both the Courts below have misread and mis-appreciated the pleadings and evidence, particularly written statement and statement of defendant as DW-1, whereby execution of agreement is admitted unequivocally, thereby rendering the judgment and decree(s) passed against law?*
>
> *2. Whether document exhibit PW-1/A (agreement) is duly proved on the record of the trial court but has been misconstrued by the courts below?"*

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

10. I will answer both substantial questions of law separately.

11**. <u>Substantial question of law No. 1</u>**:- Whether both the Courts below have misread and mis-appreciated the pleadings and evidence, particularly written statement and statement of defendant as DW-1, whereby execution of agreement is admitted unequivocally, thereby rendering the judgment and decree(s) passed against law?

A perusal of the deposition of DW1 before the learned Trial Court demonstrates that he stated in the witness box that he used to work as Labour Supply Mate with the Forest Corporation and that he had supplied labour with regard to Lot No. 13-R/97/Palampur. He stated in the Court that for the purpose of extraction of resin, marking of the trees was to be done by the Department and "Tin, Kupi, Pati and Tejab" were also to be supplied by the Corporation. Transportation of the extracted resin from one place to other was also to be done by the Corporation. He further stated that no target qua extraction of resin was given to him by the Corporation. In his cross examination, though this witness stated that he had seen agreement Ext. PW1/A, on each page of which, his signatures were there, however, he denied that when he appended his signatures on the papers, the said agreement was already filled up. In my considered view, a perusal of the said deposition of DW1 cannot be read so as to infer that defendant had admitted unequivocally with regard to the execution of agreement Ext. PW1/A. This Court cannot ignore the fact that in the written statement filed by the defendant, he had taken a specific stand that no agreement was entered into between him and the plaintiff-Corporation and his signatures were obtained by the Corporation on some blank papers. Be that as it may, as it was the plaintiff's case that document Ext. PW1/A was the agreement entered into between the plaintiff-Corporation and the defendant with regard to the lot in dispute, onus was upon the plaintiff to have had proved the execution of the said agreement, in accordance with law. There are concurrent findings returned by the learned Courts below against the plaintiff-Corporation that the Corporation has not been able to prove the execution of the said agreement, in accordance with law, as neither any officer or official, who prepared said document or who was a witness to the same, entered into the witness box to state that this was the agreement which was entered into between the parties with regard to lot in issue. Therefore, in my considered view, by reading one line of the entire statement of DW1 in isolation, this inference cannot be drawn that defendant had admitted unequivocally about the execution of the agreement Ext. PW1/A. This substantial question of law is answered accordingly.

12. **<u>Substantial question of law No. 2</u>**:- Whether document exhibit PW-1/A (agreement) is duly proved on the record of the trial court but has been misconstrued by the courts below?"

There are concurrent findings returned by both the learned Courts below that agreement Ext. PW1/A was not duly proved, in accordance with law. Said findings have been

returned by the learned Courts below on the ground that neither the scribe of the agreement nor any officer/official who was witness to the execution of the said document was examined by the plaintiff-Corporation. Findings so returned by learned Trial Court and affirmed by learned Appellate Court are duly borne out from the record of the case. PW-1 Shri D.R. Kaushal, who was examined by the plaintiff-Corporation to prove agreement Ext. PW1/A, clearly and categorically deposed in the Court that neither the said agreement was prepared by him nor the same bears his signatures. Not only this, he has gone to the extent of stating that he was not even signatory to the suit, which stood filed by the plaintiff-Corporation against the defendant. No other witness was examined by the plaintiff-Corporation except PW1 in support of its case. Therefore, in the absence of the plaintiff-Corporation having produced either the scribe of the agreement or any witness in whose presence, said agreement was entered into between the parties, it cannot be said that execution of the agreement Ext. PW1/A was duly proved on record by the plaintiff and findings to the contrary returned by the learned Court below are the result of misreading and mis-appreciation of the evidence of record. This substantial question of law is answered accordingly.

In view of above discussion, as this Court does not finds any merit in the present appeal, the same is dismissed accordingly. Pending miscellaneous application(s), if any, also stand disposed of. No orders as to costs.

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

Ashish Kumar Guleri ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CrMMO No. 536 of 2019

Decided on: September 26, 2019

Code of Criminal Procedure, 1973 – Sections 320 & 482 – Inherent powers – Quashing of FIR in non-compoundable cases pursuant to settlement between parties – Permissibility – Held, power of High Court in quashing FIR, complaint or other criminal proceedings in exercise of its inherent powers is distinct and different from power of criminal court of allowing compounding of offences under Section 320 of Code – Powers under Section 482 are not circumscribed by Section 320 of Code. (Para 11 & 15).

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 SCC 466Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497

For the petitioner: Kr. Virender Singh, Advocate.

For the respondents: M/s Sudhir Bhatnagar, Sanjeev Sood and Sumesh Raj, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General for respondents Nos. 1 and 2/State.

Ms. Rajni Gupta, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under S.482 CrPC, prayer has been made on behalf of the petitioner for quashing and setting aside FIR No. 176, dated 22.9.2018, under Ss. 279 and 337 of the Indian Penal Code and Ss. 184 and 187 of the Motor Vehicles Act, registered with Police Station Police Station, Dharamshala, District Kangra, Himachal Pradesh and consequent proceedings in Cr. Case No. 85-II/2018 titled State vs. Ashish Kumar Guleri, pending before learned Judicial Magistrate 1st Class-II, Dharamshala District

Kangra, Himachal Pradesh, on the basis of compromise (Annexure P-2) arrived *inter se* parties.

2. Precisely, the fact as emerge from the record are that FIR detailed herein above came to be lodged at the behest of respondent No.3/complainant, who alleged that vehicle bearing registration No. HP-39A-7836, being driven in rash and negligent manner by the petitioner-accused hit him, while he was near Bus Stand, Dharamshala, as a consequence of which, he suffered injuries. On the basis of complaint made by respondent No.3, FIR in question came to be lodged against the petitioner under Ss. 279 and 337 of the Indian Penal Code and Ss. 184 and 187 of the Motor Vehicles Act. Police after completion of investigation, presented *Challan* in the competent Court of law i.e. Judicial Magistrate 1st Class-II, Dharamshala, which is still pending adjudication. However, it appears that during the pendency of the case before learned Court below, parties have resolved to settle dispute amicably inter se them, as is evident from Annexure P-2.

3. On 12.9.2019, this Court while issuing notice to the respondents, deemed it necessary to cause presence of respondent No.3, so as to ascertain the genuineness and correctness of the compromise between the Parties. This Court also directed learned Deputy Advocate General to verify the factum with regard to compromise, from the police officials.

4. Mr. Kunal Thakur, learned Deputy Advocate General, has placed on record status report enclosing therewith statement of the respondent No. 3/complainant, who has come present and is represented by Ms. Rajni Gupta, Advocate, who has fled Power of Attorney on behalf of respondent No. 3.

5. Respondent No.3, who has come present in the Court, stated on oath before this Court that he has come present of his own volition and without there being any external pressure and has entered into compromise with the petitioner, whereby both the parties have resolved to settle their dispute amicably inter se them. Respondent No. 3 further stated that he shall not have any objection in case, FIR in question alongwith consequent proceedings pending in the competent Court of law, are quashed and set aside and petitioner is acquitted of the charges framed against him. Respondent No.3 has identified his signatures on the compromise, Annexure P-2. His statement is taken on record.

6. Mr. Kunal Thakur, learned Deputy Advocate General, having heard the statement of respondent No.3 and perused the report submitted by the police, fairly stated that in view of statement made by respondent No.3, there are bleak and remote chances of conviction of the petitioner as such, no fruitful purpose shall be served in allowing the criminal proceedings against the petitioner to continue.

7. In view of the aforesaid statement of respondent No. 3, this Court sees no impediment in accepting the prayer made in the instant petition, so far as quashment of FIR in question and consequent proceedings is concerned.

8. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

9. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No

doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.
>
> 29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.
>
> 29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.
>
> 29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of

> this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.
>
> 29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

10. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

11. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned

Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.

The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

12. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

> "13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:
>
> > "…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."
>
> 14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:
>
> > "… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"
>
> > "…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"
>
> 15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:
>
> (i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;
>
> (ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal

Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

13. In the case at hand also, the offences alleged against the petitioner do not involve offences of mental depravity or of heinous nature like rape, dacoity or murder and as such, with a view to maintain harmony and peace in the society, this court deems it appropriate to quash the FIR as well as consequential proceedings thereto, especially keeping in view the fact that petitioner and respondent No.3 have compromised the matter with each other, in which case, the possibility of conviction is remote and no fruitful purpose would be served in continuing with the criminal proceedings.

14. Since the matter stands compromised between respondent No.3 and petitioner, no fruitful purpose would be served in case proceedings initiated at the behest of respondent No. 3 are allowed to continue. Moreover, present is a simple dispute and since respondent No.3, is no more interested in carrying on with the criminal proceedings, as such, prayer made in the petition at hand can be accepted.

15. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 176, dated 22.9.2018, under Sections 279 and 337 of

the Indian Penal Code and Sections 184 and 187 of the Motor Vehicles Act registered with Police Station Police Station, Dharamshala, District Kangra, Himachal Pradesh and consequent proceedings in Cr. Case No. 85-II/2018 titled State vs. Ashish Kumar Guleri, pending before learned Judicial Magistrate 1st Class-II, Dharamshala District Kangra, Himachal Pradesh, are quashed and set aside. Petitioner is acquitted of the offences levelled against him in the aforesaid FIR.

16. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Bal Krishan ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No.: 1199 of 2017
Decided on: 26.09.2019

Himachal Pradesh Panchayati Raj Act , 1994 – Section 135 (2) – Order passed by SDO (C) – Order appellable – Aggrieved party filing representation against the order before Appellate Authority instead of a formal appeal – Effect – Held, right to appeal is a statutory right – Wherever right to file appeal is conferred upon a party, it has to avail said right strictly inconsonance with statutory provisions – Mere representation filed against an order passed by quasi - judicial authority, may be before the Authority which has the power to hear appeal against the said order, does not confer any power upon said Authority to adjudicate upon representation as if it were an appeal - For deciding an appeal, there has to be properly constituted appeal before the Authority. (Para 9 to 11)

For the petitioner Mr. Vijay Chaudhary, Advocate.

For the respondents Mr. Dinesh Thakur, Additional Advocate General with M/s Amit Kumar Dhumal, Seema Sharma and Divya Sood, Deputy Advocate Generals and Mr. Sunny Datwalia, Assistant Advocate General for respondents No. 1 to 4.

Mr. Ajay Shandil, Advocate for respondent No. 5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this writ petition, petitioner has challenged order dated 23.05.2017 (Annexure P-18), passed by the Deputy Commissioner, Mandi, District Mandi, H.P. vide which, order(s) passed by the Sub Divisional Officer (Civil), in exercise of quasi judicial powers conferred upon the said authority under the provisions of the Panchayati Raj Act, were set aside by the Deputy Commissioner with further direction that the private respondent herein was to continue as Panchayat Chowkidar in Gram Panchayat Lower Rewalsar, resulting in the termination of the services of the present petitioner.

2. Learned Counsel for the petitioner has argued that order impugned is *per se* void *ab initio* because a perusal of the same will demonstrate that an order passed by a quasi judicial authority, i.e. Sub Divisional Officer (Civil) was set aside by the Deputy Commissioner not in any appeal filed by the present private respondent but on a representation, purportedly filed by him in the light of direction of this Court in CWP No. 2308/2016, decided on 06.09.2016. He has further argued that there was no direction issued by this Court to the Deputy Commissioner to adjudicate upon any representation to be filed by the present private respondent and while passing the impugned order, Deputy Commissioner has erred in not appreciating that because order being assailed before it by the private respondent was a quasi judicial order, the same could not have been interfered with, except in accordance with law, which entailed filing of an appeal against the order passed by the quasi judicial authority. He thus submits that as the order *per se* is bad in law, the same be quashed and set aside. He has also argued that even otherwise there was perversity writ large in the order impugned because the same authority, which earlier while functioning as a quasi judicial Appellate Authority had held that the appeal filed by the petitioner was within

limitation, has now returned findings to the contrary without there being any fresh material on record inviting any such finding.

3. On the other hand, learned Counsel for respondent No. 5 has supported the order passed by the Deputy Commissioner on the ground that the representation was rightly entertained by the Deputy Commissioner because this Court had in fact ordered that the respondent was at liberty to approach the Deputy Commissioner. He further argued that the order passed by the Sub Divisional Officer (Civil) was not sustainable in law and the same was correctly set aside by the Deputy Commissioner.

4. I have heard learned Counsel for the parties and also gone through the impugned order and other documents appended with the petition.

5. A perusal of the impugned order demonstrates that the same was passed by the Deputy Commissioner, on a representation, so filed before him by private respondent herein, purportedly "in the light of judgment delivered by the Division Bench of Hon'ble High Court of Himachal Pradesh in CWP No. 2308 of 2016 on 06.09.2016".

6. The order passed by Hon'ble Division Bench of this Court is appended with the petition as Annexure P-16. The same reads as under:-

> *"Subject matter of this writ petition is the order, dated 2.8.2016, Annexure P-24 made by respondent No. 3. Mr. Romesh Verma, learned Additional Advocate General stated that the Bar that the order under challenge is appealable before the Deputy Commissioner.*
>
> *2. In the given circumstances, the writ petition is disposed of by providing that the petitioner is at liberty to approach thhe appropriate authority within one week from today. Till then, the status of the petitioner is protected.*
>
> *3. The petition is accordingly disposed of, as indicated above, alongwith pending applications, if any."*

7. A perusal of the order passed by this Court dated 06.09.2016 demonstrates that there was no direction issued by this Court enabling Dhameshwar (Private respondent herein) to file representation before the Deputy Commissioner. The petition in fact was disposed of with liberty to Dhameshwar, to approach the appropriate authority in view of the objection having been taken by learned Additional Advocate General that the petition was not maintainable as the order being assailed by way of said petition was an appealable order before the Deputy Commissioner.

8. Therefore, the act of the Deputy Commissioner of entertaining the representation filed by the private respondent herein and thereafter treating and disposing of the same as if it was hearing an appeal, is not sustainable in the eyes of law.

9. Right to file appeal is a statutory right. It is not a common law right. Wherever right to file appeal is conferred upon a party, then it has to avail said right strictly in consonance with the statutory provisions and statutory rules framed in this regard under the relevant Statute.

10. Mere representation filed against an order passed by a quasi judicial authority, may be before the authority which has the power to hear appeal against said order, does not confers any power upon the said authority to adjudicate upon the representation as if it were an appeal. For the purpose of deciding an appeal, there has to be properly constituted appeal before the authority and same has to be filed within the period of limitation. Assuming that there is power with the appellate authority to condone delay in filing the appeal, then also time barred appeal can be entertained if the party concerned *bonafidely* explains the delay in filing the appeal. Otherwise, any such appeal, which is time barred wherein the appellate authority does not has power to condone the delay, cannot even be entertained by the quasi judicial authority.

11. In the case in hand, Deputy Commissioner by ignoring all these aspects of the matter has passed the impugned order without appreciating that he could not have had set aside a quasi judicial order passed by the Sub Divisional Officer (Civil) under the provisions of the Panchayati Raj Act, on a Representation of the aggrieved party. The impugned order thus *prima* facie is perverse and not sustainable in law.

12. At this stage, learned Counsel for private respondent submits that he may be permitted to withdraw the representation itself which resulted in passing of the impugned order with liberty to file an appeal/ revision before the said authority.

13. Keeping in view the peculiar facts of this case, in the interest of justice, said plea of learned Counsel for respondent No. 5 is accepted. Representation filed by private respondent, which resulted in passing of the impugned order dated 23.05.2017, is permitted to be withdrawn. As a result thereof, impugned order passed by the Deputy Commissioner, Mandi, District Mandi, H.P. dated 23.05.2017 (Annexure P-18) is rendered *infructuous*. It goes without saying that the private respondent shall be at liberty to file an appeal/ revision against the order from which he is aggrieved, however, the same will be subject to the legal rights of the present petitioner, which stand accrued by the efflux of time.

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

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

Satish Kumar Thakur .....Petitioner

Versus

Surmukh Singh .....Respondent

Cr. Revision No. 97 of 2019

Decided on: September 26, 2019

Negotiable Instruments Act, 1881 - Section 147 – Compromise at revision stage – Permissibility – Accused seeking leave to compound offence at revisional stage - Leave granted in favour of petitioner inconsonance with guidelines laid in Damodar S. Prabhu vs. Saged Aabalal H (2010) SCC 663. (Para 6 & 7)

Case referred:

Damodar S. Prabhu v. Sayed Babalal H. (2010) 5 SCC 663

For the petitioner: Mr. H.C. Sharma, Advocate.

For the respondent: Mr. Bimal Gupta, Senior Advocate with Ms. Kusum Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under S.397 read with S.401 CrPC, lays challenge to judgment dated 2.1.2019 passed by learned Additional Sessions Judge, Sirmaur at Nahan, in Cr. Appeal No. 70-N/10 of 2015, affirming judgment/order of conviction and sentence dated 9.10.2015/15.10.2015 passed by Additional Chief Judicial Magistrate (I) Paonta Sahib, District Sirmaur, in Cr. Complaint No. 91/3 of 2009, whereby learned Court below, while holding petitioner-accused (hereinafter, 'accused') guilty of having committed offence punishable under S.138 of the Negotiable Instruments Act (hereinafter, 'Act'), convicted and accordingly sentenced him to undergo rigorous imprisonment for a period of six months and to pay compensation of Rs.3.00 Lakh and further to undergo four months' imprisonment in case of default.

2. Briefly stated the facts as emerge from the record are that respondent-complainant (hereinafter, 'complainant') filed a complaint under S.138 of the Act in the court of learned Additional Chief Judicial Magistrate (1), Paonta Sahib, alleging therein that the accused used to hire JCB for carrying out construction work of new roads etc. In the second week of May, 2008, accused approached complainant for hiring JCB machine for two months to carry out construction work of road at Village Manal. It is alleged in the complaint that as per agreed terms, charges for hiring machine were Rs.600/- per working hour and Rs.3,000/-

for idle day. It is further alleged in the complaint that it was agreed that the diesel for the JCB would be arranged by accused and payment thereof shall be adjusted towards amount payable to the complainant. It is further borne from the complaint that total work done in May, 2008 was of Rs.95,000/- and after deducting amount of diesel of Rs. 17,500/-, net amount of Rs.77,500/- was due from the accused. Further, total work done for the months of June and July, 2008 was Rs.1,28,595/- after deducting amount of diesel. Thus the total amount due from accused was Rs.2,06,595/-. Accused, with a view to discharge his liability, issued cheque bearing No. 932780 on 10.12.2008 in the name of complainant, amounting to Rs.2,06,000/-. However, fact remains that on presentation, said cheque was returned due to "insufficient funds" in the account of the accused.

3. After having received aforesaid memo from the bank concerned, complainant served accused with legal notice calling upon him to make good the payment within the prescribed period but since accused failed to make good the payment within prescribed period, complainant was compelled to file complaint under S.138 of the Act in the competent Court of law.

4. Subsequently, vide judgment dated 9.10.2015, learned trial Court held the accused guilty of having committed offence punishable under S.138 of the Act and convicted and sentenced him as per description given above. Aggrieved by the same, accused moved the court of learned Additional Sessions Judge by way of appeal under S.374 CrPC, which was dismissed vide judgment dated 2.1.2019 as a consequence of which, judgment of conviction and sentence passed by learned trial Court came to be upheld.

5. Vide order dated 1.4.2019, this Court, while issuing notice to the complainant, suspended substantive sentence imposed by learned trial Court subject to deposit of Rs.50,000/- within six weeks. Pursuant to aforesaid order, a sum of Rs.1,70,000/- has been deposited with the learned trial Court. During the pendency of the case learned counsel for the parties informed that the parties are in the process of settling their dispute amicably *inter se* them and as such, on 31.7.2019, this Court summoned both the parties to the court. Learned counsel representing the parties fairly stated that as per amicable settlement arrived *inter se* parties, they have resolved to settle their dispute amicably inter se them for a sum of Rs.2,70,000/-. Sum of Rs.1,70,000/- stands deposited with the learned trial Court whereas Rs.1.00 Lakh has been handed over to the complainant in the Court itself.

6. Complainant, who is present in Court, stated on oath that he of his own volition and without there being any external pressure has compromised the matter with the accused for Rs.2,70,000/- and he has already received Rs.1.00 Lakh today in the Court and in case amount of Rs.1,70,000/- lying deposited with the learned trial Court is ordered to be released in his favour, he shall have no objection in case, judgments/order of conviction and sentence passed by both the learned Courts below are quashed and set aside and accused is acquitted of the charge framed against him under S.138 of the Act. His statement is taken on record.

7. Having heard learned counsel for the parties and perused the material available on record, this Court sees no impediment in accepting the prayer made in the instant petition in terms of guidelines laid down by Hon'ble Apex Court in **Damodar S. Prabhu** v. **Sayed Babalal H.** (2010) 5 SCC 663,. Needless to say, Hon'ble Apex Court in judgment (supra) has categorically held that power under S.147 of the Act *ibid* can be exercised even in those cases, where accused stands convicted.

8. Consequently, in view of the law laid down by Hon'ble Apex Court in **Damodar S. Prabhu** (supra), present petition is allowed. Impugned judgments/order of conviction and sentence passed by both the learned Courts below are quashed and set aside. Petitioner is acquitted of the offence punishable under S.138 of the Act *ibid*. Bails bonds furnished by him are discharged.

9. Learned trial Court is directed to release the amount deposited by the accused with it, in his favour, on his making a formal application in this regard.

10. The petition is disposed of in aforesaid terms, alongwith all pending applications, if any.

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

Satish Kumar …Petitioner

Versus

State of Himachal Pradesh and others …Respondents

CrMMO No. 525 of 2019

Decided on: September 26, 2019

Code of Criminal Procedure, 1973 – Sections 320 & 482 – Inherent powers – Quashing of FIR in non-compoundable cases pursuant to settlement between parties – Permissibility – Held, power of High Court in quashing FIR, complaint or other criminal proceedings in exercise of its inherent powers is distinct and different from power of criminal court of allowing compounding of offences under Section 320 of Code – Powers under under Section 482 are not circumscribed by Section 320 of Code. (Para 10 & 13).

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 SCC 466

Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497

For the petitioner: Mr. Dinesh Singh Chauhan, Advocate.

For the respondents: M/s Sudhir Bhatnagar, Sanjeev Sood and Sumesh Raj, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General for respondents No.1 and 2/State.

None for respondent No. 3.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under S.482 CrPC, prayer has been made on behalf of the petitioner for quashing and setting aside FIR No. 43, dated 3.6.2019, under Sections 279, 337 and 338 of the Indian Penal Code registered at Police Station, Kumarsain, District Shimla, Himachal Pradesh and consequent proceedings pending in the competent Court of law, on the basis of compromise (Annexure P-2) arrived *inter se* parties.

2. Facts, as emerge from the record are that the FIR in question came to be lodged against the petitioner at the behest of HC Peeyush Raj, who alleged that on 3.6.2019, at about 7.00 am, a car bearing registration No. HP06A-6877 (Swift) met with an accident with motor cycle bearing registration No. HP52A-8391 being driven by respondent No.3, as a consequence of which, petitioner and respondent No. 3 sustained injuries. On the basis of information given by the complainant herein above, case under Ss. 279, 337 and 338 IPC came to be registered against the petitioner, who was driving car bearing registration No. HP06A-6877. Though the investigation stands completed but *Challan* has yet not been presented by the Police. However, before *Challan* could be filed in the competent Court of law, parties have resolved to settle their dispute amicably inter se them, as is evident from compromise dated 20.8.2019 (Annexure P-2.

3. On 11.9.2019, this Court while issuing notice to the respondents, deemed it necessary to cause presence of respondent No.3 so as to ascertain the genuineness and correctness of the compromise placed on record. This Court also directed learned Deputy Advocate General to verify the factum with regard to compromise from the police officials. Pursuant to order dated 11.9.2019, respondent No. 3 Lok Chand has come present with police official namely Sushil Kumar.

4. Respondent No.3, who has come present in the Court, stated on oath before this Court that he has come present of his own volition and without there being any external pressure and has entered into compromise with the petitioner, whereby both the parties have resolved to settle their dispute amicably inter se them. Respondent No. 3 further stated that he shall not have any objection in case, FIR in question alongwith consequent proceedings pending in the competent Court of law, if any, are quashed and set aside and petitioner is acquitted of the charges framed against him. Respondent No.3 has identified his signatures on the compromise, Annexure P-2. His statement is taken on record.

5. Mr. Kunal Thakur, learned Deputy Advocate General, having heard the statement of respondent No.3 and perused the report submitted by the police, fairly stated that in view of statement made by respondent No.3, there are bleak and remote chances of conviction of the petitioner as such, no fruitful purpose shall be served in allowing the criminal proceedings against the petitioner to continue.

6. In view of the aforesaid statement of respondent No. 3, this Court sees no impediment in accepting the prayer made in the instant petition, so far quashment of FIR in question and consequent proceedings is concerned.

7. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

8. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution

> evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

9. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

10. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
>
> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have

settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

11. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of

personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

"... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score..."

"...A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system..."

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision

to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

12. In the case at hand also, the offences alleged against the petitioner do not involve offences of mental depravity or of heinous nature like rape, dacoity or murder and as such, with a view to maintain harmony and peace in the society, this court deems it appropriate to quash the FIR as well as consequential proceedings thereto, especially keeping in view the fact that petitioner and respondent No.3 have compromised the matter with each other, in which case, the possibility of conviction is remote and no fruitful purpose would be served in continuing with the criminal proceedings.

13. Since the matter stands compromised between respondent No.3 and petitioner, no fruitful purpose would be served in case proceedings initiated against the petitioner are allowed to continue. Moreover, present is a simple dispute and since respondent No.3, is no more interested in carrying on with the criminal proceedings, as such, prayer made in the petition at hand can be accepted.

14. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 43, dated 3.6.2019, under Sections 279, 337 and 338 of the Indian Penal Code registered at Police Station, Kumarsain, District Shimla, Himachal Pradesh, and consequent proceedings pending in the competent Court of law, if any, are quashed and set aside. Petitioner is acquitted of the offences levelled against him in the aforesaid FIR.

15. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

****

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

Jaram Singh and others ...Petitioners

Versus

Sh. Anil Kumar Khachi and another ...Respondents

COPC No. 191 of 2017
Reserved on: September 6, 2019
Decided on October 4, 2019

Contempt of Courts Act, 1971 – Section 2(a) & (b) - Contempt – What is ?- Held, contempt is such conduct that defies the authority or dignity of a court or legislature – It is punishable in case it interferes with administration of justice. (Para 41)

Contempt of Courts Act, 1971 – Sections 12 & 15 - Contempt - Purging of contemnor - Tendering of apology – Effect – Held, apology can not be allowed to be used as a weapon of defence – Attempt to justify wrongful act by contemnor would nullify apology offered by him. (Para 52).

Cases referred:

A. Satyanarayana & Others vs. S. Purushotham & Others, (2008) 5 SCC 416

Avishek Raja and others vs. Sanjay Gupta, (2017) 8 SCC 435

Kaiser-I-Hind Pvt. Ltd. and another vs. National Textile Corpn. (Maharashtra North) Ltd. and others, (2002) 8 SCC 182

Chairman, Life Insurance Corporation of India and others vs. A. Masilamani, (2013) 6 SCC 530

Prestige Lights Ltd. vs. State Bank of India, (2007) 8 SCC 449

Jennison vs. Baker (1972) 1 All.E.R. 997

Attorney General vs. Times Newspaper Ltd., 1974 AC 273, Lord Diplock stated: (AC p.308 A)

Chandra Shashi vs. Anil Kumar Verma, (1995) 1 SCC 421

Kalyaneshwari vs. Union of India, (2012) 12 SCC 599

Pravin C. Shah vs. K.A. Mohd. Ali and another, (2001) 8 SCC 650

Subrata Roy Sahara vs. Union of India and Others, (2014)8 SCC 470

Sudhir Vasudeva, Chairman and Managing Director, Oil and Natural Gas Corporation Limited and Others vs. M. George Ravishekaran and Others, (2014) 3 SCC 373

Bihar State Government Secondary School, Teachers Association vs. Ashok Kumar Sinha and Others, (2014) 7 SCC 416

L.D. Jaikwal vs. State of U.P. (1984) 3 SCC 405.

For the petitioners	Mr. Dilip Sharma, Senior Advocate with Mr. Manish Sharma, Advocate.
For the respondents	Mr. Ashok Sharma, Advocate General with M/s Sudhir Bhatnagar and Sanjeev Sood & Kunal Thakur, Deputy Advocate General, for the respondents. Mr. Rajiv Rai, Advocate, for the applicant in CMP No. 8780 of 2018.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant contempt petition (civil) filed under Art. 215 of the Constitution of India read with Ss. 11 and 12 of the Contempt of Courts Act, 1971, prayer has been made on behalf of the petitioners to initiate contempt proceedings against the respondents for willful violation/disobedience of judgment dated 7.8.2009 passed in CWP(T) No. 2162 of 2008 titled as Himachal Pradesh Cooperative Department Inspector Grade-II Union vs. State of Himachal Pradesh and another and two other connected petitions i.e. CWP(T)'s Nos. 3189 and 4244 of 2008, which has been further affirmed in LPA No. 10 of 2010 titled Roshan Lal and others vs. the State of Himachal Pradesh and others, decided on 6.9.2016.

2. Certain undisputed facts, which have led to filing of the instant contempt petition and may be crucial for the adjudication of the controversy at hand, are that the Inspector Grade-II Union filed OA No. 1369 of 1993, seeking therein direction to the State Government for merger of cadre of Inspector Grade-II with that of Inspector Grade-I, on

Punjab pattern. Aforesaid Original Application subsequently came to be transferred to this Court and registered as CWP(T) No. 2162 of 2001 after abolition of erstwhile Himachal Pradesh Administrative Tribunal, whereafter, matter came to be heard and decided by the Single Judge of this Court. State Government issued necessary Notification merging the cadre of Inspector Grade-II with that of Inspector Grade-I on 1.8.1995.

3. Another set of employees being aggrieved with the issuance of Notification dated 1.8.1995, also approached erstwhile Himachal Pradesh Administrative Tribunal by way of OA No. 879 of 1996, which also came to be transferred to this Court and registered as CWP(T) No. 3189 of 2008. Yet another set of employees filed OA No. 533 of 1997, which was also transferred and registered in this Court as CWP(T) No. 4244 of 2008, for enforcement of Notification dated 1.8.1995 issued by the State Government.

4. State Government, with a view to balance equities *inter se* two warring sections, filed a supplementary affidavit of Mr. V.C. Katoch, the then Joint Secretary (Co-operation), on 7.7.1997 in OA No. 879 of 1996. Operative portion of the same is as under:

> "6(i) The Government notification No. Coop-A(1)-1/95, dated 1.6.1996 merging the Inspector Grade-II with that of Inspector Grade-I shall be effective w.e.f. 1.8.1995 instead of 1.7.1995. In this way, the promotion orders issued on 24.7.1995 whereby services of 12 Inspectors were regularized shall remain intact.
>
> (ii) The present applicants in O.A. No. 879/1996 as well as other similarly situate persons promoted on 1.6.1996 will not reverted and they will be entitled for benefits available under F.R. 22-C while fixing their pay.
>
> (iii) That the inter-se seniority of the applicants (Clerks) promoted on 1.6.1996 and the merged Inspector cadre will be based on the length of service of the concerned clerks and Inspectors. This will be done in relaxation of the existing provision of the R&P Rules for the post of Inspector Grade-I.
>
> (iv) That State Government contemplates framing of new R&P Rules for the category of Inspector Grade-I wherein we are proposing to increase the promotion to a reasonable level of clerks against 30% quota as available at present."

5. Learned Single Judge, after ascertaining from learned counsel for the parties, whether petitions as referred to above can be disposed of on the basis of working formula suggested as per supplementary affidavit, directed State of Himachal Pradesh to do the needful as per supplementary affidavit filed by Mr. V.C. Katoch, in OA No. 879 of 1996 {CWP(T) No. 3189 of 2008}, as referred to above. Careful perusal of the aforesaid judgment of learned Single Judge clearly reveals that the counsel appearing for the parties, in all the three petitions, informed this Court that the formula evolved by Mr. V.C. Katoch, by way of supplementary affidavit, is acceptable to the parties. Record also reveals that Review Petition No. 56 of 2009 was also filed, which was dismissed vide judgment dated 20.1.2009.

6. Being aggrieved and dissatisfied with the aforesaid judgment (Annexure C-1) passed by learned Single Judge, which was otherwise passed with the consent of the parties including State of Himachal Pradesh, some of the employees, who being aggrieved by Notification dated 1.8.1995, had approached Himachal Pradesh Administrative Tribunal, by way of CWP(T) No. 3189 of 2008, filed LPA No. 10 of 2010 before a Division Bench of this Court. However, Division Bench of this Court having noticed that impugned judgment was passed with the consent of the parties, refused to interfere.

7. Similarly, another LPA No. 108 of 2010 titled Rajesh Jaswal vs. State of Himachal Pradesh and others filed by directly recruited Inspector Grade-I claiming seniority over merged Inspector Grade-I, was also dismissed on 8.12.2016, whereafter, on 25.2.2017, final seniority list of Inspectors Cooperative Societies came to be circulated. It also emerges from the record that writ petitioners namely Rajesh Jaswal and others had also filed SLP(C)

No. 7783 of 2017 in Hon'ble Apex Court, against the judgment and order dated 8.12.2016, whereby their LPA was dismissed by Division Bench of this Court, but such SLP was subsequently dismissed as having become infructuous, vide order dated 22.9.2017 passed by Hon'ble Apex Court.

8. Since in the seniority list as referred to above, principle of "length of service" as enumerated in para-6 of supplementary affidavit dated 7.7.1997 filed by the respondent-State at the time of passing of judgment dated 7.8.2009, which subsequently came to be upheld in LPA No. 10 of 2010, decided on 6.9.2016, was violated, petitioners were constrained to file instant contempt petition, seeking therein appropriate action against the respondents.

9. Pursuant to notice issued in the petition at hand, Registrar Cooperative Societies, Shri Beer Singh Thakur, filed his personal affidavit, wherein factual narration of facts as taken note herein above stands duly admitted. However, in para-8 of the supplementary affidavit, above named officer took altogether different stand by sating as under:

> "8. That the contempt petitioners in the contempt petition have alleged that the department of the deponent in violation of the judgment dated 07.08.2009 passed in CWP(T) 2162 of 2008 as confirmed in LPA No. 10 of 2010 have finalized the inter-se seniority of merged Inspectors and clerks and has wrongly placed the petitioners below some of the mergerist Inspectors and clerks who are otherwise junior to them on the basis of length of service. In this behalf submissions of the replying deponent is that the petitioners No.1, 2 and 3 had joined their duties in the cadre of Sub-Inspectors on 21.01.1987, 17.01.1987 and 17.01.1987 respective and one Smt. Kiran Gurang who had joined her duties on 20.02.1987 was placed above petitioners in the final seniority list of Sub-Inspectors dated 01.02.1991 on the basis of merit as determined by the public service commission. It is pertinent to submit here that the seniority of the Sub-Inspectors as it stood on 01.02.1991 was finalized on the basis of the general principles of seniority as contained under para 13.4.3 of Hand Book on Personnel Matters Vol.I (Second Edition) of the Government of Himachal Pradesh. While fixing the inter-se seniority in the cadre of Inspectors on the basis of Judgment dated 07.08.2009 of the Hon'ble High Court, the original seniority of the mergerist Inspectors and the promoted clerks in their own feeder category was not disturbed. Though, the petitioners had joined their duties in feeder category i.e. Sub-Inspector before the mergerist Inspectors and promoted clerks as shown in the table of para-6 of the contempt petition but on the basis of merit they were junior to Smt. Kiran Gurang and Sh. Kuldeep Kumar, who have joined their duties after the promoted clerks shown in table, therefore, the petitioners were placed below these incumbents in the seniority list of Inspectors. There are numerous instances where the incumbents who had ranked higher in the merit of Public Service Commission had been placed higher in seniority list irrespective of the fact that they had joined their duties much later than the incumbents ranked lower in merit of the Public Service Commission. It is pertinent to submit here that the petitioners had never made any representation on the final seniority list of Sub-Inspectors as it stood on 01.02.1991.
>
> 9. That it is also pertinent to submit here that Sh. Narender Dutt one of the Inspectors among the mergerist had filed a Civil Writ Petition in the Hon'ble High Court baring No. CWP No. 7501 of 2013 challenging the seniority list of Inspectors on the similar facts and issues discussed herein above. The petitioner in this petition had prayed to place him above the promoted clerks in the seniority list who had joined after him on the basis of formula suggested by Sh. V.C. Katoch the then Joint Secretary (Coop.) to the Govt. of HP. A copy

of CWP No. 7501 of 2013 is annexed herewith for the kind perusal of this Hon'ble High Court and marked as **Annexure R-IV**. The department of the deponent had filed reply to the petition and took the stand as reiterated in para-8 supra. A copy of reply filed by the department of the deponent to the CWP No. 7501 of 2013 is annexed herewith for the kind perusal of this Hon'ble High Court and marked as **Annexure R-V**. On establishment of the Himachal Pradesh Administrative Tribunal, the writ petition was transferred to the Ld. Administrative Tribunal and was numbered as TA-4244 of 2015. The TA was not decided on merit as the petitioner withdrew the same on 06.01.2017. A copy of order dated 06.01.2017 of the Ld. Administrative Tribunal is annexed herewith for the kind perusal of this Hon'ble Court and marked as **Annexure R-VI**.

10. That the replying deponent humbly submits that keeping in view the peculiar facts and circumstances of the case the inter-se seniority if the mergerist Inspectors and promoted clerks has been fixed as per mandate of judgment dated 07.08.2009 and 06.09.2016 in a bonafide manner as per length of service and without disturbing the intra seniority of their respective cadres. The replying deponent has not disobeyed or circumvented the judgments of the Hon'ble High Court in any manner. As per spirits of the judgments, arrears of pay to the entitled/eligible mergerist Inspectors have been paid and even the eligible mergerist Inspectors have been promoted to the next promotional post of DI/DAO and further to the post of ARCS."

10. Petitioners, by way of rejoinder, reiterated that while implementing the formula of "length of service" for determining seniority of the incumbents of two cadres, respondents have introduced a new formula, which was not the part of the formula devised by the then Joint Secretary (Co-operation) to the Government of Himachal Pradesh. Petitioners have further claimed that Notification dated 11.2.2011 and letter dated 5.7.2011 (Annexure R-II and Annexure R-III of compliance affidavit dated 13.9.2017, age Pp. 47 and 49) are in consonance with the formula suggested by the then Joint Secretary (Co-operation), which was further approved by this Court. While fixing seniority of mergerist inspectors on the basis of length of service, as approved by this Court, respondents have virtually modified the formula as approved by this Court by fixing seniority without disturbing the seniority in their respective cadres, which was not the part of the formula approved by this court.

11. On 16.12.2017, this Court having carefully perused the aforesaid affidavit filed by Registrar Cooperative Societies, sought clarification qua interpretation of para-4 of the instructions pertaining to seniority (page-89) from the Principal Secretary (Cooperation) to the Government of Himachal Pradesh and till then, directed that no promotions shall be made on the basis of seniority.

12. By way of affidavit dated 3.1.2018 filed by Principal Secretary (Cooperation) in compliance to aforesaid order dated 16.12.2017, respondents submitted that the general principle for determining seniority in the case of direct recruits provides that relative seniority of the recruits shall be determined by the order of merit in which they are selected for appointment on the recommendations of the Union Public Service Commission (Commission) or other selecting Authority. Person appointed as a result of earlier selection shall remain senior to those appointed as a result of subsequent selection; provided that where person recruited initially on temporary basis is confirmed subsequently in order different from the order of merit, inducted at the time of their appointment, seniority shall follow order of confirmation and not original order of merit.

13. In view of aforesaid clarification, respondents claimed that in view of approved order of merit, selection recommended by the Commission cannot be altered/changed subsequently except in case of temporary recruits subsequently confirmed.

14. On 26.4.2018, this Court having perused aforesaid affidavit, directed the respondents to file fresh affidavit clarifying the stand taken in para-2 of the affidavit dated 3.1.2018, filed by Principal Secretary (Cooperation). On 31.5.2018, Principal Secretary (Cooperation) filed a fresh supplementary affidavit in terms of order dated 17.5.2018, giving therein complete details with regard to facts and circumstances, which led to filing of affidavit dated 7.7.1997 by Mr. V.C. Katoch, the then Joint Secretary (Co-operation) to the Government of Himachal Pradesh, on the basis of which judgment dated 7.8.2009, came to be passed by learned Single Judge in different set of petitions filed by different petitioners.

15. It would be apt to take note of following paras of the affidavit filed by the then Principal Secretary (Cooperation): -

> "(h) That after scrapping of the Hon'ble H.P. Administrative Tribunal, the O.A. No. 1369 of 1993 was converted to CWP (T) No. 2162 of 2008, the O.A. No. 879 of 1996 to CWP(T) No. 3189 of 2008 and O.A. No. 533 of 1997 to CWP(T) No. 4244 of 2008. It is submitted that all the above mentioned CWPs were decided by the Ld. Single Judge of this Hon'ble Court by a common judgment dated 7.8.2009.
>
> (i) That Sh. Deepak Sanan, the Registrar Co-operative Societies, H.P., who then was, gave a detailed account to the State Government of the administrative complication being faced by the department in the implementation of merger notification as well as promotion orders. He also suggested possible solution to resolve the problems after holding meetings with the representatives of NGO's Association of the Department and Inspector Grade-II. The points of mutual understanding between the two feeder categories, as conveyed to the Government on 29.11.1996, are reproduced as under:-
>
> "Both parties are basically agreed on the following:-
>
> (i) That the merger should take place.
>
> (ii) That both the Inspector and clerks promoted on 24.07.1995 should not be adversely affected and should remain senior to the Inspector Gr. II benefitted by the merger.
>
> (iii) That the Clerks promoted on 01.06.1996 should not be reverted.
>
> (iv) That the inter-se seniority of the clerks promoted on 01-06-1996 and the merged Inspector cadre should be based on length of service of the concerned Clerks and Inspectors.
>
> In order to ensure that all these objections are met, the date of merger of both grades of Inspectors can be any date after 24-07-1995 (preferably 01-08-1995) and the D.P.C. of 01-06-1996 with respect to Clerks should be allowed and the Clerks promoted on that date should be placed in the seniority list of Inspector as per their length of service ... "
>
> A copy of the above letter dated 29.11.1996, written by the then Registrar Co-operative Societies, H.P. to the Commissioner-cum-Secretary (Co-operation) to the Govt. of H.P., is enclosed herewith as **Annexure R-1**, for the kind perusal of this Hon'ble Court.
>
> (j) That based on the above proposal of the Registrar, on 7.7.1997, the Joint Secretary (Co-operation) to the Government of H.P. filed a supplementary affidavit in O.A. No. 879 of 1996 as converted to **CWP(T) No. 3189 of 2008** titled as Roshan Lal and others vs. State of H.P. and another, which affidavit and the formula suggested therein, later on, became part of the common judgment dated 7.8.2009, rendered by the Ld. Single Bench of the Hon'ble High Court.

(k) That the original proposal to resolve the impasse between Inspector Grade-II and Clerks vis-à-vis their seniority was sent by the Registrar to the State Govt., therefore, the import and intent of the formula proposed by the Joint Secretary (Co-operation) on 7.7.1997 in O.A. No. 879 of 1996 can be traced in the letter of the Registrar dated 29.11.1996 (supra) written, to the Commissioner-cum-Secretary (Co-operation).

(l) That the last para of the letter of the Registrar, unequivocally, spells out the intention and clarify as to how the seniority of merged Inspector Grade-II and promoted Clerks is to be determined. For the sake of brevity, the same is reiterated as follows:

"*In order to ensure that all these objectives are met, the date of merger of both grades of Inspectors can be any date after 24-07-1995 (preferably 01-08-1995) and the D.P.C. of 01-06-1996 with respect to clerks should be allowed and the Clerks promoted on that date should be placed in the seniority list of Inspector as per their length of service.".*

(m) That from above, it is clear that it has never been the intent and mandate of the aforesaid proposal to disturb the settled position of seniority of the 147 merged Inspectors Grade –II *inter se*, assigned by the commission/selecting authority. Here was no dispute with regard to the *inter se* seniority lo the merged Inspector Grade II cadre, until the 23 promoted Clerks were placed as per their length of service in between the merged Inspectors. Thus while placing the Clerks in the seniority list of Inspectors, only the length of service of the promoted Clerks, and not of the merged Inspectors, was to be taken into account while, at the same time, the already assigned original *inter se* seniority of the merged Inspectors was not to be disturbed.

(n) That the *inter se* seniority of the merged Inspectors was fixed by the department with due caution and precision as per the instructions contained under para 4 of Hand Book of Personnel Matters, Vol.-I. It is worth mentioning that seniority in cases of delay in reporting for duty after selection is governed by the Govt. of India O.M. No. 9/23/71-Estt.(D) dated 6.6.1978 and O.M. No. 351015/2/93/Estt.(D) dated 9.8.1995. As such, the candidates who join within the period as specified in the above O.Ms will have their seniority fixed under the seniority rules applicable to the service/post concerned to which they are appointed, without any depression fo seniority. Thus, in a cadre of service, a candidates high in merit but joining late within the specified period cannot be lowered in sonority on account of the fact that a candidate junior to him in merit has joined the service earlier.

(o) That while fixing the *inter se* seniority of the Inspector Grade II, the above mentioned rules (as discussed in preceding para) regarding determination of seniority was scrupulously followed. It is respectfully submitted that the Inspector Grade II who has been assigned higher merit by the Commission or other selecting authority thus, cannot become junior to another Inspector Grade II only because he had joined his duty late after selection.

(p) Therefore, without disturbing the already fixed *inter se* seniority of Inspector Grade II, the promoted clerks as per their length of service were placed in between the sonority of Inspector Grade-II as per the spirit of the supplementary affidavit of Sh. V.C. Katoch. In determining the seniority of Inspectors Grade-I, the Clerks who had longer length of service than merged Inspectors have been placed higher on the board in the seniority list as per their length of service while the original seniority of merged Inspectors *inter se*, as assigned by the Commission or other selecting authority, has been kept intact as per the instructions of Personnel Department and for the reason that

it was never the intent and spriti of the supplementary affidavit to reshuffle the seniority of the merged Inspectors *inter se*, as per their length of service. With all humility it is submitted that before filing the affidavit dated 7.7.1997, detailed deliberations took place t various levels in the department and between the representatives of merged Inspector Grade-II and Clerks promoted on 1.6.1996. And, keeping in view those deliberations, the Affidavit filed on 7.7.1997 is required to be appreciated by this Hon'ble Court.

(q) That after issuing the tentative seniority list of Inspector Grade-I as it stood on 31.12.2007, post merger, the department received some representations from the merged Inspectors challenging the method and manner in which they were placed in the seniority list. These representations were decided by the Registrar in accordance with the instructions contained in the Hand Book of Personnel Matters Vol.-I and as per the spirit of the supplementary affidavit of the State Govt. (supra). Aggrieved by the decision of the Registrar, the aggrieved parties approached the State Government. The govt. also upheld the decision of the Registrar. The Govt. was also aware of the object behind filing the supplementary affidavit and the manner in which the relative seniority of both the cadres was to be fixed in the combined seniority of Inspector Grade-I as per the proposal of the Registrar dated 29.11.1996. Accordingly, the representations were decided at the Govt. level. It is submitted that one of the similarly situate merged Inspector Grade-II filed an O.A. No. 7501 of 2013 titled Narinder Dutt vs. State of H.P. in the Hon'ble H.P. Administrative Tribunal against the above decision of the Govt./ Registrar but, later on, withdrew the O.A. in order to secure his promotion. He, ultimately, was promoted to the post of DAA/DI/ when the Registrar finalized the seniority list owing to withdrawal of O.A. by the applicant. the contempt petitioners herein were also promoted to the post of DI/DAO after the finalization of seniority list of Inspector Grade-I and they received all financial benefits attached to the higher post. It is only after the contempt petitioners availed the benefits of promotion that they chose to file the present Contempt Petition. This Hon'ble court, on the prayer of the contempt petitioners, vide order dated 16.12.2017 has been pleased to restrain the respondents not to make promotions on the basis of final seniority of Inspector Grade-I (Annexure C-4). The Interim order dated 16.12.2017 has been ordered to be continued till further orders by this Hon'ble Court vide order dated 4.1.2018.

(r) That in the supplementary affidavit dated 7.7.1997, filed by the Joint Secretary (Co-operation), it has been mentioned that the inter-se seniority shall be fixed in relaxation of the existing provision of R&R Rules for the post of Inspector Grade-I. In this regard it is submitted that under clause 11 of the R&P Rules dated 15.5.1986 roaster for determination of *inter se* seniority among each feeder category has been prescribed which is to be taken as base for preparation of seniority in the higher cadre of Inspector Grade-I. A copy of the R&P Rules is annexed herewith and marked as **Annexure R-2**. The said condition of following the roaster point was to be relaxed to the extent that the seniority list of the promoted incumbents from the clerical cadre could be prepared on the basis of length of service in their respective grade vis-à-vis combined cadre of Inspector Grade-I and Grade-II. It is submitted that proposal to this effect, after discussions with the representatives of both the categories that is Inspector Grade-II and Clerks, was submitted by the Registrar Co-operative Societies to the Government vide letter dated 27th June, 1996, a copy of which is enclosed and marked as **Annexure R-3**, for the kind perusal of this Hon'ble Court."

16. It is apparent from the perusal of aforesaid affidavit that an attempt has been made by the respondents to project that it was never the intent and mandate of the proposal which ultimately came to be placed before learned Single Judge in the shape of affidavit filed by Mr. V.C. Katoch, the then Joint Secretary (Co-operation), to disturb the settled position of merit of Inspector Grade-II *inter se* assigned by the Commission/selecting Authority. As per proposal, while placing Clerks in the seniority list of Inspector, only length of service of promoted clerks and not that of merged Inspectors was to be taken into account and already assigned original inter-se seniority of the merged Inspectors was not to be disturbed.

17. After filing of the aforesaid affidavit, a few of the persons who are working as Inspectors, District Inspectors and District Auditors, being aggrieved and dissatisfied with the interim order dated 16.12.2017, whereby Department was restrained from effecting promotions on the basis of seniority list (Annexure C-4), approached this Court by way of application filed under Order I, rule 10 CPC, seeking their impleadment in the present proceedings. While opposing aforesaid prayer made on behalf of the officials as referred to above, petitioners reiterated that seniority list has been issued in flagrant violations of the judgment as such, same cannot be given effect to.

18. On 19.11.2018, Division Bench of this Court, having noticed judgment rendered by Hon'ble Apex Court in **A. Satyanarayana & Others** vs. **S. Purushotham & Others**, (2008) 5 SCC 416, wherein it has been held that a Government servant in his service, must have 2-3 promotional avenues and he should not be allowed to stagnate on one post, directed learned Additional Advocate General to seek current instructions. On 28.11.2018, learned Additional Advocate General reiterated that the seniority list has been drawn strictly in terms of supplementary affidavit filed by Mr. V.C. Katoch, the then Joint Secretary (Co-operation), however, this Court directed respondents to file a fresh affidavit stating therein aforesaid fact.

19. Pursuant to order dated 28.11.2018, Additional Chief Secretary(Cooperation) to the Government of Himachal Pradesh has filed a supplementary affidavit, stating therein that affidavit in compliance to directions issued by this Court on 17.5.2018, stands already filed on 29.5.2018, narrating therein admitted facts and circumstances, in which impugned seniority list was prepared. In this affidavit, respondents again reiterated that the seniority list of the Inspector Grade-I and promoted Clerks has been fixed strictly in terms of supplementary affidavit filed by Mr. V.C. Katoch, the then Joint Secretary (Co-operation).

20. I have heard learned counsel for the parties and perused the material available on record.

21. It is not in dispute that judgment said to have been violated came to be passed on the basis of working formula suggested by way of supplementary affidavit filed by the then Joint Secretary (Co-operation). State Government, with a view to balance equities *inter se* mergerist Inspectors and promoted Clerks placed on record formula, as has been taken note herein above, which *inter alia* provided for determining seniority amongst two cadres on the basis of length of service in their respective cadres.

22. Para-6 (iii) of the affidavit filed by the then Joint Secretary (Co-operation) on 7.7.1997, clearly suggests that as per formula agreed *inter se* parties, inter-se seniority of clerks promoted on 1.6.1996 and merged Inspectors cadre is/was to be decided on the basis of length of service of the concerned Clerks and the Inspectors, and such exercise is/was to be done in relaxation of the existing provisions of R&P Rules for the post of Inspector Grade-I. Consistent stand from day one of the respondents has been that seniority of Clerks and Inspector Grade-I has been fixed in the spirit of supplementary affidavit filed by the then Joint Secretary (Co-operation).

23. Mr. Ashok Sharma, learned Advocate General, vehemently argued that there is no willful disobedience and violation, if any, of judgment dated 7.8.2009, passed by learned Single Judge of this Court which has been further upheld in LPA, because, final seniority list

of the Inspectors (Cooperative Societies) circulated after dismissal of LPA's Nos. 10/2010 and 108 of 2010, is strictly in terms of working formula suggested by Mr. V.C. Katoch, the then Joint Secretary (Co-operation). He further contended that inter-se seniority of the mergerist Inspectors and promoted Clerks has been fixed as per mandate of judgments dated 7.8.2009 and 6.9.2016 in a bona fide manner as per length of service and without disturbing intra seniority of their respective cadres and as such, present contempt petition deserves outright rejection. Mr. Sharma, learned Advocate General further contended that general principles of determining seniority in the case of direct recruits provide that relative seniority of the recruits shall be determined by the order of merit, in which they were selected for appointment on the recommendations of the UPSC or other selecting Authority and as such, person appointed as a result of earlier selection being senior to the petitioner has been rightly placed above in the seniority. Mr. Sharma, learned Advocate General further contended that if discussion and deliberations held by the Government prior to filing of affidavit of Mr. V.C. Katoch, the then Joint Secretary (Co-operation) are examined/perused carefully, it was never the intent and mandate of the proposal to disturb the settled position of Inspector Grade-II, inter se. As per proposal, while placing clerks in the seniority list of the Inspectors, only length of service of the promoted clerks and not of the merged Inspectors was to be taken into account. Lastly, Mr. Sharma, learned Advocate General contended that though inter-se seniority of Inspector Grade-I and promoted Clerks has been fixed in view of the spirit of the affidavit filed by Mr. V.C. Katoch, the then Joint Secretary (Co-operation) but if petitioners are not satisfied with the aforesaid decision taken by the Government, they are required to file substantive petition challenging therein aforesaid decision of the Government but definitely there is no contempt, if any on the part of the respondents, who in their wisdom have complied with the judgment in question.

24. To the contrary, Mr. Dilip Sharma, learned Senior Advocate duly assisted by Mr. Manish Sharma, Advocate, representing the petitioners, while referring to clause 6(iii) of supplementary affidavit of the Joint Secretary (Co-operation), which stands reproduced in the judgment dated 7.8.2009, passed by learned Single Judge, contended that as per agreed terms, inter-se seniority of the Clerks promoted on 1.6.1996, and merged Inspectors cadre is/was to be fixed on the basis of length of service of the concerned Clerks and Inspectors and as such, it cannot be said that judgment in question has been complied with, rather, respondents have willfully and intentionally violated the principle of length of service to benefit the Clerks and to the detriment of Inspectors upgraded as Inspector Grade-I, while framing seniority list. Mr Sharma, learned Senior Advocate argued that on the basis of the date of merger, promoted Clerks would have been junior to the merged inspectors that is why, formula of length of service with regard to their entry grade as Inspector Grade-II was devised instead of fixing seniority on the basis of dates of their merger/promotion, as such, plea of the Department that in the merit list of Sub Inspectors, Smt. Kiran Gurang was placed above the petitioners and her date of joining as Sub Inspector being later than that of the Clerks, hence, the petitioners have been pushed down in seniority, is contrary to judgment in question. Mr. Sharma, learned Senior Advocate further contended that the bare perusal of the supplementary affidavit by Mr. V.C. Katoch would reveal that the seniority of the petitioners i.e. merged Inspectors, who were Sub Inspectors before merger and were merged in the cadre of Inspectors with effect from 1.8.1995 and Clerks promoted, was to be fixed on the basis of length of service of the concerned Clerks and Inspectors and it was never the intent of the State that while fixing inter-se seniority of promoted Clerks and merged Inspectors, length of service of the promoted Clerks would only be taken into account and not of the merged Inspectors, as such, respondents by way of circulating seniority list placing petitioners below the Clerks, have attempted to re-write the judgment passed by learned Single Judge of this Court, which has been otherwise upheld till Hon'ble Supreme Court of India.

25. Having carefully perused the working formula placed before the Court by the respondents at the time of passing of judgment dated 7.8.2009 in CWP(T) No. 2162 of 2008, this Court finds considerable force in the argument of Mr. Sharma, learned Senior Advocate

representing the petitioners that there was no stipulation in affidavit dated 7.7.1997 that while fixing inter-se seniority of the promoted Clerks and merged Inspectors, only the length of service of the Clerks is to be taken into account and not of the merged Inspectors, rather, it stands duly mentioned in Clause 6(iii) of the supplementary affidavit that while determining inter-se seniority of the Clerks promoted on 1.6.1996 and the merged Inspectors cadre, length of service of the Clerks and Inspectors would be taken into consideration and such exercise would be done in relaxation of existing provisions of R&P Rules for the post of Inspector Grade-I.

26. In the case at hand, though the constant stand of the respondents has been that inter-se seniority of the petitioners (Inspectors) and Clerks promoted on 1.1.1996, has been fixed strictly in terms of the working formula suggested by the then Joint Secretary (Co-operation) but it clearly emerges from the record especially repeated affidavits filed by the respondents that inter-se seniority of promoted clerks and inspectors has been fixed as per length of service without disturbing intra seniority of their respective cadres, which action of the respondents is totally in conflict with the spirit of judgment dated 7.8.2009, which has attained finality.

27. It has been stated by the respondents in their affidavits that petitioners No. 1 to 3 had joined their duties in the cadre of sub inspectors on 21.1.1987 and 17.1.1987, whereas, Smt. Kiran Gurang, who had joined her duties on 20.2.1987, was placed above the petitioners in the final seniority list of the Inspector as it stood on 1.2.1991, on the basis of the merit determined by Public Service Commission. It has been further averred that the seniority of the inspectors as it stood on 1.2.1991 was finalized on the basis of general principles of seniority as contained in Para 13.4.3 of Hand Book on Personnel Matters, Vol. I, Second Edition. As per respondents, while fixing inter-se seniority of the cadre of Inspectors on the basis of judgment dated 7.8.2009 passed by learned Single Judge of this court, original seniority of the mergerist inspectors and promoted Clerks in their own feeder cadre was not disturbed. Respondents, with a view to justify their action, further claimed that though the petitioners had joined their duties in the feeder cadre i.e. Inspectors before mergerist Inspectors and promoted Clerks as shown in table given in para-6 of the contempt petition, but on the basis of merit, they were junior to Kiran Gurang and Kuldeep Kumar, who had joined their duties after promoted Clerks shown in the table, as such, petitioners were placed below these incumbents in the seniority list of the Inspectors.

28. In the petition at hand, this court is only concerned with the implementation of judgment passed by learned Single Judge, which has been affirmed upto Hon'ble Supreme Court of India, as such, this Court is only required to see whether mandate given in the judgment has been complied with in its letter and spirit or not? As per judgment admittedly, inter-se seniority of the clerks promoted on 1.6.1996 and the mergerist inspectors is/was to be based on the length of service of the Clerks/Inspectors, as such, stand taken by the respondents that, while fixing inter-se seniority of the clerks and Mergerist Inspectors only length of service of promoted Clerks was required to be taken into consideration, is totally contradictory to the working formula placed by it before learned Single Judge, because, as per agreed formula, inter-se seniority of the Clerks promoted on 1.6.1996 and mergerist Inspectors was to be determined on the basis of length of service of the concerned Clerks and Inspectors as such, it is not understood that how respondents can take a stand that while undertaking aforesaid exercise, only length of service of the Clerks is/was required to be taken into consideration.

29. During pendency of the contempt petition, respondents by way of supplementary affidavit have made an attempt to justify their action by stating that original proposal to resolve the impasse between Inspector Grade-II and Clerks vis-à-vis their seniority was sent by the Registrar to the State Government and import and intent of the formula proposed by the then Joint Secretary (Co-operation) on 7.7.1997 in OA No. 879 of 1995 can be gathered from letter of the Registrar dated 29.11.1997, written to the Commissioner-cum-

Secretary (Cooperation), wherein it is observed that, "*In order to ensure that all these objections are met, the date of merger of both grades of Inspectors can be any date after 24-07-1995 (preferably 01-08-1995) and the D.P.C. of 01-06-1996 with respect to Clerks should be allowed and the Clerks promoted on that date should be placed in the seniority list of Inspector as per their length of service.* "

30. No doubt, if aforesaid proposal is taken into consideration, respondents are right in stating that intent and mandate of aforesaid proposal is/was that original seniority of the mergerist Inspectors and promoted Clerks in their own feeder cadre would not be disturbed while fixing their inter-se seniority, which would be based on length of service of the Clerks, but the fact remains that Para 6(iii) of the affidavit of Mr. V.C. Katoch, the then Joint Secretary (Co-operation), clearly provides that the inter-se seniority of the applicants (Clerks) promoted on 1.6.1996, and mergerist Inspectors cadre would be based on length of service of the Clerks and Inspectors. On the basis of aforesaid affidavit, judgment dated 7.8.2009, came to be passed with the consent of the parties, as such, petitioners herein are right in contending that principle of length of service has been violated by the respondents to benefit the Clerks and to the detriment of the petitioners i.e. Sub Inspectors upgraded as Inspector Grade-I, while framing seniority list.

31. It is not in dispute that a Review Petition was filed against aforesaid judgment passed by learned Single Judge, but the same was dismissed, whereafter, directly recruited Inspector Grade-I claiming seniority over merged Inspector Grade-I, filed LPA No. 108 of 2010, which was dismissed. Directly recruited Inspector Grade-I also laid challenged to judgment dated 8.12.2016 passed in LPA No. 108 of 2010, titled Rajesh Jaswal and others vs. State of Himachal Pradesh before Hon'ble Supreme Court of India, but the same was dismissed as withdrawn, as having been rendered infructuous.

32. Learned Advocate General, while advancing argument that, in fact, there is no contempt on the part of the respondents, pressed into service law laid down by Hon'ble Apex Court in **Avishek Raja and others** vs. **Sanjay Gupta**, (2017) 8 SCC 435, whereby it has been held that a wrong understanding of the award would not amount to willful default so as to attract the liability of civil contempt as defined under S.2(b) of the Contempt of Courts Act, 1971. However, aforesaid argument advanced by learned Advocate General is totally misplaced in as much as that here the question is not with regard to understanding of the judgment stated to have been violated, rather question is whether the respondents have honoured the undertaking given by them by way of supplementary affidavit of the then Joint Secretary (Co-operation), at the time of passing of the judgment in question, which undertaking in fact, is the basis of said judgment. Whatever the import or insinuation of the undertaking be, respondents ought to have stuck to the same and honoured it and, act of the respondents in deviating from the stand taken by them in the undertaking/supplementary affidavit is sufficient to persuade this Court to infer that there is a willful disobedience on the part of the respondents. Moreover, it has never been the case of the respondents that they failed to understand the judgment in question rather consistent stand of the respondents has been that they have, in fact, complied with the judgment in question. Yet another aspect of the matter is that the respondents laid challenge to the judgment in question, by way of review petition, LPA etc. which were dismissed, hence, respondents cannot say that through all these years, they could not understand the judgment.

33. Otherwise also, in contempt proceedings, court is only concerned with the implementation of the judgment said to have been violated, and definitely, it cannot go into the question of intent or import of decision taken by the Government, which ultimately came to be placed by way of affidavit filed by Mr. V.C. Katoch, the then Joint Secretary (Co-operation). Principal Secretary (Cooperation) to the Government of Himachal Pradesh, in his supplementary affidavit dated 29.5.2018 filed in terms of order dated 17.5.2018, has clearly admitted that while placing Clerks in the seniority list of Inspectors, only length of service of the promoted Clerks and not of merged Inspectors has been taken into account, which action

of the respondents is definitely not in consonance with judgment dated 7.8.2009, whereby inter-se seniority of the Clerks and merged Inspectors is to be determined on the basis of length of service of the Clerks and Inspectors. It has been further averred in the affidavit referred to herein above that while determining seniority of Inspector Grade-I, Clerks having longer length of service than the merged Inspectors have been placed higher in seniority as per their length of service whereas, merit assessed by the Commission or other selecting authority has been kept intact as per instruction of the Personnel Department, because it was never the intent and spirit of the supplementary affidavit to reshuffle the seniority of the merged Inspectors inter se them, as per length of service.

34. But, as has been taken note herein above, aforesaid action of the respondents is not in consonance with the mandate given by this Court, while passing judgment dated 7.8.2009, hence, this Court, prima facie, is of the view that the respondents are in contempt.

35. Though, in the case at hand, respondents, by way of affidavit, as referred to above, have tendered unconditional and unqualified apology for not obeying the directions issued by learned Single Judge, but at the same time, by filing repeated affidavits to justify their conduct, an attempt has been made by respondents to hoodwink this Court by stating something which was never part of the original formula, on the basis of which, judgment in question came to be passed.

36. Having carefully perused the material available on record, this Court is of the view that every attempt has been made by the respondents to complicate the issue by taking pleas/stand, which cannot be permitted to be taken at this stage. Since this Court having carefully perused material available on record vis-à-vis mandate given by learned Single Judge, while passing judgment in question, is of the view that there is clear cut violation of judgment stated to have been violated, submission made by Mr. Ashok Sharma, learned Advocate General that since respondents in their wisdom have implemented the judgment, remedy available to the petitioners is to file a substantive writ petition, is wholly misconceived and warrants outright rejection.

37. The word "consideration" has been examined by the Constitution Bench of the Hon'ble Supreme Court in **Kaiser-I-Hind Pvt. Ltd. and another** vs. **National Textile Corpn. (Maharashtra North) Ltd. and others,** (2002) 8 SCC 182, wherein it was held as follows:

> "14. In view of the aforesaid requirements, before obtaining the assent of the President, the State Government has to point out that the law made by the State Legislature is in respect of one of the matters enumerated in the Concurrent List by mentioning entry/entries of the Concurrent List and that it contains provision or provisions repugnant to the law made by Parliament or existing law. Further, the words "reserved for consideration" would definitely indicate that there should be active application of mind by the President to the repugnancy pointed out between the proposed State law and the earlier law made by Parliament and the necessity of having such a law, in the facts and circumstances of the matter, which is repugnant to a law enacted by Parliament prevailing in a State. The word "consideration" would manifest that after careful thinking over and due application of mind regarding the necessity of having State law which is repugnant to the law made by Parliament, the President may grant assent....." (p.197)

38. The word "consider" was scrutinized by the Hon'ble Supreme Court in ***Chairman, Life Insurance Corporation of India and others vs. A. Masilamani, (2013) 6 SCC 530*** and it was held:

> "19. The word "consider" is of great significance. The dictionary meaning of the same is, "to think over", "to regard as", or "deem to be". Hence, there is a clear connotation to the effect that there must be active application of mind. In other words, the term "consider" postulates consideration of all relevant aspects of a matter. Thus, formation of opinion by the statutory authority should reflect intense application of mind with

reference to the material available on record. The order of the authority itself should reveal such application of mind. The appellate authority cannot simply adopt the language employed by the disciplinary authority and proceed to affirm its order." (p-537)

39. Order passed by the competent Court, whether ad-interim or final, is required to be complied with without any reservation. The Hon'ble Supreme Court in ***Prestige Lights Ltd. vs. State Bank of India, (2007) 8 SCC 449*** held that if order passed by the Court is disobeyed/not complied with, it may refuse the party violating the order to hear him on merits. In this regard, the Hon'ble Supreme Court held:

> ***"***24. An order passed by a competent court – interim or final – has to be obeyed without any reservation. If such order is disobeyed or not complied with, the court may refuse the party violating such order to hear him on merits. We are not unmindful of the situation that refusal to hear a party to the proceeding on merits is a "drastic step" and such a serious penalty should not be imposed on him except in grave and extraordinary situations, but sometimes such an action is needed in the larger interest of justice when a party obtaining interim relief intentionally and deliberately flouts such order by not abiding by the terms and conditions on which a relief is granted by the court in his favour." (p.549)

40. Though the respondents in their reply have tendered unconditional and unqualified apology for not obeying the directions issued by this Court, but subsequently an attempt has been made by filing detailed reply affidavit to the Contempt Petition to justify their conduct. Rather an attempt has been made to hoodwink this Court.

41. Black's Law Dictionary (8th Edn., 1999) defines *"contempt" as "Conduct that defies the authority or dignity of a Court or legislature." It also adds that "Because such conduct interferes with the administration of justice, it is punishable."*

42. Salmon L.J. in **Jennison** vs. **Baker (**1972) 1 All.E.R. 997, observed:

> ".....The inherent power of the judges of the High Court to commit for contempt of court has existed from time immemorial. The power exists to ensure justice shall be done. And solely to this end, it prohibits acts and words tending to obstruct the administration of justice. The public at large no less than the individual litigant have an interest and a very real interest in justice being effectively administered". (p.1001)

43. In the celebrated decision of **Attorney General** vs. **Times Newspaper Ltd.,** 1974 AC 273**,** Lord Diplock stated**: (AC p.308 A)**

> ".....There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined

if the order of any court of law could be disregarded with impunity...."

While Lord Morris, summarized the purpose of contempt jurisdiction as follows:

> "In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperiled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted that their authority wanes and is supplanted."

44. The Hon'ble Supreme Court in **Chandra Shashi** vs. **Anil Kumar Verma,** (1995) 1 SCC 421 observed that it is necessary for the Courts to exercise its contempt jurisdiction in order to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehoods have to be appropriately

dealt with, without which it would not be possible for any court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. It was held as under:

> "8. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. People would have faith in courts when they would find that truth alone triumphs is an achievable aim there; or it is virtue which ends in victory is not only inscribed in emblem but really happens in the portals of Courts."(p-425)

45. Likewise, there cannot be any dispute that the Rule of law has to be maintained, whatever be the consequences. This was so observed by the Hon'ble Supreme Court in **Kalyaneshwari** vs. **Union of India,** (2012) 12 SCC 599 wherein it was held as under:

> "10. The rule of law has to be maintained whatever be the consequences. The 'welfare of people' is the supreme law and this enunciates adequately the ideal of 'law'. This could only be achieved when justice is administered lawfully, judiciously, without any fear and without being hampered or throttled by unscrupulous elements. The administration of justice is dependent upon obedience or execution of the orders of the Court. The contemptuous act which interfered with administration of justice on one hand and impinge upon the dignity of institution of justice on the other, bringing down its respect in the eye of the commoner, are acts which may not fall in the category of cases where the Court can accept the apology of the contemnor even if it is tendered at the threshold of the proceedings."(p-604)

46. In this background, the next question that arises for consideration is as to how a contemnor can purge himself for contempt. In **Pravin C. Shah** vs. **K.A. Mohd. Ali and another,** (2001) 8 SCC 650, one of the question which came up for consideration was as to how a contemnor can purge himself for the contempt, although the Hon'ble Supreme Court in the said case was dealing with a criminal contempt. However, the relevant portion of the judgment reads as under:

> "23. Now we have to consider the crucial question how can a contemnor purge himself of the contempt? According to the Disciplinary Committee of the Bar Council of India, purging oneself of contempt can be done by apologising to the court. The said opinion of the Bar Council of India can be seen from the following portion of the impugned order:
>
> > "Purging oneself of contempt can be only by regretting or apologising in the case of a completed action of criminal contempt. If it is a case of civil contempt, by subsequent compliance with the orders or directions the contempt can be purged off. There is no procedural provision in law to get purged of contempt by an order of an appropriate court.
>
> 24. Purging is a process by which an undesirable element is expelled either from ones own self or from a society. It is a cleansing process. Purge is a word which acquired implications first in theological connotations. In the case of a sin, purging of such sin is made through the expression of sincere remorse coupled with doing the penance required. In the case of a guilt, purging means to get himself cleared of the guilt. The concept of purgatory was evolved from the word "purge", which is a state of suffering after this life in which those souls, who depart this life with their deadly sins, are purified and render fit to enter into heaven where nothing defiled enters. (vide Words and Phrases, Permanent Edn., Vol.35A, page 307). In Blacks Law Dictionary the word "purge" is given the following meaning: "To cleanse; to clear. To clear or exonerate from some charge or imputation of guilt, or from a contempt." It is

preposterous to suggest that if the convicted person undergoes punishment or if he tenders the fine amount imposed on him the purge would be completed.

25. We are told that a learned Single Judge of the Allahabad High Court has expressed a view that purging process would be completed when the contemnor undergoes the penalty (vide Madan Gopal Gupta (Dr.) vs. Agra University, AIR 1974 All.39). This is what the learned Single Judge said about it: (AIR p.43, para-13)

> "In my opinion a party in contempt purged its contempt by obeying the orders of the court or by undergoing the penalty imposed by the court."

26. Obeying the orders of the court would be a mode by which one can make the purging process in a substantial manner when it is a civil contempt. Even for such a civil contempt the purging process would not be treated as completed merely by the contemnor undergoing the penalty imposed on him unless he has obeyed the order of the court or he has undone the wrong. If that is the position in regard to civil contempt the position regarding criminal contempt must be stronger. Section 2 of the Contempt of Courts Act categorises contempt of court into two categories. The first category is "civil contempt" which is the willful disobedience of the order of the court including breach of an undertaking given to the court. But "criminal contempt" includes doing any act whatsoever which tends to scandalise or lowers the authority of any court, or tends to interfere with the due course of a judicial proceeding or interferes with, or obstructs the administration of justice in any other manner.

27. We cannot therefore approve the view that merely undergoing the penalty imposed on a contemnor is sufficient to complete the process of purging himself of the contempt, particularly in a case where the contemnor is convicted of criminal contempt. The danger in giving accord to the said view of the learned Single Judge in the aforecited decision is that if a contemnor is sentenced to a fine he can immediately pay it and continue to commit contempt in the same court, and then again pay the fine and persist with his contemptuous conduct. There must be something more to be done to get oneself purged of the contempt when it is a case of criminal contempt."(pp-660-661)

47. This is the duty of this Court to ensure that the majesty, sacrosanctity and dignity of the Institution should not be allowed to be crucified. The purpose of public law is to protect the Constitutional mechanism. The law is required to be implemented in dynamic manner, which may not cause a sense of insecurity or helplessness in the mind of a single individual, as has been stated by **Frank Futer.J** in **Jeennison** case supra:

> "The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope."

48. Hon'ble Apex Court in **Subrata Roy Sahara** vs. **Union of India and Others,** (2014)8 SCC 470, has categorically held that disobedience of orders of a Court strikes at the very root of the rule of law on which the judicial system rests. Judicial orders are bound to be obeyed at all costs. Howsoever grave the effect may be, is no answer for non-compliance with a judicial order. The Hon'ble Apex Court has further held that judicial orders cannot be permitted to be circumvented.

49. In the instant proceedings, this Court cannot go beyond the mandate given in the judgment, alleged to have been violated, rather in contempt jurisdiction Court is only required to see whether judgment passed by Court has been complied with in its letter and spirit and it is not permissible for Court in its contempt jurisdiction to go beyond the mandate of the judgment alleged to have been violated.

50. Their lordships of the Hon'ble Supreme Court in **Sudhir Vasudeva, Chairman and Managing Director, Oil and Natural Gas Corporation Limited and Others** vs. **M. George Ravishekaran and Others,** (2014) 3 SCC 373 have held as under:-

"19. The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act, 1971. It is a drastic power which, if misdirected, could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution. This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self determination of the sweep, meaning and effect of the order in respect of which disobedience is alleged. Courts must not, therefore, travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or willful violation of the same. Decided issues cannot be reopened; nor the plea of equities can be considered. Courts must also ensure that while considering a contempt plea the power available to the Court in other corrective jurisdictions like review or appeal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate in other jurisdictions vested in the Court, as noticed above. The above principles would appear to be the cumulative outcome of the precedents cited at the bar, namely, Jhareswar Prasad Paul and Another vs. Tarak Nath Ganguly and Others[3], V.M.Manohar Prasad vs. N. Ratnam Raju and Another[4], Bihar Finance Service House Construction Cooperative Society Ltd. vs. Gautam Goswami and Others[5] and Union of India and Others vs. Subedar Devassy PV[6].

20. Applying the above settled principles to the case before us, it is clear that the direction of the High Court for creation of supernumerary posts of Marine Assistant Radio Operator cannot be countenanced. Not only the Courts must act with utmost restraint before compelling the executive to create additional posts, the impugned direction virtually amounts to supplementing the directions contained in the order of the High Court dated 02.8.2006. The alterative direction i.e. to grant parity of pay could very well have been occasioned by the stand taken by the Corporation with regard to the necessity of keeping in existence the cadre itself in view of the operational needs of the Corporation. If despite the specific stand taken by the Corporation in this regard the High Court was of the view that the respondents should be absorbed as Marine Assistant Radio Operator nothing prevented the High Court from issuing a specific direction to create supernumerary posts of Marine Assistant Radio Operator. The same was not done. If that be so, the direction to create supernumerary posts at the stage of exercise of the contempt jurisdiction has to be understood to be an addition to the initial order passed in the Writ Petition. The argument that such a direction is implicit in the order dated 02.08.2006 is self defeating. Neither, is such a course of action open to balance the equities, i.e. not to foreclose the promotional avenues of the petitioners, as vehemently urged by Shri Rao. The issue is one of jurisdiction and not of justification. Whether the direction issued would be justified by way of review or in exercise of any other jurisdiction is an aspect that does not concern us in the present case. Of relevance is the fact that an alternative direction had been issued by the High Court by its order dated 02.08.2006 and the appellants, as officers of the Corporation, have complied with the same. They cannot be, therefore,

understood to have acted in willful disobedience of the said order of the Court. All that was required in terms of the second direction having been complied with by the appellants, we are of the view that the order dated 02.08.2006 passed in W.P. No. 21518 of 2000 stands duly implemented. Consequently, we set aside the Order dated 19.01.2012 passed in Contempt Petition No. 161 of 2010, as well as the impugned order dated 11.07.2012 passed in Contempt Appeal No.2 of 2012 and allow the present appeal."

51. Their lordships of the Hon'ble Supreme Court in **Bihar State Government Secondary School, Teachers Association** vs. **Ashok Kumar Sinha and Others,** (2014) 7 SCC 416, have held as under:

"24. At the outset, we may observe that we are conscious of the limits within which we can undertake the scrutiny of the steps taken by the respondents, in these Contempt proceedings. The Court is supposed to adopt cautionary approach which would mean that if there is a substantial compliance of the directions given in the judgment, this Court is not supposed to go into the nitty gritty of the various measures taken by the Respondents. It is also correct that only if there is willful and contumacious disobedience of the orders, that the Court would take cognizance. Even when there are two equally consistent possibilities open to the Court, case of contempt is not made out. At the same time, it is permissible for the Court to examine as to whether the steps taken to purportedly comply with the directions of the judgment are in furtherance of its compliance or they tend to defeat the very purpose for which the directions were issued. We can certainly go into the issue as to whether the Government took certain steps in order to implement the directions of this Court and thereafter withdrew those measures and whether it amounts to non-implementation. Limited inquiry from the aforesaid perspective, into the provisions of 2014 Rules can also be undertaken to find out as to whether those provisions amount to nullifying the effect of the very merger of BSES with BES. As all these aspects have a direct co-relation with the issue as to whether the directions are implemented or not. We are, thus, of the opinion that this Court can indulge in this limited scrutiny as to whether provisions made in 2014 Rules frustrate the effect of the judgment and attempt is to achieve those results which were the arguments raised by the respondents at the time of hearing of C.A. No. 8226-8227 of 2012 but rejected by this Court. To put it otherwise, we can certainly examine as to whether 2014 Rules are made to implement the judgment or these Rules in effect nullify the result of merger of the two cadres."

52. Hence, in view of the narration of facts as well as law discussed above, this Court deems it not proper case where unconditional and unqualified apology tendered on behalf of the respondents can be accepted. Rather, in given facts and circumstances of the case they are required to be dealt with strictly in accordance with Contempt of Courts Act because apology cannot be allowed to be used as a weapon of defence. In the instant case where despite repeated orders, respondents failed to comply with the directions contained in judgment dated 7.8.2009, any such apology at this belated stage cannot be accepted. This Court would have considered the apology tendered by the respondents, had they offered it in good grace, rather attempt has been made by the respondents to justify their conduct by way of filing written reply to the Contempt Petition that too stating wrong facts. Unless apology is offered in good grace same deserves to be rejected.

53. As was noted by the Hon'ble Supreme Court in **L.D. Jaikwal** vs. **State of U.P.** (1984) 3 SCC 405.

"We are sorry to say we cannot subscribe to the "slap-say sorry-and forget" school of thought in administration of contempt jurisprudence. Saying `sorry' does not make

the slapper poorer. Nor does the cheek which has taken the slap smart less upon the said hypocritical word being uttered through the very lips which not long ago slandered a judicial officer without the slightest compunction. Apology shall not be paper apology and expression of sorrow should come from the heart and not from the pen. For, it is one thing to `say' sorry - it is another to "feel" sorry."(P-406)

54. Consequently, in view of the aforesaid discussions, this Court deems it a fit case, where show cause notices are required to be issued to the respondents for non-compliance of the judgment dated 7.8.2009.

55. Accordingly show cause notices be issued to respondents in Form-I of the Contempt of Court (Himachal Pradesh Rules, 1996) calling upon them to show cause why contempt proceedings against them be not initiated for having knowingly, deliberately and willfully violated the judgment dated 7.8.2009 passed in CWP(T) No. 2162 of 2008 titled as HP Cooperative Department Inspector Grade-II Union vs. State of Himachal Pradesh and another and two other connected petitions, returnable on **25.11.2019**.

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

Dropti ....Petitioner

Versus

Sohnu Ram and others ....Respondents

CMPMO No. 416 of 2019

Decided on: October 15, 2019

Code of Civil Procedure, 1908 – Order VI Rule 17 – Amendment of plaint – Held, if amendment is essential for just and proper adjudication of controversy and if it is allowed, no prejudice would be caused to opposite party, then it can be allowed by the court – Amendment by deletion of word 'plaintiff' and its substitution by word 'defendant' in averments of plaint permitted at the post trial stage as amendment was considered necessary for just decision of case. (Para 7, 11 & 13).

Cases referred:

State of Madhya Pradesh v. Union of India and another, (2011) 12 SCC 268

Chakreshwari Construction Private Limited vs. Manohar Lal, (2017)5 SCC 212

For the petitioner: Mr. Naresh K. Sharma, Advocate.

For the respondents: None for respondents No.1 to 4.
Mr. Sudhir Bhatnagar and Mr. Sanjeev Sood, Additional Advocates General, for respondents No. 5 and 6.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant petition filed under Art. 227 of the Constitution of India, lays challenge to order dated 27.6.2019 passed by learned Civil Judge, Court No.2, Ghumarwin, District Bilaspur, Himachal Pradesh in Civil Misc. Application No. 125-6 of 2019 in Civil Suit No. 159-1 of 13, whereby an application under Order VI, rule 17 CPC, having been filed by the petitioner-plaintiff (hereinafter, 'plaintiff') came to be dismissed, with a prayer to set aside the impugned order consequently allowing the application under Order VI, rule 17 CPC.

2. Case was listed on 14.10.2019, but since none came present on behalf of the private respondents No.1 to 4-defendants (hereinafter, 'defendants'), this Court adjourned the matter for today. Even today, despite repeated pass-overs, none has come present on behalf of

the defendants No.1 to 4, as such, they are ordered to be proceeded against ex parte. It appears that the defendants No.1 to 4 are not interested in contesting the present petition.

3. For having a bird's eye view, certain undisputed facts as emerge from the record are that the plaintiff filed a suit for declaration that the he is owner-in-possession of the land denoted by Khata/Khatauni No. 81 min/96 min, Khasra No. 405/374/147, situate in Village Bhajwani, Tehsil Ghumarwin, District Bilaspur, Himachal Pradesh (hereinafter, 'suit land') and order dated 21.4.2019 passed by Deputy Commissioner, Bilaspur and mutation dated 15.6.2009 sanctioned by Assistant Collector 1st Grade, Ghumarwin, District Bilaspur, Himachal Pradesh are wrong, illegal, and void. Record reveals that after closure of plaintiff's evidence, he filed an application under Order VI, rule 17 CPC (Annexure P-5), seeking amendment of plaint. Plaintiff averred in the application that due to inadvertence and clerical mistake, word "plaintiff" has been wrongly mentioned in place of "defendant" in para-13 of the plaint, as such, he be permitted to replace the word "plaintiff" by word "defendant" in para-13 of the plaint. Besides this, plaintiff also sought amendment by inserting lines i.e. "*Late sh. Sohnu ram S/o Sh. Jiunu Ram predecessor in the interest of the defendant no. 1(i) to (iv) was dismissed. In that suit the Ld. Civil Judge Ghumarwin had discussed about the document Sajra Kishtbar in the order and judgment dated 22-04-2004 in the above mentioned case no. 94/1 of 1999 and the said Sajra Kishtbar was Exhibited in that case as Ex. DW-2/A. Thereafter the above mentioned matter was also dismissed by the first appellant court"* after the words*, "suit of"* in second line of para-13, which now learned counsel for the plaintiff does not press.

4. Aforesaid prayer made on behalf of the plaintiff came to be opposed by the defendants, who alleged that the amendment as prayed for in the application cannot be allowed at the belated stage, because same is not necessary rather, application for amendment has been filed for delaying the proceedings.

5. Learned Court below vide impugned order dated 27.6.2019, dismissed the application on the ground that the plaintiff has nowhere pleaded that despite due diligence amendment sought, could not be made before commencement of trial. Learned Court below further arrived at a conclusion that perusal of averments made in the application itself shows that amendment could have been sought before commencement of trial. In the aforesaid background, plaintiff has approached this court in the instant proceedings.

6. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned Court below in the impugned order, this Court finds that, admittedly, it has not been specially averred in the application that despite due diligence by the plaintiff, amendment now sought could not be sought earlier but, in para-5 of the application, it has been specially averred that amendment is very much necessary for the proper adjudication of the matter, and in case amendment as sought, is allowed, same will not change the nature of the suit.

7. True it is that under amended provisions of Order VI, rule 17 CPC, no amendment can be allowed after commencement of trial, especially if same is not based upon subsequent circumstances or if the same could not be raised despite due diligence before commencement of trial, but, having taken note of the nature of the amendment sought to be made, this Court is convinced and satisfied that amendment sought in para-2 of the application is essential for just and proper adjudication of the controversy and if such amendment is allowed, no prejudice would be caused to the defendants, rather, it would help learned Court below to adjudicate the controversy in an effective manner.

8. Their Lordships of the Hon'ble Supreme Court in **State of Madhya Pradesh v. Union of India and another** reported in (2011) 12 SCC 268 have held that where an application is filed after the commencement of the trial, it must be shown that despite due diligence, said amendment could not have been sought earlier. Their lordships have held as under:

> "7. The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.
>
> The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations."

9. The Hon'ble Apex Court in **Chakreshwari Construction Private Limited** vs. **Manohar Lal**, (2017)5 SCC 212, has culled out certain principles while allowing or rejecting the application for amendment, which are as under:-

> "13. The principle applicable for deciding the application made for amendment in the pleadings remains no more res integra and is laid down in several cases. In Revajeetu Builders and Developers vs. Narayanaswamy & Sons, (2009)10 SCC 84, this Court, after examining the entire previous case law on the subject, culled out the following principle in para 63 of the judgment which reads as under: (SCC p.102)
>
> > "63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:
> >
> > (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
> >
> > (2) whether the application for amendment is bona fide or mala fide;
> >
> > (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money.
> >
> > (4) refusing amendment would in fact lead to injustice or lead to multiple litigation.
> >
> > (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
> >
> > (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.
>
> These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

10. In the aforesaid judgment, the Hon'ble Apex Court has clearly held that while allowing/rejecting the application for amendment of the plaint, it is to be seen whether the

proposed amendment constitutionally or fundamentally changes the nature and character of the case. In the case at hand, refusing the amendment, would in fact lead to injustice and multiplicity of litigation.

11. Careful perusal of para-13 of the plaint (Annexure P-1) though suggests that plaintiff has averred, "*That the plaintiff has already filed a Permanent Prohibitory Injunction before Ld. Civil Jude (Jr. Div) Ghumarwin, the suit of the plaintiff was dismissed.*" If aforesaid averment is read in conjunction with the averments contained in para-14 of the plaint, amendment as sought in para-2 of the application appears to be necessary. Moreover, defendants in their written statement have not specifically denied the averments contained in paras No. 13 and 14 of the plaint, rather, it has been stated by the defendants that averments contained in paras Nos. 13 and 14 of the plaint are matter of record, which need to be proved accordingly, meaning thereby there is no specific denial, if any, to the factum of judgment having been rendered by Civil Judge (Junior Division), Ghumarwin in the suit, which was filed by defendants. Inadvertently, in para-13 of the plaint, plaintiff has used word "plaintiff" instead of "defendant". Had the suit of plaintiff been dismissed, as has been stated in para-13 of the plaint, there was no occasion for the defendant to file Regular Second Appeal No. 137 of 2006 against the plaintiff. Moreover, defendants have not specifically denied the factum with regard to filing of the suit by the defendants, while filing reply to para-2 of the application filed by the plaintiff under Order VI, rule 17 CPC.

12. Otherwise also, factum with regard to filing of earlier suit by the defendant, if any, would be proved by the plaintiff by placing on record certified copy of judgment and decree passed by learned trial Court or thereafter, judgment, if any, passed upon the appeals.

13. Needless to say, application for amendment of plaint, though has been filed on behalf of the plaintiff but same must have been drafted by a counsel, as such, omission, if any, on the part of the counsel, to use the words, "despite due diligence", could not have been made basis by learned Court below, while rejecting prayer for amendment of plaint made on behalf of the plaintiff. As has been noticed herein above, amendment as prayed in para-2 of the application, if allowed would not in any manner change the nature of the suit, as such, no prejudice whatsoever, would be caused to the defendants in case same is allowed.

14. Consequently, in view of above, present petition is allowed. Impugned order passed by learned Court below is set aside. Amendment sought by plaintiff to the extent of substituting the word plaintiff" by word "defendant" in para-13 of the plaint, as prayed for in para-2 of the application (Annexure P-5), is allowed.

15. Parties undertake to appear before learned Court below on **21.10.2019**, enabling it to proceed further with the proceedings.

16. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Smt. Banti Devi ....Petitioner.

Versus

The State of H.P. and others ...Respondents.

CWP No.: 394 of 2013
Decided on: 16.10.2019.

Aganwari Guidelines – Clause 12 – Himachal Pradesh Land Records Manual – Income certificate – Remedies of aggrieved party – Held, party aggrieved by an inquiry report of Naib -Tehsildar regarding income of an individual, has remedy to file an appeal against it – Appellate Authority designated under Clause 12 of Guidelines has no jurisdiction to decide issue of income certificate. (Para 9 & 10)

For the petitioner	Ms. Kiran Kanwar, Advocate.
For the respondents	Mr. Dinesh Thakur, Additional Advocate General with M/s Seema Sharma, Amit Kumar Dhumal and Divya Sood, Deputy Advocate Generals and Mr. Sunny Datwalia, Assistant Advocate General, for respondent-State. Mr. Vinod Gupta, Advocate for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, petitioner has challenged order passed by learned Additional Deputy Commissioner, Bilaspur, in case No. J-4/11, titled Smt. Banti Devi vs. Smt. Surendera, decided on 27.11.2012, whereby an appeal filed under Section 12 of the Anganwari Scheme/Guidelines against the alleged wrong selection of Smt. Surendera as Anganwari Worker at Anganwari Centre Berthin, stood dismissed, though not on merit.

2. Brief facts necessary for the adjudication of this petition are that process was issued by the respondent-State to fill up the post of Anganwari Worker at Anganwari Centre Berthin. This process was initiated somewhere in the year 2007. Private respondent herein was selected in the selection process which was so initiated.

3. Feeling aggrieved by the appointment of the present private respondent as an Anganwari Worker, petitioner herein preferred an appeal before Deputy Commissioner, Bilaspur. This appeal was allowed by the Appellate Authority by holding that the husband of the selected candidate owned large property, meaning thereby that annual family income of the selected candidate was certainly more than Rs.12,000/- per annum. It appears that this order was further assailed by way of an appeal by the selected candidate in terms of the guidelines issued by the government for appointment of Anganwari Workers, which contained provisions for second appeal. It further appears from the record that the subsequent appeal filed by the selected candidate probably was allowed by the said Appellate Authority by holding that order passed by the first Appellate Authority was not sustainable in law as the factum of appeal having been preferred beyond the period of limitation was ignored.

4. Feeling aggrieved, petitioner filed CWP No. 3892 of 2011 before this Court. Said petition was allowed by the Hon'ble Division Bench of this Court vide order dated 26.07.2011. Hon'ble Division Bench while holding that the initial appeal stood filed by the petitioner within the period of limitation, remanded the matter to the Additional District Magistrate, Bilaspur, for consideration of the same afresh.

5. It further appears from the record that during the course of hearing of the matter, learned Additional District Magistrate, Bilaspur, in case No. J-4/11, titled as Banti Devi vs. Smt. Surendera, ordered an inquiry into the income certificate issued in favour of the husband of the private respondent.

6. Pursuant thereto, an inquiry was conducted by the Executive Magistrate, Tehsil Jhandutta, who held that the income of the husband of the private respondent was Rs.10,200/-+6288=16488 as on 06.05.2007. This inquiry report culminated into the issuance of office order dated 22.03.2011, vide which, Executive Magistrate, Tehsil Jhaundutta, held that earlier income certificate issued to the husband of the private respondent, in which, the actual family income was reflected as Rs.7200/- per annum as on 06.05.2007 was wrong and same was ordered to be cancelled.

7. Feeling aggrieved, private respondent as well as her husband preferred an appeal under Section 28.21 of the H.P. Land Record Manual, which stood allowed by the Appellate Authority vide order dated 27.6.2012 (Annexure P-7). The appellate Authority remanded the case back to the Tehsildar Jhandutta for inquiry afresh and in his absence, Naib Tehsildar, Jhandutta, was directed to hold the fresh inquiry into the matter and thereafter, make a report. This order culminated into Inquiry Report dated 15.10.2012 (Annexure P-6) issued by Naib Tehsildar, Jhandutta, in terms of which, annual family income of the private respondent was found to be Rs.10,200/- as on 06.05.2007. After the said Inquiry Report was issued by Naib Tehsildar, Jhandutta, District Bilaspur, petitioner herein preferred an appeal afresh under Clause 12 of the Anganwari Scheme/Guidelines which stands dismissed by the learned Additional Deputy Commissioner, Bilaspur, by way of impugned order.

8. I have heard learned Counsel for the parties and gone through the documents appended with the petition.

9. A perusal of the impugned order demonstrates that the learned Appellate Authority dismissed the appeal so filed before it *inter alia* on the ground that as primarily the grievance raised before the said authority was with regard to correctness of the Inquiry Report dated 15.10.2012 (Annexure P-6) and as said authority was not the appellate authority which could have gone into the correctness of the said inquiry report, therefore, it was not competent to decide the issue of income certificate/inquiry report pertaining thereto.

10. In my considered view, the findings so returned by the learned Appellate Court are correct findings. It is not in dispute that the petitioner is basically now aggrieved by the issuance of the Inquiry Report by Naib Tehsildar, Jhandutta (Annexure P-6), as per which, income of the family of the private respondent is stated to be Rs.10,200/- as on 06.05.2007. Because this Inquiry Report is legally in existence, therefore, if the petitioner was aggrieved by the same, then the option which was available to the petitioner was to have had preferred an appeal against the said Inquiry Report under the provisions of H.P. Land Record Manual, which admittedly was not done in the present case. Therefore, as the Authority which has now passed the impugned order, was not competent to go into the legality of the Inquiry Report so issued by the Naib Tehsildar, Jhandutta, this Court does not finds any fault with the findings so returned by the said Authority while dismissing the appeal filed the present petitioner.

In view of discussion held herein above, as this Court does not finds any merit in this petition, the same is accordingly dismissed. Pending miscellaneous application(s), if any also stand disposed of. No order as to costs.

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

Naresh Verma ...Petitioner

Versus

Narender Chauhan ...Respondent

Cr. Revisions Nos. 119 and 120 of 2019

Decided on: October 16, 2019

Negotiable Instruments Act 1881 – Sections 138 & 139 – Dishonour of cheque – Complaint – Presumption of consideration – Held, once signatures on cheque are admitted by drawer, a presumption shall arise that it was issued in payee's favour for consideration and towards discharge of debt or any other liability – Onus shifts to accused to prove the contrary. (Para 9 & 10)

Cases referred:

Hiten P. Dalal v. Bartender Nath Bannerji, (2001) 6 SCC 16

M/s Laxmi Dyechem vs. State of Gujarat, 2013(1) RCR

For the petitioner: Mr. V.S. Chauhan, Senior Advocate with Mr. Ajay Singh Kashyap, Advocate, in both the petitions.

For the respondent: Ms. Aruna Chauhan, Advocate, in both the petitions.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant criminal revision petitions filed under S.397 read with S.401 CrPC, challenge has been laid to a common judgment dated 15.9.2018 passed by learned Sessions Judge (Forests) Shimla, Circuit Court at Theog, District Shimla, Himachal Pradesh in Cr. Appeal No. 5-T/10 of 2016, whereby appeal filed by the respondent-complainant (hereinafter, 'complainant') has been allowed and judgment/order of conviction and sentence dated 7.12.2015/15.12.2015 passed by learned Additional Chief Judicial Magistrate, Theog,

in Case No. 79/3 of 2015 has been modified to the extent that instead of Rs.7.00 Lakh, petitioner-accused (hereinafter, 'accused') has been directed to pay Rs.8,50,000/- as compensation to the complainant, and, appeal filed by the accused for his acquittal has been dismissed.

2. Briefly stated the facts as emerge from the record are that the complainant instituted a complaint under S.138 of the Negotiable Instruments Act (hereinafter, 'Act') alleging therein that in the month of August/September, 2014, he sold 750 apple boxes to the accused who initially made payment of Rs.3.00 Lakh to the complainant, but for payment of balance amount, issued two cheques bearing Nos. 736046 dated 3.9.2014 amounting to Rs.3.00 Lakh and 736047 dated 8.9.2014 amounting to Rs.3,37,500/-, (Exts. CW-1/B and CW-1/D) drawn on State Bank of India, Theog, however, the fact remains that the aforesaid cheques on presentation to the Bank concerned were dishonoured on account of insufficient funds in the account of the accused. Immediately after receipt of memo from the Bank concerned, complainant served a demand notice (Ext. CW-1/F) to the accused calling upon him to make payment of the amount covered by cheques within the time stipulated in the notice. Since the accused failed to make the payment within the time prescribed in the legal notice, complainant was compelled to institute proceedings under S.138 of the Act against the accused. Learned trial Court, in the totality of evidence led on record by the parties, held accused guilty of having committed offence punishable under Section 138 of the Act and accordingly, convicted and sentenced him to undergo simple imprisonment for two months and to pay a compensation of Rs.7.00 Lakh to the complainant.

3. Being aggrieved and dissatisfied with the judgment/order of conviction and sentence passed by learned trial Court, accused preferred an appeal i.e. Cr. Appeal No. 5-T/10 of 2016, whereas, complainant also filed Cr. Appeal No. 2-T/10 of 2016, for enhancement of the amount of compensation in the court of learned Sessions Judge, Shimla circuit court at Theog, who vide common judgment dated 15.9.2018, dismissed the appeal filed by the accused and allowed the appeal of the complainant, thereby enhancing the amount of compensation to Rs.8,50,000/- instead of Rs.7.00 Lakh and upheld rest of the judgment. In the aforesaid background, accused has approached this Court against the common judgment passed by learned lower appellate Court, seeking his acquittal.

4. Before adverting to the factual matrix of the case, it may be noticed that during the pendency of these petitions, learned counsel for the petitioner expressed willingness of the accused to settle the matter amicably and accordingly, on the request of accused, matter came to be repeatedly adjourned enabling him to make complete payment in terms of the judgment/order passed by learned trial Court. Bare perusal of order dated 1.8.2019 suggests that a sum of Rs.3.00 lakh came to be paid to the complainant during the pendency of the petitions, but thereafter, despite repeated adjournments, no amount ever came to be paid.

5. Today, during the proceedings of the case, learned senior counsel for the accused stated that he has no instructions, whatsoever, with regard to balance payment of the amount to be made by accused. He further stated that since the accused is not coming forward to impart instructions, this Court may proceed to decide the present petitions on their own merit.

6. Having heard learned counsel for the parties and perused the material available on record, this court finds no force in the submissions having been made by learned senior counsel appearing for the accused that impugned judgment/order of conviction and sentence passed by learned Courts below are not based upon proper appreciation of the evidence, rather, this Court finds that both the learned Courts below have dealt with each and every aspect of the matter meticulously and there is no scope of interference by this Court with the judgments passed by learned Courts below, which otherwise are based upon proper appreciation of evidence.

7. Bare perusal of the material available on record, especially statement of accused under S.313 CrPC, clearly establishes on record that cheques in question were issued by accused in discharge of lawful liability. He has nowhere denied the factum with regard to issuance of cheque rather, he has categorically admitted the case of the complainant that he had sold 750 boxes of apple to him(accused) in lieu of which liability, accused issued cheques in question. Complainant, by way of cogent and convincing evidence led on record has successfully proved all the ingredients of S.138 of the Act. Interestingly, though the accused was duly represented by a counsel but complainant never came to be cross-examined, as such, stand taken by him (complainant) remained unrebutted.

8. Once signatures on the cheque are not disputed, plea with regard to cheque having not been issued towards discharge of lawful liability, rightly came to be rejected by learned Courts below. Reliance is placed upon **Hiten P. Dalal** v. **Bartender Nath Bannerji**, (2001) 6 SCC 16, wherein it has been held as under:

> "The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....."

9. S.139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

10. True it is that to rebut aforesaid presumption, accused can always raise probable defence either by leading positive evidence or by referring to material, if any, adduced, on the record by the complainant, but, in the case at hand, accused has miserably failed to raise probable defence, much less sufficient defence to rebut the presumption available in favour of the complainant under Ss. 118 and 139 of the Act. Close scrutiny of material available on record compels this Court to agree with learned counsel for the complainant, that there is absolutely no evidence available on record to rebut the presumption available in favour of the complainant that the cheques in question were issued by the accused to the complainant towards discharge of his lawful liability. In the case at hand, accused even during his statement under S.313 CrPC, has not denied the factum with regard to issuance of cheque.

11. Hon'ble Apex Court in **M/s Laxmi Dyechem** vs. **State of Gujarat**, 2013(1) RCR (Criminal), has categorically held that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. To raise probable defence, accused can rely upon the material submitted by the complainant. Needless to say, if the accused/drawer of cheque in question neither raises a probable defence nor is able to contest existence of a legally enforceable debt or liability, statutory presumption under S.139 of the Act regarding commission of the offence comes into play. It would be apt to reproduce following paras of judgment (supra) herein below:

> "23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be

remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.

24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

25. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy."

12. Recently, Hon'ble Apex Court, having noticed various judgments passed on earlier occasions, reiterated the principles to be kept in mind while extending benefit of presumption under Ss. 118 and 139 of the Act *ibid*, in **Basalingappa** vs. **Mudibasappa,** Cr. Appeal No. 636 of 2019 decided on 4.9.2019. Hon'ble Apex Court held as under:

"23. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-

(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability. 27

(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard

of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 28 139 imposed an evidentiary burden and not a persuasive burden.

(v) It is not necessary for the accused to come in the witness box to support his defence.

24. Applying the preposition of law as noted above, in facts of the present case, it is clear that signature on cheque having been admitted, a presumption shall be raised under Section 139 that cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused."

13. This court finds no force in the argument of Mr. V.S. Chauhan, learned senior counsel for the accused that learned Court below, while upholding judgment/order of conviction and sentence passed by learned trial Court, has erred in enhancing the amount of compensation because, since total amount of both the cheques was Rs.6,37,500/-, learned trial Court erred in awarding Rs.7.00 Lakh, especially when complainant was unnecessarily compelled to initiate proceedings in competent Court of law for realisation of his own money. Cheques in question were issued in August/September, 2014, whereas, order awarding compensation to the tune of Rs.7.00 Lakh came to be passed on 18.9.2018, i.e. after four years of issuance of cheques, as such, learned lower appellate Court rightly held amount of compensation awarded by learned trial Court to be inadequate. Needless to say, law provides for compensation to the extent of double of the amount of cheque but in the case at hand, learned lower appellate Court has enhanced the compensation to Rs.8,50,000/-, which appears to be totally justifiable and adequate in the attending facts and circumstances.

14. In view of detailed discussion made above and the law laid down by Hon'ble Apex Court (supra), the petitions at hand are dismissed being devoid of merit. Judgments passed by learned Courts below are upheld. Accused is directed to surrender before the learned trial Court to serve the sentence imposed upon her, forthwith.

Pending applications, if any, stand disposed of. Bail bonds, if any, furnished by the accused in both the petitions stand cancelled.

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

Sh. Naseeb Chand ....Petitioner.

Versus

The Manager, Component & Equipment Ltd. and another ....Respondents.

CWP No.: 2649 of 2013
Decided on: 17.10.2019.

Industrial Disputes Act, 1947 – Section 25 F - Illegal termination – Back wages - Grant of – Held, whether a workman on his reinstatement is entitled for back wages, is to be decided on basis of evidence which has been adduced by parties on record – Reasons are to be given in the award as to why back wages are being denied or given – Further, it is incumbent on employer to demonstrate that during the period services of workman remained illegally

terminated , he was gainfully employed – And if employer fails to prove the same, workman can be given back wages. (Para 9).

For the petitioner	Ms. Shikha Chauhan, Advocate.
For the respondents	Mr. S.C. Sharma, Additional Advocate General with M/s R.P. Singh and Kamal Kant Chandel, Deputy Advocate Generals for respondent No. 2. None for respondent No. 1.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

As per report of the Registry, respondent No. 1 stands served. As no one has put in appearance on its behalf, said respondent is ordered to be proceeded against *ex parte*.

2. By way of this petition, petitioner has challenged the award passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla, H.P. dated 11.01.2013, in Reference No. 16 of 2006, titled as Naseeb Chand vs. The Manager Component & Equipment Ltd.

3. Facts necessary for the adjudication of the present petition are that following Reference was made by the appropriate Government to the Industrial Tribunal-cum-Labour Court for adjudication:-

> *"Whether the termination of services of Shri Naseeb Chand S/o Shri Balak Ram by the Manager Component & Equipment Ltd. Plot NO. 120, Baddi, Tehsil Nalagarh, District Solan, H.P. w.e.f. 8.12.2003 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation, the above aggrieved workman is entitled to?"*

4. Vide Award dated 11.01.2013, the Reference was answered by the Industrial Tribunal-cum-Labour Court in the following terms:-

> *"For the reasons recorded hereinabove, the claim of the petitioner is allowed and as such the termination of services of petitioner w.e.f. 8.12.2003 by the respondent is set aside and the petitioner is ordered to be reinstatement in service with immediate effect with seniority and continuity but without back wages and the reference is decided in negative. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records."*

5. Learned Counsel for the petitioner submits that denial of the back wages to the petitioner/workman despite the learned Tribunal coming to the conclusion that the termination of services of the petitioner herein was bad in law, is *per se* not sustainable in the eyes of law, and accordingly, she submits that the Award under challenge may be modified to the extent that the petitioner/workman be held entitled for back wages.

6. On the other hand, learned Deputy Advocate General has submitted that there is no perversity with the Award passed by the learned Tribunal because it is the discretion vested in the learned Tribunal to decide that the back wages are to be granted or to be denied to the workman.

7. I have heard learned Counsel for the parties and gone through the Award under challenge as also the documents appended with the petition.

8. A perusal of the Award under challenge demonstrates that the following reasoning stands mentioned as to why the learned Tribunal has not awarded back wages in favour of the workman:

> *"However, the petitioner is not entitled to back wages as it is settled law that back wages cannot be granted mechanically when the order of termination is declared illegal. Taking into account all the facts and circumstances of the case, to my mind the petitioner is not entitled to back wages. Accordingly, this issue is answered in favour of petitioner."*

9. In my considered view, the reasoning, as it stands mentioned in the Award under challenge, holding the workman as being not entitled to back wages, is not sustainable in law. There is no denial of the fact that back wages are not to be granted mechanically when the order of termination of services of the workman is declared illegal. However, there has to be a judicial application of mind by the Court concerned, both in the event of grant of back wages as also denial of the same. In other words, whether or not in a particular case, workman has to be granted back wages, conclusion thereof has to be drawn by the learned Court on the basis of evidence which has been led by the parties on record. Reasons has to be spelled out in the Award as to why the back wages are either being granted or being denied to the workman. Said claim cannot be brushed aside or declined to a workman by returning a cryptic finding that it is settled law that back wages cannot be granted mechanically when the order of termination is declared illegal. It is equally well settled law that wherever back wages are to be denied to the workman, then it is incumbent upon the employer to demonstrate before the Court that during the period for which services of the workman remained illegally terminated, he was gainfully employed and if the employer fails to prove the same on the basis of cogent evidence on record, the workman can be held entitled for back wages. In case, there is cogent evidence led by the employer, then, by referring to the documents placed on record, findings can be returned by the learned Court below declining back wages to the workman. This is a remiss in the impugned Award. Denial of back wages has been ordered by the learned Tribunal in a mechanical manner without assigning any reasons on the basis of evidence and pleadings.

Accordingly this petition is partly allowed. Award dated 11.01.2013, passed by learned Industrial Tribunal-cum-Labour Court, Shimla, in Reference No. 16 of 2006, titled as Naseeb Chand vs The Manager Component & Equipment Ltd. is partly set aside with regard to the findings returned by the learned Tribunal qua Issue No. 2 and the matter is remanded back to the learned Tribunal with the direction to return fresh findings qua Issue No. 2 on the basis of evidence and pleadings of the parties on record after affording reasonable opportunities of being heard to both the parties. Miscellaneous application(s), if any, also stand disposed of.

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

Vinod Kumar and another ....Appellants

Versus

Chain Singh and others ....Respondents

RSA No. 51 of 2008

Decided on: October 17, 2019

Specific Relief Act, 1963 – Sections 10 & 19 – Agreement to sell – Specific performance thereof – RSA against concurrent findings decreeing plaintiff's suit for specific performance of agreement to sell land after setting aside sale of same land in favour of co-defendants – Held, agreement to sell specifically admitted by defendants – Agreement to sell prior in time vis-a-vis sale deed of co-defendants - Plaintiff was ready and willing to perform his part of agreement – Co-defendants not proved to be bonafide purchasers for consideration without notice of agreement to sell – Plaintiff rightly held to be entitled for decree of specific performance. (Para 11 to 14)

Specific Relief Act, 1963 - Section 19 – 'Bonafide purchaser' – Onus of proof – Held, protection of being a 'bonafide purchaser' in good faith for value without notice of original contract is in the nature of exception to general rule and thus onus of proof of good faith is on purchaser, who pleads that he is an innocent purchaser. (Para 14)

Cases referred:

R.K. Mohammed Ubaidhullah & Ors. vs. Hajeec. Abdul Wahab (D) by Lrs & ors III(2000) CLT 187 (SC)

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the appellants Mr. Rajnish K. Lal, Advocate.

For the respondents: Mr. Ramakant Sharma, Senior Advocate with Ms. Devyani Sharma, Advocate, for respondent No.1.
Respondents No. 2 to 7 ex parte
Respondent No. 8 deleted.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Regular Second Appeal under S.100 CPC, lays challenge to judgment and decree dated 1.12.2007 passed by learned Additional District Judge, Sirmaur at Nahan, HP in Civil Appeal No. 4-N/13 of 2002, affirming judgment and decree dated 3.12.2001 passed by learned Sub Judge, First Class, Court No. 1, Paonta Sahib, in Civil Suit No. 2/1 of 2000, whereby suit having been filed by respondent No.1/plaintiff (hereinafter, 'plaintiff') for specific performance of agreement to sell dated 20.4.1998 (Ext. PW-2/A) came to be decreed.

2. Precisely, the facts as emerge from the record are that the plaintiff filed a suit against respondents No. 2 to 8-defendants No. 1 to 5 (hereafter, 'defendants No. 1 to 5') and present appellants-defendants No. 6 and 7 (hereafter, 'defendants No. 6 and 7') in the court of learned Sub Judge First Class, Court No.1, Paonta Sahib, District Sirmaur, Himachal Pradesh, praying therein for specific performance of contract/agreement to sell dated 20.4.1998, qua land comprised in Khasra No. 227/113, measuring 5 Bigha situate in Mohal Kotri, Tehsil Paonta Sahib, District Sirmaur, Himachal Pradesh, surrounded in the North by land of Gian Chand, in the South by the Shamlat land, in the East by the land of Ramesh Chand etc. and in the West by the land of Banwari Lal (hereinafter, 'suit land'). Plaintiff averred that suit land was in possession of defendants No. 1 to 5 as described in Jamabandi for the years 1997-98. On 20.4.1998, defendants No. 1 to 5, agreed to sell the suit land to plaintiff for total sale consideration of Rs.35,000/- out of which Rs.7,000/- was paid to them as part payment of sale consideration whereafter, plaintiff was put in possession of suit land. As per plaintiff, aforesaid defendants by way of agreement to sell agreed to execute sale deed on or before 31.12.1999, after payment of balance sale consideration. Parties agreed inter se them that remaining sale consideration would be paid at the time of registration of sale deed and in case, defendants No. 1 to 5 fail to do so, plaintiff would be at liberty to enforce the agreement to sell through court and in case plaintiff fails to pay the balance sale consideration at the time of execution of sale deed, earnest money of Rs.7,000/- paid by him shall stand forfeited in favour of defendants No. 1 to 5. Plaintiff claimed that he is in possession of suit land with effect from 20.4.1998 and has developed the same by constructing boundary wall. Plaintiff also claimed that he had been always ready and willing to perform his part of contract by paying balance sale consideration to defendants No.1 to 5 and even today he is ready and willing to perform his part of contract to get sale deed executed and registered in his favour. Plaintiff alleged that on 16.11.1999, when he went to Patwari for getting documents, he came to know that on 28.10.1999, defendants No. 1 to 5 have sold the suit land in favour of defendants No. 6 and 7 and as such, plaintiff approached defendants No.1 to 5 with the request to perform their part of contract by executing sale deed of suit land in his favour and offered balance sale consideration of Rs.28,000/- but defendants No.1 to 5 refused to do so. Plaintiff thereafter also approached Tehsildar Paonta Sahib and filed an application before him not to attest the mutation on the basis of sale deed in favour of defendants No. 6 and 7. Plaintiff also filed objections on 16.12.1999 before Assistant Collector 1st Grade Paonta Sahib requesting him not to attest the mutation but to no avail. Plaintiff claimed that mutation attested in favour of defendants No. 6 and 7 is illegal, void and not binding upon him. Plaintiff averred that defendants No. 6 and 7 who had prior knowledge about possession of the plaintiff over suit land are threatening to disposes him on the basis of sale deed. Plaintiff also claimed that since defendants No. 6 and 7 had prior knowledge about his possession over the suit land and agreement to sell executed *inter se*

him and defendants No. 1 to 5, sale deed executed in their favour, confers no right, title or interest on them qua the suit land.

3. Defendants No. 1 to 3 and 5 by way of separate written statement, admitted the factum with regard to execution of agreement to sell dated 20.4.1998, as well as receipt of Rs.7,000 as part payment towards total sale consideration of Rs.35,000/-. Defendants No.1 to 3 and 5 also stated in their written statements that the land, which is in possession of the plaintiff and which was agreed to be sold to him was already cultivable and plaintiff had developed the land by digging bore well. They, while admitting that the sale deed qua suit land has been executed in favour of defendants No. 6 and 7, claimed that defendants No. 1 to 5 sold 5 Bigha of land to defendants No. 6 and 7, beyond the land which was agreed to be sold to plaintiff, which is not cultivable on the spot, but defendants No. 6 and 7, taking advantage of illiteracy of the defendants No. 1 to 5, got wrong *Tatima* of the suit land prepared from the Patwari, and thereafter got sale deed registered on the basis of same. Defendants No. 1 to 3 and 5 also admitted that sale deed qua suit land was to be executed by defendants No. 1 to 5 in favour of plaintiff but now defendants No.1 to 5 are not in a position to execute sale deed in favour of plaintiff and accordingly, they refused to receive balance sale consideration i.e. Rs.28,000/- from him. These defendants specifically stated in their written statement that defendants No. 6 and 7 played fraud with defendants No.1 to 5. Defendants No.1 to 5 also admitted that the plaintiff requested them to execute sale deed on payment of Rs.28,000/- but since defendants No.1 to 5 were not in a position to execute the sale deed in favour of the plaintiff, sale deed could not be executed. Defendants No. 1 to 3 and 5 also did not deny the fact that the plaintiff is not in possession of suit land.

4. Defendants No. 6 and 7 contested the suit filed by plaintiff on the ground of maintainability, locus standi and cause of action. On merits, defendants No. 6 and 7 admitted that defendants No.1 to 5 are owner-in-possession of the suit land as detailed in para-1 of the plaint but denied that they had agreed to sell suit land in favour of the plaintiff on 20.4.1998 and plaintiff was put in possession of suit land by defendants after receipt of Rs.7,000/- as part payment out of total sale consideration of Rs.35,000/-. Defendants No. 6 and 7 averred in the written statement that defendants No. 1 to 5 have sold suit land in their favour for Rs.15,000/- vide sale deed dated 28.10.1999 (Ext. DW-2/A). These defendants also denied possession of the plaintiff on suit land and claimed that defendants No.1 to 5 never disclosed about execution of alleged agreement to sell at the time of execution of sale deed, rather, they executed sale deed of suit land in their favour of their own free will and as such, they are now in possession of suit land and plaintiff has no right, title or interest over the suit land. Defendants No. 6 and 7 further claimed that Assistant Collector 2nd Grade, Paonta Sahib, rightly attested mutation in their favour. Defendants No. 6 and 7 further averred that they are bona fide purchasers for value in good faith without notice of original contract, if any, inter se plaintiff and defendants No. 1 to 5, as such, suit of the plaintiff is not maintainable.

5. On the basis of aforesaid pleadings adduced on record by respective parties, learned trial Court framed following issues for determination on 3.1.2001:

"Issue No.1: Whether plaintiff is entitled to decree for specific performance of agreement dated 20-4-1998? .. OPP

Issue No.2: Whether defendants No. 6 and 7 are bonafide purchaser without notice of the agreement dated 20-4-1998. If so, its effect? .. OPD 6 & 7

Issue No.3: Whether defendants No. 6 and 7 got prepared wrong *Tatima* at the time of execution of sale deed? .. OPD 1 to 5.

Issue No.4: To what relief plaintiff is entitled? OPP"

6. Subsequently, vide judgment and decree dated 3.12.2001, learned Sub Judge, First Class, Court No.1, Paonta Sahib decreed the suit of the plaintiff for specific performance of agreement to sell dated 20.4.1998 (Ext. PW-2/A) on payment of balance sale consideration

of Rs.28,000/- within one month from the date of passing of judgment qua suit land. Learned trial Court directed defendants No. 6 and 7 to join the execution of sale deed by defendants No.1 to 5 in favour of the plaintiff.

7. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, defendants No. 6 and 7 preferred an appeal before learned Additional District Judge, Sirmaur at Nahan, which also came to be dismissed vide judgment and decree dated 1.12.2007. In the aforesaid background, defendants No. 6 and 7 have approached this court in the instant proceedings, praying therein for dismissal of suit for specific performance filed by plaintiff after setting aside judgments and decrees passed by both the learned Courts below.

8. Instant Regular Second Appeal came to be admitted by this Court on 6.3.2009, on the following substantial questions of law:

> "1. Whether the findings of the court below are perverse, based on misreading of oral and documentary evidence as also pleadings of the parties particularly the agreement Exhibit PW2/A, sale deed Exhibit DW2/A and statement of Chain Singh PW-1, Statement of DW1 Vinod Kumar, DW2 Ashok Kumar, DW3 Panch Ram, DW4 Gian Chand, DW5 and DW6.
>
> 2. Whether the court below has misconstrued Section 19 of the Specific Reliefs Act and the findings that the appellant was not a transferee for valuation paid in good faith and without notice to the plaintiff are sustainable in law.
>
> 3. Whether in the facts and circumstances of the case, the plaintiff was entitled to a decree for specific performance in view of the provisions of Section 27(b) of Specific Reliefs Act, 1877 and Section 19(b) of the Specific Reliefs Act, 1963."

9. Since all the substantial questions of law are interconnected, as such, to avoid repetition of discussion of evidence, same are being taken up together for determination.

10. Having heard learned counsel for the parties and perused the material available on record, this Court finds no force in the arguments of Mr. Rajnish K. Lal, learned counsel for defendants No. 6 and 7 that learned Courts below have failed to appreciate the evidence in its right perspective, as a consequence of which erroneous findings have come to the fore, rather, this Court finds from the evidence led on record by respective parties, be it ocular or documentary, that both the learned Courts below have appreciated the evidence in its right perspective and there is no scope left for this Court to re-appreciate the evidence. Moreover, this Court, while exercising appellate power under S.100 CPC, has a very limited scope to re-appreciate the evidence, especially when there are concurrent findings of fact and law, recorded by learned Courts below. Though, Mr. Rajnish K. Lal, Advocate while making this Court to peruse evidence led on record by respective parties, made a serious attempt to persuade this Court to agree with his contention that the judgments and decrees passed by learned Courts below are not correct in law, but he was unable to point out perversity, if any, in the impugned judgments and decrees. Otherwise also, perusal of material available on record clearly reveals that the factum with regard to execution of the agreement to sell dated 20.4.1998 (Ext. PW-2/A) stands duly admitted by defendants No.1 to 5, who allegedly agreed to sell suit land in favour of plaintiff for a total sale consideration of Rs.35,000/-. Defendants Nos. 1 to 5 have fairly admitted the factum with regard to receipt of Rs.7,000/-, as part payment out of total sale consideration. It is also not in dispute that agreement to sell dated 20.4.1998, Ext. PW-2/A, was executed much prior to execution of sale deed, Ext. DW-2/A, which admittedly came to be executed inter se defendants Nos. 1 to 5 and defendants No. 6 and 7, on 28.10.1999. Careful perusal of written statement having been filed by defendants No. 1 to 3 and 5, clearly proves the case of the plaintiff that the suit land comprising of Khasra No. 227/113, measuring 5 Bigha situate in Mauja Kotri, Tehsil Paonta Sahib, District

Sirmaur, Himachal Pradesh was actually agreed to be sold by defendants No.1 to 5, in favour of the plaintiff and defendants No.1 to 5, of their own volition, had entered into agreement to sell dated 20.4.1998 (Ext. PW-2/A. Defendants No.1 to 3 and 5, in their written statement have categorically stated that they had agreed to sell the land measuring 5 Bigha to defendants No. 6 and 7 but that was the land beyond the land agreed to be sold by them to the plaintiff, which is un-cultivable on the spot. These defendants have further stated that defendants No. 6 and 7, taking advantage of their illiteracy, got procured a wrong *Tatima* of the suit land from the Patwari and thereafter, sale deed was registered on the basis of said *Tatima*. These defendants have categorically stated in their written statement that sale deed was registered on the basis of *Tatima* of the land which was agreed to be sold by them in favour of plaintiff, as such, now they are not in a position to execute the sale deed in favour of the plaintiff in terms of agreement to sell dated 20.4.1998. There is no specific denial on the part of defendants No.1 to 3 and 5 that the plaintiff was not ready and willing to make payment of balance sale consideration, rather, careful perusal of written statement nowhere suggests that the plaintiff expressed inability at any point of time, to pay the balance sale consideration, rather, evidence on record clearly reveals that the plaintiff after having come to know with regard to factum of execution of sale deed in favour of defendants No. 6 and 7, qua the suit land, contacted defendants No. 1 to 5 and requested them to execute sale deed, who in turn expressed their inability to do so, for the reason that the land which was to be sold in favour of the plaintiff was further sold by them to defendants No. 6 and 7.

11. Oral as well as documentary evidence, which otherwise need not be taken note in the instant judgment, clearly proves on record that execution of agreement to sell dated 20.4.1998, Ext. PW-2/A, was proved in accordance with law by the plaintiff. No doubt, defendants No.1 to 3 and 5, never entered into witness box but the fact remains that in their written statement, they categorically admitted the factum with regard to execution of agreement to sell dated 20.4.1998, as well as receipt of Rs.7,000/- towards part payment out of total sale consideration for the sale of suit land. Though, defendants No. 6 and 7, made an attempt to carve out a case that defendants No.1 to 5 neither executed agreement to sell nor received Rs.7,000/-, but admittedly, they did not lead any evidence to substantiate their aforesaid claim. Such assertion of the defendants No. 6 and 7 rightly came to be rejected by learned Courts below in view of specific and candid admission made on behalf of defendants No. 1 to 5, in their written statement with respect to execution of agreement to sell dated 20.4.1998, and receipt of part payment of Rs.7,000/-. As has been taken note herein above, it stands duly proved on record that the plaintiff was ready and willing to make the payment of balance sale consideration of Rs.28,000/- but since defendants No.1 to 5 were unable to execute the sale deed in favour of the plaintiff for the reason that land which was agreed to sold to plaintiff, stood already sold to defendants Nos. 6 and 7, as such, there is no force in the argument of Mr. Rajnish K. Lal,, Advocate that no specific evidence, if any, ever came to be led on record by the plaintiff that he was ready and willing to make the payment of balance sale consideration enabling defendants No. 1 to 5 to get the sale deed executed and registered in terms of agreement to sell dated 20.4.1998.

12. Though, defendants No. 6 and 7, claimed that they are bona fide purchasers for value, without notice of agreement, but they failed to lead any cogent and convincing evidence that at the time of execution of sale deed Ext. DW-2/A, they were not informed by defendants No. 1 to 5 with regard to existence of agreement to sell dated 20.4.1998, Ext. PW-2/A.

13. True it is that in the case at hand, defendants No. 1 to 5 never chose to enter into witness box, but as has been noticed herein above, case of the plaintiff stands admitted in the written statement filed by defendants No. 1 to 5. These defendants in their written statement have categorically stated that defendants No. 6 and 7 in connivance with Patwari concerned, got wrong *Tatima* prepared and on the basis of which sale deed was executed qua the land, which they intended to sell to the plaintiff. In view of specific /candid admission on

the part of defendants No.1 to 5 with regard to execution of agreement to sell dated 20.4.1998, no specific evidence in the shape of oral evidence was required to be led by plaintiff, to the contrary, defendants No. 6 and 7, with a view to prove that the factum with regard to execution of agreement to sell dated 20.4.1998, was not in their notice, ought to have produced some positive evidence, that they were not in the know of prior agreement to sell inter se defendants No.1 to 5 and plaintiff.

14. By now it is well settled that onus is on subsequent purchaser to prove that he is bona fide purchaser for value without notice of earlier contract and in this regard, person taking such plea must prove absence of notice and payment of consideration without notice. Hon'ble Apex Court in **R.K. Mohammed Ubaidhullah &** Ors. vs**. Hajeec. Abdul Wahab (D) by Lrs & ors** III(2000) CLT 187 (SC) has categorically held that protection against bona fide purchaser, in good faith for value without notice of original contract is in the nature of exception to general rule and thus, onus of proof of good faith is on purchaser who pleads that he is innocent purchaser.

15. Though, the evidence led on record clearly suggests that defendants No. 6 and 7 were able to prove on record that they were put in possession of the suit land after execution of sale deed Ext. DW-2/A, and a sum of Rs.15,000/- towards sale consideration was paid but since they failed to prove that they are bona fide purchasers and had no knowledge with regard to existence of agreement to sell dated 20.4.1998, Ext. PW-2/A, learned Courts below rightly held plaintiff entitled for decree of specific performance of contract under S.19 of the Specific Reliefs Act. As per provisions contained under S.19 of the Act ibid, contract can also be enforced not only against a party to such an agreement but against any such person, who claims himself to be owner of property on account of subsequent contract. S.19 clearly provides that a person, who has paid his money in good faith, without notice of the original contract can claim for specific performance of contract but, in the case at hand, as has been noticed herein above, defendants No.1 to 5, who have allegedly sold the suit land to defendants Nos. 6 and 7, have themselves stated that they never intended to sell the suit land to defendants No. 6 and 7, who in connivance with revenue Authorities, got prepared wrong *Tatima* and thereafter sale deed was registered qua suit land, which they actually intended to sell to the plaintiff.

16. Though, in the case at hand, defendants with a view to draw benefit of S.19(b) of the Act ibid, claimed before learned Courts below that they being bona fide purchasers paid Rs.15,000/- towards sale consideration as agreed inter se parties but careful perusal of sale deed, Ext. DW-2/A, nowhere suggests that sale consideration was ever paid before the Sub Registrar at the time of registration of sale deed. Though there is recital in the sale deed that vendors have received full and final consideration of sale but if statements of defendants' witnesses with regard to this aspect of the matter are read in conjunction, juxtaposing each other, same certainly compel this Court to agree with the findings of learned Courts below that defendants No. 6 and 7 were not able to prove on record that they have paid sum of Rs.15,000/- towards sale consideration at the time of execution of sale deed Ext. DW-2/A. Therefore, this Court does not find any illegality or irregularity in the findings recorded by learned Courts below.

17. Substantial questions of law are answered accordingly.

18. Now, it would be appropriate to deal with the specific objection raised by the learned counsel representing the plaintiff with regard to maintainability and jurisdiction of this Court, while examining concurrent findings returned by both the Courts below. Mr. Rajnish K. Lal, Advocate, invited the attention of this Court to the judgment passed by Hon'ble Apex Court in **Laxmidevamma and Others** vs. **Ranganath and Others**, (2015)4 SCC 264, wherein the Hon'ble Supreme Court has held:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their

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

19. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true it is that in normal circumstances High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record.

20. The Hon'ble Apex Court in **Parminder Singh** versus **Gurpreet Singh**, Civil Appeal No. 3612 of 2009, decided on 25.7.2017, has held as under:

"14) In our considered opinion, the findings recorded by the three courts on facts, which are based on appreciation of evidence undertaken by the three Courts, are essentially in the nature of concurrent findings of fact and, therefore, such findings are binding on this Court. Indeed, such findings were equally binding on the High Court while hearing the second appeal.

21. It is quite apparent from aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned Courts below can not be interfered with unless same are found to be perverse to the extent that no judicial person could ever record such findings. In the case at hand, as has been discussed in detail, there is no perversity as such in the impugned judgments and decrees passed by learned Courts below, rather same are based upon correct appreciation of evidence as such, deserve to be upheld.

22. Consequently, in view of detailed discussion made herein above, I find no merit in the appeal at hand, which is accordingly dismissed. Judgments and decrees passed by both the learned Courts below are upheld.

23. However, before parting with the judgment, this Court having taken note of the pleadings adduced on record, especially the written statement of defendants No. 1 to 3 and 5, finds force in the arguments of Mr. Rajnish K. Lal, Advocate appearing for defendants No. 6 and 7 that in view of candid admission made by defendants No. 1 to 5, that they agreed to sell 5 Bigha of land out of suit land, in favour of defendants No. 6 and 7, they (defendants No. 6 and 7) are well within their rights to file appropriate proceedings in appropriate court of law, against defendants No. 1 to 5, for putting them in possession of 5 Bighas of land other than the land directed to be sold in favour of the plaintiff by way of instant judgment. Defendants No.6 and 7 may file such proceedings immediately, within a period of one month, if so desired, and in that event, limitation will not come in their way.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Sh. Jitender Singh ....Petitioner.

Versus

The State of Himachal Pradesh and another ...Respondents.

CWP No.: 338 of 2018
Decided on: 18.10.2019.

Industrial Disputes Act, 1947 – Section 10 – Reference – Delay in raising dispute – Effect – Held, though there is no limitation prescribed within which an industrial dispute can be raised yet the stale claims can be rejected – Onus is upon workman to demonstrate that by filing communications / representations with employer, he had kept the cause subsisting – And despite delay, he can raise industrial dispute. (Para 12)

Cases referred:
Assistant Executive Engineer, Karnataka Vs. Shivalinga, (2002) 10 SCC 167
Haryana State Coop. Land Development Bank Vs. Neelam, (2005) 5 SCC 91
UP State Road Transport Corporation Vs. Babu Ram (2006) 5 SCC 433
Assistant Engineer, CAD Kota Vs. Dhan Kunwar, (2006) 5 SCC 481
UP State Transport Corporation Vs. Ram Singh and another (2008) 17 SCC 627
State of Karnataka vs. Ravi Kumar (2009) 13 SCC 746

For the petitioner	Mr. V.D. Khidtta, Advocate.
For the respondents	Mr. Dinesh Thakur, Additional Advocate General with M/s Seema Sharma, Amit Kumar Dhumal and Divya Sood, Deputy Advocate Generals and Mr. Sunny Datwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, petitioner has challenged the Award passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla, H.P. dated 20.12.2017, in Reference No. 71 of 2006, titled as Jitender Singh vs. The Divisional Forest Officer, vide which, while answering the Reference so made to the learned Tribunal by the appropriate Government, the claim of the present petitioner was dismissed.

2. Facts necessary for the adjudication of the present petition are that the following Reference was made by the appropriate Government to the Industrial Tribunal-cum-Labour Court for adjudication:-

> *"Whether alleged termination of services of Shri Jitender Singh S/o late Shri Bahadur Singh R/o Village Palkadi, P.O. Dhami, Sub Tehsil Dhami, District Shimla, H.P. during December, 1998 by the Divisional Forest Officer, Mist Chamber, Khalini Shimla District Shimla HP, who allegedly worked in the Forest Department as beldar during 1996 to 1998 and has raised his industrial dispute after about 16 years, allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? Whereas the employer denied he working of Shri Jitender Singh in the Forest Department, if not justified keeping in view the contention of employer and delay of about 16 years in raising the alleged industrial dispute, what amount of back-wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer?"*

3. The case of the petitioner/workman was that he was engaged as a daily wage Beldar by the Forest Department in January, 1996 under Forest Range, Dhami, and he worked as such up to the year 1997. Thereafter, he worked under Ranger Officer Mashobra at Check Post Dhalli till December, 1998, when his services were terminated illegally without following the provisions of the Industrial Disputes Act. Prayer in the Industrial Dispute raised by the workman was that his termination be held to be bad and he be ordered to be re-engaged with full back wages and post service benefits including seniority.

4. The Claim of the workman was resisted by the Department *inter alia* on the issue of delay and laches as the Industrial Dispute stood raised by the workman after 16 years as from the date of his alleged illegal termination and also on the ground that the

workman in fact was never engaged as a daily wager worker in the respondent-Department during the year 1996 to 1998 as alleged by the workman.

5. On the basis of pleadings of the parties, following Issues were framed by the learned Tribunal:-

"1.Whether the termination of the services of petitioner during December, 1998 without complying with the provisions of Industrial Disputes Act, 1947 is illegal and unjustified as alleged? ....OPP

2. If Issue No. 1 is proved in affirmative, to what relief of service benefits the petitioner is entitled? .....OPP

3. Whether the petition is not maintainable as alleged? ....OPR

4. Whether the petition is barred by limitation as alleged? ....OPR

5. Relief."

6. On the basis of pleadings and evidence led by the parties, the Issues were answered by the learned Tribunal as under:-

"Issue No. 1	*:*	*No.*
Issue No. 2.	*:*	*Becomes redundant.*
Issue No. 3	*:*	*No.*
Issue No. 4	*:*	*Yes.*
Relief:		*Reference answered in favour of the respondent and against the petitioner per operative part of award."*

7. While answering the Reference, learned Tribunal dismissed the claim of the workman by holding that in fact there was no evidence on record to demonstrate that workman was engaged as daily wage Beldar by the Department nor there was any cogent explanation on record as to why the Industrial Dispute was raised by the workman after a delay of more than 16 years. Learned Tribunal by relying upon the judgment of Hon'ble Supreme Court in Assistant Engineer Rajasthan State Agriculture Marketing Board, Sub Division Kota Vs. Mohan Lal, (2013) 14 SCC 543 held that though the limitation Act is not applicable to the Reference made under the I.D. Act but delay in raising the Industrial Dispute was an important circumstance for exercise of judicial discretion in determining the relief that the Tribunal has to grant.

8. Learned Tribunal also relied upon the following judgments of Hon'ble Supreme Court in Assistant Executive Engineer, Karnataka Vs. Shivalinga, (2002) 10 SCC 167, Haryana State Coop. Land Development Bank Vs. Neelam, (2005) 5 SCC 91, UP State Road Transport Corporation Vs. Babu Ram (2006) 5 SCC 433, Assistant Engineer, CAD Kota Vs. Dhan Kunwar, (2006) 5 SCC 481, UP State Transport Corporation Vs. Ram Singh and another (2008) 17 SCC 627 and State of Karnataka vs. Ravi Kumar (2009) 13 SCC 746 and a judgment delivered by this Court in CWP No. 1912 of 2016, titled as Bego Devi Versus State of HP and others, decided on 26.10.2016. On the basis of law so laid down by Hon'ble Supreme Court in cases referred to above, learned Tribunal held that though the Court cannot import the period of limitation and Reference cannot be dismissed merely on the ground of delay, yet, this does not mean that a stale claim ought to be entertained and relief ought to be granted.

9. Learned Tribunal further held that onus to demonstrate that the dispute was raised within reasonable time, was upon the workman and the workman in the present case had failed to do so, because there was no cogent reason put forth by the workman as to why the Industrial Dispute was raised after a lapse of more than 16 years. Italso held that in the facts of this case, this delay was fatal for the simple reason that in the absence of there being any material on record to demonstrate that the workman had actually worked with the respondent-Department, no relief could be granted to the workman. With these findings, learned Tribunal dismissed the claim set up by the workman.

10. Feeling aggrieved, the workman has filed this petition.

11. I have heard learned Counsel for the parties and gone through the Award under challenge as also the documents appended with the petition.

12. In my considered view, there is no infirmity with the findings which have been returned by the learned Tribunal in the Award under challenge. Learned Counsel for the petitioner could not demonstrate that the findings returned by the learned Tribunal that there was no material on record from which it could be inferred that the workman have ever worked as daily wage Beldar with the respondent-Department between 1996 to 1998 were perverse findings. Meaning thereby that workman in the present case had miserably failed to establish from any contemporaneous record that he was ever engaged as a daily wage Beldar with the respondent-Department as alleged, coupled with this fact, there is also about 16 years delay in raising the Industrial Dispute. Though, there is no dispute that there is no limitation prescribed within which an industrial dispute can be raised, yet there is plethora of law, as relied upon by the learned Tribunal, to demonstrate that stale claim can be rejected. Where there is delay in raising of the Industrial Dispute, onus is upon the workman to demonstrate that despite there being a delay, the cause is still subsisting. This may be either by way of filing of representation(s) or through communication(s) being exchanged between the workman and the employer, from which it could be inferred that the cause is still subsisting. This is missing completely in the present case. No cogent explanation is there on record as to why the Industrial Dispute was raised after more than 16 years. In the absence of the workman having placed on record any material to substantiate that he was, in fact, engaged as a daily wage Beldar with the respondent-Department between 1996 to 1998 and further in the absence of there being any cogent material on record to demonstrate as to why the Industrial Dispute was raised after a lapse of 16 years, the dismissal of the claim petition by the learned Tribunal cannot be faulted with.

In view of discussion held hereinabove, as this Court does not finds any infirmity or perversity with the Award passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla, H.P. dated 20.12.2017, in Reference No. 71 of 2006, titled as Jitender Singh vs. The Divisional Forest Officer, this petition being devoid of any merit, is dismissed. Pending miscellaneous application(s), if any, also stand disposed of. No orders as to cost.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Sh. Avtar Singh ....Petitioner

Versus

Sh. Roshan Lal ....Respondent

CMPMO No. 92 of 2018
Decided on:21.10.2019

Code of Civil Procedure, 1908 – Order VIII Rule 1A (3) - Production of documents at later stage - Leave of court – Held, powers under Order VIII Rule 1A (3) of Code are discretionary and not to be exercised in a routine manner – Party must give explanation for non-production of documents at earlier stage of proceedings. (Para 4)

Code of Civil Procedure, 1908 – Order XII Rule 2-A - Admission/ denial of documents – Stage – Held, application seeking direction for admission or denial of documents on record by opposite party can be moved before the framing of issues. (Para 4)

For the petitioner : Mr. Bhag Chand Sharma, Advocate.
For the respondent : Mr. Jagat Paul, Advocate.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.(oral)

Two applications moved by the petitioner/tenant, i.e. **(i)** under Order VIII, Rule 1-A, sub-rule (3), read with Section 151 of Code of Civil Procedure (hereinafter referred to as CPC for short) for producing various documents on record of the case; and **(ii)** under Order 12 Rule 2, read with Section 151 C.P.C, praying for direction to landlord to admit/deny the documents, have been dismissed by the learned Rent Controller (Court No.1), Shimla, in case No.82-2 of 17/14, titled as Roshan Lal v. Avtar Singh. Aggrieved against the dismissal of

these two applications, petitioner/tenant has preferred the instant petition under Article 227 of the Constitution of India.

2. I have heard Mr. Bhag Chand Sharma, learned counsel for the petitioner and Mr. Jagat Paul, learned counsel, for the respondent and gone through the appended record.

3. **Bare facts required for adjudication of the instant petition may be noticed hereinafter**:-

3(i) The respondent/landlord moved an eviction petition under Section 14 of the H.P. Urban Rent Control Act, 1987 against the petitioner/tenant on the grounds of arrears of rent and that building in question is in dilapidated condition requiring rebuilding and reconstruction. The proceedings in the aforementioned eviction petition were going on when the petitioner/tenant moved two applications, i.e. (i) under Order 11 Rule 12 and 14, Order 12 Rule 2 read with Section 151 CPC and; (ii) under Order 11 Rule 21 and Order 12 Rule 2-A read with Section 151 CPC. Both these applications seeking directions to the landlord to place certain documents on record, were dismissed by learned Rent Controller vide order dated 01.04.2015. Petitioner/tenant challenged the order dated 01.04.2015, before this Court in CMPMO No.140 of 2015, which was dismissed on 27.04.2016 (Annexure P-19).

3(ii) Consequent upon dismissal of CMPMO No.140 of 2015, the rent petition got revived, which was stayed during the pendency of above CMPMO No.140 of 2015. The matter was listed before the learned Rent Controller. On 12.12.2017, rejoinder was filed by the respondent/landlord. In the presence of learned counsel for the parties, the issues were also framed on that day and the case was ordered to be listed for respondent/landlord's evidence on 20.01.2018. When the matter was taken up on 20.01.2018 by the learned Rent Controller for recording the evidence of the respondent/landlord, two applications in question were moved by the petitioner/tenant. In one of the application, prayer was made for producing various documents on record and in the other, prayer was made for directing the respondent/landlord to admit/deny the documents produced by the petitioner/tenant. Both the applications were dismissed by the learned Rent Controller vide order dated 23.02.2018 impugned in the instant petition.

Reasoning:

4(i) I am of the considered view that impugned order does not suffer from any infirmity, illegality or material irregularity for the following reasons:-

4(i)(a) The factum of availability of documents with the petitioner/tenant under Right to Information Act has not disputed in the present petition. Learned Rent Controller has observed that documents sought to be produced by the petitioner/tenant were obtained by him under Right to Information Act on 22.06.2016. In case, the tenant considered the documents to be necessary, then the same should have been brought on record of the eviction petition much earlier. Eviction petition was filed in 2014. There was no justification for the same having not been brought on record earlier.

4(i)(b) No cogent explanation has been offered for not placing the documents in question on record before the framing of issues, when the same were in possession of the petitioner/tenant. Issues were framed in presence of learned counsel for the parties. CMPMO No.140 of 2015 filed by the petitioner/tenant was dismissed by this Court on 27.04.2016, yet the applications in question came to be filed only after the framing of issues, at the time of recording of evidence of the respondent/landlord.

4(i)(c) Provisions of Order 8 Rule 1-A (3) of the Code of Civil Procedure, provide that when a document ought to be produced in the Court by the defendant under this Rule is not so produced, then the same shall not without leave of the Court be received in evidence on his behalf at the hearing of the suit. The applications filed by the petitioner/tenant, do not offer any cogent explanation as to why the proposed documents were not produced earlier. Repeated applications being filed by the petitioner/tenant are only delaying the disposal of eviction petition. Powers under the provisions of Order 8 Rule 1-A(3) CPC are discretionary and not to be exercised in routine manner. The discretionary order passed by learned Rent Controller is not liable to be upset in exercise of supervisory jurisdiction unless the findings are perverse or the order suffers from jurisdictional error. Learned Court below in the facts and circumstances of the case had rightly exercised the jurisdiction in dismissing the applications.

4(i)(d) The application seeking direction to landlord to admit/deny the documents already on record of the case could be moved before the framing of issues. The application under Order 12 Rule 2-A read with Section 151 CPC was rightly rejected on the ground that issues had already been framed on 12.12.2017.

5. In view of the above, there is no merit in this petition and the same is accordingly dismissed. Interim order, if any, stands vacated. Parties through their learned counsel are directed to appear before learned Rent Controller on **11.11.2019**. Pending application(s), if any, shall also stand disposed of.

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

Gulshan Kumar .....Appellant.

Versus

State of Himachal Pradesh and another .....Respondents.

LPA No.27 of 2016.
Judgment reserved on: 16.10.2019.
Date of decision: 21.10.2019.

Constitution of India, 1950 - Article 226 – CCS (CCA) Rules, 1965 – Rule 14 – Penalty of removal – Court's interference in Writ jurisdiction – Scope – Held, in disciplinary proceedings, the High Court can not act as appellate court nor it can re-appreciate evidence adduced before the Inquiring Authority unless the conclusion arrived at on the face of it, is wholly arbitrary and capricious. (Para 8)

Constitution of India, 1950 - Penalty of removal – Whether disproportionate? - Interference by Writ court – Held, doctrine of proportionality is a well recognized concept of judicial review – One of the tests to be applied while dealing with question of punishment would be, would any reasonable employer have imposed such a punishment in like circumstances ? (Para 12).

Cases referred:

Union of India and others vs. P. Gunasekaran AIR 2015 SC 545

Chairman and Managing Director, United Commercial Bank and others vs. P.C. Kakkar and connected matter, (2003) 4 SCC 364

For the Appellant : Mr. Parshotam Chaudhary, Advocate.

For the Respondents: Mr. Vinod Thakur, Additional Advocate General with Mr. Bhupinder Thakur, Ms. Svaneel Jaswal and Mr. Narender Singh Thakur, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Aggrieved by the dismissal of his writ petition, the appellant has filed the instant Letters Patent Appeal.

2. Brief facts giving rise to the filing of the present appeal are that the appellant was deputed to drive the departmental vehicle from Shimla to Kalka. According to the appellant, when he was coming back to Shimla, he got down from the vehicle and was overpowered by some unknown persons. Such persons drugged him and when he regained consciousness, he found himself at his residence on 06.10.2004. Whereas, the fact of the matter is that the vehicle of the appellant had met with an accident on the evening of the same day at Kachighati, Shimla, causing loss to the tune of Rs.59,190/-. But, the appellant neither reported the matter to the police nor apprised the department. This led initiation of departmental proceedings against appellant for which he was served a memorandum under

Rule 14 of CCS(CCA) Rules, 1965 dated 02.12.2004. The appellant filed a detailed reply to the same dated 10.12.2004.

3. The Inquiry Officer was appointed, who submitted his report to the Disciplinary Authority. The Inquiry Officer gave findings that the delinquent official drove the vehicle in a negligent manner, resulting in accident on 05.10.2004 and the version put forth by the appellant that some unidentified persons had drugged him and thereafter dropped him at his residence was not accepted by the Inquiry Officer.

4. The appellant was permitted to file representation to the inquiry report vide memorandum dated 28.07.2006. The appellant filed a detailed reply dated 11.08.2006. However, the Disciplinary Authority was not satisfied with the same and ordered the removal of the appellant vide order dated 21.09.2006 by passing a detailed/speaking order.

5. The appellant thereafter assailed the removal order before the erstwhile H.P. State Administrative Tribunal by filing O.A. No. 3229 of 2006 which upon abolition of the learned Tribunal came to be transferred to this Court and was assigned CWP(T) No. 6354 of 2008. Since, the appellant had not filed any statutory appeal against the order of removal, he was permitted to file a statutory appeal and the petition was disposed of on 05.04.2010. The appellant thereafter filed statutory appeal and the same was dismissed by the Appellate Authority on 10.06.2010.

6. Aggrieved by the order passed by the authorities below, the appellant filed CWP No. 4849 of 2010 and, as observed above, the same came to be dismissed by by the learned Single Judge, constraining the appellant to file the instant appeal.

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

7. At the outset, it needs to be noted that the learned Single Judge after taking into consideration the entire material on record has drawn a specific conclusion that the version put forth by the appellant regarding the accident was a cock and bull story and, as a matter of fact, an accident had occurred because of the gross negligence of the appellant.

8. Insofar as the reliability and adequacy of the evidence is concerned, this Court cannot venture into reappreciation of the evidence and act as third Appellate Authority. The scope of interference by the High Court in such matters has been succinctly summed up by the Hon'ble Supreme Court in ***Union of India and others*** *vs.* ***P. Gunasekaran AIR 2015 SC 545*** in the following terms:-

> *"13. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge No.I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:*
>
> *a. the enquiry is held by a competent authority;*
>
> *b. the enquiry is held according to the procedure prescribed in that behalf;*
>
> *c. there is violation of the principles of natural justice in conducting the proceedings;*
>
> *d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;*

e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;

h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

i. the finding of fact is based on no evidence.

Under Article 226/227 of the Constitution of India, the High Court shall not:

(i). re-appreciate the evidence;

(ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii). go into the adequacy of the evidence;

(iv). go into the reliability of the evidence;

(v). interfere, if there be some legal evidence on which findings can be based.

(vi). correct the error of fact however grave it may appear to be;

(vii). go into the proportionality of punishment unless it shocks its conscience."

9. From the material available on record, we find that not only the Disciplinary Authority, but even the Appellate Authority and thereafter the learned Single Judge considered the case threadbare in its entirety.

10. Now, the only question that remains to be considered is regarding the proportionality of punishment as it is vehemently argued by Mr. Parshotam Chaudhary, learned counsel for the appellant that the penalty imposed is disproportionate.

11. It needs to be observed that similar contention was raised before the learned Single Judge, who after placing reliance upon the judgment of the Hon'ble Supreme Court in ***Chairman and Managing Director, United Commercial Bank and others*** *vs.* ***P.C. Kakkar and connected matter***, reported in ***(2003) 4 SCC 364***, chose not to interfere, more particularly, in light of the observations made in paras 11 and 12 thereof which reads as under:

"11. The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Wednesbury's case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

12. To put difference unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference. Further to certain litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to

direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed."

12. It is more than settled that doctrine of proportionality is a well recognized concept of judicial review. The power to impose penalty/punishment is within the discretionary domain and sole power of the decision-maker to quantify once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention only if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review. One of the tests to be applied while dealing with the question of punishment would be "would any any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment.

13. The appellant admittedly was working as a driver at the relevant time and despite having caused an accident in which the departmental car was badly damaged thereby causing loss of Rs.59,190/-, he did not even bother to inform the department, rather, the appellant chose to put up a concocted story.

14. It has to be remembered that the driver in a department is a man of confidence. Therefore, his conduct, attitude and understanding of responsibility and adherence to discipline in an apple pie order is expected of him. The proven charges luminously project that the appellant had given all these aspects a total go-by and chosen to put up a cock and bull story.

15. In this background, it is well-nigh impossible to hold that the punishment of removal is in any manner harsh and arbitrary.

16. All the road users including professional drivers today are extremely vulnerable and exposed to the risk of accidents. These accidents essentially are not caused or attributable to the driver of the vehicle and same could be caused or may occur solely because of the fault of the other road users like vehicles, pedestrian or an animal, or can be caused because of a mechanical failure or for hosts of other reasons where the driver of the vehicle is not at all at fault. But, nonetheless once an accident does take place, the driver of the vehicle, more particularly, when the vehicle belongs to a government department owes a duty to immediately bring the true facts leading to the accident to the notice of his employer and not put up a totally concocted story (like in the instant case) which on the face of it is not believable.

17. Consequently, we find no merit in this appeal and accordingly the same is dismissed.

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

Mohinder Bansal ....Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr.MP(M) No. 1232 of 2019

Decided on: 21st October, 2019

Code of Criminal Procedure, 1973 - Section 439 – Regular bail in case of cheating etc.- Held, petitioner accused formed a company and allured people to invest money on pretext of paying higher interest – Accused absconded after collecting huge money from the investors – Evaded arrest for two years – Chances of his fleeing away from India can not be ruled out – Not a fit case, where he can be granted bail – Petition dismissed. (Para 7).

For the petitioner: Mr. Prashant Chaudhary, Advocate.
For the respondent/State: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. Raju Ram Rahi, Deputy Advocate General.
HC Surinder Kumar No. 2, Police Station Sadar Hamirpur, District Hamirpur, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 51 of 2016, dated 07.02.2016, under Sections 406, 420 and 120 IPC, registered in Police Station Sadar Hamirpur, District Hamirpur, H.P.

2. As per the averments made in the petition, the petitioner is innocent and has been falsely implicated in the present case. He is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. No fruitful purpose will be served by keeping him behind the bars for an unlimited period, so he be released on bail.

3. Police report stands filed. As per the prosecution story, on 27.02.2016 Shri Mansa Ram (complainant) made a written complaint to the police and alleged that in the year 2014 the petitioner allured of 18% interest on the investment in company, namely, Blue Grass Company, which was of the petitioner. The said company had its branch in Hamirpur. The people were allured and promised exorbitant rate of interest. As per the complainant, the petitioner and others used to come to Hamirpur and urge for more investment in the company. On the asking of the petitioner, he invested Rs.11,50,000/- in the said company and for seven months he was paid interest. After seven months, the company stopped payment of interest, so he wrote to the President of the company as he was in need of rupees eight lac. The complainant was assured that within 30 days he will get the money, but he was not paid. Likewise, the said company ditched other people also and after winding up office at Panchkula these people fled away. Upon the complaint, so made by the complainant, the police registered a case and the investigation ensued. It was unearthed that the petitioner opened company, namely Blue World Corporation and six other companies and their offices were at Hamirpur. The petitioner used to allure people by portraying that the company would pay attractive interests on their investments, so many people opened their accounts. It has also come in the police investigation that for some months the company paid interests, but then stopped paying the interests. As the investigation proceeded, police came to know about the petitioner, who after winding up the company absconded. Police recorded the statements of the witnesses. Police found that one Amit Verma, resident of Punjab, was partner in the said company. Said Amit Verma had been enlarged on bail by this Hon'ble High Court on 30.11.2016. Police extensively interrogated Amit Verma, so the petitioner and Anju Bansal were tracked down. Police made the relevant recoveries of records from Gujarat situated office of the said company. Police found the involvement of one Himanshu Bansal in the offence and the investigation revealed that Anju Bansal was also associated with the said company. The petitioner and Anju Bansal have fled and they did not deposit Rs. one crore eighty five lac, which was deposited by the investors in the said company. Police made recoveries of records and on 26.07.2018 *challan* was presented in the Court against the petitioner and Anju Bansal. As per the police, the petitioner evaded his arrest for two years and now he has been arrested. On 10.10.2018 the Hon'ble High Court allowed the bail application of co-accused Anju Bansal. As per the police, in case the petitioner is enlarged on bail, he may leave the India. Lastly, it is prayed that the bail application of the petitioner be dismissed, as he cheated the innocent people and rupees one crore and eighty five lac is recoverable from him. In case the petitioner is enlarged on bail, at this stage, he may leave

India and may also tamper with the prosecution evidence. He is resident of Gujrat and likely to thwart justice in case enlarged on bail, so the application be dismissed.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the record, including the police report, carefully.

5. The learned Counsel for the petitioner has argued that the petitioner has been falsely implicated in the present case. He has further argued that the petitioner is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. He has further argued that no fruitful purpose will be served by keeping the petitioner behind the bars for an unlimited period, so the petition may be allowed and the petitioner may be enlarged on bail. Conversely, the learned Additional Advocate General has argued that the petitioner evaded his arrest for two years and he fled away. An amount of rupees one crore eighty five lac is recoverable from the petitioner and he is resident of Gujarat and is in a position to flee from justice and tamper with the prosecution evidence, in case enlarged on bail. He has further argued that the petitioner has cheated the innocent people by alluring them with attractive and exorbitant interest on their investments, so he has committed a serious office. Lastly, it is prayed that the bail application of the petitioner may be dismissed.

6. In rebuttal the learned Counsel for the petitioner has argued that the petitioner cannot be kept behind the bars for an unlimited period, so the application be allowed and the petitioner be enlarged on bail.

7. At this stage, considering the fact that the petitioner evaded his arrest for two years and he remained absconded, he is resident of Gujrat and in case he enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice, considering the huge amount involved in the instant case, there is possibility that in case the petitioner is enlarged on bail, he may leave India and also considering the overall material, which has come on record, and without discussing the same at this stage, this Court finds that the present is not a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour. Accordingly, the petition, which sans merits, deserves dismissal and is accordingly dismissed.

8. As prayed for by the learned counsel for the petitioner, the petitioner will be at liberty to move to appropriate Court at the appropriate stage for bail, in case so required.

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

Rakesh Kumar ...Petitioner.

Versus

State of H.P. & another ...Respondents.

Cr. MMO No. 490 of 2019
Reserved on: 01.10.2019
Decided on: 21.10.2019

Indian Forest Act, 1927 – Sections 52 & 52-A (As amended vide H P Amendment Act, 1991) - Release of vehicle – Authorised Officer dismissing release application on ground of accused/ owner being an habitual offender – Revision against - Petition dismissed by Additional Sessions Judge – Petition against – Held, Sections 52 and 52-A need to be interpreted harmoniously – Under Section 52 of Act, seizure of forest produce must be proved to have been effected from the confiscated vehicle – No forest produce was seized from vehicle of petitioner - Key ingredient of recovery of forest produce from his vehicle missing in the case – So there was no justification for ordering confiscation of his vehicle by the Authorised Officer – Petition allowed. (Para 7).

Cases referred:

State of Kerala & another vs. P.V. Mathew (Dead) by LRs, AIR 2012 Supreme Court 1502
Shyambabu Kirar vs. State of M.P. & others, AIR 2016 Madhya Pradesh 28
Kashmir Singh vs. State of H.P., 2010(2) Shimla LC 75
State of Himachal Pradesh vs. Prakash Chand, ILR 2017 (II) HP 765

For the petitioner:	Mr. O.C. Sharma, Advocate.
For the respondents/State:	Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner under Section 482 Cr.P.C. against order dated 11.03.2019, passed by learned Authorized Officer-cum-Divisional Forest Officer, Nalagarh, and against order dated 22.07.2019 passed by learned Additional Sessions Judge, Nalagarh, District Solan, H.P. in Criminal Revision No. 54-NL/10 of 2019.

2. The facts giving rise to the present petition can be summarized as under:

As per the petitioner, on 11.09.2017, Shri Gurdev Singh, the then Forest Guard, Incharge, Dharampur Beat, Dharampur Block of Baddi Range alongwith Shri Bhagat Ram, Forest Worker, came to know about illicit felling of 13 *khair* trees in Retwali DPF C-1e along the roadside of Chhalondewali road. Ten logs were taken into possession, as rest of the timber was missing from the spot. The matter was reported to the police by the Forest officials, vide letter No. 227/B, dated 12.09.2017, and SHO, Police Station Barotiwala registered FIR No. 113/2017, dated 13.09.2017, under Sections 379, 411 IPC and Section 33 of the Indian Forest Act. The recovered logs of timber were taken into possession and the same were handed over to Shri Ravi Kant, the then Forest Guard, Incharge Baddi Beat. During further investigation, 24 fresh stumps of *Khair* were found, so the police were informed and suspicion was on Shri Ramesh Chand, resident of village Chhalondewali, from whom 104 logs of *khair* were recovered. Police conducted thorough investigation and analyzed the call details of Shri Ramesh Chand, which revealed that his mobile location was around the site from where the said trees were felled on 9th and 10th September, 2017. One Ram Partap disclosed that he saw S/Shri Dila Ram, Desh Raj, Ramesh Chand and Raj Kumar while they were felling the trees. Thus, the police called these persons to the police station, where they admitted that they felled the trees. During the course of investigation it was unearthed that illicitly felled trees were transported through Pickup, having registration No. HP12A-8401, owned by Shri Rakesh Kumar (petitioner herein). As the petitioner was found involved in the alleged offence, he was arrested on 20.01.2018 and the petitioner gave demarcation of M/s Orient Herbs Ltd. Plot No. 97, Baddi, where *Khair* wood was unloaded from his pickup. The petitioner also got demarcation of the spot by the police in Retwali DPF from where the *Khair* wood of illicitly felled trees was loaded in his pickup by Shri Ramesh Chand and others. Subsequently, the vehicle of the petitioner, i.e., pickup having registration No. HP12A-8401, was taken into possession alongwith its documents and its custody was handed over to learned Authorized Officer-cum-DFO, Nalagarh Division. The seized timber, i.e., 139 logs of *Khair,* were entrusted in the custody of Forest Officials and the police submitted final report. The petitioner moved an application before the learned Authorized Officer-cum-DFO Nalagarh for release of his vehicle, i.e., pickup having registration No. HP12A-8401, but the same was dismissed, vide order dated 11.03.2019. Precisely, the application was dismissed on the ground that the petitioner is habitual offender. As per the petitioner, he was neither made accused in the FIR nor he was apprehended while allegedly

transporting the forest produce in vehicle having registration No. HP12E-7827. The petitioner preferred a criminal revision before the learned Additional Sessions Judge, Nalagarh, but the same was also dismissed, vide order dated 22.07.2019, hence the petitioner preferred the present petition laying challenge to the impugned orders passed by the learned Authorized Officer-cum-DFO, Nalagarh and by the learned Additional Sessions Judge, Nalagarh. Mainly, the petitioner has based his claim that his vehicle, having registration No. HP12A-8401, was not found transporting the alleged forest produce, so the vehicle has been wrongly confiscated. As per the petitioner, the vehicle is losing its value, as since January, 2018, it is parked in open campus of DFO, Nalagarh, and is exposed to rain and sunlight. He has alleged that the learned Authorized Officer and also learned Additional Sessions Judge, Nalagarh, did not appreciate the fact that the petitioner was not apprehended transporting the alleged seized forest produce, i.e., 139 khair logs in his vehicle, having registration No. HP12A-8401. The petitioner was only involved by the police at the instance of accused Dila Ram, Desh Raj, Ramesh Chand and Raj Kumar in FIR No. 113 of 2017, but the learned Authorized Officer and also the learned Additional Sessions Judge, failed to appreciate this fact. In the above backdrop, the petitioner is seeking release of his vehicle by allowing the present petition and by setting aside the impugned orders.

3. The respondents/State by filing reply to the petition refuted the contentions raised by the petitioner. Succinctly, the respondents alleged that the matter is pending adjudication before the learned Authorized Officer, so the petition is liable to be dismissed. As per the respondents, the petitioner has not come to the Court with clean hands. The respondents contended that the learned Additional Sessions Judge has dismissed the appeal preferred by the petitioner against the impugned order dated 11.03.2019 passed by the learned Authorized Officer, on the ground of having no jurisdiction to hear the interim application under Section 52A of the Indian Forest Act. Lastly, the respondents pray that the petition may be dismissed, as it has no merits.

4. Heard. The learned Counsel for the petitioner has argued that police did not find the involvement of the vehicle of the petitioner in the alleged offence, as no forest produce was recovered from the vehicle. The petitioner was involved by the police at the instance of the accused persons and during the course of investigation the involvement of the vehicle of the petitioner was not clearly found. He has further argued that the vehicle of the accused has been confiscated without sufficient evidence and the same is made to park in the campus of DFO Nalagarh. Due to rain and sunlight the vehicle is losing its value, as the same has not been used since January, 2018. Lastly, he has argued that the impugned orders passed by the learned Authorized Officer and by the learned Additional Sessions Judge, be set aside and the vehicle of the petitioner may be ordered to be released by allowing the present petition. In order to support his arguments, he has placed reliance on some judicial verdicts of the Hon'ble Supreme Court as well as of different High Courts.

5. On the other hand, the learned Additional Advocate General has argued that the police found the involvement of the vehicle of the petitioner in the alleged offence, so his vehicle was confiscated. He has further argued that the vehicle has been rightly confiscated under the relevant provisions of law and the learned Authorized Officer has rightly dismissed the application for release of the said vehicle. He has argued that the learned Revision Court has no jurisdiction to release the vehicle in an appeal, so preferred by the petitioner, so the order, dismissing the revision, is also within the confines of law and needs no interference. He has argued that the vehicle of the petitioner was allegedly used in transporting the forest produce, so it is required to be confiscated. He has argued that keeping in view the involvement of the vehicle of the petitioner, the same may not be released and the present petition may be dismissed.

6. At the very outset, it would be apt to highlight Section 52 of the Indian Forest Act, 1927, which reads as under:

"52. Seizure of property liable to confiscation.-

(1) When there is reason to believe that a forest-offence has been committed in respect of any forest-produce, such produce, together with all tools, boats, carts or cattle used in committing any such offence, may be seized by any Forest-Officer or Police-Officer.

(2) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized, and shall, as soon as may be, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made;

Provided that, when the forest-produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior.

STATE AMENDMENTS

.....

Himachal Pradesh.-In Section 52, in sub-section(1),-

(1) For the words 'carts', substitute the word "vehicles".

[Vide Himachal Pradesh Act 25 of 1968, sec. 4 (w.e.f. 17-2-1968).]

(2) For sub-section (2), substitute the following sub-sections, namely:-

"(2) Any Forest-Officer or Police-Officer may, if he has reason to believe that a vehicle has been or is being used for the transport of timber (excluding fuelwood) resin, khair wood and katha in respect of which is forest-offence has been or is being committed, require the driver or other person-in-charge such vehicle to stop the vehicle and cause it to remain stationary as long as may reasonably be necessary to examine the contents in the vehicle and inspect all records relating to the goods carried which are in the possession of such driver or other person-in-charge of the vehicle.

(3) Every Officer seizing any property under this section shall place on such property a mark indicating that the same has been seized, and shall, as soon as may be, make a report of such seizure-

(a) Where the offence, on account of which the seizure has been made, is in respect of timber (excluding fuelwoood), resin, khair wood and katha which is the property of the State Government, to the concerned authorized officer under sub-section (1) of Section 52A; and

(b) In other cases, to the Magistrate having jurisdiction to try the offence on account of which the seizure is made."

In view of the above, it would be necessary to also highlight Section 52A as amended by the State of Himachal Pradesh, which is as under:

"Himachal Pradesh.- *After section 52, insert the following sections, namely:-*

"52A. Confiscation by Forest Officers in certain cases.-*(1) Notwithstanding anything contained in this Chapter, where a forest-offence is believed to have been committed in respect of timber (excluding fuelwoood), resin, khair wood and katha, which is the property of the State Government, the officer seizing the property under sub-section (1) of section 52 without any unreasonable delay produce it, together with all tools, ropes, chains, boats or vehicles used in committing such offence before an officer, authorized by the State Government in this behalf, by notification in the Official Gazette, not below the rank of an Assistant Conservator of forests (hereinafter referred to as the authorized officer).*

(2) Where an authorized officer seizes under sub-section (1) of section 52 any timber (excluding fuelwood) resin, khair wood and katha, which is the property o the State Government, or where any such property is produced before an

authorized officer under sub-section (1), once he is satisfied that a forest-offence has been committed in respect of such property, such authorized officer may, whether or not a prosecution is instituted for the commission of such offence, order confiscation of the property so seized together with all tools, ropes, chains, boats or vehicles used in committing such offence.

(3)(a) Where the authorized officer, after passing an order of confiscation under sub-section (2), is of the opinion that it is expedient in the public interest so to do, he may order confiscated property or any part thereof to be sold by public auction.

(b) Where any confiscated property is sole as aforesaid, the proceeds thereof, after deduction of the expenses of any such auction or other incidental expenses relating thereto, shall where the order of confiscation made under section 52A is set aside or annualled by an order under section 59 or section 59A, be paid to the owner thereof or the person from whom it was seized as may be specified in such order."

[Vide Himachal Pradesh Act 15 of 1991, sec. 5 (w.e.f. 24-7-91).]

7. After harmonious reading of Section 52 and Section 52A (as amended by the State of Himachal Pradesh) coupled with the facts of the case, it is clear that Section 52 of the Act postulates that seizure of some 'forest produce' has to be effected from the confiscated vehicle, but in the instant case police did not find or recover any 'forest produce' from the vehicle of the petitioner. It has come on record that the vehicle of the petitioner was only involved by the police, as the accused persons stated that earlier they transported the logs in his vehicle. Thus, the key ingredient of recovery of 'forest produce' is missing, as the police or the forest officials did not effect any recovery of forest produce from the vehicle of the petitioner and in fact it can be said that no forest offence qua 'forest produce' exists against the present petitioner, so there is no plausible and acceptable justification for confiscation of the vehicle of the petitioner by the learned Authorized Officer. The Hon'ble Supreme court in ***State of Kerala & another vs. P.V. Mathew (Dead) by LRs, AIR 2012 Supreme Court 1502,*** has held as under:

> ***"8. .....In the instant case, neither any property was seized from the car nor had any seizure taken effect as provided under sub-section (1) of section 52. Inasmuch as seizure under Section 52 of the Act has not taken place and no forest offence in respect of "forest produce" is shown to have been committed or established in the case, there is absolutely no justification for the seizure and the order of confiscation of the aforesaid car is beyond the jurisdiction of the authorized officer. ....."***

Thus, a combined reading of the settled position of law and the facts of the instant case compels this Court to hold that police or forest officials did not effect any recovery from the vehicle of the petitioner, which is mandatory for Section 52 of the Indian Forest Act, so the confiscation of the vehicle of the petitioner, i.e., pickup having registration No. HP12A-8401, by the learned Authorized Officer has no reasonable justification. True it is that the Act empowers the Authorized Officer to proceed in accordance with law and the power to confiscate a vehicle lies with the Authorized Officer.

8. The record demonstrates that vehicle of the petitioner was only involved when the accused persons stated that the vehicle was earlier engaged by them for transportation of logs. It has come in the investigation that the petitioner got demarcation of the spots from where he loaded and where he unloaded the logs. All these are assumptions and suppositions which might have happened do not prove that from the vehicle of the petitioner some forest produce was recovered either by the police or by the forest officials. So, in the absence of any substantial or concrete evidence, just on the basis of assumptions and

suppositions, the vehicle of the petitioner was confiscated and its custody is still with the learned Authorized Officer. The learned Authorized Officer held that the petitioner is habitual offender and he was previously involved in a case FIR No. 95 of 2017, dated 15.05.2017, under Sections 379 read with Section 34 IPC and Sections 32, 33, 41 and 42 of the Indian Forest Act. It is settled law that every criminal offence has very less or no bearing on another criminal offence and it is absolutely wrong that two or more different criminal offences are inseverable. Every criminal offence is different from another and merely on the basis that the petitioner was previously involved in a case under the Indian Forest Act and on the basis that the accused persons named the petitioner, the vehicle of the petitioner was confiscated. In fact, the available material has nothing to demonstrate that any forest produce was recovered from the vehicle of the petitioner or the vehicle was actively involved in transporting the forest produce in the alleged offence.

9. The Madhya Pradesh High Court in ***Shyambabu Kirar vs. State of M.P. & others, AIR 2016 Madhya Pradesh 28,*** has held under:

> ***"8. As noticed, the bone of contention of the petitioner is that section 52 cannot be involved for seizure of tractor unless offence has been committed in respect of any forest produce. Admittedly, the allegation against the petitioner is confined to the fact that he was cultivating the reserved forest land. There is no allegation against him that any forest produce is found in or brought from the forest by the petitioner. This is not the case of the respondents that any timber, charcoal, wood oil, gum, resin, natural varnish, bark lac, fibres, standing agricultural crop and roots of sandalwood and rosewood etc. have been found in possession of the petitioner. The only allegation is that he was cultivating the forest land. Section 52 makes it clear that a seized property can be confiscated when forest offence has been committed in respect of any forest produce. The respondents have failed to show that the offence committed by the petitioner is in respect to any forest produce. Thus, respondents have clearly erred in confiscating the tractor. Petitioner, no doubt, is liable for penalty for an offence mentioned in section 33(1)(c) of the Forest Act but for this reason his vehicle cannot be confiscated unless it is established that such forest offence has been committed in respect of any forest produce.***
>
> ***9. In P.V. Methew, (AIR 2012 SC 1502) (supra), the Apex Court opined that in the instant case, neither any property was seized from the car nor any seizure had taken place as provided under sub-section (1) of Section 52. The Apex Court, thus held that inasmuch as seizure under Section 52 of Act has not taken place and no forest offence in respect of a "forest produce", is shown to have been committed or established in the case, there is absolutely no justification in passing the order of confiscation of the vehicle. It is beyond the jurisdiction of the authorized officer.***
>
> ***10. As analyzed above, I find force in the contention of Shri Vilas Tikhe, learned counsel for the petitioner. As per the language employed in Section 52 of Forest Act (M.P. Amendment) the confiscation can take place when forest offence has been committed in respect of any forest produce. This provision has escaped notice of the court below. Resultantly, the orders are required to be interfered with.***
>
> ***11. In the result, the impugned orders to the extent petitioner's tractor was confiscated are set aside. Liberty is reserved to the respondents to take penal action against the petitioner for violating Section 33(1)(c) of the Act. The tractor of the petitioner be released forthwith."***

Again, it is reiterated by the Madhya Pradesh High Court that Section 52 of the Act can only be invoked for seizure of a vehicle when offence has been committed in respect of any forest produce. In the case in hand, the respondents have failed to connect the petitioner and his vehicle, which is confiscated, with forest produce. Therefore, the confiscation of the vehicle of the petitioner is bad in the eyes of law.

10. Our own High Court in ***Kashmir Singh vs. State of H.P., 2010(2) Shimla LC 75,*** has held as under:

> ***"6. A bare reading of the above amended provision insofar as confiscation of a vehicle under Section 52(A) of he Indian Forest Act, makes it clear that the prosecution is required to satisfy two conditions; (i) there must be notice in writing given to the registered owner of the vehicle, if practicable; and (ii) the vehicle must be found to have been used for illicit transportation of forest produce with the connivance or knowledge of the owner or his agent. The purpose of issuance of notice to the registered owner is to afford him an opportunity to explain his position regarding the use of the vehicle and to show-cause to the contrary in case he establishes that he has no knowledge or connivance for committing the said offence, the vehicle cannot be confiscated.***
>
> ***7. As already stated above, it is imperative to the Authorized Officer to issue show-cause notice and mention in it the substance of such allegation against that person, it is in that eventuality, the registered owner is under obligation to plead and prove that he had no knowledge and not connived to commit the forest offence.***
>
> ***8. ....***
>
> ***9. There is no element of evidence, prima-facie showing that the offence in question was committed with the connivance or knowledge of the petitioner herein, nor there is any reference to this effect in the show-cause notice aforesaid. Virtually, there was no material/evidence concerning the requisite knowledge and/or the connivance of the owner. The version of the petitioner given before the Authorized Officer that the offence was not committed with his knowledge or connivance, stands fully proved. Thus conclusion arrived at by the Authorized Officer and also in appeal by the learned Additional Sessions judge, is highly illegal and has caused the failure of justice, therefore, the confiscation order is unsustainable and liable to be set-aside."***

Thus, there is a plethora of judgments which clearly settle the law that under Section 52 of the Indian Forest Act the vehicle which is confiscated or is to be confiscated must be found to have been used for illicit transportation of forest produce, but in the instant case the record nowhere reflects that from the vehicle of the petitioner any forest produce was recovered. The record also nowhere points out that the vehicle of the petitioner was being used for transportation of the forest produce. Only on the basis of allegations of the accused persons, which, at this stage, do not have evidentiary support, the vehicle of the petitioner cannot be kept confiscated.

11. After profoundly discussing the material which has come on record and testing the same on the touchstone of settled position of law, this Court deems it safe to hold that the learned Authorized Officer has wrongly dismissed the release application of the petitioner and in sequel thereto the petitioner (owner of the vehicle) was expected to prefer revision petition before the learned Appellate Court, which he did. So, the petitioner has rightly approached the learned Revision Court against the rejection of his application seeking release of the vehicle by the learned Authorized Officer. Though, the learned Revision Court dismissed the appeal of the petitioner, solely on the ground that it has no jurisdiction to

entertain such an appeal. The learned Revision Court based the findings of its order on the decision of Co-ordinate Bench of this Court rendered in ***State of Himachal Pradesh vs. Prakash Chand, Criminal Revision No. 380 of 2015, decided on 17.04.2017,*** and also extracted the relevant portion of the judgment, which reads as under:

> ***"10. .....This court see substantial force in the arguments having been made by Mr. P.M. Negi, Additional Advocate General, that there is no jurisdiction vested in Sessions Judge/Additional sessions Judge to order interim release of vehicle involved in a case, because order, if any, could be passed only by court, which had taken cognizance of the chargesheet filed by the police pursuant to FIR registered. But, in the instance case, since application filed under Section 52A of the Act ibid was rejected by Authorized Officer-cum-Divisional Forest Officer, remedy, if any, against dismissal of same was to file criminal appeal before Sessions judge, and as such, respondent/owner rightly approached the Sessions judge/Additional Sessions judge, against rejection of his application. But, as has been observed above, application, if any for release of vehicle could have been made by the respondent/owner before in the court, before whom, police had presented challan in the case."***

Without delving into this issue deeply, this Court finds no infirmity in the order passed by the learned Revision Court. This Court finds that the learned Revision Court had no jurisdiction to release the vehicle of the petitioner. However, the petitioner resorted to the best available recourse, that is, filing a revision petition before the learned Revision Court.

12. After examining the matter meticulously and what has been discussed hereinabove, this Court deems it fit and apt, especially in view of settled position of law, that the vehicle of the petitioner, i.e., pickup, having registration No. HP12A-8401, is required to be released to the petitioner. So, the petition is allowed and respondent No. 2 (Authorized Officer-cum-Divisional Forest Officer, Nalagarh, Forest Division, Nalagarh, District Solan, H.P.) is directed to release the vehicle of the petitioner on *superdari* after taking surety bonds to his satisfaction.

13. Needless to say that the observations made hereinabove shall not be construed to have expressed an opinion on the merits of the case. The competent authority shall adjudicate the main case on its own merits and this order shall have no bearing on it.

****

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

Vikram Jeet and another ...Petitioners

Versus

State of Himachal Pradesh and another ...Respondents

CrMMO No. 605 of 2019

Decided on: October 21, 2019

Code of Criminal Procedure, 1973 - Sections 320 & 482 – Inherent powers – Quashing of FIR pursuant to compromise in case involving non-compoundable offences – Permissibility – Held, High Court has inherent power to quash criminal proceedings even in non-compoundable cases where the parties have settled the matter between themselves – However, this power is to be exercised sparingly and with great caution. (Para 9).

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 SCC 466

Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497

For the petitioners:	Mr. Sudhershan Singh and Mr. Tek Singh, Advocates.
For the respondents:	Mr. Sanjeev Sood, Additional Advocate General, for respondent No.1-State. Mr. Ajay Kumar, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under 482 CrPC, prayer has been made on behalf of the petitioner for quashing and setting aside FIR No. 14, dated 13.8.2019 under Ss. 451, 323, 427 and 34 IPC registered at Police Station Udaipur, Lahul & Spiti, Himachal Pradesh against the petitioners, alongwith consequent proceedings, if any, on the basis of compromise entered into between the parties vide annexure P-2.

2. Averments contained in the petition, which is duly supported by an affidavit, reveal that the FIR in question came to be lodged against the petitioner at the behest of respondent No.2/complainant-Sanjay Kumar, who at the relevant time was working as a Salesman in liquor shop situate at Udaipur, Lahul & Spiti. Above named respondent No.2/complainant alleged that the petitioners made an attempt to enter into liquor shop and thereafter allegedly gave beatings to him.

3. On the basis of aforesaid complaint, FIR in question came to be registered against the petitioner. Investigation in the case is not complete yet, but it appears that the petitioners, with the intervention of the respectable of the *Illaqua*, have resolved to settle their dispute amicably inter se them and as such have filed present petition for quashing of FIR in question.

4. On 16.10.2019, this Court having taken note of the averments contained in the petition as well as documents annexed therewith, deemed it fit to cause presence of respondent No.2, so that correctness and genuineness of the compromise could be ascertained.

5. Pursuant to order dated 16.10.2019, both the petitioners as well as respondent No.2 have come present. Mr. Ajay Thakur, Advocate has put in appearance on behalf of respondent No.2. Respondent No.2, on oath stated before this Court that he has entered into compromise with the petitioners of his own volition and without there being any external pressure and he shall have no objection in case, FIR lodged at his behest is quashed and set aside, alongwith consequent proceedings, if any, pending in the competent Court of law. Respondent No. 2 has identified his signatures on the affidavit, Annexure P-2. His statement is taken on record.

6. Mr. Sanjeev Sood, learned Additional Advocate General, having heard aforesaid statement of respondent No.2, fairly stated that since respondent No.2 has compromised the matter with the petitioners, no fruitful purpose would be served in case, FIR as well as consequent proceedings pending in the competent Court of law are allowed to continue. He further stated that in view of subsequent developments, especially the statement made by respondent No.2, there are very bleak and remote chances of conviction, as such prayer made in the present petition may be accepted.

7. In view of the aforesaid statement of respondent No. 2, this Court sees no impediment in accepting the prayer made in the instant petition, so far quashment of FIR in question and consequent proceedings is concerned.

8. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

9. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.
>
> 29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

10. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

11. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal

proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
>
> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

12. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

"... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"

"…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

13. In the case at hand also, the offences alleged against the petitioners do not involve offences of mental depravity or of heinous nature like rape, dacoity or murder and as such, with a view to maintain harmony and peace in the society, this court deems it appropriate to quash the FIR as well as consequential proceedings thereto, especially keeping in view the fact that petitioners and respondent No.2 have compromised the matter with each

other, in which case, possibility of conviction is remote and no fruitful purpose would be served in continuing with the criminal proceedings.

14. Since the matter stands compromised between respondent No.2 and the petitioners, no fruitful purpose would be served in case proceedings initiated against the petitioners are allowed to continue. Moreover, present is a simple dispute and since respondent No.2, is no more interested in carrying on with the criminal proceedings, as such, prayer made in the petition at hand can be accepted.

15. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 14, dated 13.8.2019 under Ss. 451, 323, 427 and 34 IPC registered at Police Station Udaipur, Lahul & Spiti, Himachal Pradesh against the petitioners, alongwith consequent proceedings, if any, are quashed and set aside. Petitioners are acquitted of the offences levelled against them in the aforesaid FIR.

16. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Chita Ram ....Appellant.

Vs.

The Chief Managing Director, Satluj Jal Vidyut Nigam, Himfed Building, Shimla and others .....Respondents.

RSA No.: 142 of 2018

Date of Decision: 23.10.2019

Specific Relief Act, 1963 - Sections 34 & 38 – Suit for declaration & injunction – Plaintiff challenging recovery effected from his salary towards house rent and his liability to pay penal rent towards official accommodation - Suit dismissed by trial court – Appeal of plaintiff also dismissed by first appellate court – RSA - Held, plaintiff was not the employee of Satluj Jal Vidut Nigam Limited (SJVNL) – Residential accommodation was given to him in SJVNL, township because he was posted as Incharge of Police Post there – After transfer from there, he had no right to retain said accommodation – His possession thereof was un-authorised and defendants were entitled to recover arrears of rent/ penal rent from him through his employer (Para 10 & 11)

For the appellant: Mr. Ajay Sipahiya, Advocate.

For the respondents: Ms. Devyani Sharma, Advocate, for respondent No. 1.
Mr. Dinesh Thakur, Additional Advocate General, with M/s Seema Sharma, Amit Dhumal & Divya Sood, Deputy Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral):*

By way of this appeal, the appellant has challenged the judgment and decree dated 30.03.2017, passed by the Court of learned Civil Judge (Senior Division), Rampur Bushehar, District Shimla in Civil Suit No. SD/0300047/2011, titled as *'Chita Ram Vs. The Chief Managing Director and others*, whereby a suit for declaration filed by him that letter No. 18425 dated 29.03.2008 as well as letter No. 31164 dated 30.05.2008, issued by defendant No. 3 to defendant No. 4 for deduction of an amount of Rs.2,08,966/- from his salary on account of rent for the period w.e.f. 01.01.1995 to 31.03.2008 as well as subsequent orders issued for recovery of penal rent from him by the defendants were illegal, null and void and

also for a consequential relief of injunction by restraining defendants from effecting recovery of the said amount was dismissed, as also the judgment and decree dated 05.01.2018, passed by the learned Appellate Court in Civil Appeal No. 08 of 2017, titled as *Chita Ram Vs. The Chief Managing Director and others*, vide which, the appeal filed by the appellant against the judgment and decree passed by the learned Trial Court stood decided in the following terms:

> *"49. As a cumulative effect of my aforementioned discussion, the appeal is partly allowed with no order as to costs and resultantly the judgment and decree passed by learned Trial Court are affirmed only to the extent stated above but not wholly for the reasons assigned by the Trial Court. Decree sheet be prepared accordingly. Record of the learned Trial Court be sent back alongwith a copy of this judgment and the file of this Court after its due completion be consigned to record room."*

2. Brief facts necessary for the adjudication of the present appeal are that a suit for declaration, as already mentioned above, stood filed by the appellant/plaintiff (hereinafter referred to as 'the plaintiff') against the respondents. His case before the learned Trial Court was that he was a Police Officer serving with the Government of Himachal Pradesh and thus was entitled for rent free accommodation or house rent allowance in terms of the provisions of Rules 10.76 of Chapter X of the Punjab Police Rules. He stood appointed as Incharge at Police Post, Jhakri in the month of September, 1991. In lieu of the same, Type-1 quarter No. 27 at Block No. 5 stood allotted to him at SJVNL township. Same was a rent free accommodation. He was assured by the defendants that no rent for occupation of the said accommodation shall be charged from him. He remained posted as Incharge at Police Post, Jhakri till February, 1995. In the month of August, 1994, he admitted one of his ward at DPS, Jhakri, who completed his Senior Secondary education from the said school. Plaintiff also admitted his second ward in the same school, who also passed his senior secondary examination in the year 2011-2012. Though the plaintiff was entitled for 50% fee concession at par with other employees of SJVNL for admitting his wards in the said School, however, no fee concession was granted to him. He was transferred to Police Station, Kumarsain in February 1995 and thereafter was again transferred as Incharge at Sub-Unit, Jhakri in September 1995 and he served as such till his transfer to Shimla in the month of September, 1997. Thereafter, he again served at Jhakri from July 1998 till February 2003, when on promotion, he was transferred to District Kinnaur. As per him, defendants wrongly claimed rent of the accommodation allotted to him for the period when he remained posted at Police Post/Police Station, Jhakri. Said act of the defendants was illegal and arbitrary. Defendant No. 1 had wrongly and illegally deducted an amount of Rs.1,43,583 from bills submitted by defendant No. 3. This amount was allegedly deducted on account of recovery of penal rent from 01.01.1991 to 31.12.2007 with respect to the accommodation allotted to the plaintiff. It was further his case that if he indeed was in arrears of rent, then the remedy available to the defendants was to file a suit for recovery against him. On these grounds, he filed the suit praying for declaration that the communications issued by defendant No. 3 to defendant to No. 4 for recovery of an amount of Rs.2,08,966/- on account of rent from his salary were illegal and arbitrary, as the Government of Himachal Pradesh has no right to recover the amount from him.

3. The suit was contested by the defendants. Stand of SJVNL was that for the period during which the appellant-plaintiff served as an Incharge at Police Post, Jhakri, i.e., from September 1991 till January 1995, he was not charged any rent, as SJVNL had honoured its commitment with the Government of Himachal Pradesh to provide rent free accommodation to the Police Officer who was so deployed at Jhakhri. However, after transfer of the plaintiff as Incharge of Police Post, Jhakhri in January 1995, he continued to occupy the said premises without any right or permission from SJVNL and it is for this unauthorized occupation of the premises that the employer of the plaintiff was called upon to indemnify

SJVNL and it was in lieu of same that communications were issued by the employer for recovery of Rs.2,08,966/-.

4. On the basis of pleadings of the parties, learned Trial Court framed the following issues:

"1. Whether the plaintiff is entitled for declaration that order/letter No. 18425 dated 29.03.2008 as well as letter No. 31164 dated 30.05.2008 issued by Superintendent of Police, Shimla, to Superintendent of Police, Kinnaur at Reckong Peo, to deduct the amount of Rs.2,08,966/- from the salary of plaintiff on account of the rent are illegal, inoperative, null and void, as alleged? OPP

2. Whether the plaintiff is entitled for decree to the effect that orders of penal rent recovery against the plaintiff by the defendants is to be declared illegal and not binding, as alleged?
OPP

3. Whether the plaintiff is entitled for rent free accommodation or house rent allowance from the date of posting till retirement, as alleged? OPP

4. Whether plaintiff while serving in P.P. Jhakri and also in P.S. Jhakri is entitled for 50% free concession at par with the employees of SJVNL, as alleged? OPP

5. Whether the suit is not maintainable, as alleged? OPD

6. Whether the suit is not within limitation, alleged alleged? OPD

7. Whether the plaintiff is estopped to file the suit due to his own acts, conducts, omissions and commissions, as alleged? OPD

8. Whether plaintiff has no enforceable cause of action, as alleged? OPD

9. Whether the suit is barred by Order 2, Rule 2 of the CPC, as alleged? OPD 2 to 4

10. Whether the present suit is barred by principle of res judicata, as alleged? OPD 2 to 4

11. Whether no notice U/S 80 of C.P.C. has been served by the plaintiff to defendants, as alleged? OPD 2 to 4

12. Whether the preent suit of the plaintiff is not maintainable, as alleged?
OPD 2 to 4

13. Whether the plaintiff has no locus standi to file present suit, as alleged? OPD 2 to 4

14. Whether the plaintiff is estopped by his conduct and act, as alleged? OPD 2 to 4

15. Whether no cause of action accrued in favour of plaintiff, as alleged? OPD 2 to 4

16. Whether plaintiff has not approached to this Court with clean hand, as alleged? OPD 2 to 4

17. Relief."

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

"Issue No. 1: No.

Issue No. 2: No.

Issue No. 3: Yes.

Issue No. 4: No.

Issue No. 5: No.

Issue No. 6:	*Yes.*
Issue No. 7:	*No.*
Issue No. 8:	*No.*
Issue No. 9:	*No.*
Issue No. 10:	*No.*
Issue No. 11:	*No.*
Issue No. 12:	*No.*
Issue No. 13:	*No.*
Issue No. 14:	*No.*
Issue No. 15:	*No.*
Issue No. 16:	*No.*
Relief:	*Suit is dismissed as per operative part of the judgment."*

6. The suit of the plaintiff was dismissed by the learned Trial Court. It held that it was not in dispute that plaintiff was not an employee of SJVNL and that he was an employee of the State Government. It held that plaintiff served as Incharge at Police Station, Jhakhri from September 1991 up to January/February 1995. During the said period, he was allotted Type-1 quarter No. 27 at Block No. 5 in the township of SJVNL at Jhakhri and as the accommodation was allotted to him in his official capacity, he was not charged any rent by the SJVNL for the said period. However, despite his transfer from Police Post, Jhakhri in January/February 1995, he continued his possession upon the residential accommodation allotted to him and this fact was admitted by him in his cross-examination. Plaintiff could not produce any cogent and reliable evidence to demonstrate that he was allowed to retain the residential accommodation belonging to SJVNL despite his transfer from Police Post, Jhakhri. Plaintiff could not prove any rule, which permitted him to retain the residential accommodation belonging to SJVNL despite his transfer from Police Post, Jhakri. The rules relied upon by the plaintiff pertaining to the employees of SJVNL did not also allow him to retain said residential accommodation for a long period. Plaintiff had retained the premises in dispute for a long period of 17 years after his transfer. It observed that in his cross-examination, the reason which plaintiff gave as to why he did not vacate the premises was that as double fee was charged for the schooling of his children and the said issue was not yet settled, therefore, he did not vacate the premises. Learned Trial Court held that keeping in view the fact that the residential accommodation was initially allotted to the plaintiff, because he was working at Police Post, Jhakri, said officer cannot be permitted to misuse his position by way of retaining the said accommodation even after he stood transferred from the said place of posting and therefore, there was no illegality or infirmity with the act of defendant No. 1 for effecting recovery rent of the said accommodation from the plaintiff through his controlling authority. On these basis, learned Trial Court dismissed the suit filed by the plaintiff.

7. In appeal, the findings returned by the learned Trial Court were upheld. While upholding the findings returned by the learned Trial Court, learned Appellate Court held that the plea which was taken by the plaintiff for retaining the accommodation, i.e., alleged non-settlement of the fee issue of his children, was not proved by him by placing necessary documents on record or by requisitioning necessary documents from the School. Learned Court further held that as admittedly the plaintiff stood transferred from Police Post, Jhakri to Kumarsain in December 1994, therefore, he was not entitled to retain the accommodation thereafter which stood earlier occupied by him in his official capacity as Incharge of Police Post, Jhakri. On these basis, learned Appellate Court dismissed the appeal filed by the appellant.

8. Feeling aggrieved, the plaintiff has assailed the judgments and decrees passed by the learned Courts below before this Court.

9. I have heard learned counsel for the parties and have also gone through the judgments and decrees passed by the learned Courts below.

10. There are concurrent findings of fact returned against the plaintiff by both the learned Courts below that after the transfer of the plaintiff as Incharge of Police Post, Jhakri in the month of December 1994/January, 1995, he was having no right to retain the accommodation in dispute. During the course of arguments, learned counsel for the appellant could not demonstrate from the record that the findings so returned by the learned Courts below were perverse findings. It is not in dispute that initially after posting of the plaintiff as Incharge of Police Post, Jhakri from the year 1991 up to December 1994/January 1995, no rent was charged from him for occupation of the premises in dispute. It is only after he stood transferred from the post in issue, yet he did not vacate the premises in dispute, recovery stood effected from him for occupying the premises in issue unauthorizedly. During the course of arguments, learned counsel for the appellant could not refer to any evidence on record from which it could be deciphered that the appellant had any legal right to retain the premises in question and occupy the same, even after he stood transferred from Jhakri in January 1995. This clearly demonstrates that the findings returned by the learned Courts below that after his transfer from Jhakri in January 1995, the occupation of the premises in dispute by the plaintiff was unauthorized are correct findings. As I have already mentioned above, as these are pure and simple findings of fact which have been returned by the learned Courts below on the basis of evidence on record, this appeal indeed does not involves any substantial question of law. There is no mis-reading or mis-appreciation of the evidence on record by the learned Courts below. In fact, no evidence was led by the appellant to demonstrate that after January 1995, he had any right to retain the occupation in issue without payment of rent.

11. Learned counsel for the appellant has also argued that assuming that the appellant was entitled to pay rent for occupation of the premises in dispute, even then the mode adopted by the defendants was *per se* illegal as course open for the defendants was to file a suit for recovery and not to deduct the amount from the consolidated funds of the salary of the Police Officer. It is not in dispute that SJVNL approached the employer of the appellant for the purpose of recovery of the rent to which it was entitled to, including penal rent on account of the appellant having occupied the premises of SJVNL unauthorizedly. It is on account of the request so received from SJVNL that the employer of the appellant took appropriate steps for making deductions from the salary etc. to ensure that the rent which the appellant was bound to pay to SJVNL alongwith penal rent for occupying its premises unauthorizedly was paid to the owner of the SJVNL. In my considered view, there is no illegality in the methodology adopted by the defendants for recovery of the amount. It was not for the appellant to advise the defendants as as to how they were to effect the recoveries. As appellant had occupied the premises of defendant No. 1 without payment of any rent, said defendant was within its rights to call upon the employer of the appellant to make good the payments from the emoluments due to to the appellant. Further, the act of the employer in doing so also cannot be faulted with, because the premises in issue at the first instance stood allotted by defendant No. 1 to the appellant on account of appellant's being transferred to Jhakri at the instance of the employer.

12. In view of the findings returned hereinabove, as this Court finds no merit in the present appeal and further as no substantial question of law is involved in the appeal, the same is dismissed, so also pending miscellaneous applications, if any.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Smt. Krishna Devi & others. ....Petitioners

Versus
Sh. Diwan Singh & others. ....Respondents

CMPMO No. 400 of 2017
Decided on:23.10.2019

Code of Civil Procedure, 1908 - Section 151 – Inherent powers - Compensation release application – Dismissal of by Claims Tribunal on ground that one of claimant (claimant no 4) had died during pendency of proceedings before the Tribunal and the award was a nullity – Petition against – Held, some of legal representatives of deceased claimant No.4, were already on record – Award was in favour of claimant and not against him – Compensation of other claimants already stood released to them – Award was not a nullity – Petitioner granted liberty to approach tribunal for filing appropriate application for their impleadment. (Para 4).

Cases referred:
Collector Land Acquisition NHPC vs. Khewa Ram and others, LHLJ 2007 (HP) 270
United India Insurance Co. Ltd. v. Mariyappa & Ors.,III (2017) ACC 795 (Kar.)
Madhuben Maheshbhai Patel and Ors. vs. Joseph Francis Mewan & 1 Anr., 2015 (2) GLH 499

For the petitioners Mr. H.C. Sharma, Advocate.
For the respondents Mr. Nitin Thakur, Advocate Vice Mr. Naresh Sharma, Advocate, for respondents No. 1, 2 & 3.
Respondent No.4 already ex-parte.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.(oral)

Challenge in this petition is to an order dated 14.09.2016, passed by learned Motor Accident Claims Tribunal (III), Shimla, whereby application of the petitioners for release of compensation amount was dismissed.

2. **Bare minimum facts required for adjudication of the instant petition may be noticed hereinafter**:-

2(i) One Sh. Gian Chand met with an accident on 08.11.2008. Claim petition was preferred by his widow Smt. Krishna Devi, son Sh. Chaman Lal, mother Smt. Sansaru Devi and father Sh. Bhagat Ram as claimants No. 1-4, respectively. This claim petition was allowed and vide award dated 19.12.2014 passed in MACP No. 10-S/2 of 2014/09, a compensation amount of Rs.10,99,400/- along with interest @ 7.5% from the date of filing of petition to its realization was granted.

2(ii) It is not in dispute that claimant/petitioners No.1-3 have been released their shares of compensation in terms of the award. The dispute is in respect of share falling to original claimant No.4 / Sh. Bhagat Ram, father of deceased Sh. Gian Chand. It is the admitted case of the petitioners that Sh. Bhagat Ram had died on 06.03.2010, i.e. during the pendency of the claim petition. Petitioners have brought on record the Legal Heir Certificate of original claimant No.4/ late Sh. Bhagat Ram at Annexure P-4. As per this certificate, Sh. Bhagat Ram was survived by:- (i) his widow Smt. Sansaru Devi. (ii) daughter Smt. Madhu. (iii) daughter-in-law Smt. Krishna Devi w/o late Sh. Gian Chand and (iv) grandson Sh. Chaman Lal s/o late Sh. Gian Chand. Out of these four legal heirs, except Smt. Madhu, the other legal heirs/ present petitioners were already on record of the claim petition.

3. Present petitioners moved an application for release of share of late Sh. Bhagat Ram being his legal representatives. This application has been rejected vide impugned order on the ground that the award having been pronounced in favour of a dead person has become nullity and accordingly, share of late Sh. Bhagat Ram cannot be released in favour of his legal heirs. Aggrieved, petitioners have preferred present petition:-

4. I have heard Mr. H.C. Sharma, learned counsel for the petitioner and Mr. Nitin Thakur, learned counsel, for the respondents and gone through the appended record.

4(i) I am of the considered view that the learned Tribunal below has not exercised the jurisdiction vested in it in accordance with law for the following reasons:-

4(i)(a) The award was passed in favour of four claimants. One of them, i.e. claimant No.4, admittedly had died during the pendency of the claim petition, however, solely on that count in the facts and circumstances of the case, award could not have been held to have become a nullity. The award was in favour of claimant No.4 and not against him wherein claimant No.4 was held entitled to compensation amount being dependent upon his deceased son Gian Chand.

4(i)(b) In the facts of the instant case, the shares falling in terms of the award on account of death of Sh. Gian Chand, had already been released to claimants No. 1-3, i.e. petitioners. Therefore, in the facts and circumstances of the case, after release of compensation amount to claimants/petitioners No. 1-3, award could not be held to be a nullity on account of death of claimant No.4 Sh. Bhagat Ram. Therefore, in no circumstances, award could have been held to be a nullity.

4(i)(c) Out of four legal heirs of original claimant No.4/late Sh. Bhagat Ram, three legal heirs, i.e. present petitioners were already on the record of the case before the MACT Tribunal. It was only his daughter Smt. Madhu, sister of deceased late Sh. Gian Chand, who was not on the record.

4(i)(d) A Division Bench of this court in LHLJ 2007 (HP) 270 titled as Collector Land Acquisition NHPC vs. Khewa Ram and others had framed following two questions for determination:-

> *"1. Whether an award under the Land Acquisition Act passed in favour of a dead person is nullity?*
>
> *2. Whether in a Reference Petition under Section 18 of the Land Acquisition Act, 1984 where there are more than one petitioners and one of them dies, whether the petition abates as a whole or only qua the deceased?"*
>
> The above questions were answered in following manner:-
>
> *"**12**. In conclusion, the legal position can be summarized as follows:-*
>
> *1. That a duty is cast upon the reference court o decide a reference petition even if the claimant does not appear.*
>
> *2. If the claimant does not appear despite notice he does so at his own risk and the Court can answer the reference in the absence of the evidence led by the claimant.*
>
> *3. A situation may arise where the claimant absents himself after leading evidence. In such a situation, the Court is bound to decide the reference petition on the basis of the evidence led before it.*
>
> ***13**. The question that next arises is as to what happens if the claimant has died during the proceedings. This can also happen under various circumstances, some of which the being dealt with hereunder:-*
>
> *a. In case there is only one claimant in an isolated case of land acquisition and the claimant dies, then obviously if the Court is unaware about the death of the claimant, it will proceed to decide the reference on the material placed on record before it. In sch a case, if either the legal representatives of the claimant or the acquiring authority files an appeal, then the award of the District Judge will have to be set aside and the reference proceedings deemed to have been abated. The questions whether abatement should be set aside and whether the delay, if any, should be condoned, are questions to be decided by the District Judge alone and not by the appellate court.*
>
> *a. However even in the aforesaid situation, the award cannot be said to be a nullity since the reference court is bound by law to answer the reference. In case none of the parties is aggrieved, the legal representatives can execute the award in accordance with law.*
>
> *b. In cases where there are more than one claimants and each is owner of separate share, then the death of one of the claimants can never render the award to be a nullity. The award is answered in favour of all the claimants. Therefore, in an appeal filed either by the claimants or by the acquiring authority, the legal representatives of the deceased-claimant can be brought on record even during the course of the appeal and it is not necessary to refer the matter back to the reference court.*

c. Where there are more than one petitions and they are decided by a common award and the sole claimant in one of the petitions has died during the pendency of the reference proceedings, the entire award cannot be termed a nullity. Since, the award is a common award based on common evidence led by all the parties, the legal representatives of the deceased can be brought on record during the pendency of the appeal also.

d. In cases (c) and (d) above, if any, will be qua the deceased and the entire proceedings will not abate. In both these cases the legal representatives can be brought on record even during the pendency of the appeal."

Relying upon the above judgment in the ***CMP(M) No. 274 of 2015 in RFA No. 80 of 2014***, this Court observed as under:-

"3. *The present is a case which is covered by (b) and (c) of para 13 of the judgment supra, because deceased Des Raj was not the only petitioner in the reference petition but his brother S/Sh. Jitender, Prakash Chand, Diwakar, Gian Chand and Tipender being co-owners of the acquired land were also the petitioners with him. Above all, the reference petition, they preferred has been decided by a common award passed in a batch of petitions on the basis of common evidence available on record. Therefore, irrespective of the death of deceased respondent Des Raj during the course of the proceedings in the reference petition in the trial Court, the question of abatement of the appeal and substitution of his legal representative can be gone into by this court in the present appeal. Since, his brothers, petitioners No. 1 to 3, 5 and 6 were their on record to represent the estate of the deceased petitioner-respondent and to pursue the petition, therefore, the question of abatement does not arise. The proposed legal representatives of deceased respondent Des Raj named in para 3 of the application are otherwise also required to be brought on record being entitled to receive the compensation in respect of the acquired land to the extent of their share and also to straighten the record."*

In ***III (2017) ACC 795 (Kar.)*** titled as ***United India Insurance Co. Ltd.*** *v.* ***Mariyappa & Ors.***, it was observed thus:-

*"**19**. So far as the entitlement of each claimant is concerned, it was brought to the notice of this Court that the first claimant, the grandfather died during the pendency of the proceedings before the Tribunal. Remaining claimants are father, brother and the sister of the deceased. They are all Class-II heirs. Therefore, they shall be entitled for equal share in the compensation."*

High Court of Gujarat in ***2015 (2) GLH 499,titled as Madhuben Maheshbhai Patel and Ors.*** *vs***. *Joseph Francis Mewan & 1 Anr.***, observed as under:-

"10. *Considering the aforesaid decision of the Division Bench of this Court in the case of Surpal Singh Ladhubha Gohil; decisions of the learned Single Judge of this Court in the case of Jenabai Widow of Abdul Karim Musa and in the case of Amrishkumar Vinodbhai; and aforesaid two decisions of the learned Single Judge of the Rajasthan High Court, we are of the opinion that maxim "actio personalis moritur cum persona" on which section 306 of the Indian Evidence Act is based cannot have an applicability in all actions even in an case of personal injuries where damages flows from the head or under the head of loss to the estate. Therefore, even after the death of the injured claimant, claim petition does not abate and right to sue survive to his heirs and legal representatives in so far as loss to the estate is concerned which would include personal expenses incurred on the treatment and other claim related to loss to the estate. Under the circumstances, the issue referred to the Division Bench is answered accordingly. Consequently, it is held that no error has been committed by the learned Tribunal in permitting the heirs to be brought on record of the claim petition and permitting the heirs of the injured claimant who died subsequently to proceed further with the claim petition. However, the clam petition and even appeal for enhancement would be confine to the claim for the loss to the estate as observed hereinabove."*

5. In view of the above, the impugned order is set aside. The petitioners are granted the liberty to approach the learned Tribunal by moving appropriate applications in accordance with law for their impleadment in the case, for release of the share of original

claimant No.4/late Sh. Bhagat Ram as per their entitlement. The applications be decided in accordance with law. The present petition stands disposed of in the above terms along with pending application(s), if any.

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

Sh. Ajeet Singh (since deceased) through his legal representative Sh. Lakhvinder Singh
.....Petitioner/JD.

Versus

Smt. Usha Rani & Ors. ..Respondents/Landlords.

Civil Revision No. 83 of 2019.
Reserved on : 27th September, 2019.
Date of Decision: 24th October, 2019.

Himachal Pradesh Urban Rent Control Act, 1987 – Code of Civil Procedure, 1908 – Determination of use and occupations charges – Rent Controller fixing use and occupation charges on basis of assessment done by Hon'ble High Court in another case – Challenge thereto – Held, both premises situated in same building - No evidence that premises with respect of which fixation was done by High Court was bigger in size – Fixation done by Rent controller with respect to demised premises not wrong – Petition dismissed. (Para 2).

For the Petitioner: Mr. Gautam Sood, Advocate.

For the Respondents: Mr. G. C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant civil revision petition, stands, directed against the order rendered by the learned Rent Controller, Shimla, District Shimla, H.P., on 14.05.2019, wherethrough, he after dismissing the objections reared by the JD/petitioner herein, hence proceeded to determine, in a sum of Rs.10,000/- per mensem, the, quantum of use, and, occupation, charges, vis-a-vis, the demised premises.

2. A perusal of the impugned order, (a) makes a palpable disclosure, vis-a-vis, reliance becoming placed, by, the learned Rent Controller, upon, a, binding, and, conclusive decision rendered by this Court, upon, Civil Revision No. 66 of 2015, (b) wherein, vis-a-vis, demised premises occurring in the apposite building, wherein also exist, the, hereat demised premises, this Court quantified, the, use, and, occupation, charges, in, a sum of Rs.10,000/- per mensem. The decision recorded, by, this Court, upon, the afore Civil Revision No. 66 of 2015, on 30.03.2016, has attained finality, and, consequential therewith conclusive, and, binding effect, (c) inasmuch, as, the afore determined sum of use, and, occupation charges, vis-a-vis, the demised premises therein, and, occurring in the building rather wherein also, the, extant demised premises, are, hence located/occur, obviously, does, render, it, amenable for deference being meted thereto, (d) unless, evidence stood adduced by the JD, vis-a-vis, the area, of, the demised premises qua wherewith, the afore quantification, was, made by this Court while making, a, pronouncement, upon, Civil Revision No. 66, of, 2015 being larger in size, vis-a-vis, the hereat demised premises, (e) and, also its location occurring in a portion of the building, hence, holding, a, higher commercial potential, vis-a-vis, the demised premises hereat. However, the afore evidence is amiss. Consequently, the JD is estopped to contend that the reliance as placed, upon, the afore verdict by the learned executing court, rather suffering from any fallacy. Consequently, also the dismissal, under the impugned verdict, vis-a-vis, the JD's objections, and, also quantification of use, and, occupation charges, vis-a-vis, the hereat demised premises, given their occurrence, within, the apposite building,, qua wherewith, rather, a, binding, and, conclusive verdict, stood, recorded by this Court, in, Civil Revision No. 66 of 2015, does obviously merit affirmation.

3. In net shell, therein is no merit in the instant petition, and, it is dismissed accordingly. Consequently, the order impugned before this Court is maintained, and, affirmed. The parties are directed to appear before the learned trial Court, on, 7th November, 2019. Records, if any, received, be, sent back to the quarter(s) concerned. All pending applications also stand disposed of.

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

Jai Mehta .....Appellant

Versus

Divisional Manager National Insurance Co. ....Respondent.

RSA No. 435 of 2019
Reserved on**:** 16.10.2019
Date of Decision: 24th October, 2019

Motor Vehicles Act, 1988 - Sections 39 & 43 – Temporary registration of vehicle – Effect – Vehicle met with an accident after expiry of temporary registration but before regular registration – Damages suit – Held, it is mandatory for an owner of vehicle to ply it after expiry of temporary registration, only after getting it parmanently registered with RLA concerned – After expiry of temporary registration, vehicle was not legally useable on high way – Insurer not liable to compensate the insured for the damage (Para 3)

For the appellant: Mr. P.M. Negi, Advocate.
For the respondent: Ms. Rajvinder Sandhu, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The plaintiff's suit, for, rendition of, a, decree, of, monetary damages, arising, from the insured Maruti Car, bearing a temporary registration number, hence, during, the, subsistence, of, an insurance policy, executed inter-se the plaintiff, and, the defendant, rather suffering damages, in, an accident involving, it, stood decreed, hence, by the learned trial Judge, for, a sum of Rs. 2,12,086/- along with interest, (i) and, in an appeal carried therefrom, by the aggrieved defendant, before the learned first appellate Court, the latter Court, rather reversed, the, afore judgment and decree, rendered, vis-a-vis, the plaintiff. The plaintiff becoming aggrieved therefrom, hence, for, begetting reversal, of, the verdict pronounced, upon, upon, Civil Appeal No. 42-S/13 of 2018, on 16.3.2019, has instituted, the, extant Second Appeal before this Court.

2. Though the relevant mishap hence involving the plaintiff's vehicle, wherein, it, suffered damages, rather occurred during, the, subsistence, of, a valid contract of insurance, executed, inter-se, the contesting litigants. However, in contemporaneity, vis-a-vis, the, happening, of, the ill-fated mishap, the, temporary registration number, as, stood initially assigned, hence by the Motor License Authority concerned, vis-a-vis, the plaintiff's vehicle, was, not in vogue, given, it, expiring, on 20.4.2014, (a) and, he within one month thereafter, omitted to obtain, from, the Regional Licensing Authority concerned, a, permanent registration number, qua, his insured vehicle. On, the, afore factual matrix, though the learned trial Judge, had, concluded that any want, of, the plaintiff's vehicle, not in contemporaneity, with the happening, of, the mishap, hence involving the insured vehicle, hence becoming assigned, a, permanent registration number, hence by the RLA concerned, rather not constituting, any, fundamental breach of the terms, and, conditions of the insurance policy, as, the contract of insurance, executed inter-se both, yet remained, in, subsistence, in contemporaneity, with, the happening, of, the ill-fated mishap, (b) and, with

no covenant becoming cast, in, the apt contract of insurance, wherethrough the insured, stood contractually enjoined, to obtain, a, permanent registration number, vis-a-vis, the insured vehicle, after expiry, of, the temporary registration number, obviously, rather enjoining, the, insured to re-compense, the, damages, encumbered, upon, the plaintiff's vehicle, (i) besides, it was held qua the afore contravention, vis-a-vis, the mandate(s) borne in Section 39, and, in Section 43 of the Motor Vehicles Act, making, him hence, amenable, only for, penal action, in, consonance with the apposite therewith provisions, embodied in the Motor Vehicle Act, (ii) and, reiteratedly, the insurer becoming contractually obliged, to, monetarily re-compence the plaintiff, vis-a-vis, the claimed amount.

3. However, for the reason(s) to be assigned hereinafter, the, afore assigned reason, by the, learned trial Judge, in, his hence decreeing the suit of the plaintiff, is, per-se flimsy, and, warrants disapprobation, (i) as, aptly done, by, the learned first appellate Court, (ii) given the mandatory, and, statutory provisions, of, Section 39, and, of Section 43, of, the Motor Vehicle Act, rather, peremptorily enjoining, the, owner of the motor vehicle concerned, to, ply the vehicle, only, upon his/within, the, domains thereof, and, after, expiry, of, a temporary registration number, initially assigned qua his vehicle, to, hence obtain thereafter, a, permanent registration number, qua therewith, from, the RLA concerned. Apparently, the afore mandatory statutory provisions, remained uncomplied, with, by the plaintiff, and, hence when the vehicle, was, unuseable, at the relevant time, by the plaintiff, and, dehors no covenant, becoming, embodied in the insurance policy, executed inter-se the contesting litigants, and, it hence making it incumbent, upon, the insurer, to, after expiry, of, a temporary registration number, initially assigned, vis-a-vis, the Motor Licence Authority concerned, to, thereafter obtain, from, the authority concerned, a, permanent registration number, qua therewith, (iii) rather only for ensuring qua the contract, of, insurance, not breaching any public law, or, any mandatory statutory provisions hence, is, required to be read, into, the apposite contract, of, insurance. Reiteratedly, when hereat, the afore mandatory, and, statutory provisions, become breached, or, uncomplied with, hence obviously disobliged, the, insurer, to, monetary(s) re-compense the plaintiff, for, the, damage, encumbered, upon, his insured vehicle.

4. The above discussion, unfolds, qua the conclusion(s), as arrived by the learned first appellate Court, being based, upon a proper and mature appreciation, of, evidence on record. Accordingly, no substantial questions, of law, much less, a, substantial question of law, arises, for, determination, by this Court.

5. In view of the above discussion, the instant appeal, is, dismissed, and, the judgment and decree impugned, before this Court, is, affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Prem Chand ...Petitioner

Versus

Panchhi Ram and others ...Respondents

Cr. Revision No. 127 of 2019
Reserved on: September 5, 2019
Decided on: September 9, 2019

Code of Criminal Procedure, 1973 – Section 145 – Restoration of possession of a shop – When can be denied by Executive Magistrate? - Held, Executive Magistrate acquires jurisdiction under Section 145 of Code if he is satisfied at the time of passing of preliminary order that a dispute pertaining to land exists and same is likely to cause breach of public

peace – Mere dispute between two parties qua immovable property will not give jurisdiction to Executive Magistrate to proceed under Section 145 of Code – There was already injunction order of Civil Court in favour complainant – Rights of parties qua shop in question crystallized through order of civil court – No allegation of apprehension of breach of public peace in complaint – Proceedings under Section 145 of Code were not maintainable - Order of Executive Magistrate declining restoration of possession upheld. (Para 6 to 8).

Cases referred:

Rajpati v. Bachan AIR 1981 SC 18

Indira v. Vasantha 1991 Crl. L.J. 1798

For the Petitioner	:	Mr. Maan Singh, Advocate.
For the Respondents	:	Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate, for respondent No.1. Mr. Sudhir Bhatnagar and Mr. Sanjeev Sood, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant petition filed under S.397/401 CrPC, is directed against order dated 28.3.2019 passed by Sub Divisional Magistrate, Manali, Kullu, Himachal Pradesh, whereby an application having been filed by the petitioner-complainant (hereinafter, 'complainant') under S.145 CrPC, praying therein for restoration of possession of premises i.e. Shop No. 6 situate in Manu Market, Manali, came to be rejected.

2. Key facts, necessary for the adjudication of the present case as emerge from the record are that the complainant filed complaint (Annexure P-3)under S.145 sub-sections (1)(2)(3)(4)(5)(6) sub Clauses (A) and (B) and sub-sections (7), (8), (9) and (10) CrPC seeking restoration of premises in question i.e. Shop No. 6 situate in Manu Market, Manali, namely "Prem General Store", alleging therein that somewhere in the year 2011, respondent started interfering in the premises and as such, complainant filed Civil Suit No. 8/11 in the court of learned Civil Judge (Junior Division), Manali, Kullu, Himachal Pradesh titled Prem Chand vs. Panchhi Ram, which came to be decreed in favour of the complainant vide judgment and decree dated 27.5.2013. Vide aforesaid judgment and decree, possession of premises in question was directed to be restored in favour of complainant and respondent was restrained from dispossessing the complainant from the premises save and except in due course of law. Allegedly on 16.3.2019, at about 9.15 pm, some persons posing themselves as owners, illegally entered and trespassed the premises and threatened the complainant. They allegedly threw out articles and stock from the premises. Complainant filed FIR No. 41, dated 16.3.2019 under Ss. 447, 427 and 34 IPC with the Police Station, Manali. By way of application, complainant prayed that by way of interim measure, his possession may be restored after opening the locked premises. After having received aforesaid complaint filed under S.145 CrPC, SDM, Manali, called for report from the Station House Officer, Manali, District Kullu, Himachal Pradesh vide letter dated 19.3.2019 (Annexure P-4). Station House Officer, Manali, submitted report (Annexure P-5) stating therein that on 16.3.2019, complainant Prem Chand informed telephonically that some drunk persons are forcibly trying to dispossess him by throwing articles from his shop. As per report, complainant also alleged that nephew of Panchhi Ram alongwith two other persons, forcibly entered his shop and threw out articles. He also alleged that he was forcibly dispossessed from shop No. 6, Manu Market, Manali and as such, appropriate action may be taken. Police report also suggests that the complainant also alleged that before the Police could reach the premises, persons mentioned above, had already locked the premises and left the scene. Police, in its report informed the Sub Divisional Magistrate, Manali that a case under S.447 read with S.34 IPC

stands registered and articles lying outside the shop were handed over to the complainant on *Sapurdari*.

3. On the basis of aforesaid report submitted by SHO, Manali, SDM passed impugned order dated 19.3.2019, whereby he dismissed the complaint filed under S.145 CrPC, stating therein that since S.145 deals with dispute with respect to possession causing apprehension of breach of peace, he has no justification to initiate proceedings under S.145 because civil court has already passed injunction order restraining the respondent from causing any interference in the peaceful possession of the complainant. Vide aforesaid order, SDM directed complainant to approach competent Court of law for settlement of dispute. In the aforesaid background, complainant has approached this Court in the instant proceedings with a prayer to quash and set aside impugned order.

4. I have heard learned counsel for the parties and perused the material available on record vis-à-vis impugned order.

5. Careful perusal of documents available on record, especially complaint under S.145 CrPC, filed by complainant (Annexure P-3), clearly reveals that complainant in the year 2011 had filed Civil Suit No. 8/11 in the court of learned Civil Judge (Junior Division), Manali, seeking injunction qua his forcible dispossession from the premises in question against respondent, who allegedly made an attempt to disposes the complainant, without there being any authority of law. It is also not in dispute that on 27.5.2013, learned Civil Judge (Junior Division), restrained respondent from interfering in the peaceful possession of the complainant over premises in question. Approximately, after six years of aforesaid restraint order passed by civil court, complainant filed application under S.145 CrPC, praying therein for restoration of possession of shop in question.

6. Having heard learned counsel for the parties and perused the material available on record, this Court sees no illegality or infirmity in the impugned order passed by learned Sub Divisional Magistrate, because once rights qua possession of shop in question stood crystallized in a civil suit filed by complainant in the year 2011, there was no occasion, if any, for the Sub Divisional Magistrate to order restoration of possession to the complainant that too on the basis of injunction order passed by civil court on 27.5.2013.

7. Leaving everything aside, close scrutiny of application as referred to herein above, nowhere reveals that there is specific assertion, if any, qua likelihood of breach of peace, which is a condition precedent for the magistrate to initiate proceedings under S.145 CrPC. Apart from above, Police, in its report pursuant to enquiry made by SHO, also nowhere stated anything specific with regard to possibility/apprehension of breach of peace.

8. Close scrutiny of S.145 CrPC, clearly reveals that the magistrate concerned assumes jurisdiction only if he is satisfied that at the time of passing the preliminary order a dispute likely to cause a breach of the peace exists concerning any land etc. Breach of peace mentioned in this Section is definitely not breach of mental peace of a party, rather, same means breach of peace in the locality. S.145 as provided under Chapter X CrPC, under heading "maintenance of public order and tranquility" itself suggests that breach of peace mentioned in this section necessarily means breach of peace in the locality, meaning thereby cognizance under S.145 can only be taken when there is breach of peace or tranquility in the locality. Merely because, there is dispute *inter se* two private parties qua immovable property, proceedings under S.145 cannot be drawn, unless magistrate is satisfied that this private dispute may disturb peace or tranquility of area.

9. It would be apt to take note of provisions contained under S.145 (1) CrPC as under:

> "145. Procedure where dispute concerning land or water is likely to cause breach of peace.

> (1) whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute".

10. Careful perusal of aforesaid provision of law clearly suggests that essential ingredient for invoking provisions of S. 145 CrPC is that there should be apprehension of breach of peace due to dispute over any land or water or the boundaries thereof. It is quite apparent from the bare reading of aforesaid provision of law that Magistrate, while exercising aforesaid power, should be satisfied that there is likelihood of breach of peace. Apprehension of breach of peace must exist at the time of initiation of proceedings under sub-section (1) of S. 145 CrPC. True it is, that a Magistrate can not make initial order under sub-section (1) of S. 145 on apprehension that breach of peace may happen at future point in time, rather, Magistrate, at the time of initiation of proceedings under S. 145 CrPC should be satisfied that there is likelihood of breach of peace on account of dispute between the parties. Similarly, it is not necessary that at the time of passing of final order, apprehension of breach of peace should continue or exist.

11. In this regard, reliance is placed upon **Rajpati** v. **Bachan** AIR 1981 SC 18, wherein Hon'ble Apex Court has held as under:

> "6. It is, therefore, manifest that a finding of existence of breach of the peace is not necessary at the time when a final order is passed nor is there any provision in the Code of Criminal Procedure requiring such a finding in the final order. Once a preliminary order drawn up by the Magistrate sets out the reasons for holding that a breach of the peace exists, it is not necessary that the breach of peace should continue at every stage of the proceedings unless there is clear evidence to show that the dispute has ceased to exist so as to bring the case within the ambit of sub-section (5) of s. 145 of the Code of Criminal Procedure. Unless such a contingency arises the proceedings have to be carried to their logical end culminating in the final order under sub- s. (6) of s. 145. As already indicated the contradictory stands taken by the parties clearly show that there was no question of the dispute having ended so as to lead to cancellation of the order under sub-section (5) of s. 145 nor was such a case set up by any party before the Magistrate or before the High Court. Further, it is well settled that under s. 145 it is for the Magistrate to be satisfied regarding the existence of a breach of the peace and once he records his satisfaction in the preliminary order, the High Court in revision cannot go into the sufficiency or otherwise of the materials on the basis of which the satisfaction of the Magistrate is based. In R. H. Bhutani v. Miss Mani J. Desai & Ors.(1), this Court pointed out as follows:
>
> > "The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute regarding an immovable property exists and that such dispute is likely to cause breach of peace. But once he is satisfied on these two conditions the section requires him to pass a preliminary order under sub-s. (1) and thereafter to make an enquiry under sub-s. (4) and pass a final order under sub-s. (6). It is not necessary that at the time of passing the final order the apprehension of breach of peace should continue or exist. The enquiry under s. 145 is limited to the question to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties... The High Court, in the exercise of its revisional jurisdiction, would not go into the question of sufficiency of material which has satisfied the Magistrate." **(Emphasis ours)**

7. In Hari Ram & Ors. v. Banwari Lal & Ors.(1) it was held that once a Magistrate finds that there is a breach of peace it is not necessary that the dispute should continue to exist at other stages of the proceedings also. In this connection, the High Court observed as follows:

> "Of course, Magistrate can under sub-section (1) of s. 145, Criminal Procedure Code, assume jurisdiction only if he is satisfied that at the time of passing the preliminary order a dispute likely to cause a breach of the peace exists concerning any land etc. Once that is done the Magistrate is thereafter expected to call upon the parties concerned in such dispute to attend his court in person or by pleader and put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. The enquiry, therefore, after the initial satisfaction of the Magistrate and after the assumption of jurisdiction by him, has to be directed only as respects the fact of actual possession. At that time he has not to record a finding again about the existence of a dispute likely to cause a breach of the peace."**(Emphasis ours)**

8.. To the same effect is a decision of the Hyderabad High Court in Ramarao v. Shivram & Ors.(2) where Srinivasachari J. observed as follows:-

> "As regards this contention I am of opinion that once the Magistrate has given a finding to the effect that there is apprehension of breach of peace and that he has jurisdiction to take proceedings under s. 145, Cr.P.C., he can continue the proceedings. It is not necessary that at each stage he should be satisfied that there exists an imminent apprehension of breach of peace."(**Emphasis ours**)

9. We find ourselves in complete agreement with the observations made by the Punjab and Hyderabad High Courts, extracted above, which lay down the correct law on the subject.

10. Assuming, however, that there was an omission on the part of the Magistrate to mention in his final order that there was breach of the peace, that being an error of procedure would clearly fall within the domain of a curable irregularity which is not sufficient to vitiate the order passed by the Magistrate, particularly when there is nothing to show in the instant case that any prejudice was caused to any of the parties who had the full opportunity to produce their evidence before the Court. It was therefore not correct on the part of the High Court to have interfered with the order of the Magistrate on a purely technical ground when the aggrieved party had a clear remedy in the Civil Court.

11. For these reasons therefore, we are satisfied that the order passed by the High Court is legally erroneous and cannot be allowed to stand. The appeal is accordingly allowed. The order of the High Court is set aside and the order of the Magistrate is confirmed."

12. S. 145 CrPC clearly provides that the magistrate before initiating proceedings, should be satisfied that dispute regarding immovable property exists and such dispute is likely to cause breach of peace, and once he/she is satisfied of aforesaid two conditions, he/she shall proceed to pass preliminary order under sub-section (1) of S. 145 and thereafter make inquiry under sub-section (4) and pass final order under sub-section (6) and it is absolutely not necessary at the time of passing of final order for him/her to record that apprehension of breach of peace continues or exists. In the aforesaid judgment, Hon'ble Apex Court has held that inquiry under S. 145 is limited to the question as to who was in actual possession on the date of passing of preliminary order, irrespective of rights of the parties and High Court or Sessions Court, while exercising revisionary powers, can not go into question of sufficiency of the material relied upon by the Magistrate to base his/her satisfaction.

13. While buttressing his argument, Mr. Bhupender Gupta, learned Senior Advocate placed reliance upon judgment rendered by this Court in **Digamber Jai Sabha Simla and anr.** v. **State of Himachal Pradesh and anr**., Cr. Misc. Petition Nos. 111 and 143 of 1983 decided on 22.6.1983, judgment passed by Gauhati High Court in **Ashok Kumar Ghose** v. **Khetra Mohan Das**, Cr. Revn. No. 171 of 1989, decided on 2.4.1990 and judgment passed by Patna High Court in **Ram Pravesh Singh** v. **The State of Bihar and Ors.**, Criminal Miscellaneous No. 36255 of 2013, decided on 4.1.2018. While inuring his case, Mr. Gupta, learned Senior Advocate argued that S.145 cannot be used to bring civil dispute within the ambit of criminal law with the object to establish possession on a property and mere apprehension of breach of peace between two private parties is not sufficient to draw proceedings under S. 145 of the Act *ibid*.

14. Very object and purpose of S.145 is definitely not to provide parties with an opportunity of bringing their civil disputes before a Criminal Court, or maneuvering for possession for the purpose of subsequent civil litigation and the real object of this provision is to arm the Magistrate with an additional weapon for maintaining peace within his/her area. S. 145 casts an onerous duty upon the Magistrate to guard against abuse of provisions by persons using it with the object of getting possession of property while attempting to drive the other side to a Civil Court. Aforesaid provision empowers a Magistrate to proceed under S. 145 CrPC, if in his/her opinion, dispute, if any, *inter se*, parties qua the immovable property is likely to cause breach of peace, either on the report of a police officer or upon other information and his/her satisfaction must reflect in the order passed by him/her, specifically mentioning therein grounds for his satisfaction.

15. In this regard, reliance is placed upon a judgment rendered by the Madras High Court in **Indira** v. **Vasantha** 1991 Crl. L.J. 1798, wherein it has been held as under:

> "9. The jurisdiction conferred upon an Executive Magistrate under S. 145 of the Code of Criminal Procedure is an exceptional one and the provisions of the section should have to be strictly followed while taking action under it. The object of the section is not to provide parties with an opportunity of bringing their civil disputes before a Criminal Court or of manoeuvring for possession for the purpose of the subsequent civil litigation, but to arm the Magistrate concerned with power to maintain peace within his local area. Therefore, a duty is cast on the Magistrates, to guard against abuse of provisions by persons using it with the object of getting possession of property while attempting to drive the other side to a Civil Court. The very jurisdiction of the Magistrate to proceed under this section, arises out of his satisfaction, of a dispute likely to cause breach of peace either on a report of a Police Officer or upon other information, which satisfaction must be reflected in the order which he should make in writing, stating the grounds of his satisfaction. This order which is the sine qua non of the proceedings, initiated under S. 145, Cr.P.C., must require the parties concerned in such dispute, to attend his Court in person or by pleader on a specified date and time, and to put in written statements of the irrespective claims as respects the facts of actual possession of the subject of dispute. After the passing of the preliminary order, a copy of the order shall be served in the manner provided for service of summons by the Criminal Procedure Code, upon such person or persons as may be directed by the said Magistrate and at least one copy should be affixed at some conspicuous place at or near the subject of dispute. This service of the copy of the order is provided under S. 145(1) and (3) together, it is apparent that the service of a separate summons is not contemplated and the preliminary order itself shall have to be served in the same pattern as service of summons. This Court on more than one occasion, had held, that under S. 145(1), Cr.P.C., a Magistrate having jurisdiction, shall make an order in writing that he was satisfied either from a police report or other information that a dispute likely to cause breach of peace existed, and the grounds of his satisfaction should be stated clearly to indicate the application of the mind of the Magistrate in passing the preliminary order. The provision of making the order in writing after initial satisfaction and stating the grounds of his satisfaction have been held to be mandatory. Though the Magi rate was not obliged to elaborately set out the entire

details of the information received by him, the preliminary order, on the face of it, should set out the grounds of the Magistrate being so satisfied or at least employ language to similar effect so as to indicate that he had applied his judicial mind to the information, in coming to the conclusion that there was inexistence a dispute, which dispute was likely to cause breach of peace, necessitating initiation of proceedings under S. 145, Cr.P.C. If there was absolutely nothing in the preliminary order showing expressly the grounds of his being so satisfied, which are in the nature of conclusions arrived at by him, on the report or information placed before him, it would be impossible for the parties called upon to put in their claims before him, to predicate as to what had led the Magistrate to pass such an order and to make their effective representations before him. This legal position is apparent from the decisions of this Court in Nagammal v. Mani (1966 LW (Cri) 101), Peria Mannadha Gounder v. Marappa Gounder (1968 LW Cri 179), Manikyaraja Ballal v. K. Jayaraja ballal (1981) LW Crl 10) and Janaki Ramachandran v. State, 1988 LW Cri 147 : 1989 Cri LJ 590. On facts, has already been noticed, that except summons and memo dated 4-7-1989 and 20-7-1989 there is no material on record, to indicate the promulgation of a preliminary order as contemplated under S. 145(1), Cr.P.C., which as stated earlier, is the foundation, for the exercise of jurisdiction by the Executive Magistrate."

10. The learned counsel for the respondents relied upon the judgment of the Full Bench of the Allahabad High Court in Kapoor Chand v. Suraj Prasad, AIR 1933 All 264 : (34 Cri LJ 414) for the proposition that non-compliance with strict letter of law in formulating the order under S. 145(1), Cr.P.C., would not prevent the Magistrate from exercising jurisdiction to proceed with the case and that any defect in the procedure whether of illegality or irregularity was cured by S. 537, Cr.P.C. (new S. 465, Cr.P.C.) if there was no prejudice. As stated earlier, it is his submission that reference in the summons and memo dated 4-7-1989 and 20-7-1989 to the dispute regarding house No. 7/ 16 and proceedings having been initiated under S. 145, Cr.P.C., would be sufficient to presume, not only application of mind by the Magistrate to the facts placed before him, but also his satisfaction arrived at on the materials so placed. The law laid own by the same High Court Parmatma v. State, and, Narain Singh v. Mst. Suraj Kishore Devi, , the view of the Patna High Court in Wazir Mahton v. Badri Mahton, , the dictum of the Rangoon High Court and the view of the Judicial Commissioner, Peshawar enunciated in MG. PO. LON. v. MG. BA ON (26 Cri LJ 324) and Municipal Committee, Kohat v. Piari (48 Cri LJ 159) respectively are to the same effect. In all these cases the Courts were considering the effect of the lack of a preliminary order or defects in the said order and held that they were only irregularities curable under S. 537, Cr.P.C. (new S. 465, Cr.P.C.) on the ground that no prejudice had been caused to the parties in each one of those cases. This Court in Janaki Ramachandran v. State (1988 LW Crl 147) held that requirements for passing a preliminary order under S. 145(1), Cr.P.C., was the satisfaction of the Executive Magistrate about the information with regard to breach of peace which grounds ought to be apparent on the face of the order itself and non-compliance with those legal requirements constituted an illegality affecting the very jurisdiction of the Magistrate, which could not be cured as an irregularity under S. 465, Cr.P.C. The difference between illegality and irregularity need not have to be gone into, though S. 465, Cr.P.C. takes within its fold only irregularity for two reasons, one is that I would prefer to follow the law laid down by this Court and the other is, in any event, the prejudice to the petitioners, leading to the failure of justice is apparent in these proceedings, in view of non recording of evidence and consideration of the same as provided under S. 145(4), Cr.P.C.

11. A reference was also made to the decision of the Privy Council in Abdul Rahman v. King Emperor, AIR 1927 PC 44 : (28 Cri LJ 259) to justify the approach of the Allahabad High Court and some other High Courts, holding that S. 537, Cr.P.C. would cure irregularities, if any, in the passing of the preliminary order. The Privy Council was concerned with a criminal trial. It was held therein that no serious defect in the mode of conduct of a criminal trial could be justified or cured by the consent of the Advocate of the accused. While dealing with the provisions of S. 360, Cr.P.C., as it then existed, relating to reading over of the depositions to witnesses to obtain an accurate record and to provide an opportunity to the witness to correct the words

which occurred or the clerk had taken down and not to enable the accused or his counsel to suggest corrections, the Privy Council held that a more non-compliance of the provisions of S. 360, Cr.P.C., was not enough to quash the conviction, unless it was accompanied by occasioning of any failure of justice. In that context S. 537, Cr.P.C., was referred to.

12. The Privy Council in Subramania Iyer v. Emperor (25 Madras 61) observed as follows:

> "The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity."

The view of the Privy Council in both aforementioned cases would be sufficient to steer clear of a "curable irregularity", since not only illegality is patent, but also prejudice to the petitioners is apparent.

13. The impugned order of the Sub-Divisional Magistrate does not disclose the documents placed before him by either party or his consideration of the same, to arrive at a conclusion. List of documents has not been appended to the order and the order does not also indicate any marking given to the documents produced by the respondents. Section 145(4), Cr.P.C., enables both the parties to adduce oral and documentary evidence and the Magistrate is bound not only to receive all such evidence as may be produced, but also is empowered to take such further evidence, if any, as he thinks necessary. The Magistrate under the 1974 Code cannot dispose of a proceeding on the basis of affidavits and, therefore, the evidence of witnesses will be essential for deciding the question of possession. The evidence contemplated includes both oral and documentary. In order to enable parties to adduce evidence, reasonable opportunity has to be given to produce documents and witnesses and the Magistrate will also have a duty to summon such witnesses as may be required by either party. This procedure prescribed under sub-sec. (4) must be followed, for it is mandatory and the oral evidence adduced will have to be recorded and the documents properly proved according to rules of evidence. After the production of the oral and documentary evidence, the Magistrate will have to decide the question of possession on the evidence placed before him, which necessarily implies discussion of evidence placed before him.

16. In the case at hand, dispute *inter se* parties is purely a civil one, rather rights of parties stood crystallized qua possession,, as has been taken note herein above, as such, complainant if is aggrieved on account of non-compliance of decree passed by civil court, ought to have filed appropriate proceedings in competent Court of law, but definitely not under S.145 CrPC with an intent to present civil dispute *inter se* him and respondent before a criminal court for possession of premises in question.

17. At the cost of repetition, it may be again observed that to initiate proceedings under S.145 CrPC, there are three requirements viz. (1) there must be a real breach of peace inviting such proceedings; (2) there must be material on record to prove the actual breach of peace; and (3) the magistrate shall form a subjective satisfaction to initiate such proceedings. Apart from above executive magistrate is also required to ensure /see that proceedings sought to be initiated under S.145 CrPC are actually not used by the party concerned for settlement of civil dispute for establishing possession of the property in dispute because very object of S.145 CrPC is merely to prevent breach of peace.

18. If S. 145 CrPC is read in its entirety, it provides for different steps/stages to be followed by the Magistrate concerned, while adjudicating upon the *Kallandra* placed before him/her or any other information received by him/her to the effect that a dispute exists

concerning any land, water or boundaries thereof, within his local jurisdiction, which is likely to cause breach of peace. Sub-section (1) thereof enjoins a duty upon the Magistrate to make an order in writing stating grounds of his being so satisfied that breach of peace exists on account of dispute between the parties concerning any land or water or boundaries thereof, after having received *Kallandra*/report or from any other source. While passing order under Sub-section (1) of S. 145, Magistrate is required to specifically record findings that dispute *inter se* parties is likely to cause breach of peace.

19. Similarly, Sub-section (3) casts a duty upon the Magistrate to cause service of summons on the parties concerned, after his/her having taken cognizance under Sub-section (1) of S. 145 CrPC. Sub-section (4) enables both the parties to adduce oral and documentary evidence and Magistrate is not only bound to receive all such evidence as may be adduced, but Sub-section (4) also empowers him/her to take such further evidence, if any, as he/she thinks necessary. Sub-section (5) of S. 145 CrPC provides that in case, one of the parties to the dispute is able to persuade the Magistrate that no dispute exists, the Magistrate shall cancel the preliminary order passed by him/her under Sub-section (1) and also stay further proceedings subject to such cancellation but order of the Magistrate passed under Sub-section (1) of S. 145 CrPC shall be final.

20. Sub-section (6)(a) of S. 145 CrPC empowers the Magistrate to pass an order declaring one party to be entitled to possession on the basis of evidence adduced on record by the respective parties, in terms of Sub-section (4) of S. 145 CrPC. Sub-section (6)(a) of S. 145 CrPC clearly provides that Magistrate can pass an order declaring a party to be entitled to possession thereof, until evicted therefrom in due course of law. Provisions contained under Sub-section (6)(a), further empower the Magistrate to restore the possession to a party entitled to same.

21. Leaving everything aside, in the case at hand there is no specific allegation, if any, against the respondent Panchhi Ram in the complaint filed under S.145 because, as has been taken note herein above, complainant in para-5 of the application has alleged that some persons illegally entered and trespassed into premises posing as owners. Similarly, report submitted by SHO in response to query raised by SDM also nowhere stated anything specific about respondent Panchhi Ram rather, it has been stated that the nephew of Panchhi Ram was found to be involved in the incident. Since there is no specific allegation against respondent with regard to forcible dispossession, proceedings if any, under S.145 CrPC could not have been otherwise initiated against him.

22. Merely mentioning of name of nephew of Panchhi Ram is not sufficient to conclude that forcible dispossession if any of the complainant came to be done at the behest of Panchhi Ram, rather complainant ought to have specifically mentioned the names of the persons in his complaint so that factum with regard to forcible dispossession, if any, of complainant by respondent Panchhi Ram through his nephew could be ascertained.

23. Consequently, in view of above, I find no merit in the present petition, which is accordingly dismissed. Order passed by Sub Divisional Magistrate, Manali is upheld. Pending applications, if any, stand disposed of.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Shri Saddam Hussain ....Applicant

Versus

The State of Himachal Pradesh ...Respondent

Cr.M.P.(M) No. 1880 of 2019
Decided on: 25.10.2019

Code of Criminal Procedure, 1973 - Section 439 – Regular bail – Grant of in case registered under POCSO Act, 2012- Sections 8 & 17- Held, allegations against accused are that he visited victim's house with a request to her to marry him and on refusal, he threatened her – No concrete evidence qua age of victim- Investigation is complete and chargesheet stands filed in court – No useful purpose would be served by keeping him in jail – Bail granted subject to conditions. (Para 3 & 5)

For the applicant : Mr. B.B. Vaid, Advocate.
For the respondent : Mr. Anil Jaswal, Additional Advocate General.
SI Pardeep Thakur, S.H.O, Police Station Nerwa, District Shimla, present along with record.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.(oral)

Petitioner is praying for grant of regular bail under Section 439 of the Code of Criminal Procedure in FIR No. 37 of 2019 dated 10.06.2019, registered at Police Station Nerwa, District Shimla under Sections 323, 354, 363, 366-A, 452, 506 read with Section 34 of the Indian Penal Code and Section 8 and 17 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter in short referred to as POCSO Act).

2. I have heard Sh. B.B. Vaid, learned counsel for the petitioner and Sh. Anil Jaswal, learned Additional Advocate General for the State. I have also gone through the status report filed on 23.10.2019 by ASI Mansa Ram and the record produced today by SI Pardeep Thakur, SHO P.S. Nerwa, to the extent it was necessary for adjudication of this petition.

3. **As per the status report and record, the facts are**:-

3(i)**.** Applicant on 09.06.2019 at about 9 P.M. came to the house of the complainant and pressurized her to marry him; on complainant's refusal to do so, the applicant threatened to do away with her life; complainant getting scared called for her father who had gone in the neighbourhood, where-after the applicant left her house.

3(ii). At around 11 P.M. the same night, while the complainant was asleep, the applicant again entered her home, woke her up; threatened her that either she accompany him, marry him or otherwise he will kill her; on her refusal, she was dragged by the bail petitioner alongwith two other persons, one of whom was carrying a stick 'danda'; she was beaten with stick; in order to save her life, she raised hue and cry and shouted, which compelled her father, who had gone in the neighbourhood, to return; on hearing his voice, the bail petitioner alongwith his two accomplices fled away from the spot.

3(iii)**.** The bail petitioner stopped the complainant and her father the next day (10.06.2019), while they were going to the Police Station to lodge FIR and asked them to compromise the matter.

3(iv). **The status report also reveals that**:-

(a) The complainant in the FIR herself disclosed her age as 17 years.

(b) During the investigation, it came out that name of the complainant was not entered in the Parivar Registrar of her father Sh. Abal Hussain, in Gram Panchayat Podhiyan.

(c) The complainant had studied up to primary standard; her School Leaving Certificate obtained from Govt. Central Elementary Education School, P.O. Bharanu, Sub Tehsil Nerwa, District Shimla, shows her date of birth as 22.05.2010. On that basis, age of the complainant

was taken by the prosecution as 12 years 9 months and 24 days, on the date of alleged incident.

(d) It has also come out in the investigation that this date of birth recorded in the School Leaving Certificate is not based on any contemporary authenticated record. The same has been carried forward from another School Certificate meant for nomads where probability of recording the date of birth merely on the statements of parents cannot be ruled out. Thus, at this stage, to rely upon this document with conclusiveness in respect of age of the complainant vis-a-vis curtailing the liberty and freedom of petitioner will not be appropriate.

(e) The allegations levelled in the FIR against the bail-petitioner are that he had come to the house of the complainant firstly at 9 P.M. asking her to marry him and secondly, at 11 P.M. with the same request. The second time, he was stated to be accompanied with two other persons, one of them was allegedly carrying a stick. These other two persons have so far not been identified by the prosecution.

(f) As per the case put forward in the FIR, it is apparent that the bail petitioner was very well aware about the near vicinity of the father of the complainant when he allegedly visited her house at 11 p.m.

(g) About the incident alleged to have been happened on 10.06.2019 while complainant along with her father went to lodge the FIR; the allegations are only in respect of bail petitioner asking them to compromise the matter.

(h) Status report does not reveal any previous criminal history of the bail petitioner.

(i) Bail applicant is in judicial custody at Sub Jail Kaithu w.e.f. 15.06.2019. Investigation of the case is complete and the challan stands already filed on 23.08.2019. Nothing remains to be recovered from the bail petitioner.

4. It is apt to refer to the guidelines for grant/or refusal of bail, reiterated by the Hon'ble Apex Court in **Cr. Appeal No. 1603 of 2019, titled Shri P. Chidambaram vs. Central Bureau of Investigation**, decided on 22.10.2019, relevant segments whereof are reproduced hereinafter:-

> *"17. Expression of prima facie reasons for granting or refusing to grant bail is a requirement of law especially where such bail orders are appealable so as to indicate application of mind to the matter under consideration and the reasons for conclusion. Recording of reasons is necessary since the accused/prosecution/victim has every right to know the reasons for grant or refusal to grant bail. This will also help the appellate court to appreciate and consider the reasonings for grant or refusal to grant bail. But giving reasons for exercise of discretion in granting or refusing to grant bail is different from discussing the merits or demerits of the case. At the stage of granting bail, an elaborate examination of evidence and detailed reasons touching upon the merit of the case, which may prejudice the accused, should be avoided. Observing that "at the stage of granting bail, detailed examination of evidence and elaborate documentation of the merits of the case should be avoided", in Niranjan Singh, it was held as under:-*
>
> > *"3. ……Detailed examination of the evidence and elaborate documentation of the merits should be avoided while passing orders on bail applications. No party should have the impression that his case has been*

prejudiced. To be satisfied about a prima facie case is needed but it is not the same as an exhaustive exploration of the merits in the order itself."

22. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:- (i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; (ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; (iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; (iv) character behaviour and standing of the accused and the circumstances which are peculiar to the accused; (v) larger interest of the public or the State and similar other considerations (vide Prahlad Singh Bhati v. NCT, Delhi and another (2001) 4 SCC 280). There is no hard and fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner. At this stage itself, it is necessary for us to indicate that we are unable to accept the contention of the learned Solicitor General that "flight risk" of economic offenders should be looked at as a national phenomenon and be dealt with in that manner merely because certain other offenders have flown out of the country. The same cannot, in our view, be put in a straight-jacket formula so as to deny bail to the one who is before the Court, due to the conduct of other offenders, if the person under consideration is otherwise entitled to bail on the merits of his own case. Hence, in our view, such consideration including as to "flight risk" is to be made on individual basis being uninfluenced by the unconnected cases, more so, when the personal liberty is involved.

23. In Kalyan Chandra Sarkar v. Rajesh Ranjan and another (2004) 7 SCC 528, it was held as under:-

> *"11. The law in regard to grant or refusal of bail is very well settled.The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:*
>
> *(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.*
>
> *(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.*
>
> *(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598 and Puran v. Rambilas (2001) 6 SCC 338.)*

Referring to the factors to be taken into consideration for grant of bail, in Jayendra Saraswathi Swamigal v. State of Tamil Nadu (2005) 2 SCC 13, it was held as under:-

> *"16. …….The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in State v. Capt. Jagjit Singh AIR 1962 SC 253 and Gurcharan Singh v. State (Delhi Admn.) (1978) 1 SCC 118 and basically they are — the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger*

interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case……"

24. After referring para (11) of Kalyan Chandra Sarkar, in State of U.P. through CBI v. Amarmani Tripathi (2005) 8 SCC 21, it was held as under:-

"18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati v. NCT, Delhi (2001) 4 SCC 280 and Gurcharan singh v. State (Delhi Admn.)(1978) 1 SCC 118]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused……..".

Hon'ble Apex Court in Criminal Appeal No. 1309 of 2018 titled **Sangitaben Shaileshbhai** vs. **State of Gujarat and anr**., held as under:-

"……..while adjudicating a bail application, Section 439 of the Code of Criminal Procedure, 1973 is the guiding principle wherein Court takes into consideration, inter alia, the gravity of the crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds. Each criminal case presents its own peculiar factual matrix, and therefore, certain grounds peculiar to a particular case may have to be taken into account by the Court. However, the Court has to only opine as to whether there is prima facie case against the accused. The Court must not undertake meticulous examination of the evidence collected by the police, or rather order specific tests as done in the present case…….

5. In view of the above, I am of the considered view that no fruitful purpose will be served in case the bail petitioner is allowed to continue in judicial custody. He is a resident of Village Tarshanu, P.O. Ruslah, Tehsil Nerwa, District Shimla. His presence can always be secured in the trial. Accordingly, the petition is allowed. Bail petitioner is ordered to be released on bail in FIR No. 37 of 2019 dated 10.06.2019, registered at Police Station Nerwa, District Shimla under Sections 323, 354, 363, 366-A, 452, 506 read with Section 34 of the Indian Penal Code and Section 8 and 17 of the Protection of Children from Sexual Offences Act, 2012, on his furnishing personal bail bond to the tune of Rs. 50,000/- with one local surety in the like amount to the satisfaction of the learned Sessions Judge, Shimla, subject to following conditions:-

i) The petitioner is directed to join the investigation of the case as and when called for by the Investigating Officer in accordance with law.

ii) The petitioner shall not hamper the investigation in any manner whatsoever.

iii) The petitioner undertakes not to contact the complainants, to threaten or browbeat them or to use any pressure tactics in any manner whatsoever.

iv) The petitioner shall not leave India without prior permission of the Court.

v) The petitioner undertakes not to make any inducement, threat or promise, directly or indirectly, to the Investigating Officer or any person acquainted with the facts of the case to dissuade him/her from disclosing such facts to the Court or any Police Officer or tamper with the evidence.

6. It is clarified that the observations made above are only for the purpose of adjudication of the present bail petition and the learned Trial Court shall not be influenced by any of these observations while deciding the case on merits. It shall be open for the prosecution to move for cancellation of the bail in case the petitioner abuses the liberty granted and breaches the conditions of bail. The petition stands disposed of in the above terms.

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

Renu Bala and others ...Petitioners

Versus

State of Himachal Pradesh and another ...Respondents

CrMMO No. 533 of 2019

Decided on: October 25, 2019

Code of Criminal Procedure, 1973 - Section 482 - Inherent powers – Quashing of FIR pursuant to compromise in non-compoundable cases – Scope -Held, power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 of the Code (Para 10)

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 SCC 466

Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497

For the petitioners: Mr. Goldy Kumar, Advocate.

For the respondents: Mr. Sanjeev Sood, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General, for respondent No.1.
Nemo for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under 482 CrPC, prayer has been made on behalf of the petitioner for quashing and setting aside FIR No. 38, dated 3.2.2013, under Ss. 294, 509, 109, 354D and 34 IPC, registered at Police Station Kangra, District Kangra, Himachal Pradesh and consequent proceedings i.e. Case No. 99/II/2013 pending before learned Additional Chief Judicial Magistrate, Kangra, District Kangra, Himachal Pradesh titled State of Himachal Pradesh vs. Karam Chand and others, on the basis of compromise Annexure P-2.

2. Precisely the facts, as emerge from the record are that FIR (supra) came to be lodged at the behest of respondent No.2, Smt. Kiran Bala, alleging therein that the petitioners herein not only extended threats to her but also used obscene/vulgar language over the phone. After completion of investigation, police presented *Challan* in the competent Court of law i.e. Additional Chief Judicial Magistrate, Kangra, which is pending adjudication. However, during the pendency of the case, parties have resolved to settle their dispute amicably inter se them vide compromise Annexure P-2, dated 14.7.2019, whereby petitioners as well as respondent No.2, with a view to maintain cordial relations in future, resolved to settle their dispute amicably inter se them.

3. On 12.9.2019, this Court having carefully perused the contents of Annexure P-2, deemed it necessary to cause of presence of respondent No.2, however, on 4.10.2019, learned counsel for the petitioners informed that since respondent No.2 is pregnant, she is unable to come present, as such, this Court directed Station House Officer, Dharamshala to visit the house of respondent No.2 so that factum with regard to compromise placed on record, could be verified.

4. Pursuant to order dated 4.10.2019, SI Jasbir Singh, Police Station Kangra has come present. Mr. Sanjeev Sood, learned Additional Advocate General has also made available statement of respondent No.2/complainant, recorded by Station House Officer, Police Station, Kangra, which is taken on record, perusal of which reveals that respondent No.2/complainant has entered into compromise with the petitioners vide annexure P-2 and in view of amicable settlement *inter se* parties, she does not want to prosecute the case further. Statement of respondent No.2 is taken on record.

5. Mr. Sanjeev Sood, learned Additional Advocate General, having perused statement of respondent No.2, fairly stated that since respondent No.2 has compromised the matter with the petitioners, no fruitful purpose would be served in case, FIR as well as consequent proceedings pending in the competent Court of law are allowed to continue. He further stated that in view of subsequent developments, especially the statement made by respondent No.2, there are very bleak and remote chances of conviction, as such prayer made in the present petition may be accepted.

6. In view of the aforesaid statement of respondent No. 2, this Court sees no impediment in accepting the prayer made in the instant petition, so far quashment of FIR in question and consequent proceedings is concerned.

7. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

8. At this stage, it would be relevant take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution

> evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

9. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

10. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
>
> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have

settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

11. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of

personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

"... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score..."

"...A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system..."

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision

to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

12. In the case at hand also, the offences alleged against the petitioners do not involve offences of mental depravity or of heinous nature like rape, dacoity or murder and as such, with a view to maintain harmony and peace in the society, this court deems it appropriate to quash the FIR as well as consequential proceedings thereto, especially keeping in view the fact that petitioners and respondent No.2 have compromised the matter with each other, in which case, possibility of conviction is remote and no fruitful purpose would be served in continuing with the criminal proceedings.

13. Since the matter stands compromised between the petitioners and respondent No.2, no fruitful purpose would be served in case proceedings initiated against the petitioners are allowed to continue. Moreover, present is a simple dispute and since respondent No.2, is no more interested in carrying on with the criminal proceedings, as such, prayer made in the petition at hand can be accepted.

14. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 38, dated 3.2.2013, under Ss. 294, 509, 109, 354D and 34 IPC, registered at Police Station Kangra, District Kangra, Himachal Pradesh and consequent proceedings i.e. Case No. 99/II/2013 pending before learned Additional Chief Judicial Magistrate, Kangra, District Kangra, Himachal Pradesh titled State of Himachal Pradesh vs. Karam Chand and others, are quashed and set aside. Petitioners are acquitted of the offences levelled against them in the aforesaid FIR.

15. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Shakuntla Devi ....Appellant

Versus

State of H.P. and another. ...Respondents

RSA No. 114/2009

Decided on:25.10.2019

Indian Evidence Act, 1872 – Section 35 – Correction of date of birth recorded in matriculation certificate - Entries in public record(s) vis a vis school record(s) – Held, death and birth register maintained by statutory authorities raises a presumption of correctness – It

would prevail over entries made in a school register particularly in absence of any proof that school entries were recorded at the instance of guardian of person concerned. (Para 4).

Cases referred:
Manoj Kumar vs. Government of NCT of Delhi and others, (2010) 11 SCC 702
CIDCO v. Vasudha Gorakhnath Mandevlekar, 2009 (7) SCC 283

For the appellant : Mr. Anup Rattan, Advocate.
For the respondents : Mr. Anil Jaswal, Additional Advocate General, for respondent No1.
Mr. Vir Bhadur Verma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.(oral)

The suit was filed by the appellant seeking correction in her date of birth recorded in the School Leaving Certificate from 03.01.1973 to 03.01.1975, which stands reflected in her Matriculation Certificate as well. The suit was decreed by learned Trial Court vide judgment dated 02.07.2008, however, the appeal preferred by the respondents was allowed by the learned First Appellate Court on 10.12.2008. Aggrieved against dismissal of her civil suit by the learned First Appellate Court, instant appeal has been preferred by the appellant. Parties hereinafter are referred to as they were before the learned Trial Court.

2. This appeal was admitted on 25.03.2009 on following substantial questions of law:-

"1. Whether the First Appellate Court below has misread and mis-appreciated the evidence produced on record as Exhibit PW-1/A and PW-1/B?

2. Whether the First Appellate Court below has failed to take into consideration that the presumption of truth is attached to the Parivar Register, Birth and Death Register and record of Government of Primary School, Punan and wrongly discarded these evidence?"

3. I have heard Sh. Anup Rattan, learned counsel for the appellant, Sh. Anil Jaswal, learned Additional Advocate General and Sh. Vir Bhadur Verma, learned counsel for the respondents and with their assistance gone through the record.

Substantial Questions of Law Nos. 1 & 2:-

4. Both the questions of law being interlinked, are taken up together for adjudication. The facts as borne out from the pleadings and the evidence are:-

4(i) Plaintiff was initially resident of Gram Panchayat, Sholli. Gram Panchayat Sholli, had issued a certificate to the plaintiff on 19.04.1980 (Ext. PW-3/A) to the effect that her date of birth was entered in the Gram Panchayat record as 03.01.1975.

4(ii) Plaintiff, thereafter shifted to Gram Panchayat Barog. Certificate issued by Gram Panchayat Barog on 02.10.2005 (Ext. PW-1/A) also shows that as per record of Gram Panchayat Barog, the recorded date of birth of the plaintiff was 03.01.1975.

4(iii) Ext. PW-2/A is the Certificate issued by Govt. Primary School, Punan to the effect that:- plaintiff was admitted in Govt. Primary School, Punan, District Shimla at Sr. No. 298/29; plaintiff studied Primary Classes there; her date of birth recorded at the time of admission in Class-I on 28.04.1980 was 03.01.1975; she passed out class-5th from the school on 28.02.1986.

4(iv) Ext. PW-3/B is the admission form filled by the mother of the plaintiff at the time of admission of plaintiff in the above mentioned school. This admission form dated 28.04.1980 also reflects the date of birth of the plaintiff as 03.01.1975.

4(v) The dispute is in respect of the School Leaving Certificate Ext. PW-2/B dated 11.03.1986, wherein date of birth has been recorded as 03.01.1973.

4(vi) The record shows that in both the Gram Panchayats i.e., Sholli as well as Barog, the date of birth of the plaintiff is recorded as 03.01.1975. Her date of birth entered by her mother at the time of admitting her in Govt. School, Punan, was recorded as 03.01.1975.

The date of birth recorded by the school in its admission register while granting admission to the plaintiff in Class-I was also 03.01.1975. It is only in the School Leaving Certificate that the date of birth of the plaintiff was entered as 03.01.1973 instead of 03.01.1975. There was no basis with the school for having entered the date of birth of the plaintiff as 03.01.1973 in the School Leaving Certificate. Even in the remarks column entered in Ext. PW-2/A, it has been stated that the error in recording the date of birth of the plaintiff in School Leaving Certificate was on account of some inadvertent mistake.

4(vii) The plaintiff while appearing in the witness box as PW-1, stated that she became aware of incorrect recording of her date of birth in the School Leaving Certificate only in the year 2005. It is seen from her statement that she has not been given any suggestions by the respondents to the effect that she was aware of the incorrect recording of her date of birth in her School Leaving Certificate at any point of time earlier. The instant suit was filed in 2006. Present was not a case of a person, who was praying for correction in the date of birth at the fag end of service/employment. The plaintiff was 31 years old at the time of filing of the civil suit.

4(viii) Hon'ble Apex Court in ***(2010) 11 SCC 702, titled as Manoj Kumar*** *vs.* ***Government of NCT of Delhi and others***, held thus:-

> *"**12**. The explanation offered by the appellant with supporting documents, was not considered either by respondents 3 and 4, or by the Tribunal and the High Court. They ignored the relevant material and decided against the appellant only because the matriculation certificate as it stood at the time of the employment application was different from the date given in the application for employment. While the matriculation certificate is a strong material, other equally relevant material cannot be ignored, particularly when the matriculate certificate has been corrected. The case of an entrant seeking correction of date of birth should not be equated with cases of government servants at the tail end of their service trying to get extension of service by alleging wrong date of birth. We should also not lose sight of the fact that many service Rules provide for change of date of birth in the Service Register, on production of satisfactory proof, provided that the change is sought within the first few years of entering service. Be that as it may."*

In ***2009 (7) SCC 283, titled as CIDCO*** *v.* ***Vasudha Gorakhnath Mandevlekar***, Hon'ble High Court has observed as under:-

> *"**18**. The deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent. (See Birad Mal Singh v. Anand Purohit)."*

5. The First Appellate Court has failed to observe the ratio laid down by Hon'ble Apex Court in the aforesaid judgments. The incorrect date of birth appearing in the plaintiff's Matriculation Certificate is directly attributable to the incorrect entry made in the School Leaving Certificate dated 11.03.1986 (Ext. PW-2/B) in respect of which the plaintiff is not at fault.

In view of the above, the appeal is allowed. The judgment and decree passed by the learned First Appellate Court is quashed and set aside. Suit filed by the plaintiff is decreed accordingly. Judgment and decree dated 02.07.2008, passed by the learned Trial Court is affirmed. Pending application(s), if any also stand disposed of.

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

Anil Kumar Sharma .....Petitioner.

Versus

Naresh Kumar alias Nika & Anr. ....Respondents.

Cr. Revision No. 349 of 2019.

Reserved on: 27th September, 2019.

Date of Decision: 24th October, 2019.

Code of Criminal Procedure, 1973 – Sections 397, 401 & 438 – Bail order – Challenge thereto by victim – Locus standi – Held, victim aggrieved of offence and having bonafide connection with cause of action has the locus standi to challenge bail granted by the trial court. (Para 3)

Case referred:

Amanullah and another vs. State of Bihar and others, (2016)6 SCC 699

For the Petitioner:	Mr. Satyen Vaidya, Senior Advocate with Vivek Sharma, Advocate.
For Respondent No.1:	Mr. S.D. Gill, Advocate.
For Respondent No.2:	Mr. Hemant Vaid, Mr. Arvind Sharma, Addl. A. Gs., with Mr. Y. S. Thakur, and, Mr. Vikrant Chandel, Dy. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The informant/victim, becoming aggrieved, by, an order made by the learned Additional Sessions Judge-I, Shimla, hence, affording indulgence of anticipatory bail, , vis-a-vis, the accused/respondent No.1, herein, has, thereagainst motioned this Court, for quashing, the affirmative pronouncement made, upon, bail petition No. 338/2019, on, 29.8.2019, hence by the learned Additional Sessions Judge-I, Shimla.

2. At the out set, the learned counsel appearing for the accused/respondent No.1, has with vigour, made a vehement address before this Court (a) that the informant/victim, has no locus standi, to cast a challenge, vis-a-vis, an affirmative order becoming pronounced, upon, the afore bail petition, hence by the learned Addl. Sessions Judge concerned, (b) given the befitting locus standi to cast a challenge, vis-a-vis, the afore order, being solitarily vested, in, the State, and, with the latter not making any motion, before this Court, thereupon, the motion as made herebefore, by the victim/informant, being, as, mis-recoursed legal remedy.

3. However, the afore contention is rendered rudderless, in the face of the Hon'ble Apex Court, in, a case titled, as, ***Amanullah and another vs. State of Bihar and others***, reported in ***(2016)6 SCC 699***, making, the, hereafter extracted expostulations, in, paragraphs No.19 and 20 thereof, paras whereof stand extracted hereinafter:-

> "19. The term 'locus standi' is a latin term, the general meaning of which is 'place of standing'. The Concise Oxford English Dictionary, 10th Edn., at page 834, defines the term 'locus standi' as the right or capacity to bring an action or to appear in a court. The traditional view of 'locus standi' has been that the person who is aggrieved or affected has the standing before the court, i.e., to say he only has a right to move the court for seeking justice. Later, this Court, with justice-oriented approach, relaxed the strict rule with regard to 'locus standi', allowing any person from the society not related to the cause of action to approach the court seeking justice for those who could not approach themselves. Now turning our attention towards the criminal trial, which is conducted, largely, by following the procedure laid down in the Cr.PC. Since, offence is considered to be a wrong committed against the society, the prosecution against the accused person is launched by the State. It is the duty of the State to get the culprit booked for the offence committed by him. The focal point, here, is that if the State fails in this regard and the party having bonafide connection with the cause of action, who is aggrieved by the order of the court cannot be left at the mercy of the State and without any option to approach the appellate court for seeking justice.

20. In this regard, the Constitution Bench of this Court in the case of P.S.R. Sadhanantham's case (supra) has elaborately dealt with the aforesaid fact situation. The relevant paras 13, 14 and 25 of which read thus:

"13. It is true that the strictest vigilance over abuse of the process of the court, especially at the expensively exalted level of the Supreme Court, should be maintained and ordinarily meddlesome bystanders should not be granted "visa". It is also true that in the criminal jurisdiction this strictness applies a fortiori since an adverse verdict from this Court may result in irretrievable injury to life or liberty.

14. *Having said this, we must emphasise that we are living in times when many societal pollutants create new problems of unredressed grievance when the State becomes the sole repository for initiation of criminal action. Sometimes, pachydermic indifference of bureaucratic officials, at other times politicisation of higher functionaries may result in refusal to take a case to this Court under Article 136 even though the justice of the lis may well justify it. While "the criminal law should not be used as a weapon in personal vendettas between private individuals", as Lord Shawcross once wrote, in the absence of an independent prosecution authority easily accessible to every citizen, a wider connotation of the expression "standing" is necessary for Article 136 to further its mission. There are jurisdictions in which private individuals — not the State alone — may it statute criminal proceedings.* The Law Reforms Commission (Australia) in its Discussion Paper No. 4 on "Access to Courts — I Standing: Public Interest Suits" wrote:

> "The general rule, at the present time, is that anyone may commence proceedings and prosecute in the Magistrate court. The argument for retention of that right arises at either end of the spectrum — the great cases and the frequent petty cases. The great cases are those touching Government itself — a Watergate or a Poulson. However independent they may legally be any public official, police or prosecuting authority, must be subject to some government supervision and be dependent on Government funds; its officers will inevitably have personal links with government. They will be part of the 'establishment'. There may be cases where a decision not to prosecute a case having political ramifications will be seen, rightly or wrongly, as politically motivated. Accepting the possibility of occasional abuse the Commission sees merit in retaining some right of a citizen to ventilate such a matter in the courts."

Even the English System, as pointed by the Discussion Paper permits a private citizen to file an indictment. In our view the narrow limits set in vintage English Law, into the concept of person aggrieved and "standing" needs liberalisation in our democratic situation. In Dabholkar case this Court imparted such a wider meaning. The American Supreme Court relaxed the restrictive attitude towards "standing" in the famous case of Baker v. Carr. Lord Denning, in the notable case of the Attorney-General of the Gambia v. Pierra Sarr N'jie, spoke thus:

> "... the words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him;"

Prof. S.A. de Smith takes the same view:

> "All developed legal systems have had to face the problem of adjusting conflicts between two aspects of the public interest — the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him."

Prof. H.W.R. Wade strikes a similar note:

> "In other words, certiorari is not confined by a narrow conception of locus standi. It contains an element of the actio popularis. This is because it looks beyond the personal rights of the applicant; it is designed to keep the machinery of justice in proper working order by preventing inferior tribunals

> and public authorities from abusing their powers." In Dabholkar case, one of us wrote in his separate opinion: "The possible apprehension that widening legal standing with a public connotation may unloose a flood of litigation which may overwhelm the Judges is misplaced because public resort to court to suppress public mischief is a tribute to the justice system." This view is echoed by the Australian Law Reforms Commission.
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> 25. In India also, the criminal law envisages the State as a prosecutor. Under the Code of Criminal Procedure, the machinery of the State is set in motion on information received by the police or on a complaint filed by a private person before a Magistrate. If the case proceeds to trial and the accused is acquitted, the right to appeal against the acquittal is closely circumscribed. Under the Code of Criminal Procedure, 1898, the State was entitled to appeal to the High Court, and the complainant could do so only if granted special leave to appeal by the High Court. The right of appeal was not given to other interested persons. Under the Code of Criminal Procedure 1973, the right of appeal vested in the States has now been made subject to leave being granted to the State by the High Court. The complainant continues to be subject to the prerequisite condition that he must obtain special leave to appeal. The fetters so imposed on the right to appeal are prompted by the reluctance to expose a person, who has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. The Law Commission of India gave anxious thought to this matter, and while noting that the Code recognised a few exceptions by way of permitting a person aggrieved to initiate proceedings in certain cases and permitting the complainant to appeal against an acquittal with special leave of the High Court, expressed itself against the general desirability to encourage appeals against acquittal. It referred to the common law jurisprudence obtaining in England and other countries where a limited right of appeal against acquittal was vested in the State and where the emphasis rested on the need to decide a point of law of general importance in the interests of the general administration and proper development of the criminal law. But simultaneously the Law Commission also noted that if the right to appeal against acquittal was retained and extended to a complainant the law should logically cover also cases not instituted on complaint. It observed:
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> > "58.....Extreme cases of manifest injustice, where the Government fails to act, and the party aggrieved has a strong feeling that the matter requires further consideration, should not, in our view, be left to the mercy of the Government. To inspire and maintain confidence in the administration of justice, the limited right of appeal with leave given to a private party should be retained, and should embrace cases initiated on private complaint or otherwise at the instance of an aggrieved person."
>
> However, when the Criminal Procedure Code, 1973 was enacted the statute, as we have seen, confined the right to appeal, in the case of private parties to a complainant. This is, as it were, a material indication of the policy of the law."
>
> (emphasis supplied)

(a) vis-a-vis, the import carried, by, the phrase "locus standi", and, it mandating therein, vis-a-vis, upon, failure of the State, to, cast a challenge, vis-a-vis, those orders rendered by the courts of law, upon, theirs purportedly mis-exercising jurisdiction, under, the powers, vested in them, under the Cr.P.C., rather, yet, facilitating the aggrieved, from, the apposite orders rendered, by, the courts of law concerned, upon, theirs exercising jurisdiction, under the Cr.P.C., to, rather both hold, the, befitting requisite locus standi, and, also to concomitantly cast a challenge thereagainst, before the revisional courts, (b) however, only upon, the imperative therein, cast ingredients becoming evidently satiated, inasmuch, as, the aggrieved, holding a bonafide connection, with, the cause of action, and, also his being palpably aggrieved, by, the purported erroneous orders, rendered, hence by the courts of law, upon, theirs exercising jurisdiction(s) vested, in them, under, the relevant provisions, of, the Cr.P.C. Since, the, informant also don, the, mantle, of, a victim, vis-a-vis, offences embodied, in the

apposite FIR, thereupon, he hence satiate, the, afore expostulations, and, emphatically also he holds, a prima facie connection, with, the apt cause, of, action, and, whereupon, he hold, the, befitting locus standi, to, cast an onslaught thereto.

4. Be that as it may, the learned counsel appearing for the accused/respondent No.1, has contended with much vigour, that, the order impugned before this Court, enjoining its, becoming validated, by this Court, (a) given the bail applicant/respondent No.1 herein throughout rendering cooperation, in, the investigations, as, stood conducted, by, the Investigating Officer concerned, and, also with there being no evidence against him, vis-a-vis, his either influencing, the, prosecution witnesses, or his tampering, with, prosecution evidence, and, hence the revisionist, holding no empowerment, to, make any valid espousal, before this Court qua the impugned order being, interfered with.

5. However, the afore made argument, is, bereft of any vigour, as, dehors, the respondent/accused No.1 not making, any, evident breaches, vis-a-vis, the conditions, as, pronounced for compliances therewith, by him, does, leverage this Court, to, in the exercise revisional jurisdiction, to, rather test the validity, of, the reasoning, as, assigned by the learned court below, in its proceeding, to, not order, for, the accused/respondent No.1, being subjected, to, custodial interrogation, for hence, the recovery, of, the embezzled sums of money, becoming, effectuated from him, (a) rather its proceeding, to, afford, the, indulgence of pre-arrest bail, to, the accused/respondent No.1 herein. Conspicuously also any evident breaches, vis-a-vis, any imperative conditions, set forth, in the apposite order, validly empowers only, the, court making the apposite order, to, hence cancel, the, facility of bail, whereas, legally unmeritworthy, reasoning(s) made therein, rather empowers, the, revisional court, to, make interference(s) therewith. Consequently, it is imperative, for this Court, to discern from the record, whether the reasons, as, stood assigned, hence, by the learned Additional Sessions Judge concerned, for, affording, the, indulgence, of, pre-arrest bail, to respondent No.1 herein/accused, is/are meritworthy. (a) The solitary reason which visibly prevailed, upon, the learned Additional Sessions Judge concerned, to, grant, the, indulgence of pre-arrest bail, vis-a-vis, the accused/respondent No.1, is, anvilled, upon, the factum, qua there existing, no relationship of employer, and, employee inter se the accused/respondent No.1, and, the victim/informant, and, hence, there being no occasion, for, entrustment of sums of money, to, the accused, (b) and, also concomitantly their being, no, embezzlement(s) thereof, (c) and, thereupon, also there being no necessity, for, the embezzled sums of money hence becoming ensured to be recovered, from, the accused/respondent No.1, upon his being ordered, to, be subjected to custodial interrogation. However, the afore reasoning, is, benumbed, (d) given a perusal of the status report as putforth hence before the learned Additional Sessions Judge concerned, rather unfolding, qua therein, a, trite allusion, being made, vis-a-vis, the defence rather canvassing, vis-a-vis, the afore entrusted sums of money, borne in a sum of Rs.9,65,000/-, becoming robbed, from him, at the HRTC Workshop, occurring between Taradevi-Shoghi, (e) reiteratedly, the afore propagation, does bringforth, an, acquiescence, of, the bail petitioner, vis-a-vis, his becoming entrusted, with, the afore sums of money, (f) and, also a, further acquiescence emanating therefrom qua there also occurring, a, relationship of employer and employee, inter se both, and, further, an, allusion, of, the status report filed, by the prosecution before the learned Additional Sessions Judge concerned, rather unveiling the factum, vis-a-vis, the, CCTV camera, as, installed at the relevant site, of, occurrence, rather omitting to, make any display, to, mete succor, vis-a-vis, the afore defence, as, stand propagated by the bail-petitioner/accused, (g) thereupon, with prima facie evidence, existing on record, qua the afore sums, of, money, rather standing embezzled, and, hence thereupon there was, a, dire necessity, for, the learned trial Court, to proceed, to, decline, the, indulgence, of, pre-arrest bail, to, the bail-applicant/accused, (h) and, rather it was, incumbent upon, the learned Additional Sessions Judge concerned, to insist, upon, the Investigating Officer, to, effectuate hence the recovery, of, the afore embezzled sums, of, money, at the instance of the accused, through, the bail applicant, being ordered, to be subjected, to, custodial interrogation. The afore palpable undisputed facts,

constrains this court, to, make a conclusion, vis-a-vis, the learned Additional Sessions Judge concerned, not only, overlooking the afore germane prima facie evidence, besides hers hence also overlooking, the, prima facie probative sanctity thereof, and, hence, she has mismaneuvered, both, facts and law, in, affording, the, indulgence, of, pre-arrest bail tot he applicant/accused/respondent No.1.

6. For the foregoing reasons, the instant petition is allowed, and, the impugned order rendered by learned Additional Sessions Judge-I, Shimla, upon, Bail Petition No. 338/2019, on 29.8.2019, is quashed, and, set aside. However, it is made clear that the observations made hereinabove shall have no bearings on the merits of the case. All pending applications also stand disposed of.

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

Dev Raj alias Devo .....Appellant.

Versus

State of H.P. ....Respondent.

Cr. Appeal No. 72 of 2009.
Reserved on: 15th October, 2019.
Date of Decision: 24th October, 2019.

Indian Penal Code, 1908 – Sections 307, 323, 325 & 341 – Wrongful restraint, attempt to murder, grievous hurt etc – Appeal against conviction recorded by Sessions Judge – Proof – Held, on facts (i) victim 'B' had suffered fracture of frontal bone on both sides as well as fracture of left temporal bone (ii) injuries were dangerous to life (iii) statement of victim finds full corroboration from other witnesses (iv) injuries not possible by fall (v) plea that victim was in an inebriated condition and had a fall falsified from his MLC (vi) weapon of offence connecting accused with crime – Evidence proves commission of aforesaid offences by accused – No perversity or misappreciation of evidence by trial court – Appeal dismissed. (Para 9 to 13).

For the Appellant: Mr. V.S. Rathore, Advocate.

For the Respondent: Mr. Hemant Vaid, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, directed by the convict/ accused/appellant, against, the pronouncement made by the learned Sessions Judge, Kangra at Dharamshala, H.P., upon, Sessions Trial No.34-I/VII-2006, whereunder, he convicted, besides imposed consequent therewith sentence, upon, the convict/accused/appellant, for, his committing offences punishable under Sections 341, 307, 325, and, under Section 323 of the IPC.

2. The facts relevant to decide the instant case are that on 2.2.2006 at about 8 P.M. on the way at village Paniyala, the accused wrongfully restrained Baldev Singh son of Lakha Ram, resident of Bhanala, Tehsil Shahpur, District Kangra, and, caused simple and grievous hurt to Baldev Singh. It is also alleged that the accused had caused injury to Baldev Singh which was dangerous to his life. On the afore facts, FIR was registered against the accused in the police station, and, thereafter all the codel formalities were completed.

3. On conclusion of the investigation, into the offences, allegedly committed by the accused, a report, under Section 173 of the Code of Criminal Procedure, was prepared, and, filed before the learned trial Court.

4. The accused/appellant herein, stood charged, by the learned trial Court, for, his committing offences, punishable under Sections 341, 323, 325, and, under Section 307, of, the IPC. In proof of the prosecution case, the prosecution examined 15 witnesses. On

conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction, upon, the accused/appellant herein, for, his hence committing offences punishable, under, Sections 341, 307, 325, and, under, Section 323, of, the IPC.

6. The appellant herein/accused, stands aggrieved, by the findings of conviction, recorded, by the learned trial Court. The learned counsel appearing, for, the appellant herein/accused, has concertedly, and, vigorously contended, qua the findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation, of, the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care, and, incision, evaluated the entire evidence on record.

9. The victim Baldev Singh, as, unraveled by MLC, borne in Ex.PW12/A, and, proven by PW-12, sustained upon his person, the injuries delineated therein, and, the afore injuries, are, further testified by PW-4, to, beget fracture of frontal bone, on, both sides with fracture, of, left temporal bone, and, the testification of PW-4, is, meted assured corroboration, by, the testification rendered, by, PW-3, Dr. Raman Sharma. The echoings borne in the afore rendered testifications, do carry, precise underlinings, vis-a-vis, grievous injuries hence dangerous, to the life, of, the victim, becoming rather entailed, upon, his person.

10. The afore alluded medical evidence, does, succor the charge against the accused/convict, and, the ocular account testified by the victim, is, meted fullest corroboration by PW-6, and, by PW-15. The testifications of the afore ocular witnesses, are, rendered with, the, fullest intra se, and, inter se corroborations, and, obviously they do not also unfold any blatant improvements or embellishments, vis-a-vis, their respectively recorded statements previously in writing, and, hence absolute credence, is, enjoined to be meted thereto. Even, a reading of the testifications of the afore ocular witnesses, and, as embodied in their respective cross-examinations, rather do not disclose, any defence, vis-a-vis, the accused, being unavailable at the site of occurrence, rather, the trend of cross-examination, wheretowhich rather the afore witnesses, stood subjected to, contrarily unveil, vis-a-vis, the accused alongwith the victim, and, also along, with the ocular witnesses, all together consuming liquor, (a) and, though danda, Ex.P-3, stands testified, by the ocular witnesses, to, comprise the relevant weapon of offence, yet therein it stands projected, to be not used, by the accused, in his, inflicting blows, on, the head of the victim, (b) rather the defence espouses qua the head injuries, entailed upon the person of the victim, rather being, a, sequel of the victim falling hence under the influence, of, liquor. However, all the afore suggestion(s) stood repelled. Consequently, the effect of the afore trend, of, cross-examination, wheretowhich, each of the ocular witnesses to the occurrence, stood subjected to, is qua, there occurring, a, vivid display qua the accused, joining the company of the ocular witness, hence, also mark, his presence at the relevant time, (c) and, when PW-12, who prepared Ex.PW12/A, has, in his cross-examination, also dispelled the defence espoused, vis-a-vis, the victim in contemporaneity to his being subjected to medical examination, rather his

being,in, an inebriated state, (d) thereupon, with the afore defence becoming staggered, does constrain this Court to assign tenacity, to, the uneroded testifications rendered, by, the ocular witnesses, to, the occurrence.

11. Be that as it may, Ex.P-3, though was not recovered by the Investigating Officer, at the instance, of, the accused, rather when qua therewith, memo Ex.PW6/A, stood drawn, (i) and, when, a, reading of the afore memo, makes disclosure, vis-a-vis, it being handed over by one Rafiya Ram, (ii) and, when the witnesses to the recovery memo, do not dispel the efficacy, of, the afore disclosures, made, in Ex.PW6/A, (iii) besides when for all the afore reasons, the user of Ex.P-3, by the accused, upon, the head of the victim, is, testified with assured intra se corroboration, by, the afore ocular witnesses, thereupon, this court, is, constrained, to conclude that, the medical evidence, and, the efficacious recovery, of weapon of offence, as well as, the credible ocular account rendered, hence, by the ocular witnesses, vis-a-vis, the charge, all, rather conclusively pointing towards the guilt, of, the accused.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has appraised the entire evidence, on record, in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, also does not suffer from any gross perversity or absurdity of mis-appreciation, and, non appreciation of germane thereto evidence, on record.

13. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. The learned trial Court is directed to forthwith execute, the, sentence against the accused/convict. All pending applications also stand disposed of. Records be sent back forthwith.

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

Jyoti Prakash and another .....Petitioners.

Versus

State of H.P. & another ....Respondents.

Cr. Revision No. 144 of 2015.
Reserved on: 18th October, 2019.
Date of Decision: 24th October, 2019.

Indian Penal Code, 1860 – Sections 409, 420 & 120 B – Criminal misappropriation etc – Discharge – Held, material on record shows that accused not unloaded cement bags meant for "State of H.P. supply" illegally at the site – Said cement bags were not validly disbursed to them – No parity is there between petitioners and co-accused who were discharged by Court - Order of Sessions Judge setting aside order of discharge and directing accused to face trial for offences punishable under Sections 409, 420 of Code is maintained – Petition dismissed. (Para 2 to 5).

For the Petitioners: Mr. K.S. Thakur, Advocate.

For the Respondent: Mr. Hemant Vaid, Addl. A.G., with Mr. Y.S. Thakur, and, Mr. Vikrant Chandel, Dy. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant criminal revision petition, stands, directed against the order directing the framing of charges, under Sections 409, 420, and, under Section 120-B of the IPC, against accused Anil Kumar, Surjeet Kumar, Sushil Kumar, Jyoti Prakash, and, Kanshi Ram, hence by the learned Special Judge, Mandi, who thereafter proceeded, to, direct the afore, to, record their personal appearances, before the learned Chief Judicial Magistrate, Mandi, on 14.05.2015, as the afore offences were exclusively triable, by, the afore Court.

2. The learned counsel appearing, for, the aggrieved strives to draw parity, from, the impugned order hence proceeding, to, make an order of discharge, vis-a-vis, the, apposite co-accused, namely, vis-a-vis, one Anil Sharma, one Hari Ram Khatana, one Yogi Ram, and, one Roop Singh. All the afore are public servants, and, the afore order of discharge made in their favour, hence, remained unassailed before this Court, and, hence, the afore apposite order, has, attained, the, completest conclusivity, and, finality. The espoused parity, vis-a-vis, them, is, unaffordable, as, an, ad nauseam discussion, rather exists in the impugned order, and, also the records withstand, the, exculpatory findings becoming recorded, vis-a-vis, them, (a) and, all making vivid display qua theirs holding no prima facie complicity or connivance with the aggrieved petitioners, either in making release(s), to, them, of, the cement bags, purchased only, for, user or for execution, of, government/public works, nor any firm prima facie documentary evidence exists on record, in, display, qua theirs appending their signatures, on, the registers concerned, or on the indents concerned, wherethrough, purportedly the cement bags were illegally released, vis-a-vis, the aggrieved petitioners.

3. Be that as it may, with firm exculpatory evidence existing on record, vis-a-vis, the co-accused concerned, qua whom a conclusive order of discharge was made, and, obviously thereupon, no parity, vis-a-vis, them can be claimed, by the aggrieved petitioners, (a) more so with the final report, submitted before the learned court concerned, contrarily making echoings, vis-a-vis, the aggrieved petitioners, rather without the knowledge, of, the afore discharged accused, ensuring the illegal unloading(s), of, the cement bags, at, the apposite site.

4. Even though, the cement bags were used, for, a, public purpose. However, hence, the aggrieved may espouse for parity being accorded qua them, vis-a-vis, the discharged accused. However, when a perusal, of, the recovery memo, unfolds, vis-a-vis, the cement bags, carrying the labels, vis-a-vis, “Not for sale, H.P. Govt. Supply only”, and, when the rates of purchase, of, the afore cement bags by the government of H.P., is lesser, than, the rates qua whereon hence, cement bags, can become purchased, in, the open market, (a) thereupon, dehors, the factum, vis-a-vis, the aggrieved, using the recovered, cement bags, for, a, public purpose, and, also without theirs being validly disbursed to them, yet has caused prima facie wrongful loss, to, the State exchequer, and, wrongful gain, to, the aggrieved petitioners, as, the value of the recovered cement bags, is lesser, than, the one, vis-a-vis, their purchase value from the open market, by, the aggrieved.

5. For the the foregoing reasons, there is no merit, in the instant petition, and, it is dismissed accordingly. In sequel, the order impugned before this Court is maintained, and, affirmed. However, it is made clear that observations made hereinabove shall have no bearings on the merits of the case. The parties are directed to appear before the learned trial Court on 22nd November, 2019. Records be sent back forthwith. All pending applications also stand disposed of.

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

Nand Lal ..Appellant/Plaintiff.

Versus

State of H.P. and others ..Respondents/Defendants.

RSA No. 432 of 2004.
Reserved on : 18th October, 2019.
Decided on : 24th October, 2019.

Punjab Village Common Lands (Regulation) Act, 1961 - Section 4 (3)(ii) – Vestment of land in Gram Panchyat/ State – Exclusion of certain lands from vestment –Held, Shamlat land in cultivating possession of a person for a period of more than 12 years without payment of rent or by payment of charges not exceeding the land revenue and cesses payable thereon ,is not

liable to be vested in Panchayat – Predecessor in interest of plaintiff recorded in continuous possession of land since 1915 till 1954-55 on payment of land revenue – Entries not rebutted by defendants – Land was not liable to be vested in Gram Panchayat / State of H.P. – RSA allowed – Decrees of lower courts set aside – Suit deceased. (Para 3 to 6).

For the Appellant: Mr. Mohan Singh, Advocate.

For Respondent No.1: Mr. Heman Vaid, Addl. A.G., with, Mr. Vikrant Chandel and Mr. Yudhveer Singh Thakur, Deputy Advocate Generals.

Respondents No.2 to 16 already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, stands, directed, against, the concurrently recorded verdicts, hence, by both the learned Courts below, wherethrough, the plaintiff's suit for rendition, of, a declaratory decree, for, setting aside mutation bearing No. 199, and, mutation No.237, wherethrough, the suit land was respectively vested, in, the Gram Panchayat, and, in the State of Himachal Pradesh, rather stood dismissed.

2. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 30.09.2004, admitted the appeal instituted by the plaintiff/appellant, against, the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

> Whether the findings of the learned trial Court and the first Appellate Court are dehors the evidence on record and perverse?

Substantial questions of Law No.1:

3. The strived for declaratory decree(s), for, nullifying the attestation, of, mutation No.199, and, mutation No.237, wherethrough, the suit land, was, respectively ordered to vest, in, the Gram Panchayat, and, in the State of H.P., is/are, for the reasons to be assigned hereinafter hence amenable, for, being accorded, (i)given the revenue entires borne in the revenue records appertaining, to, the suit khasra numbers, and, also appertaining, to, the phase/era, prior to the recording, of, the afore mutations, and, respectively borne in Ex. P-4, exhibit whereof, is, a jamabandi, appertaining, to, the suit kahsra number, and, appertaining to the year 1915, (ii) and, borne in Ex.P-9, exhibit whereof, is, a jamabandi appertaining, to, the year 1954-55, besides appertains to the suit khasra numbers,(iii) rather making clear, graphic unfoldings, vis-a-vis, the suit land becoming described, in, the column of ownership, as, "Shamlat Deh Hasab Rasab Araji Khewat", and, in the column of possession thereof, the, predecessor-in-interest, of, the plaintiff, one Girdhari standing recorded, to be, holding possession thereof. The afore entries existing, in, the afore alluded jamabandis, appertaining to the phase, prior, to, the recording of the afore mutations, do, all carry, a presumption truth, (iv) unless the afore presumption truth carried by the afore entires, is, rebutted, through adduction, of, cogent evidence, (v) and, whereas, for, want, of, cogent adduced rebuttal evidence, whereupon, they would rather acquire, an, aura of conclusivity, and, also would become amenable, for, completest reliance being placed thereon. Since, the requisite rebuttal evidence remains unadduced, thereupon, all the afore entries carry, an, aura of conclusivity. The effects thereof, is, qua thereon(s), hence, the mandate, of, the apposite provisions borne, in Section 4, of the Punjab Village Common Lands (Regulation) Act, 1961, becoming attracted, provisions whereof stand extracted hereinafter:-

> 4. Vesting of rights in Panchayats and non-proprietors. - (1) Notwithstanding anything to the contrary contained in any other law for the time being in force or

in any agreement, instrument, custom or usage or any decree or order of any court or other authority, all rights, title and interests whatever in the land:-

(a) which is included in the shamilat deh of any village and which has not vested in a panchayat under the shamilat law shall, at the commencement of this Act, vest in a panchayat constituted for, such,village, and, where no such panchayat, has been constituted for such village; vest in the panchayat on such date, as a panchayat having jurisdiction over that village is constituted;

(b) which is situated within or outside the abadi deh of a village and which is under the house owned by a non-proprietor, shall on the commencement of the shamilat law, be deemed to have been vested in such non-proprietor.

(2) Any land which is vested in a panchayat under the shamilat law shall be deemed to have been vested in the panchayat under this Act.

(3) Nothing contained in clause (a) of sub-section (1)and in sub-section (2) shall affect or sholl' be deemed ever to hove affected the-

(I) existing rights, title or interest of persons who though not entered as occupancy tenants in the revenue records are accorded a similar status by custom or otherwise, such as Dholidars, Bhondedars, Butimars, Bosikhuopahus, Saunjidars, Muqararidars;

(ii) rights of persons in cultivating possession of shamilat deh for more than twelve years without payment of rent or by payment of charges not exceeding the land revenue and cesses payable thereon;

(iii) rights of a mortagee to whom such land is mortgaged with possession before, the 26th January, 1950."

(a) given in sub section 3 (ii) thereof, a specific mandate becoming engrafted, whereby, stands pointedly excluded, the diktat, hence, of, the preceding thereto provisions, rather, containing, an, explicit mandate, vis-a-vis, the vestment, in the "Panchayat Deh", of, all rights qua lands reflected, as Shamlat Deh, in the revenue records apposite thereto, (b) besides thereunder, the, ordained preservation of all rights, is, bestowed upon persons, in, cultivating possession, of, Shamilat Deh, hence, for more than twelve years, and, without payment, of, rent or by payments of charges not exceeding the land revenue, and, cesses payable thereon, (c) or in other words, the aforesaid mandate borne in clause (ii) of sub section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, 1961, excludes, the operation, of, the preceding thereto provisions, occurring, in Section 4 of the aforesaid Act, wherein rather shamlat land, is, ordained to stand vested, in the Panchayat deh, (d) also apart therefrom, provisions analogous, to, the aforesaid provisions, are, also borne in clause (d) of Section 3, of, The Himachal Pradesh Village Common Lands Vesting and Utilization (Amendment) Act, No.20 of 2001, provisions whereof stand extracted hereinafter:-

"(d) land records as "Shamlat tika Hasab Rasad Malguzari" or by any such other name in the ownership column of jamabandi and assessed to land revenue and has been continuously recorded in cultivating possession of co-sharers so recorded before 26th January, 1950 to the extent of their shares therein"

(e) wherein a specific mandate, is, engrafted, qua vis-a-vis all land(s) recorded, as "Shamlat Tika Hasab Rasad Malguzari" or by any such other name in the ownership column, of jamabandi, and, assessed to land revenue, and, continuously recorded in cultivating possession, of, the apt recorded cosharers, and, with cultivating possession whereof, becoming evidently displayed, in records, prepared prior to 26th January, 1950, (f) thereupon, rather the mandate, of, preceding thereto provisions, contrarily, ordaining its/their vestment in the "panchayat deh", being hence specifically excluded besides excepted.

4. Both the aforesaid statutory provisions, for, hence purveying strength, to the espousal of the counsel, for the appellant, (i) that, with theirs excluding, the mandate, and, operation, of, the substantive provisions, borne respectively, in sub-section 3(ii) of Section 4, of, the Punjab Village Common Lands (Regulation) Act, and, in clause (d), of Section 3, of, the Himachal Pradesh Village Common Lands Vesting and Utilization (amendment) Act, No.20 of 2001, (a) AND, whereunder, stand statutory excluded hence the prior thereto explicit statutory contemplation(s), rather ordaining, the, vestment, of, shamlat land, in, the panchayat concerned, (b) does, obviously, and, necessarily require an allusion, to, the evidence, bearing absolute tandem, with, the afore-referred apt exclusionary provisions, as, contained in the afore stated statutory provisions. The apt revenue record, is borne in Ex. P-4, exhibit whereof comprises, a copy, of, jamabandi, appertaining to the suit land, and, it appertains to the year 1915, and, also in Ex.P-9, exhibit whereof comprises a copy, of, the jamabandi appertaining to the suit land, it appertains, to, the year 1954-55, (c) wherein, in the column, of ownership, reflections occur qua, vis-a-vis, land classified, as "Shamlat Deh Hasab Rasab Araji Khewat", hence the apt co-sharer therein, inclusive, of, the descrbied therein hence the predecessor-in-interest, of, the plaintiff, holding, the apposite rights, in proportion of their/his shares, to, rather make user(s) thereof. The afore referred, entries borne in Ex. P-4, and, in Ex.P-9, are not contested nor evidence, is adduced, for ripping apart the presumption of truth, carried by them, consequently, it is to be concluded, that the afore referred, displays occurring therein, hence enjoy conclusivity,hence, on all requisite fronts, and, areas, specifically also qua hence, the afore paying, the, apt land revenue, to the Revenue Agency concerned, more so when evidence contra therewith, stand unadduced, rather by the defendants, (d) whereupon, it is to be concluded, qua with the suit land holding hence the apposite description, of "Shamlat Deh Hasab Rasab Araji Khewat", thereupon, the exclusionary mandate borne, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting, and, Utilization (amendment) Act, No.20 of 2001, against its vestment, in the "panchayat deh" concerned, hence, concomitantly making its evident surfacing, (e) and, also the apt therewith exclusionary benefits thereof, hence, ensuing, vis-a-vis, the appellants/plaintiffs. (f) Nowat, also with the reflections, in the apposite order, hence, attesting mutation qua vestment, of, the suit land, initially, in, the Panchayat concerned, and, latter in the State, suit land whereof, rather carries, the, classification of "Shamlat Deh", reiteratedly renders, the, aforesaid factum/echoings, as, clearly borne, in the orders attesting the relevant mutation, order(s) whereof, is/are, borne in Ex.P-1, and, Ex.P-2, to, hence thereupon acquire conclusivity, (g) thereupon, the evident mantle, donned by the suit land, vis-a-vis, it becoming classified, as, "Shamlat Deh Hasab Rasab Araji Khewat", is, both obviously, and, openly, acquiesced by the respondent/State, also, hence the factum probandum, of, the suit land, earlier depicted, in Ex. P-4, and, Ex.P-9, to be bearing the character, of, "Shamlat Deh Hasab Rasab Araji Khewat", rather acquires corroborative vigour, as also, the fullest conclusivity. The orders borne in Ex. P-1, and, Ex.P-2, in pursuance whereof, also jamabandis, were, prepared subsequent thereto, hence, also carrying reflections, in, compatibility thereof. In aftermath, with the provisions, borne in clause (ii), to sub section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, remaining hence unsubstituted, through, a valid amendment, rather carried, by the legislative assembly concerned, (i) thereupon, with a candid diktat borne therein, especially, vis-a-vis, apt preservations of rights, qua persons, in evident cultivating possession, of "shamlat land rather for more than 12 years, without payment of rent or by payment of charges nor exceeding the land revenue, and, cesses payable thereon", (j) in category whereof, both the suit land, and, the appellant/plaintiff, fall, given emphatically, with both Ex. P-4, and, Ex.P-9, for reasons aforesaid, bearing out the factum, of, the predecessors-in-interest, of, the appellant/plaintiff, holding continuous cultivating possession, of shamlat land, since 1915 upto 1956, whereat Ex. P-1, hence was prepared, (k) thereupon, with the suit land, falling, within the ambit, of, the apposite exclusionary mandate, borne in clause (ii) to sub section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, vis-a-vis, the preceding

thereto mandate, (i) wherein, contrarily, excepting, the lands evidently falling, within, the domain of clause (ii) to sub-section (3) of Section 4, of, the Punjab Village Common Lands (Regulation) Act, and, bearing the classification of Shamlat deh, are, rather mandated to be vested, in, the Panchayat, (l) sequelly, hence, the lack of valid supplantation thereof, through, a valid legislative amendment, rather rendered, the apposite exclusionary mandate, borne in clause (ii) to sub Section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, to, both hold clout and sway, (m) whereas, Ex.P-1, and, Ex. P-2, obviously did not, either override or benumb the operation or clout, and, the command, of the apposite exclusionary statutory provisions, vis-a-vis, the preceding thereto provisions, borne in Section 4, of, the Punjab Village Common Lands (Regulation) Act, hence renders any meteing, of, reverence thereto, in, the apt order, to be not thereupon clothing it, with any sanctity.

5. Be that as it may, even during, the pendency of the instant suit, through, a valid legislative amendment, as, occurred, vis-a-vis, Section 3, of, the Himachal Pradesh Village Common Lands Vesting and Utilization Act, whereby, the apt exclusionary clause (d), was, added to Section 3 thereof, (i) wherein, clearly and expressly the coinage "Shamlat tika hasab Rasad Malguzari", hence occurs, and, with the suit land also bearing, a, similar thereto coinage, is, expressly excluded, from vestment, in, the "panchayat deh", (ii) thereupon, with, for all reasons aforestated, the suit land, being evidently, described, in the apt revenue records, to carry, the classification of ""Shamlat Deh Hasab Rasab Araji Khewat"", hence, the afore evident apt classification, donned, by the suit land, did hence render, it to fall, within, the ambit, of clause (d) of Section 3, of the Himachal Pradesh Village Common Lands Vesting and Utilization (amendment) Act, No.20 of 2001, (iii) and, also rendered mandate thereof being attractable vis-a-vis the suit land, (iv) besides obviously, when the apt exclusionary mandate, is foisted, upon land hence bearing, the aforesaid evident classification, in, the apposite revenue records, prepared prior, to, January, 1950, (iii) thereupon, with Ex. P-4 standing prepared prior to 1950, hence, the apt therewith reflections, occurring therein, acquire(s) conclusivity, (iv) hence, the recording of or making, of, Ex. P-1, and, of, Ex.P-2, whereunder, the suit land is ordered to be vested, respectively in the panancyat, or in the State, is stained with a vice, of , aforesaid entrenched statutory infractions, besides all the reflections in, the, revenue records, prepared subsequent thereto, and, in consonance therewith, are, also rendered void and nonest.

6. Be that as it may, the learned counsel appearing, for the respondents places reliance, upon, a judgment of the Hon'ble Apex Court, rendered, in a case titled as ***Gurbachan Singh and another vs. Gram Pancyayat and others***, reported in ***(2000)10 SCC 594***, the relevant paragraphs whereof are extracted hereinafter:-

> "1. This litigation has had a chequered history; the dispute confining to jurisdiction. The High Court has taken the view that the civil suit did not lie and that an application under Section 11 of the Punjab Village Common Lands (Regulation) Act, 1961 will lie before the Collector of the district. In our view, the High Court was right in coming to that view especially when a question of title has been raised and Section 13 of the said Act puts a bar to the civil court determining that question. We, therefore, dispose of this appeal in letting the appellants approach the Court of the Collector under Section 11 of the said Act.
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> 2. Under interim orders of this Court dated 27-11-1990 the appellants were required to deposit a sum of Rs 100 p.m. regularly. In terms of that order, the said sum was required to be depositedan the District Court. The sum thus collected be handed over to the respondent Gram Panchayat. This order would not, however, preclude the appellants from obtaining interim orders from the Collector when proceeding under Section 11 of the Act. In this manner, the appeal stands disposed of. No costs.

Wherein, Section 13, of the Punjab Village Common Lands (Regulation) Act, alike Section 10, of the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974, foists a statutory bar, against, the civil Court, exercising jurisdiction, over any matter, arising, from

the question of title, (i) and, when in absolute alikeness or affinity therewith, provisions also occur in Section 10 of the Himachal Pradesh Village Common Lands Vesting, and, Utilization Act, (ii) AND when in respect whereof, the, Hon'ble Apex Court, in the apt paragraphs extracted hereinabove, had concluded qua the civil courts, holding no jurisdiction, vis-a-vis, any matter falling with the domain, of the aforesaid Act, (iii) hence, no pronouncement, in the affirmative being meted, vis-a-vis, the substantial question of law, whereon, the second appeal is admitted. However, the reliance, as placed by the learned counsel appearing, for the respondents, upon, the aforesaid statutory bar, created in the apposite provisions, occurring in both, the Himachal Pradesh Village Common Lands Vesting, and, Utilization Act, and, in the Punjab Village Common Lands (Regulation) Act, for hence rendering, not maintainable, the extant suit, before the civil court concerned, (iv) is clearly a sequel, of his misreading, the entire statutory provisions, as, borne in both the afore referred statutes, (v) also arises, from, his being unmindful vis-a-vis (a) the evident description, of the suit land, in the apt record, as "Shamlat Deh Hasab Rasab Araji Khewat", whereon, the apt exclusionary statutory provisions, as, referred hereinabove, are firmly concluded, to hence stand attracted, (vi) and, as a corollary thereof, the vestment of the suit land in the panchayat concerned, is, concluded to stand stained, with, vices of apt statutory infractions. The sequel of the learned counsel appearing, for the respondents, hence remaining unmindful, vis-a-vis, the afore referred conclusions, is obviously qua hence, the apt hereafter ensual, rather arising, (vii) qua with all revenue records, specifically Ex. P1, and, Ex.P-2, being manifestly prepared in derogation, of, the apt exclusionary statutory provisions, and, in sheer derogation, of, apposite therewith classification hence donned, by the suit land, (viii) thereupon with the apt orders comprised in Ex. P-1, and, Ex.P-2, being invalidly recorded, (ix) besides, its begetting open infraction, of, the mandate of the apt exclusionary provisions, borne in clause (ii) to sub-section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, and, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting and Utilization (Amendment) Act, 20 of 2001, (x) thereupon, unless the apt excepting relief(s), as, created in the afore referred statutes, is, accepted, and, is applied hereat, (xi) thereupon, alone the solemn holistic purpose, of, the apt exclusionary mandate, would become preserved, (xii) whereupon, concomitantly, for keeping alive the apt excepting mandate, rather the apt statutory bar, hence cannot be construed, to be creating any obstruction(s), vis-a-vis, the rendition, of, the espoused decree. Contrarily, rather, the ill besides insagacious sequel, would ensue, of even invalidly made orders, anchored upon a clear lack of adherence, to the revenue records, bearing absolute congruity, with, the mandate of the apt exclusionary clauses, to, the relevant inclusionary or vesting provisions, respectively, borne in clause (ii) to sub-section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, and, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting, and, Utilization (Amendment) Act, 20 of 2001, rather, becoming hence untenably validated. Corollary thereof, is that the bar, of jurisdiction, is applicable, vis-a-vis, only validly made orders, by the revenue officers, and, it being not be applicable, vis-a-vis, any invalidly made orders or orders made in blatant transgression, of, the apt excepting statutory provisions. Moreover, the judgment whereon, the learned counsel, appearing for the respondents, has, placed reliance, makes a clear display, of the Hon'ble Apex Court, affirming, the, view taken, by the Hon'ble High Court, (i) that, the remedy available, to the aggrieved litigant, being to cast, an application under Section 11 of the Act, before the revenue officer concerned, and, not by his canvassing, his grievance, through, his instituting, a civil suit suit. Consequently, with Section 11 of the Punjab Village Common Lands (Regulation) Act, hence, appertaining to an interdiction, vis-a-vis, any preemption, vis-a-vis, sale of land, in shamlat deh, (ii) whereas, contrarily, hereat, there is open, gross and blatant transgression, of, the apt statutory hence excepting exclusionary mandate, vis-a-vis, the mandate, of, apt vesting provisions, (iii) thereupon, no remedy other than, hence for setting aside, the apposite order or for setting aside, all concurring therewith entries, as, carried in the revenue record, being, comprised, in, the institution, of, a civil suit.

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

8. In view of the above discussion, the present Regular Second Appeal is allowed. In sequel, the judgments and decrees rendered by both the learned Courts below are set aside, and, the suit of the plaintiff, is, decreed. Consequently, the plaintiff along with performa defendants is held owner in possession of the land comprised in Khata Khatauni no.37 min/96 min, bearing Khasra No.605/13 min, measuring 2-0 bighas, situated in Village Anji Sunaran,Tehsil Kandaghat, District Solan, H.P., AND, mutation No. 199 of 2.5.1956, and, Mutation No.237 of 26.8.1975, wherethrough, the suit land was respectively vested in the Gram Panchayat, and, in the State of H.P. are set aside, and, all the subsequent entries thereto showing the Gram Panchayat, and, the State of H.P. to be owner in possession, of, the suit land are null and void. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Shri P.C. Marpa .....Petitioner/tenant.

Versus

Smt. Rewat Kumari ...Respondent/landlady.

Civil Revision No. 240 of 2018.
Reserved on : 18th October, 2019.
Date of Decision: 24th October, 2019.

Himachal Pradesh Urban Rent Control Act, 1987 - Section 14(3)(a)(i) – Eviction suit on ground of bonafide requirement - Withdrawal of earlier eviction suit filed on same ground but without leave of Rent Controller - Effect – Held, in earlier rent petition, amendment was sought by the landlady but petition was dismissed as withdrawn without seeking leave of Rent Controller – Second petition contains same phraseology and content as were incorporated in amendment application – Both petitions thus being on same ground – Dismissal of earlier petition would estop landlady to file second eviction petition against the tenant. (Para 6).

Case referred:

Tara Chand vs. Baij Nath, 1994 (Suppl) Sim. L. C. 87

For the Petitioner: Mr. Satyenj Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

For the Respondent: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The tenant in the demised premises becoming aggrieved by the concurrently recorded verdicts, of, eviction, pronounced, respectively, upon, Rent Petition No. 193-2 of 2015/2010, and, upon Rent Appeal No. 35-S/14 of 2017, respectively by the learned Rent Controller-(s), Shimla, and, by the learned Appellate Authority-IV, Shimla, H.P., and, hence,

for begetting reversal thereof, has, instituted the extant civil revision petition before this Court.

2. The landlady claimed eviction of the tenant, from, the demised premises, on the statutory ground appertaining, to, her bonafidely requiring the afore premises, for, accommodating therein, her younger son, and, for enabling her married daughter, to, upon, hers visiting her matrimonial home, to, comfortably reside therein, as, the accommodation extantly available with the landlady being incommodious, and, insufficient, for meteing the bonafide requirement of both, her younger son, and, for her daughter, upon, the latter visiting, her matrimonial home.

3. Obviously, the afore petition was constituted, under, the provisions, of, Section 14(3), of, the Himachal Pradesh Urban Rent Control Act, 1987, (hereinafter referred to as the Act), the apt provisions whereof, along with the apposite thereunderneath proviso(s), are, extracted hereinafter:-

> "Section 14(3) provides that:
>
> "(3) A landlord may apply to the controller for an order directing the tenant to put the landlord in possession-
>
> (a) in the case of residential building, if-
>
> (i) he requires it for his own occupation;
>
> Provided that he is not occupying another residential building owned by him, in the urban area concerned;
>
> Provided further than he has not vacated such a building without sufficient cause within five years of the filing of the application, in the said urban area."

Despite a peremptory mandate, becoming, existed in the apposite proviso, occurring underneath, the substantive provisions of Section 14(3) of the Act, hence, injuncting, the, landlord to within the domains thereof, make, all therein occurring full, and, completest disclosures, rather in the eviction petition, (i) and, despite the tenant, in his reply to the eviction petition, rearing objections qua therewith, (ii) yet, the, landlord, not thereafter, through, hers instituting, a, rejoinder thereto, repulsing the afore averments, does, attract hereat, the proviso(s), occurring underneath, the, provisions of Section 14(3), of, the Act. The apposite proviso(s) are cast, in, a mandatory language, and, make it peremptory, upon, the landlord/landlady, to, for rendering his/her eviction petition becoming validily constituted, to make, all the apt completest or the fullest disclosures, necessarily, and, reiteratedly, with, the statute, casting, an, unbendable rigorous apposite therewith injunction, upon, him/her.

4. Even though, the afore peremptory requirement, of, law, remains unaverred in the eviction petition. However, the learned counsel appearing, for, the respondent/landlady contends, that, the afore omission becoming actionable, and, non suiting the landlady, only, upon, evidence surging forth, vis-a-vis, the mandate, of, the proviso, becoming evidently breached, and, he submits that since the afore evidence, is, amiss, thereupon, for, the afore wants, rather, immense hardship, and, injustice, would be encumbered, upon, the landlady, upon, the espoused statutory insistences being made, upon, the landlady. Nonetheless, the afore submission falters, (a) as, the afore peremptory injunction, of, law is not amenable for dilution nor its statutory rigor can become whittled, awaiting, the emergence, of, apposite breaching therewith evidence. (b) As the afore requirement is undependent, upon, breaching therewith evidence, becoming adduced, (c) rather the statute, peremptorily enjoins, upon, the landlord/landlady, to, in the eviction petition make averments, in consonance therewith, and, obviously, thereupon, when evidence adversarial, vis-a-vis, the afore statutorily required averments, stands adduced, by the petitioner/tenant, thereupon, alone the petition, would become stained, with an aura of malafides, and, would constrain the courts of law, to, non suit the landlady/landlord, and, necessarily, initial wants thereof, rather rendering the petition becoming invalidly constituted, and, also it becoming stained with vice, of, statutory suppressions.

5. Even otherwise, given hence binding, and, conclusive verdicts, becoming rendered by this Court, in, a case titled as ***Tara Chand vs. Baij Nath, reported in 1994 (Suppl) Sim. L. C. 87,*** wherein, in paragraph No.16 thereof, a candid expostulation of law, casts, a, dire statutory necessity, upon, the landlord/landlady, to, in the eviction petition, hence make the afore fullest, and, completest disclosures, for hence, satiation being meted, vis-a-vis, the proviso, as, occurring underneath, the mandate of Section 14(3) of the Act, thereupon, also the afore made address before this Court, by, the learned counsel appearing, for, the respondent/landlady, becomes staggered, and, also becomes untenable.

6. Be that as it may, there is no wrangle, vis-a-vis, the espousal made before this Court, by the learned counsel, appearing for the tenant/petitioner, that prior to the instant eviction petition becoming instituted, before the Rent Controller concerned, another rent petition bearing No. 36-2 of 2008, becoming dismissed, as, withdrawn on 18.9.2009, (i) and, when it is also not contested inter se the contesting litigants, that, within the ambit of Order 23 of the CPC, no leave to institute, a, fresh petition becoming thereat afforded to the landlady, (ii) hence, dehors the afore pleaded bonafide need, of, the landlady, for, the requisite purpose being, a, recurring need, and, also purveying, her, a continuous, and, recurring cause of action, (iii) and, not inviting the wrath, of, statutory estoppel arising from the earlier eviction petition being dismissed, as, withdrawn, without leave being granted, to, the landlady, to, re-institute afresh, it, on fresh grounds, (iv) yet when during the pendency of the earlier eviction petition, an application stood cast, under the provisions of Order 6, Rule 17, of the CPC, application whereof, is, embodied in Ex.RW2/A, and, stood instituted before the learned Rent Controller concerned, and, when the proposed strived, for, amendments, as, occurring in paragraph No.18(a) thereof, do visibly carry similar overtones, both in phraseology, and, in content, vis-a-vis, the phraseology averred, in, the extant petition, (v) thereupon, the simplicitor dismissal, as, withdrawn, of, the earlier eviction petition, carrying therein a cause of action, and, grounds, similar, to the one incorporated, in, the extant petition, does, invite, the, wrath, of, the statutory principle of estoppel, (vi) and, also weans or blunts the effect, of, any arguments, addressed before this Court by the learned counsel for the landlady/respondent, and, that the espoused need, is, a recurring or a continuing cause of action, (vii) and, also erodes, the vigour, of, his further espousal qua dehors the earlier dismissal of the eviction petition, even without leave to institute a fresh eviction petition, on, a fresh cause of action, not, inviting the wrath of the principle, of, statutory estoppel.

7. For the foregoing reasons, the instant Civil Revision Petition, is, allowed, and, orders impugned before this Court, are set aside. Consequently, the rent petition No. 193-2 of 2015/2019 is dismissed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Ram Chand ...Appellant

Versus

Suresh Kumar ...Respondent.

Cr. Appeal No.: 458 of 2018

Reserved on: 16.10.2019

Date of decision: 24th October, 2019

Negotiable Instruments Act, 1881 - Section 139 – Dishonour of cheque - Presumption of consideration – Effect – Held, holder of cheque shall be presumed to hold the cheque in discharge of valid or an enforceable contract or other legal liability- But the presumption is rebuttable (Para 3).

For the appellant: Mr. Umesh Kanwar, Advocate.

For the respondent: Mr. Naresh K. Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal, stands, directed against, the, impugned judgment, of, acquittal, pronounced, upon, RBT No.100/2 of 16/11, on 26.2.2018. The impugned judgment, is, rendered, vis-a-vis, a charge, appertaining, to, commission, of, an offence, punishable, under Section 138, of, the Negotiable Instruments Act, 1881 (hereinafter referred, to, as "the Act").

2. A cheque, bearing Ext. C-1, and, carrying therein a sum of Rs. 5,00,000/-, was, issued by the respondent-accused, vis-a-vis, the appellant-complainant. However, on its presentation, before the banker concerned, the latter, vide Ext. C-3, returned the afore cheque, and, declared it, as, dishonored, for, want of insufficient funds, in contemporaneity, vis-a-vis, its presentation, in, the account(s), of, the respondent-accused.

3. Section 139 "of the Act", leverages, a, statutory presumption, vis-a-vis, the holder, of, the apposite cheque, provisions whereof are extracted hereinafter:-

> "139. Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

A reading of the afore extracted provisions, of, the Act, makes clear unfolding(s), qua, the holder, of, the cheque rather holding it, in discharge of, a valid or an enforceable contract, or, other legal liability, inter-se the appellant-complainant, and, the, respondent-accused. However, the afore statutory presumption leveraged, vis-a-vis, the complainant, or, the holder, in, due course, vis-a-vis, the apposite cheque, rather, is, a rebutable presumption, and, upon adduction, of, apt cogent evidence, or, through suggestion(s) being meted to the complainant, or, to the latters' witnesses, the, afore presumption becoming rebuttable or rebutted.

4. A reading of the cross-examination, of, the complainant, unfolds qua his meteing, affirmative answers, to, affirmative suggestions, qua, on 10.9.2011, his drawing, a, sum of Rs. 3,50,000/-, from, the cashier, of, the company/society concerned, and, the remaining sum, of, Rs. 50,000/-, being defrayed, in cash to the respondent-accused. The effect, of, the afore meteing, of, affirmative answers, vis-a-vis, affirmative therewith suggestions, is, hence, an inference becoming fostered qua, the total of the afore defrayed sums, rather bearing visible compatibility, vis-a-vis, the cheque amount, (i) yet, thereafter, the counsel for the respondent-accused, had, during the course, of, his cross-examining CW-3, meted suggestions to him, qua, his failing to issue receipt(s), vis-a-vis, his liquidating, the, afore sums of money, to, the respondent-accused, and, thereto also, he, meted an affirmative answer. However, from the afore, no conclusion can be garnered, vis-a-vis, the amount, borne in the dishonored negotiable instrument, remaining undefrayed, to the respondent-accused, nor, it can be concluded, qua there existing no legally enforceable, or, any legally subsisting liability, inter-se both, as, thereafter he unrebuttingly clarifies, vis-a-vis, the, respondent-accused taking, a, personal loan, only, for two days. The ensuing effect, of, the afore, is, qua the amount, borne in the negotiable instrument, becoming issued, upon, the afore borrowings, being made by the respondent-accused, from, the appellant-complainant, (ii) and, fortification, vis-a-vis, the afore garnered inference, does inevitably emerge, from, CW-3, during his cross-examination, rather acquiescing, to, a suggestion, qua in contemporaneity, vis-a-vis, the, disbursement of the loan amount, by him, vis-a-vis, the, respondent, an, agreement becoming prepared, (iii) yet, when the complainant, has, thereafter also un-rebuttingly clarified, that the afore agreement, was torn, given the respondent-accused, handing over to him, a cheque, carrying therein, the sums, borrowed from him, by the respondent-accused, hence concomitant thereof effects, (iv) are, the, issuance of Ext. C-1,

being, a, sequel of a validly enforceable debt, rather becoming obtained from the complainant-appellant, by, the respondent-accused. Conspicously, all the afore effect(s) become untenably over-looked, hence by the learned trial Judge. Furthermore, with the defence espousing qua the cheque becoming issued, by the respondent-accused, vis-a-vis, one Dhani Ram, and, when the latter remained unexamined, as a witness, for, securing the defences' afore espousal, vis-a-vis, the complainant illegally possessing, the, apposite cheque, though, issued rather by one Dhani Ram, (v) thereupon also, with, the afore defence becoming staggered, also begets, an, inevitable inference qua, the, apt issuance becoming acquiesced by, the, accused.

5. Importantly, all the scribing in words, and, figures, in, Ext. C-1, remained uncontested, (a) thereupon with all, the, writings therein, in, words, and, figures, hence being concludable, to be, in the hands, of, the respondent-accused, (b) and, with the complainant, being the Managing Director, of, the company/society concerned, qua, which, the, dishonored of negotiable instrument hence stood issued, (c) thereupon bearing the afore factum(s) in mind, along with, the factum qua, the, sums, embodied in the negotiable instrument, becoming issued, from the funds of the company, hence evidently helmed by the appellant-complainant, as its, Managing Director, (d) thereupon the afore capacity, per-se enabled, the, complainant rather for ensuring realization, from, the respondent accused, the borrowings made by the latter, from, the funds of the company concerned, hence, to, recompense, the, apposite depleted funds, and, to, also hold the requisite authorization, to, institute, the, complaint, (e) and, also the issuance of the cheque, in the name of the complainant, and, his being described therein, as, a, Managing Director, does fully authorize, him, to, for, realizing the sums borne therein, from, the respondent-accused, to, institute, the, complaint, reiteratedly theirs comprising, the, sums of money, borrowed from, the, company.

6. In view of the above, I find merit in this appeal, which is accordingly allowed. In sequel, the impugned judgment, is, quashed and set aside. Consequently, the accused is convicted, for, committing an offence, punishable under Section 138 of the Negotiable Instrument Act. Let the accused be produced before this Court, on **21.11.2019,** for, his being heard, on, the quantum of sentence. Records be sent back forthwith.

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

Shashi Kumar .....Petitioner.

Versus

State of H.P. ....Respondent.

Cr. Revision No. 254 of 2016.

Reserved on: 3rd October, 2019.

Date of Decision:24th October, 2019.

Indian Penal Code, 1860 - Sections 420, 468 & 471 – Code of Criminal Procedure, 1973 – Section 239 – Accused allegedly prepared matriculation certificate of co-accused 'RS' on basis of which he obtained public service – Accused seeking discharge – Trial court dismissing prayer and ordering framing of charges – Petition against – Held, case against accused based on incriminatory statement of principal accused 'RS' and identification by him of premises where accused was running computer centre – Computers used by accused for preparing alleged certificates(s) not taken into possession – Best evidence showing complicity of the accused not on record and no prime facia case is made out against him – Petition allowed – Accused discharged. (Para 2 & 3).

For the Petitioner: Mr. Satyen Vaidya, Senior Advocate with Vivek Sharma, Advocate.

For the Respondent: Mr. Hemant Vaid, Mr. Arvind Sharma, Addl. A. Gs., with Mr. Y. S. Thakur, and, Mr. Vikrant Chandel, Dy. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant criminal revision petition, stands, directed by the petitioner herein/accused, against, the impugned verdict, recorded by the learned Judicial Magistrate 1st Class, Court No.1, Solan, H.P, (a) wherethrough, she after dismissing the application, cast under Section 239 of the Cr.P.C., and, as preferred therebefore, by the petitioner herein, and, wherein, he sought, an, order, vis-a-vis, his being discharged qua the offences constituted, under, Sections 468, 420, 471 read with Section 120 B of the IPC, and, borne in the apposite FIR, rather ordered, for, charges qua therewith being framed against, the accused.

2. Tritely put, the, expostulation(s) of law, as, embodied, in, judgments alluded, in, the impugned order, do trammel, the jurisdiction of the learned Judicial Magistrate concerned, to, upon, a prima facie case, being made out against the petitioner, vis-a-vis, the offences constituted under Sections 468, 420, 471, and, under Section 120-B, IPC, and, also concomitantly hence, render, her barred, to, make an order of discharge, upon, the accused's application cast, under, Section 239, of, the Cr.P.C. Consequently, the material alluded thereiin, and, hence, prima facie personificatory, vis-a-vis, a conclusion becoming rearable therefrom, vis-a-vis, the offences borne in the FIR, being prima facie allegedly committed, by the petitioner, and, also hence, his becoming amenable, for, facing trial, is, comprised (a) the disclosure statement, made by, the, principal accused one Roshan Thakur, who hence used, a, false document, to, obtain public service, and, who therein made echoings, vis-a-vis, the forged matriculation certificate being prepared, rather by the revisionist, and, besides made echoings qua after its becoming prepared by the revisionist, his, tendering, to him, an, illegal gratification, comprised in a sum of Rs.20,000/-, (b) the identification of the institute operated, by the revisionist, rather being made, by, the afore principal accused, (c) the landlord of the building, making disclosure(s), qua, the, taking on rent thereof, by the revisionist, for his thereat operationalising, an institution, named, and, styled, as, National Career Computer Education, and, also, the, corroborative thereto signatured statement, made, before the Investigating Officer concerned, rather by the revisionist. However, for the reasons to be assigned hereinafter, the afore purported best incriminatory pieces of evidence, are, rather unmeritworthy nor any probative sanctity, is, assignable thereto, (d) and, hence, the concomitant therefrom conclusion, is qua no prima facie case, being made out against the revisionist, for his allegedly committing offences, constituted under Sections 420, 428, 471, and, under Section 120-B, IPC, (e) and, rather the making, of, a disaffirmative order, on the revisionist's afore application, by the learned trial Magistrate, being infirm, and, meriting interference. (f) The statement of the principal accused, and, also of the landlord, not either being suffice, and, nor constituting, the, best incriminatory valuable pieces of evidence, of, immense probative vigour, (g) rather the best incriminatory pieces, of, evidence, hence, of optimum probative sanctity, standing, comprised, in the Investigating Officer, rather seizing the computers operating at the institute, and, also being managed, and, operationalised, by the revisionist, and, thereafter his ensuring collection, of, firm evidence, qua the forged matriculation certificate, hence, emanating therefrom. However, the Investigating Officer concerned, has not, either seized, the, computers, as, existing/existed, in, the institute managed or operationalized, by the revisionist, and, nor obviously, he, hence, thereafter ensured, that, the forged matriculation certificate, rather emanating therefrom. The consequence of the afore best evidence remaining uncollected, rather by the Investigating Officer concerned, does, marshal an inference, vis-a-vis, the reliance, as, placed by the learned trial Magistrate, upon, the afore alluded material, as, existing therebefore, and, to, hence thereupon record a disaffirmative order, upon, an application cast, under the provisions of Section 239 of the Cr.P.C., and, preferred therebefore, by the applicant/revisionist, being a gross misreliance thereon.

3. For the foregoing reasons, the instant petition is allowed, and, the impugned order, as, rendered by learned trial Magistrate concerned, upon, the revisionist's application,

and, stood cast therebefore, under, the provisions of Section 239 of the Cr.P.C., is, set aside. In sequel, the afore application, cast under, the, provisions of Section 239 of the Cr.P.C., is, allowed, and, the revisionist, is, discharged. All pending applications also stand disposed of. Records be sent back forthwith to the quarter concerned.

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

Shyam Chand .....Appellant.

Versus

State of H.P. ....Respondent.

Cr. Appeal No. 399 of 2011.

Reserved on: 15th October, 2019. Date of Decision: 24th October, 2019.

Prevention of Corruption Act, 1988 - Sections 7 & 13(2) – Illegal gratification – Proof of – Held, mere holding of currency notes by accused perse is not a proof of fact that he had voluntarily accepted the same as illegal gratification. (Para 11).

For the Appellant: Mr. Vinod K. Gupta, Advocate.

For the Respondent: Mr. Hemant Vaid, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, directed by the convict/ accused/appellant, against, the pronouncement made by the learned Special Judge, Kullu, District Kullu, H.P., upon, Sessions Trial No.1-2002/4-2011, whereunder, he convicted, besides imposed consequent therewith sentences, upon, the convict/accused/appellant, for, his committing offences punishable, under, Section 7, and, under, Section 13(2), of, the Prevention of Corruption Act.

2. The facts relevant to decide the instant case are that complainant Satish Kumar lodged report vide Ex.PW1/A with the police that he was a Karyana merchant running his shop at village Jia. He had purchased 5-9-0 bighas of land, comprised in Khasra No.2753 from one Khima Ram of village Jia. After execution of sale deed, accused was approached for entering the mutation for which the accused retained original sale deed with him and asked the complainant for fee etc. It is further case of the prosecution that the complainant also reported that the accused had taken Rs.6000/- as bribe from him for supply of copy of jamabandi. Subsequently, the accused informed the complainant about date of mutation of phati Kashawari as on 11.4.2002, and, asked the complainant to contract him and was asked to pay Rs.2000/- as bribe for entering the mutation. It was also reported by the complainant that on approaching the accused, he was told by the accused that "Ham Mehenge patwari hain and bina paise se kaam nahin hoga". The complainant was advised by one Vinod Mahant to report the matter to the Anti Corruption Department. On this report of the complainant FIR Ex.PW1/A was registered, and investigation of the case ensued. During the investigation PW-10 Amar Nath, Dy. S.P., gave demonstration to the complainant, Raj Krishan and Vinod Mahant qua mixture of phenolphthalien powder and sodium carbonate in two different. The complainant was asked to produce the currency notes which he had to give to the accused as bribe, on his demand. Thereafter complainant produced twenty currency notes in the denomination of rupees one hundred each having serial No. 8GC-795281 to 8GC-795300 as per memo Ex.PW1/B, which were smeared with phenolphthalein powder and were returned to him with direction to give the same to accused on demand. Raj Krishan was kept as shadow witness to keep watch on the trap. The complainant was directed to keep his hand on his head at the time of demand of bribe to give signal. It is further the case of the prosecution that on 11.4.2002 after forming a raiding party alongwith complainant and shadow witness they went to Patwar Circle Kashawari, situated at Parla Bhunter where

accused and other Patwaris were found present. The complainant was directed to go to the Patwar Khana along with Raj Krishan and the I.O.. along with other staff stayed near a temple from where shadow witness Raj Krishan was visible to them. The complainant after some time came back and told that mutation was to be sanctioned at Chhani Khor. Upon this raiding party proceeded to Chhani-Khor, where on inquiry it was told that mutations were being sanctioned and attested in the house of one Maya Ram. Accordingly, IO directed the complainant and shadow witness to remain present outside house of Maya Ram. At about 2 p.m. a van bearing HP-34-4884 reached near the house of Maya Ram from which accused and other persons alightened and went to the room in the ground floor. The complainant delivered the smeared currency notes to the accused and thereafter shadow witness signaled the raiding party. On this IO along with accompanying staff entered the room of house of Maya Ram. I.O. disclosed his identity to the accused. The accused threw currency notes on the ground by taking the same out of his pocket of coat. The accused torn photo copy of the gift deed Ex.P-26 in presence of Davinder Chandel Tehsildar. Thereafter the accused was taken into custody. The currency notes and torn copy of the gift deed were taken into possession vide memo Ex.PW1/C. Thereafter the hands of the accused were got washed with the help of solution of sodium carbonate, as a result of which the colour of the water turned light pink. The same was put into a bottle and sealed with seal-S at the spot. The currency notes were also put in separate packet in an envelope and sealed with seal-S and taken into possession vide memo Ex.PW1/C. The pocket of the coat worn by the accused was also got washed, on which the colour of the water also became light pink, which was packed in a container and sealed with seal-S The coat of the accused was taken into possession. Thereafter the police completed all other formalities relating to investigations.

3. On conclusion of the investigation, into the offences, allegedly committed by the accused, a report, under Section 173 of the Code of Criminal Procedure, was prepared, and, filed before the learned trial Court.

4. The accused/appellant herein, stood charged, by the learned trial Court, for, his committing offences, punishable under Section 7, and, under Section 13(2), of, the Prevention of Corruption Act. In proof of the prosecution case, the prosecution examined 10 witnesses. On conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication, in, the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/appellant herein, for his hence committing the aforesaid offences.

6. The appellant herein/accused, stands aggrieved, by the findings of conviction, recorded, by the learned trial Court. The learned counsel appearing, for, the appellant herein/accused, has concertedly and vigorously contended, qua the findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The accused/convict was nabbed red handed hence by the official(s) of the State Vigilance, and, Anti Corruption Wing concerned. At the relevant time, he was nabbed while accepting an illegal gratification, of, Rs.2,000/-. The nabbing of the convict by the officials, of, the State Vigilance, and, Anti Corruption Wing concerned, was, a, sequel, of, the complainant purveying an intimation, to, the Vigilance department concerned, and, obviously thereafter he was decoyed, to, ensure the nabbing, of, the convict/accused.

10. The testimony rendered by PW-1, has, acquired assured corroboration from the testification rendered, by PW-10 Mr. Amar Nath, Dy. S.P.. However, the afore testifications rendered with mutual corroboration, cannot, per se constrain this Court, to, assign the utmost solemn truth thereto. Contrarily, this Court would proceed to assign, the, utmost solemnity, vis-a-vis, the genesis of the prosecution case, (i) only when forthright evidence emerges, and, it making candid bespeakings, vis-a-vis, at the relevant time, some official work of PW-1, pending or being subjudice before the accused/convict, and, for ensuring the completion, of, the subjudice work, before the accused/convict, his, demanding an illegal gratification, from, the complainant/PW-1. The relevant purported subjudice work, pending for completion, before the accused/convict, appertains, to, the attestation of mutation, in pursuance, to, a registered deed, of conveyance executed, vis-a-vis, the complainant, by, the vendor concerned. The afore public duty is under law rather required to be peformed by the Tehsildar concerned, and, obviously hence in the completion, of, the afore public duty, the accused/convict ha sno role except, his doing the requisite preliminary work, (ii) for thereafter the Tehsildar concerned, making an order attesting mutation, on anvil, of, the apposite registered deed of conveyance, whereunder, the complainant, is, the vendee. Since, the charge appertains to an incident, which occurred, on, 11.4.2002, (iii) thereupon, vis-a-vis, the afore date, the evidence as adduced by the prosecution, is, to make loud echoings, that the accused/convict, not, deliberatedly ensuring, the, completion of the requisite preliminary work, and, his beguiling or misleading the complainant, that, the Tehsildar concerned, visiting the patwar khana concerned, for his making, an, order hence attesting the mutation, on anvil, of the registered deed, of, conveyance, whereunder the complainant, is, a vendee. Consequently, the best evidence, hence, for dispelling the effect, if any, of, evidence emerging, and, being adversarial, vis-a-vis, the accused, is comprised in the testimony of PW-9, the Tehsildar concerned, (iv) who rather in his cross-examination, has made echoings that the date assigned, for, the requisite order of mutation, being recorded, being 11.4.2002, (v) and, also he makes, a, further deposition, that, all the subsequent thereto entries, in, the rojnamacha rapat, being recorded, rather by the accused/convict. Furthermore, there, is, a candid echoing in his testification, vis-a-vis, the, public duty appertaining to the attestation of mutation, qua the acquisition of title, through, a sale deed, and, as, appertaining to the complainant, being also recorded, on 11.4.2002, (vi) and, the afore date, of, the requisite attestation of mutation, is, the, day, whereat the accused/convict, was allegedly rather caught red handed, while, taking, an, illegal gratification of Rs.2000/-, from, the complainant. In addition, when the complainant in his testification, occurring in his cross-examination, has, also accepted the afore testification rendered by the Tehsildar concerned, (vii) thereupon, there is no occasion, to, erect any inference, that, the accused/convict beguiling the complainant, about, the date of visiting, of, the Patwar Khana, rather by the Tehsildar concerned, (viii) whereat he was, to, make attestation of mutation, on anvil, of the apposite sale deed, nor any inference can be erected, that, any subjudice work remaining with the Patwari, and, also hence, there was no occasion for the accused/convict, to, for ensuring, the, completion, of, the requisite public duty, conspicuously, when the public duty was evidently completed both by him, and, by the Tehsildar concerned, rather to demand, any illegal gratification, from, the complainant.

11. Be that as it may, since the afore inference(s), forestall the vigour of the charge against the accused, and, also engender, a, further inference, that, the story propounded by the complainant, being entirely contrived or concocted, besides when in his cross-examination, PW-9 has made clear voicings, that, he had not seen any trap witness inside the

room of the Halqua Patwari, especially, at the time when the accused was apprehended, by the team, of the Vigilance department, (a) thereupon, the testifications rendered, by, the purported trap witnesses, to, the relevant occurrence, and, wherethrough they mete corroboration, to, the testification, of, the investigating officer, rather lose their probative vigour, (b) and, the reason for fortifying, the, afore inference, is garnered from the factum, that, the Tehsildar concerned, in his cross-examination, makes, voicings, that, at the relevant time, he was rather sitting inside the room, occupied by the patwari, testification whereof remains unreroded. Furthermore, with his making, a vague deposition, in his cross-examination, that, though he sighted the accused to be holding currency notes, in his hands, yet when he has further thereonwards, made a vague deposition, and, has also feigned ignorance, vis-a-vis, the origin of the currency notes purportedly, held by the accused, and, also when he has voluntarily unrebuttingly deposed, that, he had sighted the accused, to, throw the currency notes, on, the floor, (c) hence, constrain, this Court, to, erect, an, inference, that, the deposition, of, the investigating officer, and, whereto succor, is, lent by the trap witnesses, and, appertaining to the accused, being caught red handed, while receiving, an, illegal gratification, becoming eclipsed, (d) and, also assuming that the accused, was, holding afore currency notes, yet, the, mere holding, of, currency notes, by the accused would not beget, a, further inference that he had voluntarily accepted, the, afore sum of illegal gratification, from, the complainant, or from the trap witnesses, (e) as, PW-9, in his deposition comprised, in his cross-examination, deposes that he had sighted, the, accused to throw the currency notes, on, the floor,(f) wherefrom, hence, it is to be contrarily inferred that the decoyed witness or the trap witness or the staff of the vigilance department, rather forcing the afore money onto the hands of the accused, and, hence, there being no element of voluntary acceptance, of, the illegal gratification by the accused, and, also hence the propagation, of, the prosecution, that, the accused had inserted, the, afore received sum of money, in, his pocket, standing falsified. Cumulatively, hence this Court is constrained to conclude that entire exercise of the vigilance department, being a coloured exercise or it being, a, charade, for, merely falsely implicating, the, accused, despite, for, all, the, afore reasons no public duty remaining subjudice with him.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has not appraised the entire evidence on record, in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, also suffers from any gross perversity or absurdity of mis-appreciation, and, non appreciation of germane thereto evidence, on record.

13. Consequently, the instant appeal is allowed. In sequel, the judgement impugned before this Court is set aside, and, the accused/appellant herein is acquitted of the charged offences. Fine amount, if any, deposited by the accused, be refunded to him. Bail bonds stand discharged. All pending applications also stand disposed of. Records be sent back forthwith.

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

United India Insurance Co. Ltd. ....Appellant

Versus

Nagin Kumar & others. ....Respondents.

FAO No. 133 of 2018 a/w Cross-objections No. 94 of 2018

Reserved on : 21.10.2019

Date of decision: 24.10.2019

Motor Vehicles Act, 1988 - Section 149(2)(a)(i)(c) – Motor accident – Claim application – Absence of route permit as a defence – Availability – Held, mere plying of offending vehicle at a

place beyond the domain of route permit assigned, will not entitle insurer to claim immunity from its liability to indemnify the award provided the vehicle was not being plied for an unlawful purpose or purpose falling out side the category for which vehicle was registered. (Para 3).

For the appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.

For the respondents: Mr. Ajay Sharma, Sr. Advocate with Mr. Ajay Thakur, Advocate, for respondent No.1/cross-objector.

Mr. Sanjeev Kumar Suri, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal, stands, directed by the aggrieved insurer, against, the award rendered, upon, MACP No. 91-N/II/2013/2012, by, the learned Motor Accident Claims Tribunal-II, Kangra at Dhrmshala, wherethrough, vis-a-vis, disabled claimant, compensation amount, borne in a sum of Rs. 9,94,145/-, stood assessed, and, thereon interest, at the rate of 8% per annum, hence stood levied, (i) and, was ordered, to, commence from the date of filing the petition, till its deposit or realization, (ii) and, the apposite intemnificatory liability, stood fastened, upon, the insurer-appellant herein. Also, the disabled claimant becoming hence aggrieved by the compensation, assessed qua him, hence also through, Cross-Objections No. 94 of 2018, seeks enhancement, of, the compensation amount, assessed, vis-a-vis, him.

2. The learned counsel, appearing for the aggrieved insurer, does not contest, the validity, of, returning, of, affirmative findings, upon, issue No.1, and, appertaining, to, the relevant mishap, being a sequel of rash, and, negligent manner, of, driving, of, the offending vehicle, by respondent No.1. The learned counsel, appearing for the aggrieved insurer, also, does not contest, the, validity of findings, returned, upon, issue No.4, and, appertaining, to, respondent No.1, holding, at the relevant time, a valid, and, effective driving license, for, hence driving, the, offending vehicle. However, he contends, that, with RW-2, in his deposition, comprised in his cross-examination, (i) making a deposition, vis-a-vis, the route permit, assigned, vis-a-vis, the offending bus, rather by the authority concerned, rendering it plyable, from, Jawali, to, Jasur, and, also from Jasur, to, Jawali, and, back, (ii) yet, with his also thereafter, making, a, deposition, vis-a-vis, the route, whereon at the relevant time, the, offending bus become plied, rather not falling within the ambit, of, the afore assigned route permit, vis-a-vis, the offending bus, rather by the authority concerned, thereupon, he contends that the mandate, as, borne in Clause (c), of, Section 149 (2)(a)(i)(c), of, the Motor Vehicles Act, mandate whereof, is, extracted hereinafter:-

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> for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle or
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becoming breached, (iii) and, also he contends, that, with the afore being, a, fundamental breach, vis-a-vis, the terms, and, conditions, of, the contract, of, insurance, thereupon, the, saddling, of, the apposite indeminificatory liability, upon, the insurer, becoming grossly inapt.

3. However, for the reasons, to be assigned hereinafter, the afore submissions, cannot be accepted, by this Court, as, the deepest, and, the most incisive reading of the apt Clause (c), of, Section 149 (2)(a)(i)(c), of, the Motor Vehicles Act, (i) makes, hence clear, and, apparent upsurging, vis-a-vis, (ii) upon a route permit becoming assigned, vis-a-vis, a transport vehicle, by the authority concerned, though not with explicity, and, with specificity,

excluding, the, plying of the vehicle concerned, hence outside, the, area/zone, qua wherewith, the apt route permit becomes assigned, (iii) rather, the conspicuous phraseology, of, the apt clause-(c), wherefrom, the apt gathering, vis-a-vis, the espoused fundamental breach becoming occasioned, and, becoming sparked, rather, upon, a, vehicle traveling beyond the area/zone, of, the apt route permit, is, borne, in, "for a purpose not allowed by the permit" (iv) and, the latter being enjoined, to be, combinedly read, along with, the, necessity, of, the afore permit, being statutorily assignable, only, vis-a-vis, a, "transport vehicle". The afore manner(s), of, readings thereof, brings forth, inferences qua,the bringings, of,a transport vehicle, for, legally forbidden purpose, hence obviously becoming an "unlawful purpose", or, a purpose falling outside, the, apt category, qua wherewith, an apt registration, is, assigned, by the authority concerned, (v) and, bearing in mind, the, afore connotation being assignable, vis-a-vis, the afore conspicuous phraseology, as, is embodied in Clause (c), of, Section 149 (2)(a)(i)(c) of the Motor Vehicles Act, (vi) thereupon with no evidence becoming adduced, vis-a-vis, at the relevant time, the vehicle being plied, for, an unlawful purpose, or, for, any statutorily interdicted purpose, (vii) rather, with the offending vehicle being used, by its driver, for traveling, to, the house, of, his relative, (viii) and, when the afore traveling, does not constitute, any, unlawful purpose, (ix) thereupon when, at, the relevant stage, hence a mishap involving, the, offending vehicle, rather occurred, at, the relevant site, plyings whereof, theeon(s), is, though beyond the domain, of, the route permit, assigned qua therewith, by, the authority concerned, would not per-se invite, the, requisite statutory embargo, as, finds encapsulation, in, Section 149 (2)(a)(i) (c), of, the Motor Vehicles Act.

4. Be that as it may, even if assumingly, the vehicle driven by respondent No.1, was plied beyond, the, area/zone, of, the route permit, issued qua therewith hence by the authority concerned, thereupon also, it, not per-se hence begetting attraction thereon, vis-a-vis, the apposite statutory embargo, (a) as the relevant accident evidently occurred, on, a National Highway, (b) and, when the route permit, assigned qua the offending vehicle, by, the authority concerned, does not fall within, the, domain, of, the National Highway, whereon(s) rather the ill-fated accident evidently occurred, (c) besides when no adduced evidence hence exists, qua the impermissible route(s), whereon, the offending vehicle became plied, rather not occurring, in, vicinity, of, the apt validly assigned route permit, (d) thereupon, it, would, be, befitting to conclude qua respondent No.1, taking his vehicle, to ply it, within the closest area/zone, qua wherewith, a valid route permit, stood assigned, qua the offending vehicle, by, the authority concerned, for, his thereafter plying, the, same within, the, vaildly assigned route. Pre-eminently, also with the offending vehicle, not, plying outside, the territory of Himachal Pradesh, (e) and, therealongwith, bearing in mind also, the afore factum, vis-a-vis, the, proven, and, unchallenged ascription, of, commission of 'tort of negligence', by respondent No.1, and, hence involving, the, offending vehicle, though, happening outside, the, zone qua wherewith, a, route permit become assigned, visibly hence, not becoming demonstrated, by any adduced cogent evidence, to, hold a close nexus, vis-a-vis, the espoused breach, of, the, route permit, as, stood, validly assigned qua the offending vehicle, (f) and, evidence whereof, may be embodied, in, a condition existing in the relevant, insurance cover, rather completely forbidding, the, plying(s) thereof, on, the inapt route, besides, imperatively, the, validly assigned route being also made with application, of, mind rather by the assigning authority, vis-a-vis, given the fullest plyable condition, of, the assigned route hence necessatating its imparative plyings thereon(s), hence for obviating occurrence(s), of, accident(s), (g) contrarily, with the apt offending vehicle becoming driven, at the relevant stage, on, a National Highway, and, hence obviously, with, the National Highway, being concludable to be, in a more befitting plyable condition, vis-a-vis, the validly assigned route(s), hence also, constrains this Court, to, conclude, that, any minimal deviation, from, the route permit, even for, a, private purpose, of, respondent No.1, not inviting, the, statutory embargo, occurring, in, the apposite Clause (c), of, Section 149 (2)(a)(i)(c) of the Motor Vehicles Act, as, the afore nexus rather becomes unsatiated, and, thereupon, the, saddling, of, the indemnificatory liability, upon, the insurer, is, apt.

5. However, the disabled claimant, as echoed, by, his ensuring adducing, a, disability certificate, borne in Ext. PW-2/A, stood entailed, with, a, 25% disability, of, fracture half femur right with fracture tibia left with stiff knee, (i) and, with PW-2, during the course, of, his deposition, making echoings, vis-a-vis, the disabled injuries being, a, sequel, of, an ill-fated accident, (ii) and, further onwards, his, making, a, testification qua hence the disabled claimant, becoming, precluded, to, perform hard work, of, a mason, and, also with the disabled claimant, vis-a-vis, his possessing, the, requisite skill, in, masonry work, making a testification, qua, therewith, and, also placing on record, a, passport, wherein unveilings occurr qua his being granted, a, visa, to, travel, to, UAE, (iii) thereupon, his testification qua his rendering employment, as, a mason in UAE, obviously acquires both vigor and tenacity. Even though, the disabled claimant has testified, vis-a-vis, from his proven avocation, of, a skilled mason, his hence drawing a per mensem salary of Rs. 26,000/-, yet, the learned Tribunal, has, reduced his per month salary, to, Rs. 10,000/-, and, the afore deduction, is obviously both reasonable, and, tenable, (v) given the nature of, the, proven avocation, being performed by the disabled claimant, prior to his becoming entailed, with, the disabling injuries, moreso, when no adduced evidence hence exists, and, comprised, in, the, engaging(s), vis-a-vis, , the, services, of, the disabled claimant, his becoming liquidated per mensem, wages, in, sums, lessor, than, as, stand, comprised, in the impugned award.

6. For the foregoing reasons, there is no merit, in, the appeal filed, by the insurer, and, is hence dismissed, and, the impugned award, is, maintained, and, affirmed. The cross-objections filed by the disabled claimant, also, stand(s) dismissed. All pending applications also stand disposed of. Records be sent back forthwith.

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

United India Insurance Co. Ltd. ....Appellant

Versus

Nisha Rani & others. ....Respondents.

FAO No. 167 of 2018
Reserved on : 21.10.2019
Date of decision: 24.10.2019

Motor Vehicles Act, 1988 - Section 149 (2) (a)(i)(c) – Motor accident – Absence of route permit as a defence – Availability - Held, accident occurring in an Area / Zone situated in close proximity of road with respect to which a valid route permit was there –This minimal deviation from route permit even for private propose would not attract provisions of Section 149(2) (a)(i)(c) of the Act. (Para 3 & 4)

Cases referred:

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

Sarla Verma & others vs. Delhi Transport corporation, 2009 (6) SCC 121.

For the appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.

For the respondents: Mr. Ajay Sharma, Sr. Advocate with Mr. Ajay Thakur, Advocate, for respondents No. 1 to 3.
Respondents No. 4 and 5 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal, stands, directed by the aggrieved insurer, against, the award rendered, upon, MACP No. 22-N/II/13/10, by, the learned Motor Accident Claims Tribunal-II, Kangra at Dhrmshala, (a) wherethrough, vis-a-vis, the, successors-in-interest, of, deceased one Rajneesh, compensation amount, borne in a sum of Rs. 13,30,000/-, hence stood assessed, and, thereon interest, at the rate of 8% per annum, stood levied, (b) and, was ordered, to, commence from the date of filing the petition, till its deposit or realization, (c) and, the apposite intemnificatory liability, stood fastened, upon, the insurer-appellant herein.

2. The learned counsel, appearing for the aggrieved insurer, does not contest, the validity, of, returning, of, affirmative findings, upon, issue No.1, and, appertaining, to, the relevant mishap, being a sequel of rash, and, negligent manner, of, driving, of, the offending vehicle, by respondent No.1. The learned counsel, appearing for the aggrieved insurer, also, does not contest, the, validity of findings, returned, upon, issue No.4, and, appertaining, to, respondent No.1, holding, at the relevant time, a valid, and, effective driving license, for, hence driving, the, offending vehicle. However, he contends, that, with RW-2, in his deposition, comprised in his cross-examination, (i) making a deposition, vis-a-vis, the route permit, assigned, vis-a-vis, the offending bus, rather by the authority concerned, rendering it plyable, from, Jawali, to, Jasur, and, also from Jasur, to, Jawali, and, back, (ii) yet, with his also thereafter, making, a, deposition, vis-a-vis, the route, whereon at the relevant time, the, offending bus become plied, rather not falling within the ambit, of, the afore assigned route permit, vis-a-vis, the offending bus, rather by the authority concerned, thereupon, he contends that the mandate, as, borne in Clause (c), of, Section 149 (2)(a)(i)(c), of, the Motor Vehicles Act, mandate whereof, is, extracted hereinafter:-

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> for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle or
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becoming breached, (iii) and, also he contends, that, with the afore being, a, fundamental breach, vis-a-vis, the terms, and, conditions, of, the contract, of, insurance, thereupon, the, saddling, of, the apposite indeminificatory liability, upon, the insurer, becoming grossly inapt.

3. However, for the reasons, to be assigned hereinafter, the afore submissions, cannot be accepted, by this Court, as, the deepest, and, the most incisive reading of the apt Clause (c), of, Section 149 (2)(a)(i)(c), of, the Motor Vehicles Act, (i) makes, hence clear, and, apparent upsurging, vis-a-vis, (ii) upon a route permit becoming assigned, vis-a-vis, a transport vehicle, by the authority concerned, though not with explicity, and, with specificity, excluding, the, plying of the vehicle concerned, hence outside, the, area/zone, qua wherewith, the apt route permit becomes assigned, (iii) rather, the conspicuous phraseology, of, the apt clause-(c), wherefrom, the apt gathering, vis-a-vis, the espoused fundamental breach becoming occasioned, and, becoming sparked, rather, upon, a, vehicle traveling beyond the area/zone, of, the apt route permit, is, borne, in, "for a purpose not allowed by the permit" (iv) and, the latter being enjoined, to be, combinedly read, along with, the, necessity, of, the afore permit, being statutorily assignable, only, vis-a-vis, a, "transport vehicle". The afore manner(s), of, readings thereof, brings forth, inferences qua,the bringings, of,a transport vehicle, for, legally forbidden purpose, hence obviously becoming an "unlawful purpose", or, a purpose falling outside, the, apt category, qua wherewith, an apt registration, is, assigned, by the authority concerned, (v) and, bearing in mind, the, afore connotation being assignable, vis-a-vis, the afore conspicuous phraseology, as, is embodied in Clause (c), of, Section 149 (2)(a)(i)(c) of the Motor Vehicles Act, (vi) thereupon with no evidence becoming adduced, vis-a-vis, at the relevant time, the vehicle being plied, for, an unlawful purpose, or, for, any statutorily interdicted purpose, (vii) rather, with the offending vehicle being used, by its driver, for traveling, to, the house, of, his relative, (viii) and, when the afore traveling, does not constitute, any, unlawful purpose, (ix) thereupon when, at, the relevant stage, hence a mishap involving, the, offending vehicle, rather occurred, at, the relevant site, plyings

whereof, theeon(s), is, though beyond the domain, of, the route permit, assigned qua therewith, by, the authority concerned, would not per-se invite, the, requisite statutory embargo, as, finds encapsulation, in, Section 149 (2)(a)(i) (c), of, the Motor Vehicles Act.

4. Be that as it may, even if assumingly, the vehicle driven by respondent No.1, was plied beyond, the, area/zone, of, the route permit, issued qua therewith hence by the authority concerned, thereupon also, it, not per-se hence begetting attraction thereon, vis-a-vis, the apposite statutory embargo, (a) as the relevant accident evidently occurred, on, a National Highway, (b) and, when the route permit, assigned qua the offending vehicle, by, the authority concerned, does not fall within, the, domain, of, the National Highway, whereon(s) rather the ill-fated accident evidently occurred, (c) besides when no adduced evidence hence exists, qua the impermissible route(s), whereon, the offending vehicle became plied, rather not occurring, in, vicinity, of, the apt validly assigned route permit, (d) thereupon, it, would, be, befitting to conclude qua respondent No.1, taking his vehicle, to ply it, within the closest area/zone, qua wherewith, a valid route permit, stood assigned, qua the offending vehicle, by, the authority concerned, for, his thereafter plying, the, same within, the, vaildly assigned route. Pre-eminently, also with the offending vehicle, not, plying outside, the territory of Himachal Pradesh, (e) and, therealongwith, bearing in mind also, the afore factum, vis-a-vis, the, proven, and, unchallenged ascription, of, commission of 'tort of negligence', by respondent No.1, and, hence involving, the, offending vehicle, though, happening outside, the, zone qua wherewith, a, route permit become assigned, visibly hence, not becoming demonstrated, by any adduced cogent evidence, to, hold a close nexus, vis-a-vis, the espoused breach, of, the, route permit, as, stood, validly assigned qua the offending vehicle, (f) and, evidence whereof, may be embodied, in, a condition existing in the relevant, insurance cover, rather completely forbidding, the, plying(s) thereof, on, the inapt route, besides, imperatively, the, validly assigned route being also made with application, of, mind rather by the assigning authority, vis-a-vis, given the fullest plyable condition, of, the assigned route hence necessatating its imparative plyings thereon(s), hence for obviating occurrence(s), of, accident(s), (g) contrarily, with the apt offending vehicle becoming driven, at the relevant stage, on, a National Highway, and, hence obviously, with, the National Highway, being concludable to be, in a more befitting plyable condition, vis-a-vis, the validly assigned route(s), hence also, constrains this Court, to, conclude, that, any minimal deviation, from, the route permit, even for, a, private purpose, of, respondent No.1, not inviting, the, statutory embargo, occurring, in, the apposite Clause (c), of, Section 149 (2)(a)(i)(c) of the Motor Vehicles Act, as, the afore nexus rather becomes unsatiated, and, thereupon, the, saddling, of, the indemnificatory liability, upon, the insurer, is, apt.

5. Further there onwards, the learned counsel, for, the aggrieved insurer, has, contested the quantification, of, compensation, as, made, vis-a-vis, the successors-in-interest, of, the deceased, who, provenly met his end, in, sequel to, the fatal injuries, encumbered, upon, his person, in sequel to the collision, happening inter-se him, and, the offending vehicle, on, anvil qua, no cogent evidence, becoming adduced, vis-a-vis, the deceased, being a skilled carpenter, (i) and, also, on, anvil qua his, during, the relevant time, rearing, an, income of Rs. 7,500/- per mensem, hence therefrom, yet, the afore submission(s), is, rudderless, (ii) as, in, the, deposition, of, the claimant, there occur echoings qua the deceased, during his life time, becoming befittingly skilled, in, carpentery work, (iii) and, when, vis-a-vis, the afore made echoings, no cogent apt rebutting evidence, becomes adduced, rather by the insurer, and, comprised in persons, residing, in, the vicinity of the home, of, the deceased, making testifications, for, hence cogently rebutting, the, afore deposition, (iv) thereupon the deceased, during, his life time, is inferred, to, possess adequate skill(s), in, carpentery, and, whereupon, the, computation, of, his per mensem, in, a sum, of, Rs. 7500/-, appears to be just, and, reasonable, and, does not warrant any interference. Consequently, the, further thereonwards hence application(s) thereon, of, the requisite multiplier, after, meteing, the, apposite 1/3rd deduction, from, his per mensem income, of, Rs. 7500/-, and, thereonwards, the, meteing(s), of, apt hikes, and, escalations, vis-a-vis, his future enhancement, of, income,

rather also fall(s), within the domain, of, verdicts, respectively rendered, by, the Hon'ble Apex Court, in, a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, and, in a case titled ***Smt. Sarla Verma & others vs. Delhi Transport corporation, 2009 (6) SCC 121***.

6. For the foregoing reasons, there is no merit, in, the appeal filed, by the insurer, and, is hence dismissed, and, the impugned award, is, maintained, and, affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Vakil Singh (through LRs) & others .....Appellant

Versus

Bir Singh & others ....Respondents.

RSA No. 441 of 2008

Reserved on : 17.10.2019

Date of Decision: 24th October, 2019

Specific Relief Act, 1963 – Section 38 – Decree of permanent prohibitory injunction – Grant of - Held, plaintiffs claiming settled possession over suit land through sale deed(s)- Sale deed(s) not proved in evidence by them – Plaintiffs possession can not be inferred simply on basis of mutations(s) attested in their favour – Plaintiffs since not proved to be in settled possession, are not entitled for permanent prohibitory injunction. (Para 4 to 6).

For the appellant: Mr. G. D. Verma, Sr. Advocate with Mr. B. C. Verma, Advocate.

For the respondents: Mr. J. L. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal, stands directed, against, the concurrently recorded verdicts, hence, by both the learned Courts below, wherethrough, the plaintiff's suit, for, rendition, of, a decree, of, permanent prohibitory injunction, and, also for rendition, of, a decree of mandatory injunction, vis-a-vis, the suit khasra numbers, and, against the defendants, hence stood decreed. 2. This Court, on 3.9.2008, had, admitted the appeal, instituted by the defendants/appellants, against, the judgment and decree, rendered, by the learned first Appellate Court, upon, the hereinafter extracted, substantial question of law, for, its hence making, an adjudication thereon:-

1. Whether presumption of correctness as attached to the revenue entries exhibit P-1, jamabandi for the year 1988-89, and jamabandi exhibit P-2, for the year 1991-92 stand amply rebutted by virtue of oral as well as documentary evidence on record as produced by appellants/defendants?

Substantial question of Law No.1:

3. Vis-a-vis, one Chinti Devi, a conclusive, and, binding verdict, stood hence recorded, by this Court, judgment whereof, stands, embodied, in Ext. P-8, (a) and wherethrough, after dismissal, of, the defendants' objections, vis-a-vis, the conclusive, and binding judgment, and, decree, pronounced against the defendants, (b) hence, a, pronouncement was made, for issuance, of, warrant(s) of possession, vis-a-vis, the suit property, and, theirs' being executed, vis-a-vis, the afore decree holder one Chinti Devi, (c) and, visibly the afore mandate become complied with, and, besides the vendor, of, the plaintiffs, one Chinti Devi, obviously stood delivered, hence, physical possession, of, the suit property, by, the defendants, (d) thereupon, with the earlier litigation, wherein the afore pronouncement, was recorded, engaging, and, being inter-se the afore Chinti Devi, and, the

defendants herein, (e) and, wherein, a conclusive, and, binding besides completely executed decree, hence, rather of possession, was rendered, vis-a-vis, the afore Chinti Devi, does completely, benumb the defendants espousal, qua, theirs acquiring, through, adverse possession, hence title and interest, vis-a-vis, the suit khasra numbers. However, the afore Chinti Devi alone, held, an, indefeasible, vested right, to, through recoursing, the, apposite legal processes, hence seek injunction, against, invalid usumption, vis-a-vis, her valid possession, qua, the suit khasra numbers, and, as, purportedly, made, at the instance, of, the defendants. Significantly, the, afore locus standi remains rather unvested, in, the plaintiffs'. The plaintiffs' also claimed qua their acquiring hencetitle, vis-a-vis, the suit land, through, mutation No. 661, and, mutation No. 662, mutations whereof, were, respectively attested, on 14.7.1986, in sequel to theirs' acquiring title, through, a sale made in their favour, by the said Chinti Devi, (b) and, also therethrough claimed, a, valid facilitatation, to, institute a suit, seeking therethrough, hence, rendition, of, the espoused decree, vis-a-vis, suit khasra numbers, and, against the defendants. Significantly, hence, the validity, of, attestation, of, the afore mutations bearing mutation No. 661, and, mutation No. 662, mutations whereof were attested 14.7.1986, becomes, the, fulcrum wherethrough, an, apt determination would hence ensure, (a) whether the plaintiffs, hold, possession, of, the suit property, (b) whether they are entitled, to, claim rendition, of, the espoused decree against the defendants, and, vis-a-vis, the, suit khasra numbers, (c) however, for, the afore attested mutation(s) becoming validated by this Court, it, was incumbent, upon, the plaintiffs, to, ensure adduction, of, firm evidence, hence meteing satiation, rather with the apposite mandatory statutory provisions, borne both, in, The Transfer of Property Act, and, in, The Registration Act, (d) whereunder(s), vis-a-vis, immovable property hence holding, a, value of more than Rs. 100/-, a, scribed registered deed of conveyance, is, enjoined to be executed, inter-se the vendor, and, the vendee, and, vis-a-vis, the suit khasra numbers. However, the execution, of, the requisite mandatory/statutory registered deed of conveyance, inter-se Chinti Devi, and, the plaintiffs, though, is referred in mutation bearing No. 661, and, also in mutation bearing No. 662, respectively attested, on, 14.7.1986, (d) however, for, the afore reflections cast therein, becoming validated hence by this Court, and, also theirs' becoming concluded to enjoy conclusivity, rather enjoined, the, plaintiffs', to, adduce, the, apposite deed(s), hence into evidence. However, the apt registered deed, of, conveyance executed, purportedly inter-se, the, plaintiffs, and, said Chinti Devi remained unadduced into evidence and, when hence, only, thereafter valid title, vis-a-vis, the suit khasra numbers, would become vested, in, the plaintiffs, and only, when in pursuance thereof, a, valid mutation would become attested, (f) whereas, the, afore requisite statutorily enjoined registered deed of conveyance, as purportedly executed inter-se plaintiffs, and, Chinti Devi rather remaining unadduced into evidence, (g) thereupon upon breach, of, the afore requisite mandatory statutory mandate, and, also when hence, for, want thereof, no valid title, is, conveyed, inter-se the suit khasra numbers, by, Chinti Devi, to, the plaintiffs, (h) thereupon the orders hence attesting mutations, and, theirs' therein unfolding qua the apposite deeds becoming executed, is/are, yet, for non adduction(s) thereof, rather *void-abinitio,* and, consequently, all, the, apposite entries, and, appertaining, to, the suit khasra numbers also do not any legal vigors.

4. Be that as it may, since the reflections, in, the records appertaining to the suit khasra numbers, hence, displaying the plaintiffs, to, hold possession, as, owner, of, the suit khasra numbers, become rebutted, (i) and, when the ensuing therefrom inference, is, qua Chinti Devi or her LRs becoming solitary entitled, to, claim ownership, vis-a-vis, the suit property, (ii) besides when, with, the previously rendered conclusive, and, binding judgment, and, decree, in, the suit engaging Chinti Devi, and, the defendants, becoming enforceable, only rather by the afore, (iii) and, also with this Court rebutting the defendants' espousal, qua their acquiring title, vis-a-vis, suit khasra numbers, hence through adverse possession, (iv) and, with no challenge being cast, vis-a-vis, the discountenancing(s), by both the learned courts below, vis-a-vis, the defendants' afore propagation, (iv) hence with even the afore findings becoming conclusive, (v) thereupon Chinti Devi, or, her legal representatives, are,

declared to hold possession, vis-a-vis, the suit khasra numbers, besides, the concurrent judgments, and, decrees made, vis-a-vis, the plaintiffs, wherethrough the defendants, are, restrained from interfering the suit khasra numbers, are, quashed and set aside.

5. The above discussion, unfolds, qua the conclusion(s), as arrived by the learned Courts below, being not based, upon a proper and mature appreciation, of, evidence, on, record. The substantial question, of law, is, answered, accordingly.

6. In view of the above discussion, the instant appeal, is, allowed, and, the judgment and decree impugned, before this Court, is, quashed and set aside. Consequently, the plaintiff's suit is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Kishori Lal Sharma and others ...Petitioners

Versus

State of H.P. and others ..Respondents

CWP No. 1200 of 2019 alongwith
CWP No. 1224 of 2019
Reserved on: 17.10.2019.
Date of decision: 23.10.2019.

Constitution of India, 1950 - Article 226 – Writ Jurisdiction – Alternative remedy – Existence of – Effect – Existence of alternative remedy, doest not create an absolute legal bar on exercise of writ jurisdiction by High Court – Decision whether to exercise or not to exercise such writ jurisdiction is to be taken by High Court on examination of facts and circumstances of a particular case (Para 12)

Interpretation of Statutes – 'Punctuation' mark in a clause – Effect – Held, punctuation marks do not control the meaning of statutory provision if it is otherwise obvious. (Para 18)

Himachal Pradesh Cooperative Socities Act, 1968 (Act) - Sections 35-A & 37 – Scope and applicability - Held, provisions of Section 35-A of Act can be invoked where a cooperative society constituted in accordance with provisions of Act rules and byelaws does not exist – These provisions can not be invoked where there exists a managing committee but same has been superseded by the Registrar in exercise of powers under Section 37 of Act. (Para 22)

Title: Kishori Lal Sharma and others vs. State of H.P. and others Page - 855

Cases referred:

Maharashtra Chess Association vs. Union of India (2019) 3 Apex C.J. 166
Dadaji vs. Sukhdeobabu, AIR 1980, SC. 150
Union of India and another vs. G.M. Kokil and others 1984 (Supp) SCC 196
R.S. Raghunath vs. State of Karnataka and another (1992) 1 SCC 335)

For the Petitioner(s) : Mr. Rakesh Dhaulta, Advocate.

For the Respondents: **Mr. Vinod Thakur, Addl. A.G. with Mr. Bhupinder Thakur and Mr. Narinder Thakur, Dy. A.Gs., for respondents No.1 to 3.**
Mr. Hamender Singh Chandel, Advocate, for respondents No.4 to 11.

The following judgment of the Court was delivered:

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.Tarlok Singh Chauhan, Judge

Since common questions of law and facts are involved in both these petitions, therefore, the same were taken up together for consideration and are being disposed of by a common judgment.

2. The only difference in both these petitions is that the petitioners in CWP No. 1200 of 2019 are the Members of 'The Talai, Gram Sewa Sabha Samiti, Talai i.e. respondent No.4-Society, whereas the petitioner in CWP No. 1224 of 2019 is the former Secretary of respondent No.4-Society. The prayers made in both these petitions are common and read as under:

"**CWP No.1200 of 2019:**

(I) That the notification issued by respondent No.3 appointing a Nominated Committee in respondent No.4-Society, dated 28.03.2019(Annexure P-2) may be quashed and set-aside being illegal and arbitrary.

(ii) That respondents No.2 and 3 may be directed to appoint administrator in the respondent No.4 Society as per provisions of Section 37 of the Act to run the day to day affairs of the Society.

(iii) That respondents No.2 to 3 be directed to restore the democratically elected Managing Committee of the Society in a time bound manner by conducting election of the Managing Committee of the respondent No.4 Society as per provision of law.

CWP No. 1224 of 2019

(I) That the order dated 28.3.2019 (Annexure P-1) removing the elected Managing Committee may be quashed and set-aside being illegal, without jurisdiction and arbitrary, further the elected Managing Committee of respondent No.4 Society may be allowed to complete its normal tenure.

(ii) That the notification issued by respondent No.3 appointing a Nominated Committee in respect of respondent No.4 Society, dated 28.3.2019 (Annexure P-2) may be quashed and set-aside being illegal and arbitrary.

(iii) That respondent No.4 Society may be directed to place the suspension order of the petitioner on record and the same may be directed to be quashed and set-aside being illegal and without jurisdiction.

(iv) That the respondent No.2 may be directed to conduct re-audit for the year 2017-2018 of the respondent No.4-Society by associating the petitioner with the same.

3. The undisputed facts lie in a narrow compass. The elected Managing Committee of respondent No.4-Society had vide resolution No. 1313 dated 19.1.2019 resolved to request the respondent No.3 to appoint Departmental Administrator in the Society to run its day to day affairs. However, respondent No.3 without taking any cognizance of the above referred resolution of the Society, issued show cause notice dated 8.3.2019 and 13.3.2019 to the then Managing Committee. The reply was filed by the then Managing Committee jointly as well as individually and not being satisfied with the said replies, respondent No.3 ordered the removal of the elected Managing Committee by invoking the provisions of Section 37 (1) (a) of the H.P. Cooperative Societies Act, 1968 (for short Act) vide its order dated 28.3.2019.

4. On the very same day i.e. on 28.3.2019, respondent No.3 vide notification constituted the Nominated Managing Committee of respondent No.4-Society consisting of respondents No.5 to 11 under Section 35-A of the Act which according to the petitioners is in gross violation of the law.

5. It is the contention of the petitioners that once the provisions of Section 37 (1) (a) had been invoked, then respondent No.3 without adhering to the other provisions of section could not have resorted to Section 35-A of the Act which empowers the Registrar to constitute new Committee only in a situation where a committee constituted in accordance with the provisions of the Act, rules and byelaws does not exist. Whereas, in the present case the elected Managing Committee of respondent No.4- Society was in existence on 28.3.2019

and had been removed by respondent No.3 by invoking provisions of Section 37(1) (a) of the Act.

6. The official-respondents have contested the petition by filing reply wherein it has been contended that respondent No.3 after removing the Managing Committee of the respondent No.4-Society by invoking provisions of Section 37 (1) (a) of the Act, had three options with him i.e. either:

(i) to order fresh election to the Committee as per provision contained in Section 37 (1) (a) (i) of the Act ; or

(ii) appoint one or more administrators to manage the affairs of the society as per provision contained in Section 37 (1) (a) (ii) of the Act; or

(iii) constitute a new committee to manage the affairs of the society as per provision contained in Section 35-A (1) of the Act.

7. Having invoked the provisions of Section 35-A (1) of the Act, no fault can be found with the action of respondent No.3. In addition thereto, it has been averred that in view of the Auditors report pertaining to the Society for the financial year 2017-18 wherein large scale illegalities and irregularities had been detected in the Society, no fault can be found in the action of respondent No.3.

8. The private respondents have not filed any separate reply and have adopted the reply filed by official respondents No.1 to 3 as is evident from the order dated 9.9.2019, which reads as under:

> *Mr. Hamender Singh Chandel, learned counsel submits that no separate reply is intended to be filed on behalf of respondents No.4 to 11 and reply to the writ petition filed on behalf of respondents No.1 to 3, is adopted on their behalf. No rejoinder is intended to be filed."*

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

10. At the out-set, it needs to be pointed out that even though there are serious allegations regarding the mis-management, mis-appreciation and embezzlement of the funds of the Society by the Members of the society, but that is not the subject matter, therefore, this Court will not go into this question.

11. However, Mr. Hamender Singh Chandel, learned counsel for the private respondents would argue that since the petitioners have not availed an alternative efficacious remedy or rather the statutory remedy under Section 72 of the Act, therefore, the present petitions are not maintainable.

12. It is more than settled that existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.

13. This was so held by the Hon'ble Supreme Court in a very recent judgment in ***Maharashtra Chess Association vs. Union of India (2019) 3 Apex C.J. 166***, wherein it was observed as under:

> *"18. This argument of the second respondent is misconceived. The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.*
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> *19. This understanding has been laid down in several decisions of the Hon'ble Supreme Court. In* **Uttar Pradesh State Spinning Co. Ltd. vs. R.S. Pandey, (2005) 8 SCC 264,** *the Hon'ble Supreme Court held as under:*
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> > *"11. Except for a period when Article 226 was amended by the Constitution (Forty-Second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed*

limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy."

20. The principle that the writ jurisdiction of a High Court can be exercised where no adequate alternative remedies exist can be traced even further back to the decision of the Constitution Bench of the Hon'ble Supreme Court in ***State of Uttar Pradesh vs. Mohammad Nooh, 1958 SCR 595,*** *where Justice Vivian Bose observed:*

"10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. (Halsbury's Laws of England, 3rd Ed., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

21. The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors. Thus, the mere fact that the High Court at Madras is capable of granting adequate relief to the Appellant does not create a legal bar on the Bombay High Court exercising its writ jurisdiction in the present matter."

14. Since the interpretation of statute is involved in the present case, therefore, it is only this Court that can adjudicate on such matters and the same cannot be left to the authorities constituted under the Act. Therefore, the objection of Mr. Chandel is overruled.

15. In order to appreciate the controversy, it would be necessary to reproduce Section 35-A and Section 37 of the Act, which read as under:

*"**35-A. Power of Registrar to constitute new committee in certain case** : — (1) Where in any Co-operative society, a committee constituted in accordance with the provisions of this Act, rules and bye-laws does not exist; the Registrar may, notwithstanding anything to the contrary contained in this Act or rules or bye-laws, constitute by notification a committee for such society consisting of such number of members and not exceeding eleven out of whom not less than one third shall be share holders of such society, as he may deem fit:*

Provided that if the number of the members of the committee so constituted is less than eleven, the Registrar may, from time to time, add a member or members to the committee.

(2) A committee constituted under sub-section(1) shall be deemed to be committee for all the purposes of this Act, rules and bye-laws and shall continue to function for a period of two years or until such period as a committee for such society is constituted in accordance with the provisions of this Act, rules and bye-laws, whichever expires earlier:

Provided that the Government may by notification extend the period of two years so as not to exceed in the aggregate three years."

"37. [Supersession of Committee :— *(1) If, in the opinion of the Registrar, a committee of any co-operative society or any member thereof persistently makes default or is negligent in the performance of the duties imposed on it or him by this Act or the rules or the bye-laws, or commits any act which is prejudicial to the interest of the society or its members, the Registrar may, after giving such committee or member, as the case may be, an opportunity to state its objections, if any, by order in writing—*

(a) remove the committee; and—

(i) order fresh election to the committee; or

(ii) appoint one or more administrators who need not be members of the society, to manage the affairs of the society for a period not exceeding one year specified, in the order which period may, at the discretion of the Registrar, be extended from time to time, so however, that the aggregate period does not exceed five years; or

(b) remove the member and get the vacancy filled up for the remaining period of the out going member, according to the provisions of this Act, the rules and the bye-laws.

(1-A) Where the Registrar, while proceeding to take action under sub-section (1) is of the opinion that suspension of the committee or any member during the period of proceedings is necessary in the interest of the Co-operative society, he may suspend such committee or member,as the case may be, and where the committee is suspended, make such arrangements as he think proper for the management of the affairs of the society till the proceedings are completed:

Provided that if the committee or member so suspended is not removed, it or he shall be reinstated and the period of suspension shall count towards its or his term;

(2) The Registrar may fix such remuneration for the administrator, as he may think fit. Such remuneration shall be paid out of the funds of the society.

(3) The administrator shall, subject to the control of the Registrar and to such instructions as he may from time to time give, have power to perform all or any functions of the committee or of any officer of the society and take all such actions as may be required in the interest of the society.

(4) The administrator shall at the expiry of his term of office, arrange for the constitution of a new committee in accordance with the bye-laws of the society.

(5) Before taking any action under sub-section(1) in respect of a Co-operative society, the Registrar shall consult the financing institution to which it is indebted.

(6) A member who is removed under sub-section (1) may be disqualified for being elected to any committee for such period not exceeding three years as the Registrar may fix and the said period shall commence after the expiry of the term of the committees from which he is removed.]

The section provides for the removal of the committee of a co-operative society, if it mismanages its affairs. It also provides further for the appointment of an administrator in place of expelled management, till a new committee is elected."

16. According to the petitioners, respondent No.3, after having invoked Section 37(1) (a) of the Act, was required to complete the action under such section by following the provisions of Section 37 (1) (i) and (ii) which provide for ordering fresh election to the committee; or appointing one or more administrators who need not be members of the society to manage the affairs of the society for a period not exceeding one year specified, but respondent No.3 could not have resorted to Section 35-A by appointing nominated committee which as against the appointment of Administrator is for three years and this would amount to defeating the very purpose of the Act.

17. On the other hand, the learned Additional Advocate General and Mr. Hamender Chandel, learned counsel for the private respondents would argue that after having invoked Section 37 (1) (a) of the Act, there existed no Managing Committee in the respondent No.4-Society and, therefore, respondent No.3 was well within its right in

exercising one of the options that was available to him (as mentioned above) and, therefore, no fault can be found in the action of respondent No.3. In addition thereto, Mr. Hamender Chandel, would argue that in the language used in Section 37, there is semicolon used therein, therefore, each of the remedies resorted to in the said Section was independent and thus fully empowered respondent No.3 to take resort to Section 35-A of the Act.

18. In interpretation of statute by Bindra it is observed that "Punctuation marks do not control the meaning of a statutory provision if it is otherwise obvious."

19. In Law Lexicon comma is defined as "The smallest division of a sentence in language. The comma and semicolon are both used for the same purpose to punctuation, namely, to divide sentences and part of sentences; the only difference being that the semicolon makes the division a little more prolonged than the comma." Semi-colon is defined as "According to well established grammatical rules, this is a point only used to separate parts of a sense more distinctly than a comma."

20. The Hon'ble Supreme Court in ***Dadaji*** vs. ***Sukhdeobabu, AIR 1980, SC. 150***, was pleased to observe that "it is well known that punctuation marks by themselves do not control the meaning of a statute when its meaning is otherwise obvious. What the Court must see is the object of the Act.

21. Bearing in mind the aforesaid, it would be noticed that Section 35-A of the Act was not there when the Original Act of 1968 was promulgated and was introduced by way of amendment initially by Ordinance and thereafter by the H.P. Cooperative Societies (Amendment) Act, 1976. The statement of Objects and Reasons for introducing the Bill, reads as under:

STATEMENT OF OBJECTS AND REASONS

In order to ensure effective implementation of the Himachal Pradesh Co-operative Societies Act, 1968 (hereinafter called the principal Act) it is considered expedient that the Registrar be empowered to direct amendment of bye-laws of any co-operative society and also to register the same if it appears that such an amendment is necessary or desirable in the public interest or in the interest of the society/Co-operative movement. Further in order to weed out the weak co-operative units it is essential to empower the Registrar to order the amalgamation, re-organisation or conversion into any other class of societies or order that any society should transfer its assets and liabilities in whole or part in the public interest. Of late it has been experienced that the higher level co-operative institutions are not being managed effectively by the managing committees. Besides, in order to safeguard the interests of the State Government in the case of such co-operative institutions where the Government has subscribed the share capital of rupees five lakhs or more or the Government has assisted indirectly, the necessary provisions are required to be made in the Law. There are no powers under which the Registrar can order suspension of members of managing committees during the pendency of the proceedings relating to suspension of the managing committees under section 37 of the principal Act and he has also no powers to extend the period of Administrator(s) appointed under the aforesaid section beyond two years which in some case appears inadequate to put the society on sound footings. It is desirable that such a provision should be made in the Law. Due to upward trend of prices of agricultural inputs etc., it is also desirable to increase the ceiling of Rs.1,000 under section 47 of the Act. Section 52 of the principal Act provides for the first charge only in respect of produce of land and the industrial implements,which is inadequate. As such it has been decided to make a provision whereby such charge may also be created on the other movables or the loanees. Further the Registrar has been armed with powers to issue certificate for recovery of crop loans as arrears of land revenue. In terms of the existing provisions of sub-section(1) of section 98 of the principal Act only the Deputy Minister dealing with Co-operation can be a Vice-chairman of the

Council and there is no mention of the State Minister who at present is dealing with Co-operation. It is, therefore, decided to do away with this anomaly and to make the necessary amendments in the principal Act so that the Ministers of all ranks dealing with the Co-operation should be associated with the functioning of the Council. Since the number of Apex Level Societies is more than one and as such it is necessary to substitute the work "Chairman" with the word "Chairmen" in section 98(1)(iii) of the principal Act. Section 108 of the principal Act does not make them mention of section 93 which is co-related to sections already mentioned therein. The necessary insertion of section 93 in this section is desirable.

The Legislative Assembly was not in session and circumstances existed which rendered it necessary for the Governor to take immediate action by promulgating an Ordinance under Article 213(1) of the Constitution of India. Accordingly, Ordinance i.e. , The Himachal Pradesh Co-operative Societies (Amendment) Ordinance, 1975 (Ordinance No. 4 of 1975) was promulgated on 6-11-1975. This Ordinance is required to be replaced by an amendment Act.

This Bill seeks to achieve the aforesaid objections and to replace the aforesaid Ordinance without any modification.

SIMLA *MANSA RAM,*

The th February, 1976. *Minister-in-charge."*

22. It would be evident from a bare reading of Section 35-A that the same can be invoked by the Registrar only where in any co-operative society, a committee constituted in accordance with the provisions of the Act, rules and bye-laws does not exist, but the same cannot be invoked in the cases of Society where there exists a Managing Committee and the same has been superseded by the Registrar himself by invoking the powers of Section 37 of the Act. That would amount to defeating the very provisions of the Act. The Registrar cannot firstly by superseding the Committee under Section 37 and thereby making the Managing Committee non-existent cannot thereafter invoke the provisions of Section 35-A of the Act by claiming that the committee constituted in accordance with the provisions of the Act does not exist. The respondent No.3 cannot take advantage of his act of superseding the Committee to justify his action by appointing a new Committee under Section 35-A of the Act. The action of respondent No.3 is clearly in violation of the law and cannot therefore be sustained.

23. As a last ditch effort, Mr. Hamender Chandel, learned counsel for the private respondents would argue that since the Section 35-A is special provision and begins with non-obstante clause, therefore, the other provisions of the Act have to give way to the provisions of Section 35-A.

24. A non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment. (Refer: ***Union of India and another vs. G.M. Kokil and others 1984 (Supp) SCC 196*** and ***R.S. Raghunath vs. State of Karnataka and another (1992) 1 SCC 335).***

25. No doubt, Section 35-A contains a non-obstante clause which would invariably give overriding effect to certain other provisions of the Act but nonetheless the same cannot be applied in the present case for the simple reason that for invoking the Section 35-A condition precedent is that at the time of invoking this provision there does not exist a committee constituted in accordance with the provisions of this Act, rules and bye-laws. But once a Committee exists and has thereafter been superseded by the Registrar under Section 37 of the Act, this power under Section 35-A cannot be invoked or else as it would amount to playing mischief with the provisions of the Act.

26. The remedy under Section 35-A and Section 37 of the Act are totally separate and distinct and therefore, operate in different fields. Moreover, once the Registrar has resorted to the provisions of Section 37(1) (a) then the Registrar by superseding the Committee was required to take recourse to other provisions as contemplated in this Section i.e. Section 37 itself and could not have mischievously resorted to Section 35-A.

27. Having said so, I find merit in these petitions and the same are accordingly allowed and the notification issued by respondent No.3 appointing a Nominated Committee in respondent No.4-Society, dated 28.3.2019 (Annexure P-2) is quashed and set-aside and respondent No.3 is directed to appoint Administrator in the respondent No.4-Society as per the provisions of Section 37 of the Act to run the day to day affairs of the Society.

28. However, before parting it needs to be noticed that even though both these petitions are being allowed, however, the appointment of the petitioner in CWP No.1224 of 2019 in the respondent No.4-Society as Secretary cannot be restored in view of the criminal cases that are pending against him.

29. Both the petitions are disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending applications, if any, also stand disposed of.

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THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

LPA No. 148 of 2011:
State Election Commission ...Appellant
Versus
Sh. Ram Kumar Negi & Others. ...Respondents.

LPA No. 104 of 2013:
Sanjeev Kumar ...Appellant
Versus
State Election Commission & others. ...Respondents.

LPA Nos.148 of 2011 & 104 of 2013
Reserved on:27.8.2019
Decided on: 04.10.2019

Constitution of India, 1950 – Articles 14 & 226 – Seniority in absorbing department – Whether service rendered in parent department on equivalent post is to be considered? – Held, on facts, offer of deputation/ absorption was not under any R & P Rules, as Rules were not in existence – It was only in exercise of executive powers of the State that posts were filled on deputation basis – Therefore, State was within its bounds to impose conditions it deemed fit in deputing and absorbing the staff and such staff had the right to accept or reject the conditions so imposed by the State – As per conditions, seniority of absorbed staff was to rank from the date of absorption – Previous service rendered in parent cadre was not to be considered toward seniority – Petitioner accepted said conditions and accepted absorption – He can not claim seniority over officials absorbed earlier simply on basis of his previous service rendered in the parent department. (Para 3)

Constitution of India, 1950 - Dispute regarding interse seniority – Rejection of petitioner's representation by the department –Filing of repeated representations – Effect – Held, repeated representations do not revive the cause of action. (Para 3).

Administrative Tribunals Act, 1985 - Section 21 (1) – Limitation – Held, signed application can be laid before the Administrative Tribunals within three years of accrual of cause of action. (Para 3).

Coram:

Hon'ble Mr. Justice Dharam Chand Chaudhary, Acting Chief Justice.
Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.
Whether approved for reporting?[5] *Yes.*

LPA No. 148 of 2011:

For the appellant : Mr. Onkar Jairath, Advocate.

[5] **Whether reports of Local Papers may be allowed to see the judgment?**

For the respondents : Mr. B.C. Negi, Sr. Advocate, with Mr. Nitin Thakur, Advocate, for respondent No.1.

Mr. Dilip Sharma, Sr. Advocate, with Mr. Manish Sharma, Advocate, for respondent No.2.

Respondent No.3 *ex parte*.

LPA No. 104 of 2013:

For the appellant : Mr. Dilip Sharma, Sr. Advocate, with Mr. Manish Sharma, Advocate.

For the respondents : Mr. Onkar Jairath, Advocate, for respondent No.1.

Mr. B.C. Negi, Sr. Advocate, with Mr. Nitin Thakur, Advocate, for respondent No.2.

Respondent No.3 *ex parte*.

Jyotsna Rewal Dua, J.

Whether seniority of the petitioner absorbed in respondent No.1-State Election Commission, is required to be re-drawn by counting the service rendered by him in the equivalent grade in his parent department, in light of decision of the Hon'ble Apex Court in ***(2000) 1 SCC 644***, titled as ***Sub-Inspector Roop Lal and another*** vs. ***Lt. Governor through Chief Secretary, Delhi and others***, is the **primary question involved** in this bunch of Letter Patent Appeals. Learned Single Judge, allowed the writ petition and directed the Commission to prepare a fresh seniority list by taking into account the service period of the petitioner in the equivalent grade in his parent department. Hence, LPA No. 148 of 2011 has been preferred by the employer-State Election Commission and LPA No. 104 of 2013, has been preferred by original respondent No.2.

2. **The facts may be noticed, thus**:- (parties hereinafter are referred to as they were before the learned Writ Court)

2(i) Petitioner joined as an Accountant in H.P. Agro Packaging Company, Gumma on 01.10.1990 in the pay scale of Rs. 570-1080. This post was re-designated as Senior Assistant(Accounts), as a result of revision of pay scales w.e.f. 01.01.1986. Resultantly, petitioner on 26.12.1990 (Annexure A-13), was designated as Senior Assistant (Accounts) w.e.f. 01.10.1990, in the pay scale of Rs. 1800-3200.

2(ii) Petitioner, on deputation came to respondent No.1-State Election Commission on 31.08.1996 as Senior Assistant.

2(iii) On 18.12.1999, written option was sought from the petitioner for appointment by transfer as Senior Assistant in respondent No.1-State Election Commission on or before 26.12.1999. The option was accordingly tendered by the petitioner. Office order dated 20.05.2000 (Annexure A-2), was issued in respect of absorption of petitioner in respondent No.1-State Election Commission. Two relevant conditions of this office order in respect of determination of petitioner's seniority are reproduced hereinafter:-

"6. Seniority of the official would be fixed from the date of absorption."

> *"9. The absorption would be on clear understanding that in case the above terms and conditions are acceptable to him, he would submit his joining report to the Head of Department within a week time from the issue of the orders failing which the absorption will be treated as cancelled."*

Thus, as per this office order, the seniority of the absorbed official (petitioner) was to be fixed from the date of his absorption. Further, the official to be absorbed (petitioner), was to submit his joining report only in case the terms and conditions were acceptable to him, failing which, the absorption was to be treated as cancelled.

2(iv) The above conditions were acceptable to the petitioner, therefore, he submitted his acceptance report on 22.05.2000 (Annexure A-3).

2(v) Respondent No.2, joined as Clerk in the Directorate of Panchayati Raj Department, H.P. on 26.07.1988. He was promoted there as an Auditor on 28.08.1993 in the revised pay scale of Rs. 1500-2640. The scale was revised to Rs. 1800-3200 w.e.f. 01.01.1986. On 16.09.1994, respondent No.2, was deputed in respondent No.1-State Election Commission, as Senior Assistant in the pay scale of Rs. 1800-3200. He was absorbed as Senior Assistant in respondent No.1-State Election Commission, on 17.05.2000.

2(vi) Respondent No.3 was deputed as Senior Assistant in respondent No.1-State Election Commission on 01.11.1995 in the pay scale of Rs. 1800-3200. He was absorbed in respondent No.1-State Election Commission on 19.05.2000.

2(vii) Thus, respondents No. 2 & 3, were deputed as Senior Assistants in respondent No.1-State Election Commission and had joined as such, prior in time to the petitioner. Also, respondents No. 2 & 3, were absorbed in respondent No.1-State Election Commission, prior in time to the absorption of the petitioner.

2(viii) After the absorption of petitioner and respondents No. 2 & 3 as Senior Assistants in respondent No.1-State Election Commission, tentative seniority list of Senior Assistants as on 20.06.2000, was circulated on 22.06.2000 (Annexure A-4). Seniority list was prepared on following two principles as laid out in the memo:-

> *"(b) The continuous-length of period for which the officials concerned have served as Sr. Assistants in the Commission's Establishment as well as in the pre-absorption department/organizations shall be the main criterion so that the official with the longer period of such service shall rank senior to the officials with shorter period of such service, subject to the conditions specified in clause(c) below."*
>
> *"(c) An official absorbed/appointed by transfer from a later date shall not be senior to an official absorbed/appointed by transfer from the earlier date."*

The combined effect of above two principles was that condition at Sr. No. (c), was to override condition No.(b), in case of conflict. Resultantly, an official absorbed/appointed by transfer in respondent No.1-State Election Commission later in point of time, had to rank junior to the one absorbed/appointed on an earlier date. In accordance with these instructions, name of the petitioner figured in the tentative seniority list below respondents No. 2 & 3, who were absorbed/appointed in respondent No.1-State Election Commission earlier to the petitioner.

2(ix) Representations were invited against the tentative seniority list from the aggrieved persons. Petitioner submitted his representation against his placement in the tentative seniority list below respondents No. 2 & 3 and sought to count his service rendered in the pay scale of Rs. 1800-3200 in the parent department. His representation was rejected

by respondent No.1-State Election Commission on 20.07.2000 (Annexure A-6). Final seniority list of Senior Assistants as on 20.06.2000, was circulated on 21.07.2000 (Annexure A-7), reiterating the seniority positions of the tentative seniority list.

2(x) Though, the representation of the petitioner against tentative seniority list stood rejected by a specific order and final seniority list stood issued, yet petitioner once again submitted his representation on 20.09.2000 (Annexure A-8), followed by reminders dated 27.06.2002 (Annexure A-9) dated 27.06.2003 (Annexure A-10). Respondent No.1-Commission having already turned down the claim of the petitioner, did not respond to these repeated representations.

2(xi) Feeling aggrieved against his seniority position assigned to him, the petitioner preferred OA No. 180 of 2004 on 11.01.2004 before the erstwhile H.P. State Administrative Tribunal, praying for quashing of (i) tentative seniority list dated 22.06.2000 (Annexure A-4) as well as (ii) final seniority list dated 21.07.2000 (Annexure A-7). Direction was also sought for redrawing the seniority list of senior assistants after counting the entire service of the petitioner as senior assistant w.e.f. 01.10.1990 on the principle of length of service along with consequential benefits of promotion etc.

2(xii) The writ petition was allowed by learned Single Judge, relying upon the judgment in ***(2000)1 SCC 644,*** titled as ***Sub-Inspector Roop Lal and another*** vs. ***Lt. Governor through Chief Secretary, Delhi and others.*** Directions were given to the respondent No.1-Commission to redraw the seniority list after considering equivalent service rendered by the petitioner in his parent department. Hence, present appeals have been preferred.

3. We have heard the rival contentions of the parties and gone through the record.

3(i) The background of the judgment passed by Hon'ble Apex Court in Roop Lal's case (supra), may be noticed first.

3(i)(a) Government of India in OM No. 20020/7/80-Estt.(D), dated 29.05.1986, stipulated that in case of a person who is initially taken on deputation and absorbed later *(i.e. where the relevant recruitment rules provide for "transfer on deputation/ transfer"),* his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already (on the date of absorption) the same for equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from the date he has been holding the post of deputation or the date from which he has been appointed on a regular basis to same or equivalent grade in his parent department, ***whichever is later***.

3(i)(b) In Roop Lal's case (Supra), Hon'ble Apex Court held that the use of words "whichever is later"is violative of Article 14 & 16 of the Constitution and quashed this text in the impugned memorandum. It was held thereunder:-

> *"**23**. It is clear from the ratio laid down in the above case that any Rule, Regulation or Executive Instruction which has the effect of taking away the service rendered by a deputationist in an equivalent cadre in the parent department while counting his seniority in the deputed post would be violative of Articles 14 and 16 of the Constitution. Hence, liable to be struck down. Since the impugned Memorandum in its entirety does not take away the above right of the deputationists and by striking down the offending part of the Memorandum, as has been prayed in the writ petition, the rights of the*

appellants could be preserved, we agree with the prayer of the petitioners/ appellants and the offending words in the Memorandum "whichever is later" are held to be violative of Articles 14 and 16 of the Constitution, hence, those words are quashed from the text of the impugned Memorandum. Consequently, the right of the petitioners/appellants to count their service from the date of their regular appointment in the post of Sub-Inspector in BSF, while computing their seniority in the cadre of Sub- Inspector (Executive) in the Delhi Police, is restored."

3(i)(c) Above decision was implemented vide Office Memorandum dated 27.03.2001 (Annexure A-14), where-under, it was decided by the Government to substitute the term "whichever is later" in the Office Memorandum dated 29.05.1986 by the term "whichever is earlier". Fresh instructions dated 27.03.2001 were to take effect from 14.12.1999, which was the date of the judgment passed by the Hon'ble Apex Court.

Points Involved:-

3(ii) Primarily, two points arise for adjudication in the instant case:-

(i) Whether the judgment in Roop Lal's case (supra) is applicable to the facts of the instant case?

(ii) Whether the relief prayed for by the writ petitioner was barred by limitation or not?

3(iii) In the case in hand, at the time of transfer, deputation and absorption of the petitioner, respondents No. 2 & 3, admittedly, there were no Recruitment & Promotion Rules in respondent No.1-State Election Commission. The offer of deputation/absorption in respondent No.1-State Election Commission was thus, not under any provisions of Recruitment & Promotion Rules, but was in exercise of executive powers of the State. Therefore, State was within its bounds to impose conditions it deemed fit in deputing and absorbing the staff. Such staff had the right to accept or reject the conditions so imposed by the State. This was held so in ***(2006) 8 SCC 129***, titled as ***Indu Shekhar Singh and Others vs. State of U.P. and others***, which has been further relied upon in ***(2017) 8 SCC 256*** titled as ***Mrigank Johri vs. Union of India***. Point involved in present case was also dealt with by Hon'ble Apex Court in Mrigank Johri's case (supra). The question as framed therein in paragraph-29 is reproduced hereunder:-

"29. *The contentions may be elaborate but the crux of the issue is whether the OMs referred to aforesaid which generally provide for the benefit of service rendered in the previous cadre in an equivalent post on being absorbed in another department would apply to a case where the absorption is on specified terms and conditions with the benefit of such past service in the previous cadre as well as the period of service rendered on deputation being denied ?"*

This question was answered by the Hon'ble Apex Court in following paras:-

*"**31**. It is no doubt true that the OM dated 29.5.1986 as modified by OM dated 27.3.2001 did provide for the benefit of the previous service rendered in the cadre. This is in effect also the ratio of the judgment in SI Rooplal case (supra). This would also be inconformity with the normal service jurisprudential view.*

However, it would be a different position if the absorbing department clearly stipulates a condition of giving willingness to sacrifice the seniority while preserving all other benefits for the absorbee (which are accepted) failing which the option was available to the absorbee to get himself repatriated to the parent department. The terms and conditions are categorical in their wording that the absorbees would be "deemed to be new recruits" and the previous service would be counted for all purposes "except his/her seniority in the cadre". The appellant accepted this with open eyes and never even challenged the same. Their representations to give them the benefit of their past seniority was also turned down and thereafter also they did not agitate the matter in any judicial forum. The controversy was thus not alive and it was not open for them to challenge the same after a long lapse of period of time. In fact on the day of filing of the OM, any prayer to set aside the terms and conditions of absorption would have been clearly barred by time unde`r Section 21 of the Administrative Tribunals Act, 1985.

34. *We are in agreement with the submission of the respondents that this issue has been squarely dealt with in Indu Shekhar Singh's case (supra) where almost identical issues have been dealt with by holding that the State was within its right to impose conditions where the employees had the option to exercise their right of election. The entitlement was not under any rules but under what was called the residuary power."*

3(iv) In the instant case, Recruitment & Promotion, Rules, were not in existence at the time of transfer/deputation/absorption of petitioner and respondents No. 2 & 3 in respondent No.1-State Election Commission. State, in exercise of its executive powers laid down the conditions for determining the seniority of the staff absorbed in it, as per which, seniority was to rank from the date of absorption with clear rider that those who were absorbed earlier in point of time, will rank senior to those who were absorbed later in point of time. Petitioner consciously accepted this condition and gave his acceptance report on 22.05.2000. It is thereafter that he was absorbed in respondent No.1-State Election Commission w.e.f. 20.05.2000. The petitioner is estopped from taking a U-turn to include his earlier service in the equivalent grade in his parent department rendered by him w.e.f. .1.12.1990 towards determination of seniority. The judgment passed by Hon'ble Apex Court in Roop Lal's case (supra) will not be applicable to the case of the petitioner as in that case absorption was under Recruitment & Promotion Rules, whereas, in the instant case, the absorption was under the residual power i.e. executive power of the State. Hon'ble Apex Court in Mrigank Johri's case (supra) has held that while exercising its executive power, State Government can frame terms and conditions, which if accepted by the employee without any demur will be binding on him.

3(v) It is also noticeable that there is no challenge by the petitioner to the terms and conditions of his absorption where-under, his seniority was to rank from the date of his absorption in respondent No.1-State Election Commission. It is apt to quote following observations from Mrigank Johri's case, wherein Hon'ble Apex Court held as under:

"32. *The appellants sought to rake up the issue only when the seniority list was finalized. This was preceded by the draft seniority list. Whatever may be the dispute of seniority qua other persons, insofar as the appellants were concerned, their seniority was based on the terms and conditions of their absorption. The position of the appellants in the seniority list was thus a sequitur to the terms and conditions of their absorption. We are of the view that it is precisely for this reason, anticipating that their claim would be time barred, that a challenge was laid only to the seniority list without challenging*

the terms and conditions of absorption though in the grounds, a plea was raised against the terms and conditions of absorption. Unless the terms and conditions of absorption were to be set aside, the seniority list prepared was inconformity with the same."

3(vi) **Limitation:-** Representation of the petitioner against the tentative seniority list of Sr. Assistant, seeking to include his service rendered in equivalent grade in parent department, was rejected by respondent No.1-State Election Commission on 20.07.2000 (Annexure A-6). Final seniority list was issued on 21.07.2000(Annexure A-7). It is settled law that repeated representation do not revive the cause of action. In ***(2013) 12 SCC 179***, titled as ***State of Uttaranchal and Another*** *v.* ***Shiv Charan Bhandari***, Hon'ble Apex Court held as under:-

" 19. From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time."

Original application filed by the petitioner before the erstwhile H.P. Administrative Tribunal on 11.01.2004, was clearly barred by limitation prescribed under Section 21 of the H.P. State Administrative Tribunal's Act. No prayer was made for condonation of delay. The original application was admitted by the erstwhile H.P. State Administrative Tribunal on 31.10.2007 subject to objection of limitation. In ***(1999) 8 SCC 304 titled as Ramesh Chand Sharma*** *v.* ***Udham Singh Kamal and Others***, Hon'ble Apex Court, held thus:

"**7.** *On perusal of the materials on record and after hearing counsel for the parties, we are of the opinion that the explanation sought to be given before us cannot be entertained as no foundation thereof was laid before the Tribunal. It was open to the first respondent to make proper application under Section 21(3) of the Act for condonation of delay and having not done so, he cannot be permitted to take up such contention at this late stage. In our opinion, the O.A. filed before the Tribunal after the expiry of three years could not have been admitted and disposed of on merits in view of the statutory provision contained in Section 21(1) of the Administrative Tribunals Act, 1985. The law in this behalf is now settled (see Secy. to Govt. of India v. Shivam Mahadu Gaik-wad).*"

In ***Special Leave to Appeal (C) 7956/2011***, titled as ***D.C.S. Negi*** vs. ***Union of India & Ors***. decided on 07.03.2011, it was held as under:

" A reading of the plain language of the above reproduce section makes it clear that the Tribunal cannot admit an application unless the same is made within time specified in clauses (a) and (b) of Section 21(1) or Section 21(2) or an order is passed in terms of sub-section (3) for entertaining the application after the prescribed period.

Since Section 21(1) is couched in negative form, it is the duty of the Tribunal to first consider whether the application is within limitation. An application can be admitted only if the same is found to have been made within the prescribed period or sufficient cause is shown for not doing so within the prescribed period and an order is passed under Section 21(3).

In the present case, the Tribunal entertained and decided the application without even adverting to the issue of limitation. Learned counsel for the petitioner tried to explain this omission by pointing out that in the reply filed on behalf of the respondents, no such objection was raised but we have not felt impressed. In our view, the Tribunal cannot abdicate its duty to act in accordance with the statute under which it is established and the fact that an objection of limitation is not raised by the respondent/non-applicant is not at all relevant."

Judgments relied upon by learned Sr. Counsel for the petitioner in ***(2001) 2 SCC 259,*** *titled as* ***K.Thimmapa and others*** *v.* ***Chairman, Central Board of Directors, State Bank of India and another*** and ***(1995) 5 SCC 680***, for not holding delay and laches against the petitioner in case of violation of Article 14 of the Constitution, are not applicable to facts of the instant case.

4. In view of the above discussion, the belated claim of the petitioner could not be entertained being barred by Section 21 of H.P. Administrative Tribunals Act, it even otherwise was barred by principles of acquiescence and estoppel. On merits also, judgment in Roop Lal's case could not be applied to the facts of instant case in view of law laid down by Hon'ble Apex Court in Mrigank Johri's case.

Resultantly, LPA No. 148/2011 and LPA No. 104/2011 are allowed. The judgment passed by learned Single Judge on 22.12.2010 in CWP(T) No.10202/2008, titled as Sh. Ram Kumar Negi vs. State Election Commission & others, is quashed and set aside, the writ petition is dismissed.

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

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BEFORE HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN, C.J. AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

M/s Mohan Meakin Ltd. ...Petitioner

Versus

State of H.P. and others ..Respondents

CWP No.5232 of 2014 a/w
connected matters
Reserved on: 29.08.2019
Decided on: 06.09.2019

Himachal Pradesh Excise Act, 2011(Act) – Sections 27, 36 & 38 - Scope of – Held, Act makes a distinction between excise duty and countervailing duty on one hand and consideration payable for grant of licence – However, State may in addition to or instead of excise duty or countervailing duty may accept sum in consideration of a lease of any right under Section 27 (Para 45).

Himachal Pradesh Excise Act, 2011(Act) – Section 28(1) – Nature & Scope – Held, Section 28 (1) of Act contains a delegation of power to the Finacial Commissioner to grant a licence, permit or pass on payment of such fees as he may direct. (Para 48).

Constitution of India, 1950 - Article 226 - **Excise Policy for the year 2014 -15** – Condition No. 10.28 (A) (8) and 10.29 stipulating imposition of additional fee and penalty on manufacturers/distillers/bottlers etc., in case of their failure to manufacture/ sell quantum of liquor for which they were granted wholesale licence to vend - Challenge thereto – Petitioner's contending policy to be arbitrary whereas State submitted that what is sought to be imposed and realized is not a tax but a fee for breach of conditions licecne – Held, if something is payable by way of tax or duty, then liability to pay would not depend upon performance or non-performance of assessee – But, if something is payable only in terms of

contract, then contractual obligation so imposed can be tested on parameters of performance failure or breach – Manufacturers/ distillers/bottlers etc. on account of statutory prescriptions can not sell their product in open market – They can not be asked to pay the additional fee etc. for sale less than minimum guaranted quota. (Paras 54, 56 , 58 & 151)

Constitution of India, 1950 – Article 226 – **Himachal Pradesh Liqour Licence Rules, 1986 –** Rule 35 – A(22) - **Excise Policy for the year 2014 -15** – Condition No. 4.3 stipulating imposition of additional fee and penalty on retailers in case of their failure to sell quantum of liquor for which they were granted licence to vend - Challenge thereto – Held, leving of additional fee and penalty commenced from the year 2009 with introduction of Rule 35-A and from year 2013-14 when condition was incorporated in Annual Policy Announcement which continued till 2016-17 – Petitions filed only in 2015 whereas Petitioners chose to apply for renewal of their lincence year after year – They can not raise challenge to such condition. (Para 99)

Cases referred:

B.C. Banerjee vs. State of M.P. (AIR 1971 SC 517)
Excise Commissioner U.P. vs. Ram Kumar (AIR 1976 SC 2237)
Har Shankar vs. Deputy Excise and Taxation Commissioner [(1975) 1 SCC 737]
Kerala Samsthana Chethu Thozhilali Union vs. State of Kerala [(2006) 4 SCC 327]
Lilasons Breweries Pvt. Ltd. vs. State of M.P. (AIR 1992 SC 1393)
Mohan Meakin Ltd. vs. State of Himachal Pradesh [(2009) 3 SCC 157]
Nashirwar vs. State of Madhya Pradesh [(1975) 1 SCC 29]
Orissa State (Prevention & Control of Pollution) Board vs. Orient Paper Mills, {(2003) 10 SCC 421}
Panna Lal vs. State of Rajasthan (AIR 1975 SC 2008)
Rajendra Singh vs. State of Madhya Pradesh [(1996) 5 SCC 460]
State of Madhya Pradesh vs. Firm Cappulal (AIR 1976 SC 633)
State of Punjab vs. Devans Modern Breweries Ltd. [(2004) 11 SCC 26]
Surinder Singh vs. Central Government and others [(1986) 4 SCC 667]

For the petitioner(s):	M/s. K.D. Sood and Sanjeev Bhushan, Senior Advocates, with M/s. Arvind Sharma, Satish Kumar, K.C. Sankhyan, Tek Chand Sharma, Surender K. Sharma and Sukrit Sood, Advocates.
For the respondents:	Mr. Ajay Vaidya, Senior Additional Advocate General, with Mr. R.N. Sharma, Advocate.

The following judgment of the Court was delivered:

V. Ramasubramanian, Chief Justice.

Challenging the Excise Policy Announcements which stipulated the levy of additional fee and penalty, whenever the quantity of liquor manufactured and/or sold, fell short of the minimum guaranteed quota fixed every year for the licensees, three groups of persons, namely manufacturers/ distillers/bottlers, wholesalers and retailers have come up with this batch of writ petitions.

2. We have heard Mr. K.D. Sood, learned Senior Counsel appearing for the manufactures/distillers/bottlers, Mr. Sanjeev Bhushan, learned Senior Counsel appearing for the wholesalers, Mr. Satish Kumar, learned Counsel for the retailers and Mr. Ajay Vaidya, learned Senior Additional Advocate General appearing from the respondents-State.

3. It was agreed across the Bar that CWP No. 5232 of 2014 filed by M/s Mohan Meakin Ltd. may be taken as the lead case in so far as the manufacturers/distillers/bottlers are concerned and CWPs Nos. 8047 of 2014 and 2302 of 2015 filed respectively by Aradhana Wines and Paradise Wines may be treated as lead cases in so far as wholesalers are concerned and CWP Nos. 2069 and 2745 of 2015 filed respectively by Abhay Prashar and Amit Wine may be treated as the lead cases in so far as retail vends are concerned.

What is under challenge

4. What is challenged in the writ petitioners filed by the manufactures/distillers/bottlers is Condition Nos.10.28(A) and 10.29 of the Excise Policy for 2014-2015, by which an additional fee and a penalty was sought to be levied, if the manufacturers/distillers/bottlers failed (i) to manufacture the quantum of liquor for which they were granted license and (ii) to sell as much quantity of liquor for which they were granted the wholesale license to vend.

5. What is under challenge in the writ petitions filed by the wholesalers, is also the same Condition No. 10.28 (A), but with specific focus on Condition No. 10.28 (A) (8) of the Excise Policy for 2014-2015.

6. What is challenged by the retailers in these writ petitions is Condition No. 4.3 of the Excise Policy announced in respect of four consecutive years namely, 2013-14, 2014-15, 2015-16 and 2016-17.

7. Therefore, in essence, the challenge by the manufacturers/distillers/bottlers is confined to two conditions contained in the Excise Policy of one particular year, namely 2014-15. Similarly, the challenge by the wholesalers is confined to only one condition contained in the Excise Policy for the year 2014-15. However, the challenge by the retailers is to a particular condition contained in the Excise Policy for the four consecutive financial years, namely 2013-14 to 2016-17.

8. Condition No. 4.3 of the Excise Policy which is under challenge in the writ petitions filed by the retailers, had some variations year to year. In other words, Condition No. 4.3 in the Excise Policy of the year 2013-14 was worded differently from Condition No. 4.3 in the Excise Policy of the year 2014-15. The distinction may be better understood if they are presented in a tabular column:

Condition No. 4.3 for the year 2013-2014.	**Condition No. 4.3 for the year 2014 - 2015.**
The licensee shall be required to lift the cent percent monthly Minimum Guaranteed Quota as fixed for each vend failing which he shall still be liable to pay the licence fee fixed on the basis of the minimum Guarantee Quota. In addition, the licensee shall also be liable to pay additional fee at the rate of Rs. 20/- per proof litre on the un-lifted Quota, which falls short of the Minimum Guaranteed Quota. The Asstt. Excise & Taxation Commissioner/Excise & Taxation Officer I/c of the District shall review the position of lifting of Minimum Guaranteed Quota on monthly basis. If he finds that the licensee has failed to lift the monthly Minimum Guaranteed Quota by the date scheduled for monthly recovery of license	*Each licensee shall be required to lift the Minimum Guaranteed Quota both of Country Liquor and IMFS as fixed for each vend failing which he shall be liable to pay the license fee fixed on the basis of the Minimum Guaranteed Quota. In addition to the payment of license fee on the unlifted Minimum Guaranteed Quota of the Country liquor, the licensee shall also be liable to pay additional fee at the rate of Rs. 10/- per proof litre on the unlifted Quota of Country liquor which falls short of 100% of the Minimum Guaranteed Quota. Besides this, the licensee shall also be liable to pay a penalty of Rs. 7/- per proof litre on the unlifted quota of Country Liquor which falls short of the benchmark of 80% of the Minimum Guaranteed Quota.*

fee, he shall proceed to recover the amount of additional fee as mentioned above.	*Similarly, the licensee shall also be liable to pay additional fee @ Rs. 56/- per proof litre on the unlifted quota of IMFS which falls short of 100% of the Minimum Guaranteed Quota of IMFS. The licensee shall also be liable to pay a penalty of Rs. 14/- per proof litre on the unlifted quota of IMFS which falls short of the benchmark of 80% of the Minimum Guaranteed Quota. The Asstt. Excise & Taxation Commissioner/Excise & Taxation Officer I/c of the District shall review the position of lifting of Minimum Guaranteed Quota on Quarterly basis. Lifting position for 1st quarter of the year 2014-15 shall be reviewed latest by 30 July, 2014, for the second quarter, it shall be reviewed latest by 30th October, 2014, for the third quarter latest by 15th January, 2015 and lifting position for the fourth quarter shall be reviewed positively by 10th March, 2015. The AETC I/c of the District shall ensure recovery of the additional fee as well as the amount of penalty on unlifted quota which falls short of the quarterly quota of the vend of such defaulting licensees with the prior approval of the Collector (Excise) of the concerned Zone who shall also ensure that the AETC or ETO I/c of the concerned District has recovered the amount of additional fee and penalty as referred to above. In case, the defaulting licensee lifts his unlifted quota of any quarter in subsequent quarters or latest by 10th March, 2015 by attaining 100% benchmark of Annual Minimum Guaranteed Quota for the purpose of additional fee and 80% benchmark of the Annual Minimum Guaranteed Quota for the purpose of penalty, such licensee shall be entitled to set off the amount so deposited previously with prior approval of the Collector (Excise) of the Zone concerned. However, the aforementioned order of the Collector (Excise) concerned shall be subject to the final approval of the Excise and Taxation Commissioner (H.P.). The Collector (Excise) of the Zone concerned shall further ensure submitting the Quarterly Reports of the Zone to the Excise & Taxation Commissioner, Himachal Pradesh District-wise and licensee-wise at least before the end of the*

	Quarter subsequently to the quarter to which the report relates for the first three quarters and for the last quarter on 31st March of the Financial Year itself.

9. The offending portions of Condition Nos. 10.28 (A) and 10.29 of the Excise Policy for the year 2014-15 reads as follows:

> *"10.28(A):* ***Apart from above, some other new provisions are further incorporated in the Excise Announcements for the year 2014-15 inter-alia as hereunder :-***
>
> *(1) Bottling of IMFS and country liquor in Pet bottles (For Export only) shall be allowed irrespective of the fact that it is banned for sale in the state of Himachal Pradesh provided sale thereof is allowed in the concerned importing/Manufacturing State outside H.P.*
> *(2) ……*
> *(3) ……*
> *(4) …..*
> *(5) …..*
> *(6) ……*
> *(7) ……*
> *(8) The Per Annum Minimum Sale-limit licensee-wise and category-wise is fixed in respect of L-1B, L-1BB and L-1 wholesale license-holders of the State for the year 2014-15. As per Annuxure-'F' annexed herewith the details of Annual Benchmarks of Sale-limits in respect of L-1 licenses of Himachal Pradesh for the year 2014-15 have been shown. The Annual Benchmarks of Sale-limits of L-1B and L-1BB licensees have been shown in annexed Annexure-'E' itself at Sr. No. 12 to 27 thereof.*
>
> *The aforesaid Condition of per annum licensee-wise and category-wise Minimum Sale limit in terms of proof liters has been prescribed as per details vide Annexures- E & F. Therefore, the afore-mentioned L-1, L-1B and L-1BB wholesale license-holders, whose Annual Sale-limits is less than 40,000 Pls, above 40,000 Pls but less than 80,000 Pls, above 80,000 Pls but less than 1,20,000 Pls and above 1,20,000 Pls during the year 2014-15, their existing Annual Sale-limits are enhanced upto 30%, 20%, 16% and 6% respectively. However, while enhancing the existing minimum Annual Sale-limits of these various licensees upto 30%, 20%, 16% and 6% referred to above as the case may be, the Excise and Taxation Commissioner, Himachal Pradesh reserves the right to rectify the clerical errors of calculations in allocating the Annual sale targets of such wholesale licensees for the year 2014-15 during the financial year as and when it may be necessary to do so. The Annual Benchmarks of sale limits fixed for the year 2014-15 to such afore-mentioned licensees have been assigned keeping in view the fact that the licensees in the higher range of Annual Sale-limits are not allocated lesser Annual Benchmarks of sale in totality as compared to the licensees falling on the immediate lower range of Annual Sale-limits on the bordering margins and on happening of such an event, the percentage of Annual Sale-limits of the immediate higher range of licensees has been enhanced rationally upto the Annual Benchmarks of Sale-limits level of the licensees falling on the immediate lower borderline range of the licensees. Considering the financial sustainability aspect, a sale of minimum of 40,000 Pls of IMFS by the L-1 category of first range of licensees is made mandatorily applicable. The AETC/ETO I/c of the District shall ensure monitoring of quarterly sale of minimum of the 25% of the per annum sale limit by each category of such licensees as referred to above and in the event of the sale falling short of the above mentioned minimum quantity of IMFS, such licensee shall be liable to pay an additional fee @ Rs. 28/- and a penalty @ Rs. 14/- per proof litre separately on the sale falling short of the above mentioned minimum prescribed sale limit of IMFS. In addition to it, such licensee who has not made abovementioned sale of IMFS as per annum minimum prescribed sale*

limit for the year 2014-15 shall also not be eligible for renewal of his/her license for the year 2015-16. The AETC/ETO I/c of the District shall review the position of per annum minimum sale limit of IMFS on quarterly basis sale position of the IMFS for 1st quarter of the year 2014-15 shall be reviewed latest by 30th July, 2014, for the second quarter, it shall be reviewed latest by 30th October, 2014, for 3rd quarter latest by 15th January, 2015 and sale position for the 4th quarter shall be reviewed positively by 10th March, 2015. The AETC/ETO I/c of the District shall ensure recovery of the additional fee as well as the amount of penalty on the quantity of IMFS falling short of the quarterly quota of every such whole sale vend of such defaulting licensee with the prior approval of the Collector (Excise) of the concerned Zone who shall also ensure that the AETC/ETO I/c of the concerned District has recovered the amount of additional fee and penalty as stated hereinabove. In case, the defaulting licensee makes up his short sale of the IMFS of any quarter in subsequent quarters or latest by 10th March, 2015 thereby attaining the Annual Minimum prescribed sale Limit in terms of prescribed proof litres, such licensee shall be entitled to set off the amount so deposited previously on account of additional fee and the penalty with the prior approval of the Collector (Excise) of the concerned Zone. However, the afore-mentioned order of the Collector (Excise) of the Zone concerned shall be subject to the prior approval of the Excise & Taxation Commissioner (H.P.). The Collector (Excise) of the Zone shall further ensure sending of the quarterly reports of the Zone to the Excise & Taxation Commissioner, Himachal Pradesh District-wise and licensee-wise at least before the end of the quarter subsequent to the quarter to which the report relates for the first three quarters and for the last quarter on 31st March of the Financial Year itself.

10.29: Provision regarding Annual Sale Limits of the Manufacturers of Country Liquor and Indian Made Foreign Spirit.

Each Manufacturer/Bottler of Country liquor and IMFS within the state including L-1B and L-1BB licensees shall be mandatorily required to manufacture/bottle and ensure sale of Minimum Annual Production Capacity Benchmark of the Unit/Plant for the year 2014-15 which has been determined based on formula of Minimum Capacity created and utilized on pro-rata basis of total quota prescribed by the Govt. failing which the Unit/Plant shall be liable to pay penalty keeping in view the capacity utilization percentage of each Country liquor and IMFS manufacturing plant based on the data of 2012-13. The enhanced quota for the successive years 2013-14 and 2014-15 has also been added on the data of 2012-13 for the purpose of determining Annual Production Capacity Utilization for the year 2014-15. The Distillery with Bottling license/Bottling Plant-wise Charts indicating benchmarks of Annual Minimum Production capacity Utilization and Sale-limits targeted to be achieved by each Plant for the year 2014-15 have been prepared and annexed herewith as Annexure-D for H.P. based Country Liquor Plants and Annexure-E for H.P. based IMFS manufacturing Plants.

Out of the afore-mentioned Distilleries with Bottling licence/Bottling Plants, those Distilleries with Bottling licence/Bottling Plants whose Annual Capacity Utilisation/sale is less than 10%, 10% to 20%, 20% to 30% and above 30% during the year 2014-15, shall be liable to enhance their existing minimum annual production capacity utilization/sale upto 30%, 20%, 16% and 6% respectively. However, while enhancing the existing minimum annual production capacity utilization/sale-limits of the various licensees upto 30%, 20%, 16% and 6% referred to above as the case may be, the Excise & Taxation Commissioner, Himachal Pradesh reserves the right to rectify the clerical errors of calculation in allocating the Annual Production/Sale targets of such Bottlers/licensees for the year 2014-15 during the financial year as and when it may be necessary to do so. The target percentage of Annual Production capacity Utilisation/Sale-limits to

such aforementioned Bottlers/Licensees has been assigned keeping in view the fact that the licensees/Bottlers in the higher range of Annual Production capacity Utilisation/Sale-limits are not allocated lesser targets of percentage in totality as compared to the licensees/Bottlers falling on the immediate lower range of Annual capacity Utilisation/Sale-limits on the bordering margins and on happening of such an event, the percentage of Annual capacity Utilisation/Sale-limits of the immediate higher range of licensees/ Bottlers has been enhanced rationally upto the target percentage level the licensees/Bottlers falling on the immediate lower borderline range of the Bottlers/licensees. An additional fee of Rs. 5/- per proof litre and penalty @ Rs. 7/- per proof litre separately in the case of Country liquor manufacturers and an additional fee @ Rs. 28/- per proof litre and penalty @ 14/- per proof litre separately in the case of IMFS manufacturers shall be leviable and imposable on the underproduced/unsold quota of Country liquor or IMFS as the case may be which falls short of the afore-mentioned prescribed Annual quantity/ percentage of the Minimum Annual Production Capacity Utilization Limit/sale of each such Distillery with Bottling license/Bottling Plant as indicated against the names of each one of them in Annexures 'D' and 'E' ***annexed herewith and applicable*** *for the year 2014-15. In case, the defaulting licensee manufacturers and sells his under-produced/unsold quota of any quarter in subsequent quarters or latest by 10th March, 2015 thereby attaining the prescribed under-produced/unsold limit of such Minimum Annual Production Capacity Utilisation Limit/sale-limit, such licensee shall be entitled to set off the amount so deposited previously on account of additional fee and the penalty with prior approval of the Collector (Excise) concerned. However, the aforementioned order of the Collector (Excise) concerned shall be subject to prior approval of the Excise and Taxation Commissioner (H.P.). The Collector (Excise) of the Zone concerned shall further ensure submitting the Quarterly Reports of the zone to the Excise & Taxation Commissioner, Himachal Pradesh District-wise and licensee-wise at least before the end of the Quarter subsequent to the quarter to which the report relates for the first three quarters and for the last quarter on 31st March of the Financial Year itself."*

10. In a nutshell, the impact of Condition No. 4.3 as it stood for the year 2013-14 was (i) that a licensee should lift whatever is the Monthly Minimum Guaranteed Quota as fixed for him cent percent and (ii) that in case of his failure to lift the Minimum Guaranteed Quota, he will become liable, to pay Rs. 20/- per proof litre on the un-lifted Quota, in addition to the licence fee fixed for the entire quota.

11. Similarly, the impact of Condition No. 4.3 on the retailers for the year 2014-15 and the subsequent years was (i) that each licensee should lift the Minimum Guarantee Quota of both Country Liquor and Indian Made Foreign Spirit as fixed for each vend; (ii) that in case the licensee failed to lift the Minimum Guaranteed Quota of Country Liquor, he will be liable to pay an additional fee at the rate of Rs. 10/- per proof litre on the un-lifted quota of country liquor; (iii) that in case of failure to lift the Minimum Guaranteed Quota and in case the quantity falls below 80% of the Minimum Guaranteed Quota, the licensee will also be liable to pay a penalty of Rs.7/- per proof litre, in the case of Country Liquor; (iv) that in the case of IMFS, the additional fee payable will be Rs. 56/- per proof litre on the un-lifted quota and (v) that in case the lifted quota of IMFS falls below 80% of the Minimum Guaranteed Quota, a penalty of Rs. 14/- per proof litre will also be payable.

12. In so far as the manufactures/distillers/bottlers are concerned, what is actually challenged is a similar provision contained in Condition No. 10.28 (A)(8) and Condition No. 10.29. These conditions in entirety are not under challenge, but only those portions which have a monetary impact upon the petitioners alone are challenged. The impact of the offending portion of these conditions is as follows: (i) that a sale of a Minimum 40,000

proof litres of IMFS by the L-1 category of First Range of Licensees is mandatory; (ii) that in case the sale of IMFS falls short by the Minimum Quota, the Licensee is liable to pay an additional fee of Rs. 28/- and penalty of Rs. 14/- per proof litre separately on the shortage; (iii) that a licensee who has not made the minimum sale of IMFS, as per the prescribed sale limit for the year 2014-2015 shall not be eligible for renewal of licence for 2015-16; (iv) that each manufacture/bottler of country liquor and IMFS within the State including L.1-BB licensee should mandatorily manufacture/bottle and ensure sale of Minimum L-1 Production Capacity Benchmark of the Unit/Plant; (v) that in case a licensee is guilty of short manufacturing/short selling, he will be liable to pay an additional fee of Rs. 5/- per proof litre with penalty of Rs. 7/- per proof litre, in addition to the licence fee for the entire quota in respect of country liquor; (vi) that in case of failure on the part of the licensee to produce/sell the quota allotted of IMFS he shall pay an addition fee of Rs. 28/- per proof litre and a penalty of Rs. 14/- per proof litre.

13. Thus, what is under challenge in these writ petitions is the levy of (i) additional fee and (ii) penalty, for producing and/or selling, less than the quota allotted to each licensee.

14. Before we proceed further, it must be noted that the grant/renewal of licenses to manufacture/distil/bottle and the license to wholesale or retail vend, of country liquor, foreign liquor etc. is always subject to Policy Announcements made year after year. The Annual Policy so announced will always contain a Clause relating to minimum guaranteed quota and the license fee. The minimum guaranteed quota for the retail vend of country liquor and foreign spirit is fixed at different levels for each of the districts of Himachal Pradesh, depending upon the statistics regarding consumption (it is a pity that a welfare State expects the consumption of liquor to increase year after year). The minimum guaranteed quota and annual license fee fixed for the retail vend of country liquor and foreign spirit for the year 2013-2014 were as follows:

> *"4.1The Minimum Guaranteed Quota (MGQ) has been fixed at 1,89,20,000 proof litre of Country Liquor and 1,61,61,000 proof litre of Foreign Spirit {Indian Made Foreign Spirit (IMFS) & Imported Foreign Spirit (IFS) both bottled in India (B.I.I) and bottled in original (B.I.O) for the State. No quota has been fixed for Beer, Wine, Cider and RTD Beverages. The district-wise allotment of the MGQ is as under:-*

Name of District	*Minimum Guaranteed Quota*	
	Country Liquor (in Pls)	*Foreign Spirit (in Pls)*
1.Shimla	*30,71,917*	*22,90,156*
2.Solan	*11,49,523*	*12,94,450*
3. BBN Baddi	*11,61,250*	*10,94,300*
4.Sirmour	*10,04,054*	*9,13,800*
5.Kinnaur	*1,75,246*	*2,47,848*
6.Bilaspur	*11,29,588*	*9,74,800*
7.Mandi	*21,61,782*	*15,40,814*
8.Kullu	*7,43,888*	*14,25,631*
9.Lahaul Area	*26,439*	*66,914*
10.Hamirpour	*11,83,930*	*8,50,055*
11.Kangra	*30,13,134*	*21,83,000*
12.Revenue District Nurpur	*9,94,321*	*8,52,930*
13.Una	*16,50,810*	*13,89,335*

14.Chamba	*14,54,118*	*10,36,967*
Total	*1,89,20,000*	*1,61,61,000*

4.2 The License fee on the various kinds of liquor has been fixed for the year 2013-2014 as under:-

(i)	*Country liquor*	=	*Rs.141/- per proof litre.*
(ii)	*Indian Made Foreign Spirit*	=	*Rs 210/- per proof litre.*
(iii)	*Beer*	=	*Rs.28/- per bulk litre.*
(iv)	*Imported Foreign Spirit (B.I.I)*	=	*Rs.220/- per proof litre.*
(v)	*Imported Foreign Spirit (B.I.O.)*	=	*Rs.240/- per proof litre.*
(vi)	*Imported Beer (B.I.O)*	=	*Rs.35 per bulk litre.*
(vii)	*Imported Wine & Cider (B.I.O)*	=	*Rs.30/- per bulk liltre.*
(viii)	*Indian Made Wine & Cider (Imported through S-1B licenses only)*	=	*Rs.28/- per bulk litre.*
(ix)	*RTD Beverages*		*(a) Rs.21/- per bulk litre in the case of alcoholic contents upto 5%* *(b) Rs.28/- per bulk litre in the case of alcoholic contents exceeding 5% but not exceeding 8%"*

15. Similarly the minimum guaranteed quota of country liquor and the foreign spirit and the annual license fee fixed for the year 2014-2015 were as follows:

"4.1The Minimum Guaranteed Quota (MGQ) has been fixed at 2,00,80,700 proof litre of Country Liquor and 1,72,13,500 proof litre of Foreign Spirit {Indian Made Foreign Spirit (IMFS) & imported Foreign Spirit (IFS) both bottled in India (B.I.I) and bottled in original (B.I.O) for the State. No quota has been fixed for Beer, Wine, Cider and RTD Beverages. The district-wise allotment of the MGQ for the year 2014-2015 is as under:-

Name of District	*Minimum Guaranteed Quota*	
	Country Liquor (in Pls)	*Foreign Spirit (in Pls)*
1.Shimla	*31,49,433*	*23,68,558*
2.Solan	*12,33,702*	*13,82,422*
3. BBN Baddi	*12,02,616*	*11,29,449*
4.Sirmour	*10,53,513*	*9,81,939*
5.Kinnaur	*1,89,266*	*2,67,676*
6.Bilaspur	*11,96,251*	*10,12,418*
7.Mandi	*23,34,725*	*16,64,089*
8.Kullu	*8,03,399*	*15,39,681*
9.lahaul Area	*28,554*	*72,267*

10.Hamirpour	*12,62,047*	*9,17,842*
11.Kangra	*32,45,781*	*23,57,650*
12.Revenue District Nurpur	*10,70,927*	*9,21,164*
13.Una	*17,45,852*	*14,90,054*
14.Chamba	*15,64,636*	*11,08,291*
Total	*2,00,80,700*	*1,72,13,500*

4.2 The License fee on the various kinds of liquor has been fixed for the year 2014-2015 as under:-

(i)	*Country liquor*	=	*Rs.147/- per proof litre.*
(ii)	*Indian Made Foreign Spirit*	=	*Rs 219/- per proof litre.*
(iii)	*Beer*	=	*Rs.28/- per bulk litre.*
(iv)	*Imported Foreign Spirit (B.I.I)*	=	*Rs.229/- per proof litre.*
(v)	*Imported Foreign Spirit (B.I.O.)*	=	*Rs.249/- per proof litre.*
(vi)	*Imported Beer (B.I.O)*	=	*Rs.35 per bulk litre.*
(vii)	*Imported Wine & Cider (B.I.O)*	=	*Rs.30/- per bulk litre.*
(viii)	*Indian Made Wine & Cider (Imported through S-1B licenses only)*	=	*Rs.28/- per bulk litre.*
(ix)	*RTD Beverages*		*(a) Rs.21/- per bulk litre in the case of alcoholic contents upto 5%* *(b)Rs.28/- per bulk litre in the case of alcoholic contents exceeding 5% but not exceeding 8%"*

16. The philosophy behind (if it could be called a philosophy) the fixation of minimum guaranteed quota and the levy of additional fee and penalty, for short manufacturing and/or short selling, is that the right to manufacture and sell liquor is the monopoly of the State, which is parted with in favour of the private players upon payment of a fixed fee and the generation of a particular level of revenue for the Government and that having taken a license to enjoy the privilege, any failure on the part of the licensee to manufacture and/or sell the fixed quota hits upon the revenues of the State.

17. Keeping in view the above background in mind, let us now see the grounds on which the manufacturers/ distillers /bottlers, the whole sellers and the retailers challenge the impugned policy conditions.

Brief grounds of challenge by the 3 categories of persons

18. The challenge to the impugned policy conditions, by the manufacturers, some of whom also hold subsidiary licenses to wholesale vend of liquor, as projected by Mr. K. D. Sood, learned Senior Counsel is on the following grounds:

(i) That the levy of additional fee, for the purpose of compensating the State for the loss of revenue in the form of duty of excise, has been repeatedly held by courts to be ultra vires and that therefore, there cannot be any such levy.

(ii) That the manufacturers as well as the wholesalers are not entitled as per the statutory prescriptions and the license conditions, to sell liquor in the open market, but they are obliged to sell whatever is manufactured and /or held in stock by them only through the retailers and that too upon the production of passes/permits by the retailers and hence the manufacturers and wholesalers cannot be penalized with the levy of additional fee and penalty for not achieving the target when the achievement of target depends upon the performance of somebody else;

(iii) That in any case, no penalty can be levied through the Excise Policy issued year after year, especially when there are special provisions for levy of penalty under Chapter-VI of the Himachal Pradesh Excise Act, 2011; and

(iv) That the levy of additional fee and penalty upon all the three stake holders, namely the retailers, the wholesalers and the manufacturers, will have in a cascading effect, leading to the collection of three times the revenue.

19. The challenge to the impugned policy conditions is made by the wholesalers, as projected by Mr. Sanjeev Bhushan, learned Senior Counsel, on the following grounds:

(i) That neither the Act nor the Rules contemplate any levy for not selling the quota allotted, except under sub-Rule (22) of Rule 35-A of the Himachal Pradesh Liquor License Rules, 1985 and hence the levy of additional fee and penalty is unauthorized;

(ii) That insofar as the wholesalers are concerned, the levy of additional fee and penalty was in force only for one year, namely, 2014-2015, but not before or after the said year, though the said levy continued for about four years in respect of the retailers; and

(iii) That even the wholesalers are not entitled to sell the entire quantity held by them in stock, in the open market and hence they cannot be penalized for the failure, if any, on the part of the retailers to lift the guaranteed quota.

20. On behalf of the retailers, it was contended by Mr. Satish Kumar, learned counsel-

(i) that the additional fee levied for short selling, partakes the character of excise duty, as it is intended to compensate the State for the loss of revenue in the form of excise duty and hence it is unauthorized by law;

(ii) That due to the levy of additional fee and penalty, persons who sell less, end up paying more and hence the policy is arbitrary;

(iii) That since the levy of additional fee is for the failure to sell the minimum guaranteed quota, it is also in the nature of a penalty for the breach of license conditions and hence the levy of two penalties is completely arbitrary.

(iv) That the levy of additional fee and penalty for short selling was dispensed with in the Excise Policy of the year 2018-2019; and

(v) That even while calculating the quantum of sales for the last quarter of the year, the authorities take the sales made only up to the 10th day of March, and not 31st day of March, which has resulted in an arbitrary application of the policy, even if the policy is presumed without admitting, to be valid.

Response of the State

21. In response to the aforesaid contentions, it is argued by Mr. Ajay Vaidya, learned Senior Additional Advocate General-

(i) that the minimum guaranteed quota for the manufacturers is fixed every year by the State Government, after the approval of the Cabinet, by taking into consideration, the production/sale for the previous year, the optimum capacity utilization of the Unit etc.;

(ii) That the State is the exclusive owner of the privilege to trade in liquor and the citizens do not have any fundamental right to carry on the business to manufacture and sell liquor,

(iii) That the Himachal Pradesh Excise Act, 2011 prohibits the manufacture, possession and sale of any intoxicant, except under the authority and subject to the terms and conditions of a license granted by the Financial Commissioner;

(iv) That Section 27 of the said Act empowers the Government to grant lease to any person, of the right of manufacturing, supplying, selling and of storing for manufacture or sale, liquor, upon payment of ***"such sum"*** in addition to excise duty or countervailing duty and hence the levy under challenge is perfectly authorized by Section 27;

(v) That the writ petitioners who had accepted the grant/renewal of licenses year after year with their eyes wide open to the Policy Announcements made year after year, are now estopped from challenging one of the conditions contained in the policy for renewal of the license;

(vi) That what is charged by way of additional fee and penalty under the impugned policy conditions are not in the nature of excise duty or any other tax, but only a fee for the breach of the conditions of license;

(vii) That the petitioners have not challenged the fixation of minimum guaranteed quota but have merely challenged the levy of additional fee and penalty for the failure to lift the minimum guaranteed quota and hence the challenge itself is invalid;

(viii) That while duties of excise and countervailing duties of alcoholic liquor for human consumption, if such liquor is manufactured or produced in the State, is covered by Entry 51, the production, manufacture, possession, transport, purchase and sale of intoxicating liquor is covered by Entry 8 in List II of Schedule 7 of the Constitution.

(ix) That Condition No. 1.1 of the Policy Announcements for the year 2014-2015 made it very clear that the liquor licenses are granted subject not only to the provisions of the Act and the Rules but also subject to the licensee fulfilling any other obligation, as imposed by the orders of the Excise and Taxation Commissioner;

(x) That even the distillery license issued in Form D-2 contains a condition to the effect that the licensee should comply with all the directions of the Excise and Taxation Commissioner and hence the policy conditions cannot be challenged;

(xi) That the power to levy additional fee and penalty emanates from Section 27 of the Himachal Pradesh Excise Act, 2011, which empowers the Government to grant lease upon payment of ***"such sum***"; and

(xii) That in any case it is not necessary, as held by the Supreme Court in ***Surinder Singh vs. Central Government and others [(1986) 4 SCC 667]*** that all the conditions should be traceable only to the Statutory Rules.

Distinction between the 3 categories of persons before us

22. Though all the three categories of persons who are before us, namely (i) manufacturers/distillers/bottlers, (ii) wholesalers, and (iii) retailers, are on common ground in their attack to the impugned policy conditions, to a great extent, their right to challenge the impugned policy conditions, vis-a-vis the obligations cast upon them under the licenses, are placed on different turfs. Therefore, we may have to deal with the cases of these three categories of writ petitioners separately, as the prism through which their rights have to be seen, has different colour variations.

23. That these three categories of persons have different sets of rights and obligations arising under the respective licenses and that therefore, their grounds of challenge to the impugned policy conditions have to be tested on different parameters, can be best understood, if we have a look at (i) the different types of licenses contemplated by the Rules,

(ii) the different types of fees stipulated by the Rules and (iii) the different types of obligations cast upon them by the Rules. Therefore, let us now take a look at the statutory provisions before we deal with the cases of each of these three categories of persons.

A survey of the Statutory provisions:

24. Until the State of Himachal Pradesh became an independent State, the law relating to import, export, transport, manufacture, sale and possession of intoxicating liquor was governed by the Punjab Excise Act, 1914 (Punjab Act 1 of 1914). After the reorganization of the States, the provisions of the same Act were adopted.

25. Section 58(1) of Punjab Act 1 of 1914 confers power upon the State Government to make Rules for carrying out the provisions of the Act. Sub-Section (2) of Section 58 lists out the matters in respect of which provisions may be made in the Rules so issued by the State Government. Some of the matters which may be dealt with by the Rules, are indicated in Clauses (d), (e) and (f), which read as follows:

> *"**58. Powers of State Government to make rules**.-*
>
> *(1) .....*
>
> *(2) In particular, and without prejudice to the state generality of the foregoing provisions, the State Government may make rules-*
>
> *(a) ……..*
>
> *(b) ……*
>
> *(c) ……*
>
> *(d) regulating the import, export, transport or possession of any intoxicant or excise bottle and the transfer, price or use of any type or description of such bottle.*
>
> *(e) regulating the periods and localities for which, and the persons, or classes of persons, to whom, licenses, permits and passes for the vend by wholesale or by retail of any intoxicant may be granted and regulating the number of such licenses which may be granted in any local area.*
>
> *(f) prescribing the procedure to be followed and the matters to be ascertained before any license is grantee for the retail vend of liquor for consumption on the premises."*

26. In exercise of the powers so conferred by Section 58(1) of the Punjab Act 1 of 1914, the Government of Himachal Pradesh issued a set of Rules known as the "Himachal Pradesh Liquor License Rules, 1986". These Rules are divided into several parts. Part-A deals with the classes of licenses and the Authorities empowered to grant and renew licenses and Part-B contains Regulations governing the grant and renewal of licenses.

27. Part-A of these Rules deals with (i) foreign liquor, (ii) country spirit, (iii) denatured spirit, (iv) rectified spirit, (v) country fermented liquor and country spirit prepared from fruits, and (vi) special items. The provisions contained in Part-A of the Rules contemplate the grant of different types of licenses.

28. In the year 2011, the State of Himachal Pradesh got its own enactment known as Himachal Pradesh Excise Act, 2011 (HP Act 33 of 2012). By Section 82 of H.P. Act 33 of 2012, all the provisions of Punjab Act 1 of 1914, except a few, such as Section 58, got repealed. This is perhaps for the reason that the H.P. Liquor License Rules, 1986 were issued in exercise of the powers conferred by Section 58(1) of the Punjab Act 1 of 1914. In fact, Section 80(1) of H.P. Act 33 of 2012 also confers Rule making powers upon the Statement Government. Sub-Section (2) of Section 80 lists out the matters in respect of which the Government was empowered to make Rules. The list of matters included in Section 80(2), is comprehensive. Clause (d) of sub-Section (2) of Section 80 of the H.P. Act 33 of 2012 is more detailed than Clause (d) of Section 58(2) of the Punjab Act 1 of 1914. What was included in Clause (e) of sub-Section (2) of Section 58 of the Punjab Act 1 of 1914, was included as Clause (i) of sub-Section (2) of Section 80 of the H.P. Act 33 of 1914. Clause (j) of sub-Section

(2) of Section 80 of the H.P. Act 33 of 2012 is also in *pari materia* with Clause (f) of Section 58(2) of the Punjab Act 1 of 1914.

29. Despite sub-Section (2) of Section 80 of the H.P. Act 33 of 2012 containing almost identical or an improvised version of the matters covered in sub-Section (2) of Section 58 of the Punjab Act 1 of 1914, the Government did not think fit to issue a new set of Rules under the H.P. Act, but chose to follow the very same set of Rules issued in 1986 in exercise of the powers conferred under the Punjab Act. As a consequence, it is the H.P. Liquor License Rules, 1986 that continue to hold the field till date and these Rules have validity, in view of Section 82 of the H.P. Act which saves Section 58 of the Punjab Act from repeal.

Different types of licenses under the Rules:

30. Though the Rules contemplate around 41 types of licenses, some of them relate to denatured spirit, rectified spirit, country fermented liquor etc., about which we are not concerned in this case. The licenses other than the licenses relating to denatured spirit etc., about which we are concerned in this case may fall broadly under the categories of (i) wholesale vend of foreign liquor to various categories of persons; (ii) retail vend of foreign liquor to various categories of persons; (iii) wholesale vend of country spirit held by a distillery or a warehouse; and (iv) retail vend of country spirit to various persons. These are only broad categories and not exhaustive. Other than these types of licenses, Part-A of the Rules also contemplate the grant of licenses for bottling of foreign liquor and bottling of country spirit.

31. Part-B of the Rules contains Rules 2 to 25 that stipulate the procedure for the grant and renewal of licenses. Part-C of the Rules contains five Rules, namely Rule 26 to Rule 30, indicating the different types of fees payable in respect of the licenses under these Rules.

32. Rule 26 of the HP Liquor License Rules, 1986, prescribes three different types of fees payable for the grant of various types of licenses under the Rules. It is of significance and hence, it is extracted as follows:

> *"26. The fees payable in respect of licenses under these rules are of the following kind:*
>
> *(a) fixed fees;*
> *(b) assessed fees;*
> *(c) fees fixed for allotment or by auction or negotiation or renewal or tender."*

33. Though Rule 26 contained in Part-C of the Rules provides for three different types of fees, namely (i) fixed fees, (ii) assessed fees, and (iii) fees for allotment, the other provisions contained in Part-C deal only with the issues relating to fixed fees and assessed fees. While the matters relating to fixed fees are dealt with in Rules 27 to 29, under Part-C(i), the provision relating to assessed fee is dealt with, only in Rule 30 under Part-C(ii). The third category of fee indicated in Rule 26 namely "fees fixed for allotment" is actually taken to Part-F of the Rules.

34. For the purpose of easy appreciation, but with an element of approximation (if not mistakes), the different types of licenses contemplated by Part-A of the Rules, the category into which they fall and the nature of the fee chargeable in respect of the same, are presented in a tabulation as follows:

Types of licenses	***Category into which they fall***	***Type of fee payable***
L.1, L.1-A, L.1-B, L.1- BB, L.1-C & L.13	*Wholesale vends*	*Fixed fee alone*
L.2-A, L.9-A, L.10-BB, L.12-AA & L.14-C	*Certain types of retail vends*	*Fixed fee alone*

L.3, L.3-A, L.4, L.4-A, L.5, L.5-A, L.6, L.7, L.8, L.9 & L.12-C	*Different types of retail vends*	*A combination of fixed fee and assessed fee*
L.12-A & L.12-B	*Two different types of retail vends*	*Assessed fee only, but together with fixed fee in the case of cinema*
L.2, L.14, L.14-A & L.14-B	*Retail vend of foreign liquor to public only and wholesale vend to certain types of licenses, retail vend of country spirit for consumption on and off the premises or at a fair or on a special occasion*	*Allotment, renewal, auction or negotiation*

35. Rule 15 of the H.P. Liquor License Rules, 1986 contains a prohibition, prohibiting the holding of certain types of licenses in conjunction with certain other types of licenses. Rule 17 lists out certain types of licenses which may be granted only to the holders of certain other types of licenses.

36. The Himachal Pradesh Liquor License Rules 1986 contains four Schedules, namely Schedules-A to D. Schedule-A lists out the different types of licenses indicated in Rule 27 and the rate of fees per annum fixed in relation thereto. Therefore, by its very nature, Schedule-A gets amended year after year, depending upon the Annual Excise Policy Announcements.

37. Schedule-B to the Rules prescribes the rates of assessed fee payable for licenses which fall under the category of assessed fees. Schedule-C provides the rates of application fee for allotment, renewal fee, basic license fee and annual license fee.

38. While some of the fees stipulated in Schedules-A, B and C are fixed, the others are indicated as rates per proof litre or bulk litre.

39. Thus, in essence, the Himachal Pradesh Liquor License Rules, 1986 contemplates different types of fees. The amount of fixed fees payable for different types of licenses included in Rule 27, are stipulated in Schedule-A in a tabular column and this tabular column gets amended year after year. Therefore it appears that the Rules are exhaustive, providing not only for (i) different types of licenses and (ii) different types of fees, but also providing for the actual amount of fees payable for that particular year. With this introduction, of the broad scheme of the Rules, let us now come to the grounds on which the impugned policy conditions are challenged by the three different categories of persons before us.

Contentions of the manufacturers/distillers/bottlers:

40. In paragraph 18 above, we have recorded in brief, the contentions of Mr. K.D. Sood, learned Senior Counsel appearing for the manufacturers. His first ground of attack to the impugned policy conditions is that the levy of additional fee, for the purpose of compensating the State for the loss of revenue in the form of duty of excise, has been repeatedly held by courts to be ultra vires and that therefore, there cannot be any levy unauthorized by the Act and the statutory rules. Reliance is placed in this regard by the learned Senior Counsel for the petitioners upon the decision of the Supreme Court in **B.C. Banerjee vs. State of M.P. (AIR 1971 SC 517).** It was held in the said decision that "no tax can be imposed by any by-law or rule or regulation unless the statute under which the subordinate legislation is made specifically authorizes the imposition, even if it is assumed that the power to tax can be delegated to the executive". It was further held in the said

decision that the basis of the statutory power cannot be transgressed by the rule making authority and that a rule making authority has no plenary power.

41. The decision in **B.C. Banerjee** was also cited with approval by two larger Benches, one in **State of Madhya Pradesh vs. Firm Cappulal (AIR 1976 SC 633)** and another in **Excise Commissioner U.P. vs. Ram Kumar (AIR 1976 SC 2237). B.C.Banerjee** was followed even in **Lilasons Breweries Pvt. Ltd. vs. State of M.P. (AIR 1992 SC 1393).**

42. Relying upon the ratio laid down by the Supreme Court in the aforesaid cases, it is contended by Mr. K.D. Sood, learned Senior Counsel for the petitioners that neither any excise duty nor any compensation in a sum equivalent to excise duty can be levied on the unlifted quantity of liquor, wherever a minimum guaranteed quota is fixed.

43. But in our considered view, there is a small distinction between the cases decided by the Supreme Court and the batch of cases on hand.

44. In **B.C. Banerjee,** a condition was imposed that the successful bidders will have to sell a prescribed minimum quantity of liquor in their shops and that if they failed to take delivery of the prescribed minimum quantity, they will have to pay excise duty on the quantity of liquor that they failed to take delivery. Therefore, having regard to Entry 51 of List-II in the Seventh Schedule to the Constitution and Section 25 of the M.P. Excise Act, 1915 authorizing the levy of excise duty, the Supreme Court came to the conclusion in **B.C. Banerjee** that no power was conferred upon the rule making authority to levy duty on any article which did not fall within the scope of Section 25.

45. But the statutory provisions contained in the H.P. Excise Act, 2011 makes a clear distinction between excise duty and countervailing duty on the one hand and the consideration payable for the grant of a lease (the appropriate nomenclature is license). As in the case of Section 25 of the M.P. Excise Act, 1915, Section 36 of H.P. Excise Act, 2011 also provides for the levy of excise duty or countervailing duty. But Section 38 of the H.P. Excise Act, 2011 makes it clear that the State Government, in addition to or instead of, any excise duty or countervailing duty, may accept a sum in consideration of a lease of any right under Section 27.

46. Section 27(1) also makes it clear that the State Government may lease to any person the right of manufacturing, supplying by wholesale, selling by wholesale or by retail or storing for manufacture or sale, any country liquor, foreign liquor etc. upon payment of such sum, in addition to the excise duty or countervailing duty. It may be useful to extract Section 38 and 27 (1) as follows:

> *"**38. Payment for grant of leases.** – The State Government may, in addition to or instead of any excise duty or countervailing duty leviable under this Chapter, **accept a sum in consideration** of the lease of any right under section 27."*
>
> ***27. Grant of leases of manufacture, sale etc. –** (1) The State Government may lease to any person, competent to contract, **on payment of such sum** in addition to excise duty or countervailing duty, on such conditions and for such period, as it may deed fit, the right –*
>
> *(a) of manufacturing or of supplying by wholesale, or of both, or*
>
> *(b) of selling by wholesale or by retail, or*
>
> *(c) of storing for manufacture or sale,*
>
> *any country liquor, foreign liquor, beer, wine spirit within any specified area."*

47. Again, Section 28(1) empowers the Financial Commissioner to grant any license, permit or pass upon payment of such fees, if any and subject to such restrictions and on such conditions as the Financial Commissioner may direct. Section 28(1) reads as follows:

> ***28. Fees and other conditions for grant of licenses, permits and passes.**- (1) Every license, permit or pass, under this Act, shall be granted –*

(a) on payment of such fees, if any,

(b) in such form and containing such particulars,

(c) subject to such restrictions and on such conditions, and

(d) for such period,

as the Financial Commissioner may direct."

48. Thus, there are two distinguishing features between the writ petitions on hand and the decision of the Supreme Court in **B.C. Banerjee.** They are: (i) what was sought to be collected from the licensees in **B.C. Banerjee** was the actual excise duty even on the quantity of liquor that was not lifted. But in the case on hand what is sought to be collected is only an additional fee. (ii) In **B.C. Banerjee,** the Supreme Court took note of Section 27 of the M.P. Excise Act, 1915, which is in *pari materia* with Section 38 of the H.P. Excise Act, 2011. However, there was no provision in the M.P. Excise Act which is similar to Sections 27(1) and 28(1) of the H.P. Excise Act, 2011. In particular, Section 28(1) contains a delegation of power to the Financial Commissioner to grant a license, permit or pass "on payment of such fees" as the Financial Commissioner may direct. Therefore, the flaw in the legislation of the State of Madhya Pradesh pointed out by the Supreme Court in **B.C. Banerjee,** does not exist in the H.P. Excise Act, 2011.

49. In fact, **B.C. Banerjee** was distinguished by a Bench of the same composition in **Panna Lal vs. State of Rajasthan (AIR 1975 SC 2008).** The question that was taken up for consideration in **Panna Lal** was as to whether the excise license granted to a person rendered him liable to pay a stipulated sum mentioned in the license or not. It was contended before the Supreme Court that the amount of money sought to be collected as a guaranteed sum, under the exclusive privilege system, partook the character of excise duty on the unlifted quantity of liquor. In support of the said contention, the decision in **B.C. Banerjee** was relied upon. But in para 33 of the report in **Panna Lal,** the Supreme Court pointed out that in the Rajasthan's case, the State Government did not impose any excise duty on the licensee and that when a stipulated sum of money is collected for enjoying the privilege, the same did not tantamount to the levy of excise duty. The same distinction as drawn by the Supreme Court in **Panna Lal** would apply to the case on hand also.

50. It is true that in a later decision in **State of M.P. vs. Firm Cappulal,** the Supreme Court identified that there could be two different situations, one of the type that arose in **B.C. Banerjee** and another of the type that arose in **Panna Lal. Firm Cappulal** was found on facts, by the Supreme Court to be of **B.C. Banerjee** type. Therefore, **Firm Cappulal** may not be of any assistance to the petitioners.

51. Since **B.C. Banerjee** was not distinguished in **Firm Cappulal** but was held only to be of a different type, the question again came up for consideration in **Excise Commissioner vs. Ram Kumar,** cited supra. But in **Ram Kumar,** what was sought to be levied was "still head duty" on the quota allotted and a compensation equal to the still head duty, to the extent of shortfall. Thus, **Ram Kumar** was actually a case of levy of duty and hence the Court distinguished the decision in **Panna Lal** and held that the issue is settled in **B.C. Banerjee.** After finding on facts that what was levied was a duty disguised as compensation, the Court held in **Ram Kumar** that the same was impermissible in law as it represented in reality, a demand for excise duty on the unlifted quantity of liquor. In para 18 of the report, what was opined by the Supreme Court in **Ram Kumar** was ***"that the demand made by the State, though disguised as compensation, was in reality a demand for excise duty on the unlifted quantity of liquor which is not authorized by the provisions of the Act".***

52. Therefore, right from **B.C. Banerjee,** the Court was troubled only with the lack of authorization under the provisions of the Act. Hence before applying the line of decisions starting from **B.C. Banerjee,** we must see if there was authorization or not, under the provisions of the Act. As we have pointed out, there was authorization under Section 27(1)

and particularly upon the Financial Commissioner under Section 28(1). Therefore, the line of decisions starting from **B.C. Banerjee** cannot be used by the petitioners as a magic wand to produce the desired result.

53. The second contention of Mr. K.D. Sood, learned Senior Counsel for the manufacturers/distillers/bottlers is that the manufacturers as well as wholesalers are not entitled as per the statutory prescriptions and the license conditions to sell liquor in the open market. They are supposed to sell whatever is manufactured or held in stock, only to the retailers and that too upon the production of passes/permits by the retailers. In such circumstances, it is his contention that the manufacturers and wholesalers cannot be penalized for not selling the minimum guaranteed quota.

54. It is not in dispute on the side of the respondents that the manufacturers and wholesalers cannot take the liquor manufactured or held in stock by them, to the open market and vend the same. It is only through retailers and that too upon production of passes/permits that whatever is produced or held in stock can be sold. Therefore, the question arises is as to whether the manufacturers and wholesalers can be imposed with consequences of breach of the license conditions to manufacture and/or sell the minimum guaranteed quota.

55. We think that in this regard, the State is in a catch-22 situation. They have to either fall or stand on the strength of their own plea that what is sought to be levied by way of additional fee and penalty is not in the nature of excise duty.

56. The law is well settled that if something is payable by way of tax or duty, the liability to pay would not depend upon the performance or non-performance of the assessee. But if something is payable only in terms of the contract, which in these cases have taken the shape of licenses, then the contractual obligation so imposed upon the assessee can certainly be tested on the parameters of performance, failure or breach etc.

57. To escape the wrath of **B.C. Banerjee,** the respondents have taken a stand in these cases that additional fee and penalty do not partake the character of a tax or duty and that they fall only in the realm of contractual condition. If it is so, an obligation for the breach of a contract cannot be imposed upon a person who cannot be held responsible for the breach of contract, especially when the fulfillment of the contractual conditions depends upon what the State does and what another set of licensees namely the retailers, do.

58. By imposing a restriction upon the manufacturers and wholesalers from selling their product directly in the open market, through statutory prescriptions, the State has tied their hands. To say thereafter that these licensees, whose hands were tied by the State, failed to swim the English Channel, making them liable for certain consequences, would be completely arbitrary. Therefore, the second contention raised by the learned Senior Counsel for the petitioners is well founded.

59. The third contention of the learned Senior Counsel for the petitioners is that no penalty can be levied through Annual Policy Announcements, *de hors* the provisions of Chapter-VI of the H.P. Excise Act, 2011.

60. It is true that Chapter-VI of the H.P. Act 2011 contains provisions for various types of penalties. Section 39 deals with penalty for unlawful production, manufacture, possession, import, export, transport, sale etc. Section 40 speaks about penalty for rendering or attempting to render denatured spirit fit for human consumption. Section 41 provides for penalty for mixing noxious substance with liquor. Section 42 speaks about compensation for death or injury caused to any person due to consumption of liquor. Section 43 deals with penalty for certain acts by licensee or his servants. Section 44 deals with penalty for fraud by licensed manufacturer or vendor, Section 45 stipulates penalty for consumption of liquor in a chemist's shop, Section 46 prescribes penalty for consumption of liquor in public places and

Section 47 speaks about penalty for offences not otherwise provided for. Section 49 provides for enhanced punishment for certain offences after previous conviction.

61. But most of the penalties statutorily prescribed under Chapter-VI, are punishable with imprisonment. It is only Sections 43 and 47 that do not provide for imprisonment. Therefore, it is clear that the scope and ambit of Chapter-VI of the Act is completely different from the penalty contemplated for breach of license conditions. Though Section 43(d) also provides only for a penalty of imposition of fine, in case the holder of a license willfully does or omits to do anything in breach of any of the conditions of licenses, thereby making it possible for the respondents to bring the case of the petitioners even under the said provision, we do not think that the penalty contemplated by the Annual Policy Announcements is just the same as the penalty contemplated under Section 43(d). This is for the reason that under Section 55(1)(b), no Judicial Magistrate shall take cognizance of an offence punishable under Section 43 except on a complaint of the Collector or Excise Officer. Therefore, the failure to lift the minimum guaranteed quota, cannot be brought within the purview of Section 43(d). Hence, the contention that the penalty contemplated by the impugned policy conditions, *de hors* the provisions of the Chapter-VI of the Act, is *ultra vires,* cannot be accepted, as they operate in two different fields.

62. The last contention of Mr. K.D. Sood, learned Senior Counsel for the manufacturers is that the levy of additional fee and penalty upon all the three stake-holders, namely the retailers, wholesalers and the manufacturers will have a cascading effect leading to the collection of three times the revenue and hence it is unreasonable and arbitrary.

63. There can be no quarrel about the fact that a taxing Statute cannot be tested on the ground of reasonableness. But the respondents have taken a positive stand that the additional fee and penalty do not partake the character of a tax or excise duty. Therefore, the contention whether what is sought to be levied is reasonable or not, can be tested.

64. As we have pointed out earlier, the manufacturers/ distillers/ bottlers as well as the wholesalers are aggrieved only by condition Nos.10.28A and 10.29 of the Excise Policy for only one year, namely 2014-2015. But insofar as the retailers are concerned, they are aggrieved by a similar condition contained in condition No. 4.3 of the Excise Policy for four consecutive years, namely 2013-2014 to 2016-2017. Therefore, the argument of the learned Senior Counsel for the manufacturers in this regard, is available only in respect of one year namely 2014-15 and not the other years.

65. In simple terms, for the year 2014-2015, all the three categories of persons, namely manufacturers, wholesalers and retailers were made liable to pay additional fee and penalty on the quantum of liquor that they failed to lift as per the minimum guaranteed quota. This, according to the learned Senior Counsel for the manufacturers is unreasonable, since the same resulted in claiming the same amount from three different parties.

66. The correctness and validity of the aforesaid contention can be tested only by some mathematical calculation. Therefore, let us take one physical example of one manufacturer, namely Mohan Meakin Ltd..

67. In Annexure-E of the Annual Policy Announcements, for the year 2014-2015, the annual minimum production capacity utilization and sales units for each of the manufacturers was provided in a chart. At Sr. No. 8 of the chart contained in Annexure-E, the minimum annual bench mark fixed for Mohan Meakin Ltd., the petitioner in the lead writ petition CWP No. 5232/2014, was indicated as 9,79,352.740 proof Ltrs. Therefore, the quarterly quota allotted to Mohan Meakin Ltd. was to be 2,44,838.184 proof Ltrs. The actual sale made by Mohan Meakin Ltd. during the first quarter of 2014-2015 ending with June, 2014 was indicated by the respondents themselves in a demand, as 85549.500 proof Ltrs. The difference between the quarterly quota for presumed sale and the actual quarterly sale made by them, was arrived at in the tabulation as 1,59,288.684 proof Ltrs. (2,44,838.184-85,549.500).

68. Therefore, the additional fee leviable was indicated in the demand to be Rs.44,60,083.00, calculated @ Rs.28 per proof Ltrs. for the shortfall of 1,59,288.684 proof Ltrs. In addition, a penalty was also demanded @ Rs.14/- per proof Ltrs., which worked out to be Rs. 22,30,042.00.

69. If the manufacturer, namely, Mohan Meakin Ltd. is guilty of selling less than the minimum guaranteed quota to the extent of 1,59,288.684 proof Ltrs. during the first quarter of 2014-2015, the wholesaler and retailer are also equally guilty of not lifting the very same quantity. What is manufactured, actually finds its way to the market, through the wholesaler and the retailer. What does not find its way to the market, is what is sought to be charged with. Therefore, naturally the quantity that was not sold, was the quantity that never reached the market. (Even assuming that the retailers indulged in selling spurious liquor, the quantity of authenticated liquor sold by them will remain the same)

70. The wholesalers and the manufacturers are made liable to pay Rs.28/- per proof Ltrs. towards additional fee and Rs.14/- per proof Ltrs. towards penalty for the unlifted quantity. Therefore, what is collected from the manufacturers and the wholesalers is virtually Rs.56/- per proof Ltrs. towards additional fee and Rs.28/- per proof Ltrs. towards penalty (as each of the two will pay Rs.28/- per proof Ltrs. towards the additional fee and Rs.14/- per proof Ltrs. towards the penalty).

71. In addition, the retailers are also imposed with an obligation to pay the additional fee on the unlifted quota of IMFS, @ Rs.56/- per proof Ltrs. Therefore, for the first quarter of 2014-2015, a manufacturer was required to pay an additional fee of Rs.28/- per proof Ltrs., the wholesaler was required to pay an additional fee of Rs.28/- per proof Ltrs. and the retailer is required to pay an additional fee of Rs.56/- per proof Ltrs. This makes the total amount of additional fee levied on the very same quantity to be Rs.112/- per proof Ltrs. This is in addition to Rs.14/- per proof Ltrs. to be paid by the manufacturer towards penalty and an equivalent amount to be paid by the wholesaler towards penalty. But insofar as the retailer is concerned, the penalty of Rs.14/- per proof Ltrs. is payable only if the unlifted quota falls short of 80% of the minimum guaranteed quota. In case it does, the retailer also pays Rs.14/- , which makes the total amount of penalty collected, as Rs.42/- per proof Ltrs. (@ Rs14/- for each of the three categories of persons, namely, manufacturer, wholesaler and retailer).

72. Therefore, in effect, the respondents will be entitled to collect, for the first quarter of 2014-2015, (i) a total of Rs.112/- per proof Ltrs. towards additional fee; and (ii) a total of Rs.42/- per proof Ltrs. towards penalty. In other words, an amount of Rs.154/- per proof Ltrs. can be collected by the respondents on the unlifted quota.

73. In respect of Mohan Meakin Ltd., the unlifted quota for the first quarter of 2014-2015, was indicated to be 1,59,288.684 proof Ltrs. But if this quota had been actually lifted, the respondents would have collected a particular amount towards the excise duty. Let us now see what they would have collected towards the excise duty.

74. Mr. Ajay Vaidya, learned Senior Additional Advocate General provided to us a tabulation containing the rate of excise duty levied during the year 2014-2015 on Country Liquor and Indian Made Foreign Spirit. For the purpose of testing the correctness of the last contention of the manufacturers, let us take a highest rate of duty of excise as a bench mark. For Indian Made Foreign Spirit with an ED price of about Rs.5000/- per case the duty of excise levied for 2014-2015 was Rs. Rs.80/- per proof Ltrs. The rate of license fee for IMFS for the very same period was Rs.219/- per proof Ltrs. Therefore, on IMFS, the State was entitled or expected to collect Rs.219/- per proof Ltrs. with a duty of excise of a maximum amount of Rs. 80/- per proof Ltrs. (actually for IMFS with ED price of above Rs.5000/- per case alone, the duty of excise was Rs.80/- per proof Ltrs, but for IMFS with ED price of below Rs.1200/- per case, the duty of excise was Rs.32/- per proof Ltrs. and for IMFS with an ED price between Rs.1200/- and Rs.5000/- per case, was Rs.55/- per proof Ltrs.).

75. But for the purpose of calculation we have taken a figure that is most advantageous to the State. If this figure of Rs.80/- per proof Ltrs. is taken as the duty of excise for IMFS for the year 2014, then the amount that the State would have collected per proof Ltrs. would have been Rs.299/- per proof Ltrs. (Rs.219 towards the license fee and Rs. 80/- per proof Ltrs. towards the excise duty).

76. As we have pointed out earlier, the yearly quota allotted for Mohan Meakin was 9,79,352.740 proof Ltrs. The quota for the first quarter was 2,44,838.184 proof Ltrs. If this entire quantity had been lifted, the State would have secured a revenue of little less than about Rs.7.30 crores (rupees seven crores thirty lacs). (Rs.2,44,838.184 x Rs.299).

77. But what was lifted was 85.549.500 proof Ltrs., providing an actual revenue of around Rs.2.55 crores (rupees two crores fifty five lacs). Therefore, we would have normally expected a short fall of around rupees five crores.

78. But the annual license fee of Rs.219/- per proof Ltrs. is payable not on the actual quantity of sale but on the minimum guaranteed quota. The petitioners have no quarrel about this. Therefore, the petitioner Mohan Meakin was obliged to pay (and they are not disputing this), a license fee of Rs.219/- per proof Ltrs. of IMFS, on the entire quarterly quota, namely 2,44,838.184 proof Ltrs. Therefore, by way of annual license fee, Mohan Meakin Ltd. would have paid around Rs.5.35 crores. (2,44,838.184 per proof Ltrs. X Rs.219/-).

79. Hence the actual short fall was only around rupees two crores. (Rs.7.30 crores – Rs.5.35 crores). Let us now see whether the State was attempting to collect an amount more than this amount of rupees two crores, by imposing the same levy of additional fee and a penalty upon the three different categories of persons.

80. As we have indicated earlier, the manufacturer is obliged to pay Rs.28/- per proof Ltrs. towards the additional fee and a penalty of Rs.14/- per proof Ltrs. towards the penalty. The wholesaler is required to pay a similar amount towards the additional fee and penalty. In the example that we have taken on hand of Mohan Meakin Ltd. the short fall was more than 20%. In other words, even 80% of the minimum guaranteed quota was not achieved during the first quarter of 2014-2015. Therefore, the retailer was also liable to pay an additional fee of Rs.56/- per proof Ltrs. and a penalty of Rs.14/- per proof Ltrs.

81. Thus, all the three of them had cumulatively become liable to pay an additional fee of Rs.112/- per proof Ltrs. (Rs.28+Rs.28+Rs.56= Rs.112) and penalty of Rs.42 per proof Ltrs. (Rs.14x3). In other words, on the same unlifted quota, the three categories of persons before us had cumulatively become liable to pay Rs.154/- per proof Ltrs. (Rs.112+42/-).

82. The unlifted quota for the first quarter of 2014-2015 for Mohan Meakin, even according to the respondents was 1,59,288.684 proof Ltrs. On this unlifted quantity, the manufacturer became liable to pay an additional fee of Rs.28/- per proof Ltrs. and a penalty of Rs.14/- per proof Ltrs. The wholesalers became liable to pay an equivalent amount and the retailers had also become liable to pay an additional fee and penalty totaling to a grand amount of Rs.154/- per proof Ltrs.

83. Therefore, the amount collected towards the additional fee and penalty on this short fall in sale of 1,59,288.684 proof Ltrs., @ Rs.154 per proof Ltrs. would come to more than Rs.2.46 crores (rupees two crores and forty six lacs).

84. In other words, the actual loss of revenue (in the form of duty of excise) for the State, due to the deficit in the production-cum-sale was around Rs.2.00 crores for the first quarter of 2014-2015 in respect of one manufacturer. But what was sought to be collected by way of additional fee and penalty for compensating this loss of revenue, was Rs.2.46 crores. Therefore, the last contention of the learned Senior Counsel for the petitioners/

manufacturers that the levy of additional fee and penalty upon all the three categories of persons for the very same deficit in sale has a cascading effect, merits acceptance.

85. Thus, two out of four grounds raised by the manufacturers may have to be upheld.

Contentions on behalf of the wholesalers:

86. The first ground on which the wholesalers assail the impugned policy conditions is that neither the Act nor the Rules contemplate any levy for not selling the quota allotted, except sub-Rule (22) of Rule 35-A of the Rules and hence, the levy of additional fee and penalty is unauthorized.

87. But the aforesaid contention may not be wholly correct. As we have pointed out earlier, the Himachal Pradesh Excise Act, 2011, contains three provisions, two in Chapter-IV and one in Chapter-V, which authorize the levy of (i) such sum, (ii) fees, and (iii) sum. These are Sections 27, 28 and 38, the first two of which fall in Chapter-IV and the third falls in Chapter-V. The Act also contains a separate provision in Section 36 included in Chapter-V for the levy of excise duty or countervailing duty. Sections 27, 28 and 38 of the Act have already been extracted by us in paragraphs 46 and 47 above. While Section 27 speaks about payment of ***"such sum"*** for the grant of a lease of the right of manufacturing or supplying by wholesale or of selling by wholesale or retail or of storing or of storing for manufacture or sale, Section 28 speaks of payment of ***"fees"*** for the grant of license, permit or pass. Again Section 38 speaks of acceptance of "***a sum***" in consideration of the lease of any right under Section 27.

88. When the Financial Commissioner is expressly authorized by section 28, to issue directions for the grant of license upon payment of fees, there is no use contending that the levy is unauthorized by law.

89. Coming to the Rules, we have already pointed out that Rule 26 of the H.P. Liquor License Rules, 1986 speaks of three different types of fees payable in respect of licenses. The rule is extracted in paragraph 32 above.

90. The types of licenses for the grant of which fixed fee alone is payable, the types of licenses for the grant of which a combination of fixed fee and assessed fee is payable, the types of licenses for the grant of which fees for allotment, renewal or auction is payable, are all provided in a tabular column in paragraph 34 above. From the table provided in paragraph 34 above, it is clear that the wholesale vendors, who are entitled to the grant of L.1, L.1-A, L.1-B, L.1-BB, L.1-C and L.13 licenses, are liable to pay fixed fees, as per Rule 27. We do not find any Rule other than Rule 26, which we have extracted above, that categorizes the different types of fees payable by a licensee. According to the petitioners, there is no Rule in the entire scheme of H.P. Liquor License Rules, 1986, which speaks about additional fee. This is why it is contended by Mr. Sanjeev Bhushan, learned Senior Counsel for the wholesalers that a fee not authorized by the Rules cannot be levied.

91. But the above argument, appears to have arisen out of a confusion in the manner in which the Rules are grouped. As we have pointed out elsewhere, the matters relating to fixed fees are grouped under Part-C(i) in Rules 27 to 29. The provision relating to assessed fees is given in Part-C(ii), in Rule 30. But fee for allotment, renewal, auction etc., spoken to by Rule 26(c) is taken to Part-F.

92. Rule 34 reserves for the Financial Commissioner, the right to grant all or any of the licenses indicated in Rule 1, by auction or by negotiation or by private contract or by any other arrangement. But this power is not available to the Financial Commissioner in so far as the licenses which can be granted on fixed fee or assessed fee or both. This is made clear by Rule 34 itself. Rule 35(1) makes it clear that the licenses for certain types of retail vends of foreign liquor can be granted only by allotment or renewal on fixed fee. Therefore, it

appears that what is dealt with by Rule 26(c) is not a third category of fee, though, such an impression is created.

93. Apart from the three categories of fees indicated in Rule 26, there are also other types of fees, indicated in Rule 35. Rule 35(5) speaks about the rates of application fee, renewal fee, basic license fee and the rates of license fee applicable on different kinds of liquor. Therefore, Schedule-C also contains rates of renewal fee, basic license fee and license fee. These types of fees are also defined in the Explanation under sub-Rule (6) of Rule 35.

94. Rule 35-A, one of the sub-Rules of which is relied upon by the wholesalers, deals broadly with the allotment of licenses. Though there is nothing inherent in Rule 35-A to indicate that the conditions stipulated therein apply only to the retailers, the Government has understood Rule 35 as applicable only to retailers. We shall deal with aspect separately in the next part of this order. Sub-Rule (22) of Rule 35-A reads as follows:

> ***"35-A. Allotment of licenses.***
>
> *xxx xxx xxx*
>
> *(22) The licensee shall be required to lift the Minimum Guaranteed Quota as fixed for each vend failing which he shall still be liable to pay the license fee fixed on the basis of the minimum quota. In addition to the payment of license fee on the un-lifted Minimum Guaranteed Quota the licensee shall also be liable to pay additional fee at the rate of Rs. 20/- per proof litre on the un-lifted quota, which falls short of 80% of the Minimum Guaranteed Quota. The Asstt. Excise & Taxation Commissioner/Excise & Taxation Officer I/C of the district shall review the position of lifting of Minimum Guaranteed Quota on monthly basis. If he finds that the licensee has failed to lift 80% of the annual Minimum Guaranteed Quota by 15th of March and after hearing then licensee comes to the conclusion that the licensee will not be able to make up the deficiency by 31st March, he shall proceed to recover the amount of the additional fee as mentioned above."*

95. Even if the aforesaid Rule 35-A is not applicable to wholesalers, the contention of the wholesalers that the levy of additional fee is unauthorized by the Act and the Rules cannot be sustained. This is for the reason that the Act contains provisions for the levy of "such sum" and "sum" as well as "fees". Each of these words has a different connotation. Therefore, the first contention that the impugned policy conditions are *ultra vires* the Statute or Rules, is unsustainable.

96. The second contention that in respect of manufacturers and wholesalers, the levy of additional fee and penalty was confined only to one year namely 2014-15 and that neither before nor after the said year, any such levy was made, does not take the petitioners anywhere. In a writ petition, we are only concerned with the question whether a levy is authorized or unauthorized. The fact that the respondents never imposed such a levy in the past, does not make it invalid. Similarly, even if the respondents had levied it for any number of years, the same would not become legal, if it is unauthorized by law. Hence, the second ground of attack has to fail.

97. The third ground of attack by the wholesalers is that they are not permitted by the Statute to sell the available stock in the open market and that they are supposed to sell the liquor only through the retails upon production of passes and permits and that therefore, they cannot be penalized for any failure on the part of the retailers to lift the guaranteed quota. This contention of the wholesalers is similar to one of the contentions of the manufacturers. The contention of the manufacturers has been upheld in this regard. Therefore, on the same logic, the third ground of attack made by the wholesalers has to be upheld.

<u>Contentions on behalf of retailers:</u>

98. The first contention of the retailers is that the additional fee levied for short-selling, partakes the character of excise duty, as it is intended to compensate the State for the loss of revenue in the form of excise duty. But this is the very same contention that was raised on behalf of the manufacturers, on the basis of a long line of decisions starting from **B.C. Banerjee.** However, we have rejected this contention, on the basis of statutory prescriptions.

99. Moreover, the retailers cannot be heard to raise such a contention, for two reasons. As we have stated elsewhere, the levy of additional fee for the retailers, commenced (i) from the year 2009 when Rule 35-A(22) was inserted and (ii) from the year 2013-14 when condition no. 4.3 was incorporated in Annual Policy Announcements which continued up to the year 2016-17. The retailers came up with a writ petition for the first time only in the year 2015, challenging not only the policy conditions imposed in the Excise Policy for 2013-14 but also the policy condition imposed in the Excise Policy for 2014-15. By the time the retailers chose to challenge the condition contained in the Excise Policy 2013-14, the next Excise Policy for 2014-15 had already come and the retailers, year after year, chose to apply for renewal. Therefore, the retailers cannot be heard to raise the above contention, after having repeatedly applied for renewals year after year dispute the existence of a rule and the continuation of such a policy.

100. The question of estoppel against a Statute may not arise in this case, as we have already pointed out the provisions contained in the Statute. In addition, sub-Rule (22) of Rule 35-A, which we have already extracted above, provides for the levy of additional fee on the unlifted quota, which falls short of 80% of the minimum guaranteed quota. Rule 35-A in entirety including its sub-Rule (22) was inserted, by way of an amendment vide Notification No. 7-155/2008-EXN-9076-95 Dated 31.03.2009, published on 06.04.2009. Therefore, the concept of levying additional fee for the failure to lift the minimum guaranteed quota had been introduced way back in 2009 and Mr. Satish Kumar, learned counsel appearing for the retailers, conceded that the attempt to challenge Rule 35-A (22) was only faint and feeble. No valid ground is raised in support of the challenge to the said rule. No argument was raised to the effect that Rule 35-A(22) is ultravires the Act. In fact the argument that the levy of additional fee and penalty are unauthorised by law goes contrary to the challenge to rule 35A(22). This is why, in the course of hearing, the learned Counsel gave up the challenge to the rule. As against the rigours of the impugned policy conditions, Rule 35A(22) is less harsh. Therefore, the challenge to the same was given up. Hence the contention of the retailers that the levy is unauthorized by law, is unsustainable.

101. The second contention advanced on behalf of the retailers is that due to the levy of additional fee and penalty, persons who sell less, end up paying more and hence the policy is arbitrary.

102. But once it is admitted that the levy is both authorized by the Rules and by the terms and conditions of contract, the petitioners cannot challenge the levy on the ground that it imposes a burden which is onerous. Winners and losers have to pay different prices and they cannot weigh the efforts taken, in terms of the return.

103. The third contention advanced on behalf of the retailers is that the levy of additional fee is in the nature of a penalty, as it is imposed for the breach of license conditions. Therefore, it is contended that to levy an additional fee and a penalty would tantamount to imposition of double penalties.

104. But we do not agree. What is contemplated by condition No. 4.3, in substance is as follows:

> *"(i) That insofar as country liquor is concerned, the licensee should pay an additional fee at the rate of ₹ 10/- per proof litre on the unlifted quota of country liquor which falls short of 100% of the minimum guaranteed quota.*

(ii) That in respect of country liquor, the licensee, in addition to the additional fee, should also pay a penalty of ₹ 7/- per proof litre if the unlifted quota falls short of the benchmark of 80% of the minimum guaranteed quota.

(iii) That in respect of IMFS, the licensee should pay an additional fee at the rate of ₹ 56/- per proof litre on the unlifted quota of country liquor which falls short of 100% of the minimum guaranteed quota.

(iv) That in respect of IMFS, the licensee, in addition to the additional fee, should also pay a penalty of ₹ 14/- per proof litre if the unlifted quota falls short of the benchmark of 80% of the minimum guaranteed quota."

105. Therefore, the additional fee and penalty operate at two different levels. Therefore, there cannot be a challenge on the ground that the additional fee itself partakes the character of penalty.

106. The next contention advanced on behalf of the retailers is that the levy of additional fee and penalty for short-selling, was dispensed with in the Excise Policy of the year 2018-19. But we do not know how the same would make the impugned policy conditions unlawful. The concession shown in subsequence years will not make the levy made in the previous years unlawful.

107. The last contention raised on behalf of the retailers is that even while calculating the quantum of sales for the last quarter of the year, the Authorities take only the sales made up to the 10th day of March and not the 31st day of March and that therefore, the policy condition is bad at least to the extent of its application.

108. We have already extracted condition No. 4.3 of the Annual Policy Announcement of the year 2014-15. At the cost of repletion, we should once again extract the relevant portion of condition No. 4.3, which forms the subject matter of the last contention on behalf of the retailers. The second part condition No. 4.3 for the year 2014-15 reads as follows:

> *"The Assistant Excise and Taxation Commissioner/ Excise and Taxation Officer I/C of the District shall review the position of lifting of minimum guaranteed quota on quarterly basis. Lifting position for the first quarter of the year 2014-15 shall be reviewed latest by 30th July, 2014, for the second quarter, it shall be reviewed latest by 30th October, 2014, for the third quarter latest by 15th January, 2015 and lifting position for the fourth quarter shall be reviewed positively by 10th March, 2015..... In case the defaulting licensee lifts his unlifted quota of any quarter in subsequent quarters or latest by 10th March, 2015 by attaining 100% benchmark of annual minimum guaranteed quota for the purpose of additional fee and 80% benchmark of the annual minimum guaranteed quota for the purpose of penalty, such a licensee shall be entitled to set off the amount so deposited previously with the prior approval of the Collector (Excise) of the zone concerned."*

109. It appears from the extracted portion of condition No. 4.3 that what is to be taken into account for ascertaining the achievement of target, appears to be the quota lifted up to the 10th March, insofar as the last quarter is concerned. While the extracted portion of condition No. 4.3 provides for a set off, if the failure to lift the minimum guaranteed quota in any one or more of the first three quarters is compensated in the subsequent quarter, there is no such provision insofar as the last quarter is concerned.

110. Therefore, the extracted portion of condition No. 4.3 suffers from two incongruities. They are: (i) Though the minimum guaranteed quota is ordained to be lifted during the period of twelve calendar months, the performance is assessed once in a quarter of three months. But so far as the last quarter is concerned, the above extracted portion makes it obligatory for the retailer to achieve the entire target by the 10th March of the year. In other words, though the target for lifting the minimum guaranteed quota can be achieved in a

period of twelve calendar months, what is achieved in a period of eleven months and ten days alone is taken into account. (ii) While set off is permitted for the shortfall in the quota lifted during the first three quarters, if such shortfall is compensated before the 10th day of March, there is no such provision for a set off for the shortfall in the fourth quarter. Even if the shortfall in the quota lifted during the period from 1st January to the 10th day of March, is compensated by lifting additional quantity during the period from 11th day of March to the 31st day of March, the licensee is still made liable, at least by the language employed in the above extracted portion of condition No. 4.3.

111. In any case, once a statutory rule imposes an obligation to lift the minimum guaranteed quota and once the statutory Rule {Rule 35-A (22)} also indicates the consequences for the failure to lift the minimum guaranteed quota, it is not possible for the respondents to impose a condition in the Excise Policy, which will overreach the statutory Rule. Rule 35-A (22) has not been repealed or amended. Therefore, we do not know how condition No. 4.3 can be enforced without amending Rule 35-A(22).

112. On this aspect, it is contended by Mr. Ajay Vaidya, learned Senior Additional Advocate General that where an Authority is conferred with a power to do a certain act under the Statute, subject to any Rules made thereunder, such Authority will have jurisdiction to exercise that power even by issuing administrative instructions, if no Rule had been framed. He places reliance in this regard, upon the decision of the Supreme Court in **Surinder Singh vs. Central Government {(1986) 4 SCC 667}.** It was held in paragraph 6 of the said decision as follows:

> *"Where a Statute confers powers on an Authority to do certain acts or exercise power in respect of certain matters, subject to Rules, the exercise of power conferred by the Statute does not depend on the existence of Rules unless the Statute expressly provides for the same. In other words, framing of the Rules is not a condition precedent to the exercise of the power expressly or unconditionally conferred by the Statute. The expression "subject to Rules" only means, in accordance with the Rules, if any. If Rules are framed, the powers so conferred on Authority could be exercised in accordance with these Rules. But if no Rules are framed, there is no void and the Authority is not precluded from exercising the power conferred by the Statute."*

113. The decision in **Surinder Singh** was also followed in **Orissa State (Prevention & Control of Pollution) Board vs. Orient Paper Mills, {(2003) 10 SCC 421}.** It was held therein that the power vested under a statutory provision, would still be exercisable even in the absence of the Rules and that the non-framing of Rules does not curtail the power of the State Government to issue a notification.

114. Since Section 28(1) empowers the Financial Commissioner to issue directions with regard to payment of fees for the grant of licenses, permits and passes, it is contended by the learned Senior Additional Advocate General that the ratio of the decision in **Surinder Singh** will squarely apply.

115. But we do not think so. The ratio of the decisions in **Surinder Singh** and **Orissa State (Prevention & Control of Pollution) Board** will not be applicable to the cases on hand. This is for the reason that in the cases on hand, a statutory rule is in existence.

116. If the statutory Rules had been completely silent, with regard to the fixation of minimum guaranteed quota and with regard to the consequences for the failure to achieve the quota, we could have accepted the aforesaid contention. Once the statutory Rules had occupied the field in the form of Rule 35-A(22), there was nothing left for the executive to exercise. In fact the ratio in **Surinder Singh** is also to this effect, as can be seen from the last two lines of the portion from the decision in **Surinder Singh** extracted above. It is made clear in the aforesaid portion of the decision in **Surinder Singh** that if no Rules are framed, there is no void and the Authority is not precluded from exercising the power conferred by the

Statute. Since the Rules are framed in this case with regard to the obligation to lift minimum guaranteed quota and since the Rules also speak about the consequences for failure to do so, there was no void left for the executive to fill up. Therefore, the last contention of the learned counsel appearing for the retailers has to be upheld and the impugned policy condition, to the extent to which it is in conflict with Rule 35-A(22) has to be struck down.

117. But before we do so, we should deal with some of the contentions of Mr. Ajay Vaidya, learned Senior Additional Advocate General appearing for the State.

118. The first contention of Mr. Ajay Vaidya, learned Senior Additional Advocate General is that under Article 298 of the Constitution, the executive power of the State shall extend to carrying on of any trade or business and the making of contracts for any purposes. Insofar as the trade of manufacture and sale of liquor is concerned, the State has the exclusive privilege and citizens do not have any fundamental right to carry on the business of manufacture and sale of liquor. The Himachal Pradesh Excise Act, 2011 also prohibits the manufacture, possession and the sale of any intoxicant except under the authority and subject to the terms and conditions of a license granted by the Financial Commissioner. The licenses issued are in the realm of a contract and hence it is contended by the learned Senior Additional Advocate General that it was up to the licensees to enter into a contract or not. The licenses are renewed according the learned Senior Additional Advocate General, year after year and hence if the terms and conditions of the contract are not acceptable, it was always open to the licensees to walk out. No one, according to the learned Senior Additional Advocate General, compelled the licensees to enter into a contract. Having entered into a contract it is not open to them to challenge one of the conditions of contract.

119. In other words, the contention of the learned Senior Additional Advocate General is that it was up to the licensees to take it or leave it.

120. But as rightly contended by Mr. K.D. Sood, learned Senior Counsel for the manufacturers, the argument to take it or leave it, advanced by the State of Kerala under the Kerala Abkari Shops Disposal Rules, 2002 was rejected by the Supreme Court in ***Kerala Samsthana Chethu Thozhilali Union vs. State of Kerala [(2006) 4 SCC 327].*** Paragraph 58 of the report in the said decision may be usefully extracted as follows:

> *"58.Take it or leave it" argument advanced by Mr. Chacko is stated to be rejected. The State while parting with its exclusive privilege cannot take recourse to the said doctrine having regard to the equity clause enshrined under Art. 14 of the Constitution of India. The State must in its dealings must act fairly and reasonably. The bargaining power of the State does not entitle it to impose any condition it desires."*

121. In ***Mohan Meakin Ltd. vs. State of Himachal Pradesh [(2009) 3 SCC 157]***, the Supreme Court followed the decision in ***Kerala Samsthana Chethu Thozhilali Union.***

122. The argument "take or leave it" cannot be advanced on behalf of the State at least insofar as the manufacturers are concerned. Once an industry is set up at a huge cost, providing for employment opportunities and the development of ancillary industries, to the people of the State, the survival of the industry, cannot be thrown at the mercy of State on the ground that the industry has the option either to get the license renewed or to shut down. In these days when the Governments of each State compete with one another to woo industrial houses to set up plants in their States, it is not open to the Government to contend that they have a choice to take it or leave it.

123. While the Courts will be loathe to interfere in matters of contract between the State and private parties, the Courts can always identify statutory contracts as distinguished from non-statutory contracts and test the terms and conditions of the contract on the touch stone of statutory prescriptions. Therefore, the first contention of the learned Senior Additional Advocate General has to be rejected.

124. It is true that the State is the exclusive owner of the privilege to trade in liquor. It is also true that there is no fundamental right in any citizen to do trade or business in intoxicants. In ***Nashirwar vs. State of Madhya Pradesh [(1975) 1 SCC 29]***, the Court explained that the trade in liquor has always stood on a different footing from other trades. It was also clarified that the State has the exclusive right or privilege of manufacture and sale of intoxicating liquor and that therefore, the consideration charged for the grant of such privilege, is neither a tax nor excise duty.

125. After citing with approval, the decision in ***Nashirwar***, a Constitution Bench of the Supreme Court held in ***Har Shankar vs. Deputy Excise and Taxation Commissioner [(1975) 1 SCC 737]*** that the power of the Government to charge a price for parting with its rights and not the mode of fixing that price, that constitutes the essence of the matter. In paragraph 56 of the said decision, the Constitution Bench drew a distinction between a tax and a fee and indicated that the fixed fee charged to the vendors of foreign liquor need not bear any *quid pro quo* to the services rendered to the licensees. The Constitution Bench also traced the power of the Government to enter into contracts in this regard, to Article 298. To this extent, the learned Senior Additional Advocate General is right that the issue lies in the realm of contract. But beyond the same, nothing flows out of ***Nashirwar*** or ***Har Shankar.***

126. As we have pointed out earlier the contract entered into by the State in the form of a license, can always be tested with reference to the Statute and the Rules framed there-under. None of the aforesaid decisions prohibit the testing of the same.

127. Relying upon the observations of the Constitution Bench in paragraphs 15 and 16 of its decision, it is contended by the learned Senior Additional Advocate General that the petitioners who offered their bids in the auctions, did so with full knowledge of the terms and conditions attached to the auctions and hence they cannot be permitted to wriggle out of the contractual obligations. He also contended that the licensees offered their bids voluntarily in the auctions with full knowledge of the commitments which the bids involved. Therefore, he contended that it was not open to them to come to Court.

128. But as we have pointed out earlier, the petitioners in these cases are persons who already held licensees which came up for renewal year after year. The terms and conditions for the renewal, are indicated in the Annual Excise Policy Announcements. As rightly contended by the learned Senior Counsel for the petitioners, the applications for renewal of licenses are required to be made, as per Rule 11 of the Himachal Pradesh Liquor License Rules, 1986, before the end of December each year. But the Annual Excise Policy Announcements are made only in March. Therefore, there is no comparison between the cases on hand and the cases before the Supreme Court in ***Nashirwar*** and ***Har Shankar.***

129. Moreover, the petitioners before the Constitution Bench in ***Har Shankar*** were persons who committed default in payment of a portion of the license fee fixed in the auction. Even the annual license fee payable in installments, was not paid by them and when the arrears of license fee were sought to be recovered they came up with a contention that the arrears co-related to the unlifted quota in respect of remaining period of the lease.

130. But in the cases on hand all the petitioners have paid whatever is the fee fixed for the entire minimum guaranteed quota. What is sought to be recovered from them is the loss of revenue that the State allegedly suffered, in the form of duty of excise, due to the entire quota not being lifted. Therefore, the mantra of ***Har Shankar*** cannot produce the results, in these cases.

131. The reliance placed by the learned Senior Additional Advocate General on the decision of the Supreme Court in ***Rajendra Singh vs. State of Madhya Pradesh [(1996) 5 SCC 460]*** is also faulty for the very same reason. As seen from paragraph 3 of the said decision, the petitioner therein failed to pay even the bid amount and committed default. ***Cases where there is default in payment of the bid amount stand on a different***

footing from cases where the bid amount is paid in full, but an additional fee levied for failure to sell a fixed quantity, comes under challenge.

132. Placing strong reliance upon the decision of another Constitution bench in ***State of Punjab vs. Devans Modern Breweries Ltd. [(2004) 11 SCC 26]***, it was contended by the learned Senior Additional Advocate General that once it is accepted that what is sought to be levied is part of the privilege price, then the licensees had an option to opt out of the business, in case such levies were considered by them to be detrimental to their interests. Our specific attention is drawn to the last line of paragraph 103 of the report in the said decision. Drawing our attention to paragraphs 116, 119 and 121 of the report it is also contended by the learned Senior Additional Advocate General that the persons who had entered into a contractual relationship with the State cannot turn around and question the terms and conditions of the contract.

133. But as we have pointed out earlier, the power to enter into a contract, which is recognized by Article 298 of the Constitution is regulated by the Himachal Pradesh Liquor License Rules. Therefore, the terms and conditions of the license, can always be tested within the four corners of the Statutory Rules for finding out whether they run contrary to the Rules or not.

134. The next contention of Mr. Ajay Vaidya, learned Senior Additional Advocate General, is that the petitioners have not chosen to challenge the fixation of minimum guaranteed quota under the policy conditions but have merely challenged the levy of additional fee and penalty for the failure to lift the minimum guaranteed quota. Therefore, it is his contention that a person who does not question the imposition of an obligation cannot challenge the imposition of certain consequences flowing out of non-compliance with the obligations.

135. The above contention is fairly justified. Persons who did not question the fixation of minimum guaranteed quota, cannot come and contend that even if they failed to fulfill their contractual obligations, no consequences should follow.

136. But on the above sole ground, it is not possible for us to throw the writ petitions out. The reason is that the failure to fulfill the terms and conditions of license does not result in the only consequence of imposition of additional fee and penalty. It may also lead to other consequences such as the cancellation of license. So long as all the consequences of the failure to lift the minimum guaranteed quota are not challenged and so long as only one of the consequences of the breach of the license conditions is challenged, the writ petitions are maintainable, even without a challenge to the obligation imposed under the policy conditions. Therefore, this contention of the learned Senior Additional Advocate General has to be rejected.

137. The next contention of the learned Senior Additional Advocate General revolves around Entries 8 and 51 of List-II of the Seventh Schedule to the Constitution. While Entry 8 relates to production, manufacture, possession, transport, purchase and sale of intoxicating liquors, Entry 51 relates to duties of excise on alcoholic liquors manufactured or produced in the State. This contention of the learned Senior Additional Advocate General is intended to drive home the point that the State has the exclusive privilege to deal in liquor.

138. We have no quarrel with the above proposition. Right from **Nashirwar** and **Har Shankar** up to the latest decision in **Devans,** the Supreme Court has again and again confirmed this position.

139. It is next contended by Mr. Ajay Vaidya, learned Senior Additional Advocate General that condition No. 1.1 of the Policy Announcements for the year 2014-15 made it clear that liquor licenses are granted, subject not only to the provisions contained in the Act and the Rules, but also subject to the licensee fulfilling any other obligation as imposed by the orders of the Excise and Taxation Commissioner. Even in the distillery licenses issued in

Form D-2, a condition is incorporated that the licensee should fulfill all the directions of the Excise and Taxation Commissioner. Therefore, it is contended that even the terms and conditions of contract recognize the power of the Excise and Taxation Commissioner to impose certain obligations not expressly provided by the Act and the Rules.

140. We have no difficulty in accepting even this contention. As a matter of fact, the Financial Commissioner has power by virtue of Section 28 of the H.P. Excise Act, 2011 to issue directions even with regard to payment of fees for the grant of licenses, permits and passes. Similarly, condition No. 1.1 of the Policy Announcements confers power upon the Excise and Taxation Commissioner to impose obligations that may not be traceable to the Act and the Rules. Thus, there are sufficient safeguards for both the Financial Commissioner and the Excise and Taxation Commissioner.

141. But it does not mean that either the Financial Commissioner or the Excise and Taxation Commissioner can impose an obligation, which runs contrary to an obligation imposed by the Act or the Rules. It is always permissible for us to test whether an additional obligation imposed by the Excise and Taxation Commissioner as per condition No. 1.1 of the Policy Announcements, runs contrary to any Rule. It is well within our jurisdiction to test whether the field sought to be covered by the Excise and Taxation Commissioner is already occupied by the provisions of the Act or the Rules. In the case on hand, Rule 35-A(22) appears to hold the field. Therefore, we can certainly invoke the theory of occupied field and test whether there is any repugnancy.

142. Placing reliance upon the decision of the Supreme Court in **Rajendra Singh vs. State of Madhya Pradesh [(1996) 5 SCC 460],** it is contended by Mr. Ajay Vaidya, learned Senior Additional Advocate General that the jurisdiction of the High Court under Article 226 is not intended to facilitate the avoidance of obligations voluntarily involved. It was held in said case that even in cases where there are complaints of violation of statutory Rules and conditions, it must be remembered that the violation of each and every provision does not furnish a ground for the Court to interfere.

143. We do not know how the decision in **Rajendra Singh** can be pressed into service on behalf of the respondents. As in the case of **Har Shankar, Rajendra Singh** was also a case where a person who became the highest bidder for a certain number of liquor shops, failed to pay even the bid amount in monthly installments. When the shops were re-auctioned, they fetched a lesser amount giving rise to a claim for payment of the differential amount in terms of the contract. When this demand was challenged and the matter landed up in Supreme Court, the Supreme Court observed that several considerations indicated in the decision should be kept in mind while examining complaints of violation of statutory Rules.

144. But we have to keep in mind, a fundamental difference between cases where a party to a contract attempts to wriggle out of the contract on the ground of violation of the procedure prescribed by law, and cases where the conditions of contract are challenged as being violative of statutory prescription. In the case on hand, at least the retailers pitch their claim on the ground that the impugned policy conditions run contrary to the statutory Rules. This is an issue not covered by the decision in **Rajendra Singh.**

Conclusion:

145. We made, in the course of hearing, four pointed queries to the learned Senior Additional Advocate General. After getting instructions from the officials of the respondents, the learned Senior Additional Advocate General submitted the response of the Department to those queries. The queries made by us and the response of the State are presented in a tabular column as follows:

Sr. No.	***Query***	***Answer***

1.	*Rule 35-A(22) notified on 06.04.2009. Sub Rule 22: was it introduced in 2009 and has it undergo any change till date?*	*The Rule was introduced on 06.04.2009 vide Notification No. 7-155/2008-EXN-9076-95 dated 31.03.2009 published on 06.04.2009. There has been no amendment notification issued by the Financial Commissioner (Excise) therefore, no change has been carried out in the Rule 35-A(22) till date.*
2.	*Does this rule applied to Whole Sellers/Retails/Manufacturers/or does it apply to Retailer only?*	*Rule 35-A of the H.P. Liquor Rule, 1986 is the main Rule and has been specifically made "Subject to Rule 34 of these Rules". Accordingly, rule 35-A(22) is applicable to retail sale licensees.*
3.	*Does it apply to all or only one?*	*Hence, it does not apply to all i.e. (a) Manufactures, (b) Whole Sellers and (c) Retailers, but it only applies to Retailers.*
4.	*What was the necessity for imposing the condition 4.3 in the annual Excise Policy?*	*The condition No. 4.3, 10.28(8) and 10.29 of the Excise announcement was approved by the State Govt.* *The gist of reasons for introduction of para 4.3 and 10.29 which is as under:* *Non-lifting of remaining 20% quota resulting in Revenue loss. (para 4.3)* *The percentage level of capacity utilization of certain Plants was below 6% of their Annual Production capacity, but are still continuing. However their indulgence in the clandestine activities of evasion of levies cannot be all together negated. Therefore, regulation of the activities of such Plants has become necessary in the interest of Govt. Revenue. (para 10.29)*

146. It is clear from the above, that insofar as the retailers are concerned, the obligation to lift the minimum guaranteed quota, as fixed by the concerned Authority year after year, is imposed by Rule 35-A(22) of the H.P. Liquor License Rules, 1986 itself. The consequences that would fall upon the licensees in the event of their failure to fulfill this obligation, are also spelt out in Rule 35-A(22) itself. Therefore, what is left by Rule 35-A(22) to the executive is only the determination of the minimum guaranteed quota every year.

147. To put it in simple terms, there are three issues to be addressed. They are: (i) the obligation to lift the minimum guaranteed quota; (ii) what actually is the minimum guaranteed quota in a particular year; and (iii) what are the consequences of failure to lift the minimum guaranteed quota.

148. Rule 35-A(22) occupies the field in respect of issues (i) and (iii). It leaves issue (ii) alone to be determined by the executive, year after year, depending upon the average annual consumption in the State, district-wise. Therefore, what is left unoccupied by the statutory Rules, where the executive can have a play in the joints, is the fixation of minimum

guaranteed quota every year. Since the other two issues fall in the occupied field, the respondents cannot issue Annual Policy Announcements, without amending the Rules.

149. Just as a Statute cannot override the Constitution and just as a Rule cannot override a Statute, an executive instruction cannot override a Rule. Fixing a rate of additional fee and a rate of penalty, by ignoring the rate of additional fee stipulated in Rule 35-A(22), would tantamount to executive instructions overriding the statutory Rules. Therefore, condition No. 4.3 of the Excise Policy announced in respect of the years 2013-14, 2014-15, 2015-16 and 2016-17, is *ultra vires* Rule 35-A(22) and hence, all the writ petitions of the retailers challenging condition No. 4.3, deserve to be allowed. But we are obliged to point out that the respondents are entitled to collect the additional fee at the rate and in the manner prescribed in Rule 35-A(22), for all these years in question, including the years from which and during which, the Rule had been in force.

150. Insofar as the wholesalers and manufacturers are concerned, the Rules are silent about any obligation to lift the minimum guaranteed quota. Therefore, it is open to the respondents to fill up this void, in the form of Annual Policy Announcements, as held by the Supreme Court in **Surinder Singh,** which was followed in **Orient Paper Mills.**

151. But since what is sought to be collected by way of additional fee and penalty, is as per the terms of the contract, they can be tested in terms of the provisions of the Contract Act. When so done, it is found that the wholesalers and manufacturers are imposed with a financial burden, not for their own failure to fulfill the contractual obligations, but for the failure of third parties namely retailers to fulfill their obligations. We have elaborated this position elsewhere while dealing with the second contention of the manufacturers. In addition, the additional fee and penalty sought to be collected from all the three categories of persons, exceeds the loss of revenue that the State would suffer in the form of excise duty. We have given detailed mathematical calculation with regard to the same. For one act of failure on the part of one of the three parties, which results in the loss of revenue in the form of duty of excise to the extent of a particular amount, it is unreasonable to impose a burden upon all the three categories of persons resulting in the collection of more amount than what was lost by way of duty of excise. Therefore, condition Nos. 10.28(A) (8) and 10.29 of the policy conditions for the year 2014-15, insofar as manufacturers and wholesalers are concerned, are liable to be set aside.

152. Therefore, in fine-

(A) the writ petitions filed by the manufacturers and wholesalers are allowed and condition Nos. 10.28(A) (8) and 10.29, insofar as they impose the burden of additional duty and penalty for failure to lift the minimum guaranteed quota are set aside, however with a rider that they shall pay the license fee for the entire minimum guaranteed quota; and

(B) the writ petitions filed by the retailers are partly allowed and condition No 4.3 of the policy announcements for all the 4 years namely 2013-14 to 2016-17 are set aside, with a rider that the retailers will be liable to pay the license fee for the entire minimum guaranteed quota together with the additional fee as stipulated in Rule 35-A (22) of the Himachal Pradesh Liquor License Rules, 1986 for all the years during which the said rule is in operation.

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