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Code of Criminal Procedure, 1973- Section 319- An application for impleadment was filed on the ground that G had sworn an affidavit that he had issued the disputed dishonoured cheque- hence, he be impleaded as a party- the application was rejected by the Trial Court – held that G had admitted that the cheque was issued as a security for the sum of money borrowed by him from the complainant- in these circumstances, the application was rightly rejected by the Trial Court- petition dismissed.

Title: Devinder Singh Vs. Mehar Chand Page-195

Code of Criminal Procedure, 1973- Section 319- An application for impleading the accused was filed by the prosecution, which was allowed by the Trial Court- aggrieved from the order, the present petition has been filed contending that the names of the accused were not mentioned in the FIR and the statement made by the complainant in the Court against them cannot be accepted- held that husband of the complainant had written to the Superintendent of police for taking action against the petitioner – nothing was shown in the cross-examination of the complainant to falsify her statement in the examination-in-chief regarding the involvement of the petitioner – there is no infirmity in the order of Trial Court – petition dismissed.

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Code of Criminal Procedure, 1973- Section 320- Matter was compounded before the Appellate Court on the basis of the consent given by Learned Public Prosecutor- held that the effect of the composition shall be acquittal – the mere fact that Appellate Court had not mentioned it in the order will not make any difference – appeal dismissed.

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Code of Criminal Procedure, 1973- Section 320- The matter was compromised between the accused and the legal representatives of the deceased complainant- a revision was filed against

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Code of Criminal Procedure, 1973- Section 397- Charge was framed for the commission of offences punishable under Sections 420 and 120-B of IPC and 13(2) of Prevention of Corruption Act, 1988 - case of the prosecution is that K had executed a Will – the petitioner made a wrong declaration that he is a citizen of India – the certificate is found to be fake on which the charge sheet was filed – held that the petitioner was born in Ladakh and is a Tibetan national as per the form submitted for registration of foreigners – his year of birth was mentioned in the form as 1967, whereas, it was mentioned as 1960 in the identity card issued by Election Commission of India and 1960 in the passport – the school record collected by Investigating Officer has not been connected to the petitioner – as per Citizenship Act, a person born in India after 26th January, 1950 but before 1st day of July, 1987 is a citizen of India – the petitioner is to be treated as a citizen of India – the petition allowed- the order of framing charge set aside.
Title: Ming Ching Dorje Vs. State of H.P. Page-801

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offence punishable under Section 420 of I.P.C- petitioner claims that he is innocent and has been falsely implicated- he is joining investigation and is not in a position to flee from the justice- he has aged parents and two minor children, on these grounds the pre-arrest bail was sought- police filed a report stating that petitioner is not disclosing the truth- chassis number was tempered and the vehicle was sold- there is involvement of other persons as well- held that petitioner is involved in the sale of the truck and is responsible for the change of registration number of truck- petitioner is not co-operating with the police and is not telling the truth- investigation is at initial stage- hence, discretion of grant of bail cannot be exercised in favour of the petitioner- petition dismissed.
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Code of Criminal Procedure, 1973- Section 439- An FIR was registered for the commission of offence punishable under Section 420 read with Section 34 of I.P.C and Sections 6, 7, 8 and 9 of Lotteries Act (Regulation) and Sections 3, 4 and 6 of the Prize Chit and Money Circulation Schemes (Banning) Act, 1978 with the allegations that petitioner and other Directors had allured the people with attractive prizes and bumper prize of car – 800 people joined the scheme but only 66 were given prizes and remaining 73 people did not get anything- Rs. 40 lacs were embezzled in this manner – the petitioner filed an application seeking bail pleading that she has been falsely implicated and investigation has not been conducted fairly – held that the petitioner and other co-accused had dealt with the money of others and they have not returned the money – the money was taken on the false promise of the award of gifts - a prima facie case is made out against the petitioner and co-accused - in case of bail, the petitioner will flee from justice – the bail cannot be granted to the petitioner in these circumstances- the petition dismissed.
Title: Manju Bala Vs. State of Himachal Pradesh Page-351

Code of Criminal Procedure, 1973- Section 439- An FIR was registered for the commission of offences punishable under Sections 302, 341, 323, 325 and 504 read with Section 34 of IPC against the petitioner – the petitioner has filed the present petition seeking bail – held that the there is a likelihood that petitioner may tamper with the prosecution evidence and may flee from justice- the petitioner is involved in a heinous offence and cannot be enlarged on bail- petition dismissed.
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Code of Criminal Procedure, 1973- Section 439- FIR was registered for the commission of offence punishable under Section 376 of I.P.C. – the petitioner filed an application for bail – held that the offence alleged against the accused is heinous offence committed against a mentally challenged lady – the accused can influence the investigation- the discretion of bail cannot be exercised in his favour- petition dismissed.

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Code of Criminal Procedure, 1973- Section 457- JCB machine was seized by the police in connection with FIR registered under Section 353, 504 and 506 of I.P.C in police Station, Kala Amb- application for release was rejected by CJM and the revision was dismissed by Sessions Judge – held that the accused and his brother were found to be involved in illegal mining on earlier occasions – a vehicle involved in the mining activities is liable to be confiscated – police was competent to seize the vehicle – however, the challan was not filed under Mining Act, therefore, vehicle ordered to be released on sapurdari bond of Rs. 2 lac with one surety in the like amount- SP directed to look into the reason for not filing the challan under Mining Act- the Court directed to look into the applicability of Mining Act, if challan is filed under the same.

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Code of Criminal Procedure, 1973- Section 482- A complaint was filed for the commission of offences punishable under Sections 403, 405, 406, 415, 417, 418, 420, 499, 500 and 120-B pleading that the complainant was approached by accused No. 6 for investing in a housing project to be constructed in District Sonipat- promise was made to deliver possession by the end of 2014 and not later than January, 2015 – the complainant decided to buy 4-BHK independent apartment for Rs. 46,79,000/- - the accused appropriated the money and constructed 2-BHK and 3-BHK apartments as they were in higher demand – the Trial Court summoned the accused under Sections 417, 418 and 420 for trial- the accused filed the petition pleading that the complaint discloses the matter of civil nature – the Court had wrongly summoned the accused – held that the accused had assured that the facility will be available in the express city – the complainant had invested the money to buy second floor in a building at a far off place, which had no amenities – the amount invested by the complainant has been utilized for the construction of type-II and type-III quarters – the possession was not delivered to him despite the receipt of the money – the Trial Court had passed a reasoned order while summoning the accused- the Trial Court had jurisdiction to pass the order- the petition dismissed.

Title: Vijay Goyal, Director of Express Projects (Pvt.) Ltd. Vs. Lt. Col. Vivek Gupta Page-380

Code of Criminal Procedure, 1973- Section 482- A petition for maintenance was filed pleading that marriage between the parties was solemnized in accordance with Hindu rites and custom- one child was born – the husband started treating the wife with cruelty – the petition was allowed and maintenance @ Rs. 5,000/- per month was awarded to the wife – aggrieved from the order, the present petition has been filed pleading that maintenance of Rs. 15,000/- per month had already been awarded by Additional District Judge in exercise of matrimonial jurisdiction – this amount was not taken into consideration by the Court below – hence, it has been pleaded that order be set aside – held that the marriage is not disputed – it is also not disputed that parties are residing separately – husband is a contractor having good business and wife is totally dependent upon him- considering the status of the parties and their standard of living, the maintenance is not excessive- petition dismissed.

Title: Ashwani Kumar Vs. Sunita Kumari Page-225

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 420, 467, 468, 471, 120-B, 201 IPC read with Section 13(2) of the Prevention of Corruption Act, 1988 stating that the accused No. 1 had got sponsored the

name of his daughter and accused No. 2 had got sponsored the name of his son-in-law whereas they were not eligible – present petition was filed for quashing the FIR and the consequent proceedings on the ground that accused had no role to play in the selection of the candidates and the committee was constituted by the State Government – held that the FIR and consequential proceedings can only be quashed if the Court is satisfied that no conviction can be recorded against the accused on the basis of material collected by the prosecution – accused No. 1 was posted as clerk in sub-employment exchange- names of 10 candidates were sponsored – names of the daughter of accused No. 1 and son-in-law of accused No. 2 were not on the list – the accused prepared a forged and fictitious list in which their names were included – signature of the sub-employment officer was forged- there is sufficient material against the accused and the FIR cannot be quashed – petition dismissed.

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Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offence punishable under Section 498-A read with Section 34 of I.P.C- the matter has been compromised by the parties- informant stated that she is not interested in pursuing the matter after the compromise – held that the offence punishable under Section 498-A is not compoundable – however, the High Court can quash the FIR and the consequent proceedings while exercising its inherent powers – the parties are residing under the same roof and no useful purpose would be served by allowing the criminal proceedings to continue – petition allowed, FIR and the consequent proceedings ordered to be quashed.

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Code of Criminal Procedure, 1973- Section 482- FIR was lodged for the commission of offences punishable under Sections 353 and 332 of IPC against respondent No. 4 – respondent No. 4 filed a complaint before the Court after one month of the registration of FIR – The Court took cognizance and summoned the petitioner- petitioner filed the present petition for quashing the proceeding – held that once the commission of cognizable offence was disclosed by the complaint , the Court had no option but to take cognizance – registration of FIR is no bar for filing of the complaint – the Court cannot look into the merits of the case- petition dismissed.

Title: Suraj Bali Vs. State of H.P. and others Page-740

Code of Criminal Procedure, 1973- Section 92 and 311- An application for recalling PW to produce certain photographs was filed by the prosecution which was allowed by the Trial Court – held that the PW had tried to produce the photographs but it was not allowed in absence of any permission from the Court – the court has the power to recall a witness for just decision of the case – the production of photographs is necessary for determining the lis – the petition dismissed.

Title: Om Prakash Sahani & another Vs. State of H.P. Page- 453

Constitution of India, 1950- Article 226- A news item was published regarding the rape and murder of 8 year girl- status report shows that the accused has been apprehended and sent to judicial custody- the investigation is nearing completion and the report of FSL is awaited – the State has taken appropriate action in the matter – proceedings closed with a direction to the Investigating Officer to complete the investigation and to present the challan in the Court at the earliest.

Title: Court on its own motion Vs. State of H.P & others CWPIL No.97 of 2017 (D.B.)
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Constitution of India, 1950- Article 226- A news item was published in the newspaper, according to which forest mafia had felled trees worth several crores- dead body of forest guard was found in jungle- directions were issued to the authorities to file affidavits/status reports-

investigation was transferred to CID by the State- Court directed CBI to investigate into the matter – however, police filed a status report that investigation is at an advance stage and challan would be filed soon - the State also took a decision not to refer the matter to CBI- held that from the affidavits it is apparent that deceased was posted as a forest guard and was discharging his duties pro-actively – he had reported the illicit felling of trees to higher authorities- his dead body was found hanging from the tree- the bag containing a vial of poison was also recovered near the dead body – suicide note mentions the names of certain persons including forest officers- another suicide note was recovered in which the deceased had expressed pain, anguish and shock regarding the manner in which affairs of department were being conducted – deceased had suffered multiple injuries which were ante mortem in nature- all the FIRs were being investigated by the different agencies- directions issued to CBI to investigate into the matter by constituting a Special Investigating Team of not less than three officers, to hand over the record to CBI and to take action against the erring officers.

Title: Court on its own Motion vs. State of Himachal Pradesh & others CWPIL No. 55 of 2017 (D.B.) Page-290

Constitution of India, 1950- Article 226- A survey was conducted for establishing a new Government College at Ranital District Kangra but the college was opened at a different place known as Takipur that too without any proper infrastructure – aggrieved from the decision of the government, the present writ petition has been filed- held that a Court will not interfere with the policy decision unless the action of State is erroneous, unreasonable, irrational or illegal – the issue raised is purely political in nature and the Court should not interfere with the same – the decision was taken in great haste without obtaining necessary permissions from the Competent Authorities but the steps are being taken to complete the formalities – 50% of the work has been done and remaining would be completed at the earliest – Takipur is at a short distance of 5 k.m. from Ranital- it is well connected and on the highway- it has more feeding area than Ranital - the excess area of the school is being used to house the college and there is no infirmity in the same – petition disposed of with a direction to obtain the necessary clearance within four weeks and in case of default to stop the construction and to ensure the availability of adequate infrastructure and staff.

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Constitution of India, 1950- Article 226- **Administrative Tribunal Act, 1985**- Section 15- The process of filling the posts of Takniki Sahayaks was initiated by the Executive Officer, Panchayat Samiti as per the scheme formulated by the Government of H.P. to ensure the quality and cost effectiveness of civil works being carried out by the Gram Panchayat – the question is whether Takniki Sahayaks hold civil post or not – held that the posts of Takniki Sahayaks are not statutory posts – they are being created in terms of the scheme – panchayat sahayaks do not carry on any function of the State, they do not hold post under the statute, their posts are not created, recruitment rules applicable to the employee of the State are not applicable to them and the process of selection for their appointment does not fall within the constitutional scheme – they do not hold any civil post and Tribunal does not have jurisdiction over them.

Title: Santosh Vs. State of H.P. & others Page-310

Constitution of India, 1950- Article 226- Applications were invited for filling up the posts of Water Guard- petitioner applied for the post – Interview Committee awarded highest marks to respondent No. 6- held that no allegation of malafide was made against the members of selection committee- respondent No. 6 had secured highest marks in matriculation examination- he had not annexed any experience certificate or BPL Certificate, whereas certificates were annexed by respondent No. 6- Selection Committee had correctly held the respondent No. 6 is entitled to the job- petition dismissed.

Title: Sanjeev Kumar Vs. State of H.P. and others Page-527

Constitution of India, 1950- Article 226- Deceased was a Junior Engineer in Public Works Department – he died in an accident on 19.11.2006 on collapse of a bridge during its load testing – the petitioner is the wife of the deceased who has filed the present writ petition seeking compensation for the death – respondents No. 1 to 4 pleaded that it was the obligation and responsibility of respondent No. 5 to pay damages against any loss or injury which might occur to any person by or arising out of carrying out the contract – held that the death of the deceased during the course of employment is not disputed – according to inquiry report, the construction of bridge was responsibility of the firm and safety measures were to be taken by the firm in consultation with departmental officers – inquiry report also stated that the procedures were not followed while load testing of the bridge which led to its failure – respondent No. 5 did not appear in the Court to give its version – the bridge was being constructed by respondent No. 5 on behalf of respondent No. 1- the bridge would not have collapsed in normal circumstances and respondent No. 5 was to explain the cause of the failure which was not explained – the negligence is proved by the report of the inquiry committee – the fact that compassionate appointment was provided to the family members will not help as the compassionate appointment is provided in all cases of death of employees – there was no contributory negligence on the part of the deceased – the deceased was drawing salary of Rs. 12,704/- per month and after deducting 1/3rd share, the loss to legal heirs comes to be Rs. 8,470/- per month or Rs. 1,01,640/- per annum- the age of the deceased was 41 years and multiplier of 15 will be applicable – the amount of compensation payable would be Rs. 15,24,600/- - the legal heirs are thus held entitled to a compensation of Rs. 15 lacs with interest @ 7.5% per annum.

Title: Bhanu Devi Vs. State of H.P. & Ors. Page-405

Constitution of India, 1950- Article 226- Department of Medical Education and Research, Himachal Pradesh, issued a Prospectus-cum-Application Form for admission to the Postgraduate Degree (MD/MS) Courses, in Indira Gandhi Medical College & Hospital, Shimla, and Dr. Rajindra Prasad Medical College and Hospital, Tanda, District Kangra, Himachal Pradesh providing a condition that selected candidate for PG Degree/diploma will have to execute a bank guarantee of Rs. 10 lacs (Rs. 3 lacs in 1st and 2nd year respectively and Rs. 4 lacs in third year) - the condition was challenged as unreasonable, irrational, illogical and illegal, and the condition having not been imposed in the past etc. – held that the condition was contained in the prospectus – prospectus is a complete code in itself – candidates seeking admission under the prospectus are bound by the terms and conditions contained therein- the petitioner did not challenge the condition prior to or during the process of selection – further, the candidates are being paid stipend, which is more than the amount of bank guarantee – any candidate of all India quota who does not take stipend is exempted from the condition – the purpose is to ensure the availability of best medical care and facilities to the natives residing in remote far-flung and tribal area – Court cannot interfere with a policy decision, unless the same is unreasonable, irrational, illogical and illegal – the policy can be altered with the change in circumstances – the condition cannot be said to be unreasonable – petition dismissed.

Title: Dr. Ramesh Kaundal and others Vs. State of H.P. & others (D.B.) Page-373

Constitution of India, 1950- Article 226- Land was recorded in the ownership of petitioner and others but was in exclusive possession of petitioner as well as one H – the share of H was mutated in favour of the petitioner – land was allotted to the petitioner under consolidation – respondents No. 3 and 4 filed a revision claiming the allotment on the basis of the judgment and decree passed by Civil Court – revision was allowed by Divisional Commissioner- the order of Divisional Commissioner has been assailed by the present writ petition- held that Civil Court had granted a decree declaring the parties to be joint owners- Divisional Commissioner had only ordered the correction of revenue entries in accordance with the judgment – the revenue officials are otherwise under an obligation to give effect to the decree of the Civil Court- there is no infirmity in the order passed by revenue court – petition dismissed.

Title: Bhim Singh Vs. State of Himachal Pradesh and others Page-690

Constitution of India, 1950- Article 226- Petitioner aged 19 years and having mild to moderate mental retardation has filed the writ petition for abortion of foetus on the ground that it is risky for her to complete the normal period of pregnancy and to deliver the child – the medical board was constituted, which submitted the report that due to abnormal growth of foetal head, life of foetus is in danger- normal delivery is not possible in these circumstances and there can be danger to the life of the mother as well - the petition disposed of with a direction to arrange for the termination of the pregnancy and to preserve the DNA of the foetus for use during the investigation, inquiry, and trial in a criminal case.
Title: Geeta Devi Vs. State of H.P. and others (D.B.) Page-664

Constitution of India, 1950- Article 226- Petitioner applied for the post of clerk but failed to qualify the written test – he filed the present writ petition seeking direction to display the key answer sheet of the test – held that no allegations of mala fide were made against the respondents – the petitioner approached the court when the vacancies were already filled and selected candidates had received their appointment orders – the Rules do not provide that the answer key shall be displayed – writ petition dismissed.
Title: Baldev Singh Vs. High Court of H.P. (D.B.) Page-476

Constitution of India, 1950- Article 226- Petitioner challenged the scheme, whereby the taking of insurance was made compulsory for loanee apple cultivators as violative of Article 14 – held that the scheme was framed for implementation of Pilot Weather Based Crop Insurance Scheme (WBCIS) in which insurance of the crop was made compulsory for the farmers who had obtained loans from various lending institutions and it was made optional for non-loanee farmers – the classification between loanee farmers and non-loanee farmers is based upon intelligible differentia which has a nexus with the object of protecting the interest of lending institution and the farmer- no such protection is required in case of non-loanees – the scheme is not violative of Article 14 – petition dismissed.
Title: Prem Sharma Vs. State of HP and others Page- 636

Constitution of India, 1950- Article 226- Petitioner challenged the appointment of respondent No. 2 as Chief Librarian- the petitioner claimed that she was appointed in the service in the year 1988 whereas respondent No. 2 was appointed in the year 1992 – she is senior to respondent No.2 and should have been considered for the post in preference to respondent No.2 – held that respondent No.2 had discharged the duties of Assistant Librarian and Librarian – he had more experience for the post- his appointment as Assistant Librarian and Librarian was not challenged- the feeder category for the post of Chief Librarian is Librarian – the petitioner was drawing a salary equivalent to the salary of Librarian but this will not make her eligible for holding the post of Chief Librarian- petition dismissed.
Title: Sanjokta Thakur Vs. High Court of H.P. & others (D.B.) Page-684

Constitution of India, 1950- Article 226- Petitioner claims to be a registered society-its grievance is that the work of transportation of clinker etc. is not being provided to its members despite the fact that they are covered by the scheme for the resettlement and rehabilitation of oustees of ACC Cement Factory, Gaggal, District Bilaspur- held that definition of oustee provided under Clause-2 of the scheme shows that oustee is a member who has been deprived of his house, land or path on account of acquisition proceedings in connection with the construction of ACC Cement Factory, Gaggal- members of the petitioner society are not covered under the definition of oustees and have no right to claim benefits granted to the oustees- scheme is for the settlement of oustees of ACC Cement Factory, Gaggal, District Bilaspur and cannot be availed by others - ACC is neither State nor authority and no writ can be issued against it - no infringement of right has been established- petition dismissed.
Title: Maa Sheetla Associated Cement Company Vs. State of HP and others
Page-259

Constitution of India, 1950- Article 226- Petitioner is a president of the school management committee and has been authorized to file the present writ petition by the Committee by passing a resolution – permission was given by respondent No. 2 to exchange the land in view of the land encroached by respondent No. 7 – a writ petition was filed for quashing the permission and to initiate the proceedings for encroachment – held that respondent No. 7 had agreed to exchange the land found to be have been encroached by him after demarcation – the permission was granted for the exchange by the Competent authority – the land exchanged by respondent No. 7 is more valuable and situated adjacent to the school which can be utilized by the school for its activities – the exchange was in the best interest of the school – petition dismissed.

Title: Gian Chand Vs. State of H.P. and others (D.B) Page- 419

Constitution of India, 1950- Article 226- Petitioner was appointed as a Class-IV employee in the respondent-Board in the 2004- the post of Sanitary Inspector/Male Health Supervisor was advertised for which the minimum prescribed qualification was Diploma in Sanitation- the petitioner was selected and appointed as Sanitary Inspector/Male Health Supervisor – he joined the post in the year 2007 – a complaint was made regarding his appointment on the ground that he did not possess the diploma in sanitation- FIR was registered and petitioner was dismissed from service – the petitioner filed the present writ petition pleading that no inquiry was conducted and mere registration of the FIR is not sufficient – respondent pleaded that verification was conducted from Chancellor, Maghadh University, Bihar, Director Health Services, Bihar and Director Health Services, Himachal Pradesh - it was found that no course of Sanitary Inspector was conducted nor any certificate was issued in favour of the petitioner- held that the appointment of the petitioner was on probation for a period of two years – it was specifically provided that if any declaration given by the petitioner is found to be incorrect, his services were liable to be dismissed by the Board – the petitioner was dismissed on the ground that certificate submitted by the petitioner was not found to be genuine – the order was passed during the period of probation- the order is in accordance with the terms and conditions of the employment – the act of the employer is duly protected by the appointment order – there is no infirmity in the order- petition dismissed.

Title: Deepak Kumar vs. Cantonment Board Page- 697

Constitution of India, 1950- Article 226- Petitioner was appointed as Anganwari worker but her appointment was held to be bad by Additional Deputy Commissioner primarily on the ground that her income was in excess of the limit prescribed in the scheme/guidelines for the engagement of Angarwari workers- an appeal was filed, which was dismissed – held that inquiry report filed by Tehsildar, Shilai shows that the family income of the petitioner was in excess of Rs. 12,000/- - however, the family income of the petitioner was not determined by Tehsildar – it was incumbent upon the Tehsildar to state the actual family income of the petitioner – the authorities had wrongly relied upon the report of Tehsildar – appeal allowed – matter remanded to the Appellate Authority for deciding the appeal afresh by affording an opportunity of being heard.

Title: Babija Devi Vs. State of Himachal Pradesh and others Page-688

Constitution of India, 1950- Article 226- Petitioner was initially appointed as a constable in Border Security Force - he was dismissed from service for the commission of offence punishable under Section 40 of Border Security Force Act for permitting three civilians to cross the border along with three pairs of cattle – an appeal was filed, which was disposed of with a direction to modify the sentence from dismissal to three months rigorous imprisonment – an order of fixation of pay was passed – aggrieved from the order, the present writ petition has been filed – held that appellate authority had commuted the sentence of dismissal to three months rigorous imprisonment and had ordered that period of absence excluding the period of sentence of three months rigorous imprisonment be regularized by granting the leave of kind due – the petitioner

cannot be granted any benefit which was not granted by the Appellate Authority – the order of Appellate Authority was not assailed and has become final – petition dismissed.

Title: Deep Singh Vs. Union of India and others Page- 693

Constitution of India, 1950- Article 226- Petitioners were admitted to four year degree course under the respondent No. 2 – they completed their classes for the session 2014-2016 – they desired their transfer to different colleges of the State due to inadequate infrastructure and lack of quality education – the applications were rejected by respondent No. 1 on the ground that petitioner had not cleared the examination for the semesters for which they were imparted education – aggrieved from the order, the petitioners filed the present writ petition – held that petitioners have not cleared their first, second, third and fourth semesters examination – respondent No. 1 had issued various directions for complying with the norms fixed by All India Council for Technical Education (AICTE) – no grievance has been made by other students – a student is expected to pursue his studies diligently and clear the examination – permitting non meritorious students to migrate can bring bad name to the institution and university – there is no illegality in imposing condition of clearing the examination for the academic year for which migration is sought – the clause maintains educational standard and cannot be said to be arbitrary – petition dismissed.

Title: Sidhant Malhotra & others Vs. H.P. Technical University, Hamirpur & another Page-262

Constitution of India, 1950- Article 226- Respondent No. 2 had invited offers for flats which were to be raised at housing colony HIMUDA Apartment, Kasumpti- petitioner applied for allotment – flat No. 3 category II in Block No. 16 was allotted to the petitioner – the petitioner was told that the block was shifted to hillside – the petitioner claimed that location of flat was changed by respondent No. 2 without informing him– respondent No. 2 stated that the block was shifted as the construction on the earlier plan side was not feasible – the block numbers were also changed due to change in the entire block- respondent No. 3 objected and asked to restore the numbers as per the original plan- the flat numbers were maintained thereafter as per the original plan – held that the question raised by the petitioner involves highly disputed question of facts which cannot be adjudicated in exercise of jurisdiction under Article 226 of Constitution of India- the petition dismissed with liberty to approach the appropriate Court for the redressal of the grievance.

Title: Rajesh Kumar Tekriwal Vs. State of Himachal Pradesh & Ors. Page-704

Constitution of India, 1950- Article 226- Respondent No. 2 invited applications for the post of lecturers including lecturer in Material Science and Engineering- the petitioner was selected and was granted extension of joining time till 30.12.2009 subject to the condition that no further extension would be granted to him- the petitioner claimed that respondent No. 2 was aware that petitioner was selected for one year contract with University Montpellier 2 France for research in the field of nano technology – he was wrongly granted extension for a period of 6 months- held that petitioner had sought to improve his career prospect on his own and had accepted 12 months contract with the University at France- no consent was given by the respondent No. 2 for the same – the option lies with the petitioner to serve either at France or to report to the respondents- the interest of students has to be taken into consideration- maximum extension of 6 months can be granted which was granted in favour of the petitioner – no legal duty of the petitioner has been violated by the respondents – petition dismissed.

Title: Dr. Rajesh K. Sharma Vs. Union of India and others Page-134

Constitution of India, 1950- Article 226- Respondent was initially appointed in the year 1981 as Computer Operator in the Health Department of Himachal Pradesh – he superannuated on 31.1.2010 after attaining the age of 58 years – he claimed that he was deployed in various offices

to render the services of clerk but was not granted promotion as Assistant- the respondent claimed that different channel of promotion is available to the category of computer operator – the petitioner was never assigned the duties of clerk – writ court concluded that no promotional avenues are available for the post of computer operator – the work of clerk was taken from the petitioner – the petitioner was held entitled to two higher scales in the hierarchy of pay scales, one on the completion of 12 years and another on the completion of 24 years – held in appeal that Recruitment and Promotion Rules show that the computer operator is a feeder category for the post of Junior Statistical Assistant and Statistical Assistant- the rules for the post of statistical assistants were notified in the year 2011 and amended in 2013 – it was not explained as to why the petitioner was not promoted during his service- the petitioner worked on one post from 1981 to 2010, which amounts to stagnation – the writ court had rightly allowed the petition- appeal dismissed.

Title: State of Himachal Pradesh and others Vs. Surender Kumar Parmar (D.B.)

Page-189

Constitution of India, 1950- Article 226- Respondent/applicant filed an application for seeking various reliefs after he was allowed to voluntarily retire from service – the application was transferred to the High Court on abolition of the Tribunal – the Writ Court allowed the petition and directed the corporation to grant the benefit under FR 22 (c) as well as proficiency step up – aggrieved by the order, the present appeal has been filed pleading that after seeking voluntary retirement, the respondent/applicant cannot seek the benefit of past services – held that an offer of voluntary retirement gives rise to a concluded contract between employer and employee- once the benefits have been given to the employee, the matter cannot be re-opened by the employee – the writ Court had ignored this position of law – appeal allowed- judgment of writ Court set aside.

Title: HP Agro Industries Corporation Ltd. Vs. B.M. Dutt Page-487

Constitution of India, 1950- Article 226- Road was constructed without acquiring the land and without consent of the owners/petitioners- land of other villagers was utilized for the construction of the road by acquiring the same –the petitioners filed the present petition seeking direction to pay the compensation to them- the respondents stated that there is delay on the part of the petitioners – held that no express or implied consent of the owners has been proved- the State cannot discriminate between the citizens – a person has a constitutional right to the property – the State cannot deprive a person of the property except in accordance with law- the petition allowed- respondents directed to initiate acquisition proceedings for acquiring the land.

Title: Jai Parkash and others Vs. State of Himachal Pradesh and others Page-414

Constitution of India, 1950- Article 226- The writ petitioner claimed that the Housing Board was bound to provide double motorable road to his plot - his earlier writ petition was disposed of with a direction that any encroachment on the path would be removed and no allotment shall be made affecting the rights of the petitioner – personal hearing was given and additional land was allotted in favour of respondent No. 3 – held that the report of local commissioner shows that plot allotted to respondent No. 3 is located on the approach road and at the dead end of lane- 3 – the sale deed mentions the access from lane-3 – the claim that the petitioner has access from lane-2 and lane-3 is not correct and would constitute the violation of the lease deed – the authority had granted hearing to the petitioner and had passed a reasoned order – petition dismissed.

Title: R.S. Thakur Vs. H. P. Housing & Urban Development Authority and others

Page-148

Contempt of Courts Act, 1971- Section 12- Petitioner filed a writ petition, which was disposed of with a direction to the respondent to examine the case of the petitioner in the light of the judgments passed by the Court and to take a decision within a period of six weeks – the petitioner

claimed that respondent had violated the direction passed by the Court- the respondent passed an order dated 25.7.2015 and the applicability of the judgment passed by the Court was considered – a fresh order was passed in which the judgments were considered – it was observed that the case of petitioner was different from the cases of other persons in as much as appointment of petitioner was not in accordance with the Rules and hence, the petitioner was not entitled for the grant-in-aid – held that the case of the petitioner was considered - applicability of the judgments to his case were considered but they were not found applicable – the Court will exercise jurisdiction under Contempt of Courts Act cautiously and only where a clear case of breach of the order of the Court is made out – the petitioner has to prove his case beyond reasonable doubt – no violation of the judgment of the Court is made out in the present case- petition dismissed.

Title: Ganesh Dutt Vs. R.K. Pruthi (D.B) Page-347

'E'

Employees Compensation Act, 1923- Section 4- Commissioner saddled the insurance with liability to pay the interest – aggrieved from the award, present appeal has been filed – held that the insurer cannot be directed to satisfy the liability regarding the interest where the contract excludes the same- the policy did not exclude the payment of interest by the insurer in the present case – the Commissioner had rightly saddled the insurer with liability – appeal dismissed.

Title: M/s Daulat Ram and Mangat Ram Vs. Oriental Insurance Company and others Page- 598

Employees Compensation Act, 1923- Section 4- Compensation of Rs.4,01,300/- was awarded by the Commissioner – it was contended that deceased was not employed by C but by B – C had died during the pendency of the petition and was substituted by his legal representatives who have not denied the relationship between the parties- Insurance Company had also not taken a plea that there was no valid insurance – appeal dismissed.

Title: National Insurance Company Vs. Khanddo Lama & others Page-634

Employees Compensation Act, 1923- Section 4- Deceased had sustained burn injuries by coming into contact with the transmission line above the site of construction- Commissioner awarded compensation of Rs. 9,15,222/-- aggrieved from the order, present appeal has been filed- held that post-mortem report proves that deceased had suffered burn injuries- employer had not taken any steps to get the transmission line removed- deceased was carrying out the construction at that time of accident- there was delay in filing the petition but the reasons for the same were given which were duly supported by the evidence- deceased was earning Rs. 200/- per day- compensation was correctly assessed by the Commissioner- appeal dismissed.

Title: Manoj Kumar Tandan Vs. Kamla Devi Page-227

Employees Compensation Act, 1923- Section 4- Deceased was murdered by his co-employee who was convicted for the commission of offence punishable under Section 302 of I.P.C- it is not disputed that they were engaged on a vehicle- claim petition was allowed by the Court- held in appeal that the murder of the employee by co-employee during the course of employment will fall within the purview of Employees Compensation Act- deceased and convict were employed by the respondent No. 6- insurance was not taken by respondent No. 6, therefore, Insurance Company cannot be fastened with liability- appeal partly allowed and the liability fastened upon the respondent No. 6.

Title: Oriental Insurance Company Vs. Sushma Devi and others Page-515

Employees Compensation Act, 1923- Section 4- The Commissioner awarded the compensation of Rs. 5,84,800/- and funeral expenses of Rs. 5,000/- - the Board was directed to deposit the

amount within one month from the date of the order, failing which the interest was to be paid @ 12% per annum- aggrieved from the non-grant of interest, present appeal has been filed – held that the dependents of the workman were entitled to compensation from the date of accident – the employer is under an obligation to deposit the amount due under the Act and in case of failure to deposit the amount within one month from the date it fell due, the Commissioner can award interest @ 12% per annum or at such higher rate not exceeding the maximum of the lending rate – the amount was not deposited by the Board within time and the Commissioner erred in not awarding interest on the compensation- appeal allowed – claimant held entitled to interest @ 12% per annum on compensation amount from the date of accident.

Title: Mumtaz Vs. The Executive Engineer, Aug (E) Div. No.-2, H.P.S.E.B. Ltd.

Page-624

'H'

H.P. Panchayati Raj Act, 1994- Section 41- A claim was filed for share in the rental received from the Bharti Televenture Limited regarding the tower raised upon the land jointly owned and possessed by the claimants- Gram Panchayat passed an order and held the claimants entitled for the rental- held that in view of Section 41 of H.P. Panchayati Raj Act, 1994, Gram Panchayat cannot entertain any lis, subject matter of which exceeds Rs. 2,000/- but Section 53 permits a person to institute a case- claimants had initiated the proceedings and the bar of Section 41 will not apply to it- petition dismissed.

Title: Sushil Kumar Vs. Sham Kumar & others Page- 546

H.P. Tenancy and Land Reforms Act, 1972- Section 104(8)(d)- Petitioner joined the armed forces on 21.8.1963 and was discharged on 1.2.1991 – his father was owner of land and got inheritable share of the petitioner reserved to the extent of five acre – a note was made to this effect in jamabandi – the petitioner filed an application for resumption which was allowed and the petitioner was permitted to resume 1/8th share - an appeal was filed by the petitioner claiming 1/4th share, which was dismissed – the matter was remanded in further appeal – Financial Commissioner (Appeals) set aside the remand order and upheld the order of Land Reforms Officer – held that the property of the father of the petitioner was inherited by his four sons – only inheritable share of the member of armed forces on the date of joining can be reserved –when the petitioner joined armed forces, his father had four sons, three daughters and a wife- inheritable share of the petitioner was 1/8th – subsequently, the property was bequeathed to four sons but this would not have any effect on the inheritable share on the date of joining the armed forces - Financial Commissioner had rightly found that the petitioner was entitled to 1/8th share and there was no infirmity in the order passed by Land Reforms Officer who had ordered the resumption of inheritable share only –- Financial Commissioner had rightly passed the order – petition dismissed.

Title: Rajinder Mohan Vs. State of H.P. and others Page-427

H.P. Tenancy and Land Reforms Act, 1972- Section 118- The Government introduced a scheme by the name of "Incredible India Bed and Breakfast/Homestay Establishments" encouraging owners of the houses to allow the tourists to reside with them – Government of Himachal Pradesh notified the scheme known as Himachal Pradesh Homestay Scheme, 2008 – incentives and exemption from taxes were provided in the scheme – the petitioner registered the accommodation as a homestay – a notice was received by the petitioner to stop the commercial activity as it was in violation of Section 118 – petitioner explained that there was no violation but an order for cancelling the registration certification was issued- the State contended that a clarification has been issued prohibiting the use of the land for any purpose without the permission of the State Government – held that the petitioner has not violated any terms and conditions of the scheme floated by the State or the Central Governments – no action has been taken by the State for violation of Section 118 of Tenancy and Land Reforms Act- the scheme applies to the private

house and not to a commercial property- the scheme was to supplement the availability of accommodation in the rural tourist destination – the owners are exempted from the payment of tax and they have to maintain minimum standards of cleanliness, sanitation, and quality of food – the guest stays in the house as a member of the family – there is no prohibition in the H.P. Tenancy and Land Reforms Act for the use of house for the purpose of homestay and condition cannot be imposed by executive order- writ petition allowed and order passed by respondent No. 4 quashed and set aside.

Title: Brig Harmesh Sethi (Retd) Vs. State of Himachal Pradesh & others (D.B.)

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H.P. Tenancy and Land Reforms Act, 1972- Section 18- Society was constituted inter alia to purchase or take on long lease or acquire by exchange or otherwise land for the construction of the houses or housing colonies– the members were enrolled on fake address – out of 173 members, only 14 were found to be residents of the area of operation of the society – the authority cancelled the membership of the petitioner as well as the allotment made to them after inquiry – held that different types of societies exist for different purposes, which are governed by their bye-laws – since, there is restriction on the acquisition of the land by non-agriculturist, therefore, a housing society formed by agriculturist can allot land to its members – however, when the members are non-agriculturist, the society can allot the building to the member and not the plots- members of co-operative department have failed to conduct a check on the activities of the society – directions issued to the Deputy Commissioners to conduct a thorough probe to identify such societies and to take action in accordance with law – the petitioners are not the residents of the area of the operation of the society and have violated the law – the petition dismissed.

Title: Raksha Gupta & Ors. Vs. State of H.P. & Ors. Page-644

H.P. Urban Rent Control Act, 1987- Section 14- Landlord filed an eviction petition on the ground that the premises had become unsafe and unfit for human habitation and on the ground of bona-fide requirement of the landlord for rebuilding and reconstruction- the petition was allowed by the Rent Controller – an appeal was filed, which was dismissed – held that the building is located in a core area where a ban has been imposed on the construction – however, the approval can be granted by the State Government for reconstruction- landlord has already submitted building plan for approval –the eviction cannot be denied on the ground that it is not permissible to carry out the construction in the core area- the Courts had rightly ordered the eviction- petition dismissed.

Title: Sanjeev Sood (Bhagra) Vs. Raj Kumar Sood & others Page-805

H.P. Urban Rent Control Act, 1987- Section 14- The East India Hotel Limited is the owner of the demised premises which was let out to the respondent- the respondent sublet the same to S without the consent of the landlord – the tenant defaulted in the payment of the rent and also covered open veranda outside the demised premises materially impairing its value and utility - the demised premises is bonafidely required for rebuilding and reconstruction work, which cannot be carried out without its vacation- the landlord filed an eviction petition against the tenant on these grounds – the eviction petition was partly allowed by the Rent Controller – an appeal was filed by the landlord which was allowed – aggrieved from the order, the tenant has filed the present petition- held that the tenant or his brother to whom the possession was handed over did not step into the witness box- no evidence was produced despite having been granted six opportunities – it is proved that existing structure is more than 100 years old – reconstruction cannot be carried out without eviction of the tenant – the names of respondent No. 2 and his family members have been mentioned in the ration card – respondent No. 1 is residing in Ghaziabad – tenant admitted that he had constructed flush latrine and washing space – the tenant has forfeited all rights in the tenanted premises after delivering possession – the eviction

was rightly ordered- the tenant is liable to pay Rs. 6,000/- per month for each of the three premises in his possession i.e. Rs.18,000/- per month- the petition disposed of.

Title: Diwakar Dutt Kukreti Vs. EIH Associated Hotels Ltd. & another Page-341

H.P. Urban Rent Control Act, 1987- Section 14- The petition for eviction was allowed by the Rent Controller on the ground of arrears of rent amounting to Rs. 46,200/- along with interest @ 9% per annum and cost of Rs. 1,000/- - the tenant deposited an amount of Rs. 43,000/- which was less than the adjudged arrears – the tenant filed an appeal which was dismissed – held in revision that the stand taken by the tenant is contradictory – the deposit by the tenant will not help him in absence of any findings that landlord had neglected or refused to accept the rent – the Rent Controller had rightly held the tenant to be in arrears of rent- petition dismissed.

Title: M/s B.K. Sons (deceased) through LRs. Vs. Babu Lal Page-320

High Court of Himachal Pradesh (Original Side) Rules, 1997- Rule 16(i)- Present petition has been filed for execution of the judgment passed by the High Court in FAO – it has been stated that award was modified by the High Court and the execution lies before the High Court – held that execution of the decree or order passed in the appeal is to be carried out by the court exercising original jurisdiction at the first instance- petition dismissed.

Title: Phullu Devi & another Vs. Piare Lal Sharma & others (D.B.) Page-723

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized as per Hindu rites and custom- one daughter was born - wife started misbehaving with the husband and his parents- she used to leave her matrimonial home without knowledge and consent of the petitioner as well as his parents and used to return after 5-6 days - wife left 5-6 days prior to filing of the petition and when the husband went to bring her, she declined and demanded maintenance of Rs. 500/-- husband arranged separate accommodation and started giving Rs. 500/- per month to her- she filed a false complaint against the husband- husband sought divorce on this ground- wife denied the allegation of the husband- Trial Court dismissed the petition- held in appeal that plea of the husband was duly supported by the evidence- Trial Court had discarded the evidence on the admission of PW-2 and PW-3 that wife was residing in a portion of building where her matrimonial home is located- however, this fact cannot be read in isolation- she had not visited the matrimonial home despite the persuasion of the husband- these facts clearly established cruelty on the part of the wife- appeal allowed – judgment of the Trial Court set aside and the marriage between the parties ordered to be dissolved.

Title: Joginder Prashad Vs. Shreshta Devi Page-499

Hindu Marriage Act, 1955- Section 13- Wife filed a petition for divorce pleading that a fraud was practiced upon her and she was told that her husband is MBA, which is not correct – her husband and his family members treated her with cruelty and demanded Rs. 2 lacs from the wife- report was lodged in the police station- she was turned out of the house after snatching the jewellery – the petition was allowed and decree of divorce was granted- held that the version of the petitioner was corroborated by PW-2- the fact that petition under Section 125 Cr.P.C was dismissed on the ground that wife was able to maintain herself is not sufficient to dismiss the petition for divorce- the Court had properly appreciated the evidence - appeal dismissed.

Title: Vikas Goel Vs. Deepti Chanana Page-176

Hindu Marriage Act, 1955- Section 24- Husband filed a petition for divorce – the wife filed an application seeking maintenance pendente lite @ Rs. 31,000/-p.m. and litigation expenses of Rs. 40,000/- - the trial Judge granted the maintenance @ Rs. 25,0000/- per month and litigation expenses of Rs. 15,000/- - aggrieved from the order, the present petition has been filed pleading that carry home salary of the husband is Rs. 43,575/- out of which an amount of Rs. 6,000/- is

being paid to the wife and Rs. 2,000/- is being paid to each of the children in compliance with the direction passed by Judicial Magistrate Class, Court No. 4- held that the gross salary of the husband is Rs. 97,152/- and the carry home salary is Rs. 42,159/- after various deductions – a sum of Rs. 10,000/- is being paid to the wife and the children- mother is dependent upon the husband and he has to maintain himself as well- hence, maintenance reduced to Rs. 12,000/- per month with liberty to the wife to seek enhancement, if legally permissible.

Title: Dr. Parveen Singh Bhatia Vs. Anita Bhatia Page-179

Hindu Marriage Act, 1955- Section 24- Wife filed a petition seeking maintenance @ Rs. 30,000/- per month- Court granted the maintenance @ Rs. 10,000/- per month- aggrieved from the order, present revision has been filed- held that the Court has to take into consideration the income of husband and wife while awarding the maintenance- wife was working as a dietitian and was getting a salary of Rs. 80,000/- per month but she has resigned from her job- hence, the inference that wife was unable to maintain herself was properly drawn by the Court- respondent is drawing a salary of Rs. 91,000/- per month- he is also getting a special allowance of Rs. 57,000/- per month- Trial Court had not awarded proper amount of maintenance- revision allowed and maintenance enhanced to Rs. 22,000/- per month.

Title: Shipra Saklani Vs. Arun Mishra Page- 529

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Income Tax Act, 1961- Section 143- Assessee filed a return declaring net taxable income as Rs. 7,22,943/- and he disclosed Rs. 15 lacs as income from the agriculture- a notice was issued to the assessee- assessee filed a revised return in which he enhanced his agriculture income to Rs. 2,80,92,500/- return was accepted by Assessing Officer- however, commissioner set aside the assessment order holding it to be erroneous and remanded the matter for a fresh assessment- assessee filed a statutory appeal which was dismissed- Assessing Officer assessed the agriculture income as Rs. 15 lacs and declared additional income of Rs. 2,65,82,500/- as income earned from undisclosed sources and added it to the taxable income- assessee filed the present appeal- held that it is undisputed that assessee and his family members had made investments in L.I.C. in the year 2008, 2009 and 2011 worth Rs. 6.18 crores – the Commissioner found that earning of additional income of Rs. 2.65 crores so reflected in the revised return was already in the knowledge of the assessee- the Assessing Officer had failed to inquire from the assessee about the source of income – no inquiry was conducted for ascertaining the authenticity of the bills, vouchers, books of account of the assessee – it is not disputed that entire sale of horticulture produce of more than Rs. 2.8 crores is in cash – income from agricultural source is marginal – the assessee filed a revised return on receipt of the notice- the omission or wrong statement in the original return must be due to a bona fide inadvertence or mistake on the part of the assessee – Assessing Officer failed to notice that in the original return there was a reference to investment in LIC but the investment was not disclosed, even income from the orchard was also not disclosed – the additional evidence pertaining to the agent was led during the proceedings, which was rightly accepted – no prejudice was caused to the assessee by this additional evidence – the Commissioner has wide powers to pass such orders as may be deemed fit in the circumstances of the case- appeal dismissed.

Title: Virbhadra Singh (HUF) through its Karta Shri Virbhadra Singh Vs. Principal Commissioner of Income Tax (D.B.) Page- 599

Income Tax Act, 1961- Section 194- Development Authority was established for development and management of bus stands within the State of H.P. – a decision was taken to execute the work through the staff of H.R.T.C. – the payments were released by Development Authority in favour of H.R.T.C. – no tax was deducted from the amount paid by authority to the H.R.T.C. – assessment proceedings were initiated and the income of the assessee was computed by adding the amount paid to the H.R.T.C. as a taxable income – an appeal was filed, which was allowed by

the Commissioner - a further appeal filed before Income Tax Appellate Tribunal was dismissed – held that the arrangement between HRTC and Development Authority was a stop-gap arrangement whereby two entities agreed to share their resources by making an arrangement in which the salaries of staff and other expenditure incurred by HRTC was to be shared proportionately – no professional services were being rendered by either entity – the Authorities had a arrived at a correct conclusion- appeal dismissed.

Title: Pr. Commissioner of Income Tax Vs. M/s. H. P. Bus Stand Management & Development Authority Page-282

Income Tax Act, 1961- Section 260-A- Assessee is a company engaged in Generation, Transmission & Distribution of Power in the State of Himachal Pradesh - it had made payment on account of wheeling charges/SLDC/Transmission charges- it was found in TDS inspection/ survey that payment was made without deduction of tax at source- assessee contended that payment was made by the payee- however, it was held liable for the interest and penalty- appeal was filed before the Commissioner Income Tax (Appeals), which was dismissed – further appeal was filed before Income Tax Appellate Tribunal which modified the order and issued a direction to re-compute the amount of interest- Assessing Officer imposed the penalty- appeal was filed which was dismissed – further appeal was filed before the Income Tax Appellate Tribunal which ordered the deletion of penalty- aggrieved from the order, the present appeal has been filed by the Income Tax Department- held in appeal that first proviso to Section 201 provides that if the returns have been filed by the recipients of income and he has paid the tax, the person referred in Section 201 shall not be treated as assessee in default – in the present case, the recipients of income had paid the tax and thus, assessee is not to be treated as a person in a default- Tribunal had rightly held that assessee is not liable for any tax - appeal dismissed.

Title: Commissioner of Income Tax Vs. H.P. State Electricity Board (D.B.) Page-1

Income Tax Act, 1961- Section 80 IB and 80 HHC- Assessee is engaged in the manufacture of voice and fax encryption system – he imported necessary hardware and software from the United States and integrated the same at its premises at Shoghi- he claimed deduction, which was disallowed by Assessing Officer- an appeal was filed, which was dismissed – Income Tax Appellate Tribunal set aside the orders on further appeal and remanded the matter to the Assessing Officer for fresh adjudication – aggrieved from the order, the present appeal has been filed- held that the assessee is engaged in the manufacture of software which is an Encryption Algorithm and manufacture of Serial Encryption Hardware- sale of Computer software falls within the scope of sale of goods- the judgment of Appellate Tribunal upheld and appeal dismissed.

Title: Commissioner of Income Tax, Shimla Vs. M/s Shoghi Communication Ltd. Page-74

Indian Evidence Act, 1872- Section 45 and 73- Complainant filed a complaint about the commission of an offence punishable under Section 138 of N.I. Act stating that cheque of Rs. 4 lac was issued by the accused to discharge his liabilities but the cheque was dishonoured- an application was filed by the accused for comparison of the signatures and handwriting of the complainant with the handwriting on the disputed cheque – the application was dismissed by the Trial Court- held that the accused had taken a defence that his cheque was stolen and was misused by the complainant – it was not disputed by the accused that the cheque was signed by him and therefore there was sufficient authority with the holder of the cheque to fill the same – the comparison of the signatures and handwriting on the cheque will be of no use in these circumstances – the Trial Court had rightly rejected the application – petition dismissed.

Title: Tajinder Singh Vs. Anil Nayyar Page-657

Indian Penal Code, 1860- Section 147, 323, 324 read with Section 149- Accused gave beatings to the complainant party and caused simple injuries by means of danda and Darat – accused

were tried and acquitted by the Trial Court- held in appeal that independent witnesses were not associated, although they were present at the spot – this shows that investigation is not fair – the accused had sustained injuries which were not explained – the recovery of the weapon of offence was not made in accordance with law- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Lohari Ram and others Page-435

Indian Penal Code, 1860- Section 147, 323, 353, 332, 325, 307 and 382 read with Section 149- FIR was registered at the instance of accused K for the commission of offence punishable under Section 436 of I.P.C. – police had gone to the Village to investigate the offence where the demarcation was to be carried out – before the demarcation, K handed over two letters signed by Pardhan and BDC members stating that the demarcation be not carried out – brothers and father of K arrived and started pelting stones – other accused also arrived and pelted stones – K snatched the revenue papers from Patwari- accused gave beatings to T, who sustained multiple injuries- the accused were tried and convicted by the Trial Court for the commission of offences punishable under Sections 147, 323, 353, 332, 325 read with Section 149 of I.P.C- the Court acquitted the accused of the commission of offences punishable under Sections 307 and 382 read with Section 149- held in appeal that the prosecution witnesses had deposed consistently about the incident – nothing material could be elicited in their cross-examination – however, PW-5 did not support the prosecution version but that is not sufficient to doubt the prosecution version – blood stained clothes were not produced before the Court – the clothes were also not sent to FSL for examination – the conviction and sentence modified and the accused acquitted of the commission of offences punishable under Sections 323 and 325 read with Section 149 of I.P.C. - the conviction for the commission of offences punishable under Sections 332 and 353 read with Section 149 affirmed.

Title: Kanthi Ram & others Vs. State of H.P. Page-430

Indian Penal Code, 1860- Section 279 and 304-A- Two trucks came with high speed - one truck crushed a child aged 6 ½ years- driver did not stop the truck and fled away- it was found on investigation that accused was driving the truck- he was tried and acquitted by the Trial Court- held in appeal that PW-1 admitted that he had arrived at the spot after five minutes of the incident- PW-2 stated that she could not note the number of truck- PW-3 admitted that accident had not taken place in his presence- PW-4 stated that he had not noticed the number of the truck- PW-7 admitted that he is illiterate and could not note the number of the truck- in these circumstances, prosecution had failed to prove that truck being driven by the accused had caused the accident- I.O. had also failed to collect the material evidence- Trial Court had taken a reasonable view while acquitting the accused-appeal dismissed.

Title: State of Himachal Pradesh Vs. Besaria Ram Page-158

Indian Penal Code, 1860- Section 279 and 337- Accused was driving a motorcycle in a rash and negligent manner- the motorcycle hit a scooter due to which S sustained injuries- accused was tried and acquitted by the Trial Court- held in appeal that it was admitted by the complainant that the motorcycle was shifted after the incident-specific evidence regarding the rashness and negligence was not given- Trial Court had taken a reasonable view while acquitting the accused-appeal dismissed.

Title: State of Himachal Pradesh Vs. Raj Kumar Page-39

Indian Penal Code, 1860- Section 279 and 337- **Motor Vehicles Act, 1988-** Section 187- Informant was returning to her house along with her daughter – the accused came driving his scooter in a rash and negligent manner and hit the right leg of the informant – she was taken to hospital- the accused was tried and convicted by the Trial Court- an appeal was filed, which was

allowed- held that the witnesses had given contradictory version regarding the place of incident – the Appellate Court had rightly acquitted the accused in such situation- appeal dismissed.
Title: State of Himachal Pradesh Vs. Muni Lal Page-808

Indian Penal Code, 1860- Section 302 and 201 read with Section 34- A dead body was noticed by PW-14 which was lying inside the car – there was a wound on the head and a dog chain was tied around the neck of the deceased – according to prosecution, there was an altercation between the accused and the deceased on the issue of the fare of the taxi – the accused strangulated the deceased with the dog chain – accused M made a disclosure statement leading to the recovery of the car keys - the Trial Court convicted the accused R and M – aggrieved from the judgment, present appeal has been filed- held that the case is based upon circumstantial evidence – in a case of circumstantial evidence, prosecution must establish all the pieces of incriminating circumstances and they must lead to the conclusion of guilt and not to any other conclusion – suspicion cannot take the place of proof – PW-17 did not support the prosecution version and was declared hostile – the theory of last seen sought to be established from this witness has not been established – the purchase of dog chain by the accused has not been established on record – the vehicle was not a taxi or a private vehicle used for commercial purposes- hence, the prosecution version that there was altercation on the issue of fare is not acceptable – juvenile in conflict with law has already been acquitted and no appeal has been filed against the acquittal - the name of the officer who lifted the finger prints has not been given – the recovery was also not proved satisfactorily – the keys were not connected to the car in which the deceased was found- the call data record has not been certified in accordance with Section 65-A of Indian Evidence Act and is not admissible – the Trial Court had wrongly convicted the accused- appeal allowed- judgment of Trial Court set aside- accused acquitted.
Title: Ravi Kumar Vs. State of Himachal Pradesh (D.B.) Page-301

Indian Penal Code, 1860- Section 304- Deceased was constructing house of the accused on contract basis – the labourers employed by the deceased did not report for work on which the accused made inquiries from the deceased as to why the labourers had not arrived for construction work – the accused started giving beatings to the deceased- the deceased fell down – he was taken to Hospital and was declared brought dead – the accused was tried and convicted by the Trial Court- held in appeal that none of the prosecution witnesses had specifically stated that they had seen the accused giving blows on the head of the deceased- they admitted that deceased had lost balance and fallen down on the stairs, which probablizes the version of the defence that deceased had sustained injuries by way of fall- PW-1 and PW-2 turned hostile and did not support the prosecution version – there are major contradictions in the testimony of PW-3 and she has given a different version in the Court – the Trial Court had wrongly relied upon her testimony to record conviction – the medical evidence does not connect the accused to the injuries- prosecution version was not proved beyond reasonable doubt in these circumstances- appeal allowed- accused acquitted.
Title: Inder Verma alias Raju Vs. State of Himachal Pradesh Page-553

Indian Penal Code, 1860- Section 304-A and 336 read with Section 34- Charge-sheet was presented against the petitioner for causing death by negligence – it was asserted that the petitioners had administered intravenous injection causing death – the petitioners filed the present petition for quashing the proceedings – held that the intravenous administration of the injection was in accordance with prevalent medical opinion mentioned in the medical textbooks – the petition allowed and the proceedings against the petitioners dropped.
Title: Anita Sood & others Vs. State of H.P. & others Page-783

Indian Penal Code, 1860- Section 323, 336, 342 and 506 read with Section 34- Informant is owner-cum-driver of a truck – he was on the way to Mandi and was accompanied by PW-2 and R

– he parked his truck to make a call – the accused picked up a stone and hit the informant on the head – he became unconscious and regained consciousness after 2 – 2 ½ hours- the accused were tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held that the shirt, vest and stone came out of the same parcel, whereas, they were seized on different dates – the stone was not shown to the doctor – right of fair trial of the accused was violated by the Court – the informant admitted the presence of 100- 150 persons but no independent witness was examined – true genesis of the incident was not disclosed – no test identification parade was conducted to determine the identity – the Court had wrongly convicted the accused – revision allowed- judgment of the Trial Court and Appellate Court set aside.

Title: Sher Singh Vs. State of Himachal Pradesh Page-572

Indian Penal Code, 1860- Section 325, 323, 506, 147 and 149- Informant was present in his home when the accused came and abused him – they attacked him with fist blows and sticks- two teeth of the informant were broken- the accused were tried and convicted by the Trial Court- an appeal was filed - the Appellate Court convicted the petitioner/accused and acquitted rest of the accused – held in revision that name of PW-5 was not mentioned in the FIR – name of T was mentioned but he was not examined in the Court – there are discrepancies in the testimonies of PW-5 - the testimony of the informant was disbelieved regarding the other accused and cannot be relied upon to convict the petitioner/accused – the Appellate Court had wrongly relied upon the testimony of the informant to convict the petitioner/accused – appeal allowed – judgment of Appellate Court set aside and accused acquitted of the commission of offence punishable under Section 325 of I.P.C.

Title: Milap Chand Vs. State of Himachal Pradesh Page-412

Indian Penal Code, 1860- Section 354- Prosecutrix was studying in class-IV – accused was working as a teacher- accused called the prosecutrix and asked him to sit on his lap- when she refused to do so, accused forcibly caught hold of her and placed his hand on her leg - remaining students were asked to go outside the room- accused was tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused was acquitted – held in appeal that there was a delay of seven days in reporting the matter to the police – no explanation was given for the same- defence witnesses proved the good conduct of the accused and that he had dispute with the management over the salary- accused was given beating and he had reported the matter to the police after which present FIR was registered- there are contradictions in the testimonies of the prosecution witnesses- prosecution version that accused had committed indecent assault on the prosecutrix in the presence of the students appears to be improbable – testimony of the child witness has to be seen carefully- Appellate Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of H.P. Vs. Bishambhar Dass Page-85

Indian Penal Code, 1860- Section 363, 366-A and 376- Prosecutrix was found missing and it was found on inquiry that accused had taken her with the assurance that he would marry her- police was informed - the prosecutrix was recovered from the house of the accused- accused was tried and convicted by the Trial Court- held in appeal that date of birth of the prosecutrix was not proved satisfactorily- panchayat secretary admitted that certificate was not prepared as per law- same is not connected to the prosecutrix- prosecutrix admitted that she was more than 16 years of age at the time of incident – ossification test shows that age of the prosecutrix was 15½ years at the time of incident - three years margin has to be given to the age determined by the ossification test - testimony of the prosecutrix is suspicious- Trial Court had wrongly convicted the accused- appeal allowed and judgment of the Trial Court set aside- accused acquitted.

Title: Aneep Kumar Vs. State of Himachal Pradesh Page-273

Indian Penal Code, 1860- Section 376- **Protection of Children from Sexual Offences Act, 2012-** Section 4- PW-1, wife of the accused made allegations against her husband that he had committed sexual intercourse with her daughter aged less than 2 years under the influence of liquor- this fact came to her notice on the medical examination of the victim – the accused was tried and convicted by the Trial Court- held in appeal that PW-1 had materially improved upon her version – the improvement goes to the very root of the prosecution case – the informant had made three different statements on three different occasions which did not match each other – the relationship between the wife and husband was strained and possibility of lodging the false FIR cannot be ruled out – the prosecution version is not probable – the child was suffering from infection in her uterus and the possibility of sustaining injury by application of medicine in the infected part cannot be ruled out – the Trial Court had wrongly rejected the defence version – the prosecution version was not proved beyond reasonable doubt- appeal allowed- judgment of Trial Court set aside.

Title: Vivek Singh Vs. State of H.P. (D.B.) Page-395

Indian Penal Code, 1860- Section 379 and 411- Informant G has parked his vehicle no. HP-10-0483 at Nav Bahar Parking, Sanjauli on 6.9.2005 - when he came to take his vehicle at about 10 am on the next day, the vehicle was found missing- he reported the matter to the police on which FIR was registered- vehicle of the informant was recovered from the possession of accused R and S at Patiala on 8.9.2005- the accused disclosed on inquiry that they had got prepared a duplicate key – the place was got identified - accused were tried and acquitted by the Trial Court- held in appeal that custody of the stolen vehicle was handed over by the official(s) of Punjab Police to the official(s) of Police Station Dhali – the recovery memo was not proved by examining the author – the original memo was not produced but its photocopy was produced – the document is in Punjabi and its English translation was also not proved - identities of the accused were not proved - the recovery was also not established – there are contradictions in the testimonies of the prosecution witnesses – the trial Court had rightly acquitted the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Ashok Kumar Page-329

Indian Penal Code, 1860- Section 447 and 379- Accused armed with the sticks entered into the land possessed by the complainant and damaged the crop sown by him- complainant suffered loss of Rs. 1500/-- the complaint was dismissed by the Trial Court – held in appeal that there are material contradictions in the testimonies of CW-1 and CW-2 – CW-3 did not support the complainant's version – independent witness was present but was not examined – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: Attar Singh Vs. Sarup Singh and Ors. Page-482

Indian Penal Code, 1860- Section 451, 147, 148, 323, 325 read with Section 149- Informant was taking tea – he came outside for urinating – accused U met him and gave him beatings – subsequently, accused U came with 3-4 boys to the house of the informant and gave beatings to informant - when father of the informant tried to rescue him, the accused also gave him beatings – the accused were tried and acquitted by the Trial Court- held in appeal that the weapons of offence were not recovered- PW-6 and PW-7 did not support the prosecution version- the accused were not properly identified – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Bhupinder @ Bhuppi Page-450

Indian Penal Code, 1860- Section 452 and 376- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Accused raped the prosecutrix, when she was alone in her room – the prosecutrix disclosed the incident to her mother on her return – the accused was tried and convicted by the Trial Court- held in appeal that the FIR was lodged on the same day – the medical examination corroborated the prosecution version – mere absence of semen in the vaginal

swab will not make the prosecution version doubtful- the prosecutrix was proved to be less than 18 years on the date of incident – therefore, the question of consent will not arise – the Trial Court had rightly convicted the accused- appeal dismissed.

Title: Daleep Singh @ Deepu Vs. State of Himachal Pradesh Page-327

Indian Penal Code, 1860- Section 452, 376 and 511- Prosecutrix aged 4 years was alone in the house- her family members had gone to field to harvest the maize crop- the father of the prosecutrix heard cries and went towards the room- he saw the accused running from the room- prosecutrix was inside the room without salwar and was weeping – she informed on inquiries that accused had tried to rape her – accused was tried and acquitted by the Trial Court- held in appeal that Medical Officer has ruled out the possibility of sexual intercourse- no abrasion, laceration or inflammation was found by her- the testimony of prosecutrix is in contrast to the prosecution story as she deposed that her mother had arrived at first instance and thereafter her uncle came to the spot, whereas, prosecution story is that father of the prosecutrix reached the spot and thereafter her mother had arrived- prosecutrix did not state that accused had tried to rape her - grand-mother of the prosecutrix was at the spot but it is not explained as to why she had not arrived on hearing the cries of the prosecutrix- testimony of the prosecutrix does not inspire confidence and the Court had rightly rejected the prosecution version- appeal dismissed.

Title: State of Himachal Pradesh Vs. Suresh Kumar (D.B.) Page-531

Indian Penal Code, 1860- Section 498-A and 306- Deceased and accused were married to each other for more than 18 years – the deceased set herself on fire after pouring kerosene oil – she was taken to hospital where she succumbed to her injury – the accused was tried and acquitted by the Trial Court- held in appeal that the statement of the deceased was recorded by the I.O. after obtaining fitness from the Medical Officer – the Medical Officer deposed that the deceased was admitted with the history of suicidal burns by pouring kerosene oil on her body after she had an argument with her husband- PW-14 also proved that accused was standing outside and the deceased was lying on the road – accused was asking the deceased to go home – the deceased committed suicide afterwards – the deceased had lodged a complaint with the women police cell but the same was not pressed – it was also established that sum of Rs. 5 lacs was paid by the parents of the deceased to the accused- dying declaration clearly implicated the accused – minor contradictions are not sufficient to doubt the prosecution version – Trial Court had wrongly held that dying deceleration was not voluntary – the prosecution version was proved beyond reasonable doubt – appeal allowed – accused convicted of the commission of offences punishable under Section 498-A and 306 of I.P.C.

Title: State of H.P. Vs. Raj Kumar (D.B.) Page-724

Indian Penal Code, 1860- Section 498-A and 323- Marriage of the informant was solemnized with the accused in the year 2004 as per Hindu rites and custom- accused started beating the informant and demanding dowry after two months of the marriage – she was also beaten in the presence of Gram Panchayat – the accused was tried and acquitted by the Trial Court- held in appeal that the prosecution version that accused had given beating to the informant and had demanded dowry was not proved – no witness except the informant stated about the demand of dowry – informant was not interested in residing with the accused but wanted to take divorce – the members of the panchayat were not cited as witnesses and adverse inference has to be drawn against the prosecution- Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of H.P. Vs. Nikku Ram Page-581

Indian Penal Code, 1860- Section 498-A, 306 and 404 read with Section 34- Deceased was married to A – the accused started maltreating the deceased for not bringing dowry- the deceased used to complain about the ill- treatment – she was ousted from her matrimonial home 3-4 times

but every time she was sent back and the accused were asked to mend their behaviour – the deceased consumed poison and died in the hospital – the accused were tried and acquitted by the Trial Court- held in appeal that instigation or abetment by the accused persons to the deceased has not been proved- there is no evidence of any conspiracy – the Trial Court had rightly acquitted the accused- appeal dismissed.

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

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit for declaration and injunction pleading that his father S and B were real brothers, who were co-owners of the suit land - B executed a Will in favour of the plaintiff – the Will propounded by the defendant is null and void - the defendant pleaded that he was looking after B and B had executed a Will in his sound disposing state of mind - the suit was dismissed by the Trial Court - an appeal was filed, which was partly allowed – held in second appeal that the plaintiff had not examined any witness to prove the veracity and authenticity of the Will – the plaintiff was ill and confined to the bed – he could not serve B – he could not perform the last rites of B - B had cancelled the Will executed in favour of the plaintiff- B died in the house of the defendant - Will propounded by the defendant was duly proved - mere presence of beneficiary at the time of execution of the Will does not affect its authenticity – the Appellate Court had rightly concluded that B had executed a Will in his sound disposing state of mind- appeal dismissed.

Title: Hukmi Devi & another Vs. Madan Page-759

Industrial Disputes Act, 1947- Section 25- Workman was denied the benefit of regularization on the ground that he had not completed more than 240 days' continuous service- a reference was made to the Labour Court and the Labour Court answered it in favour of the workman- aggrieved from the award, the present appeal has been filed- held that workman had rendered more than 240 days' continuous service in each year except 1997- workman had served 212 days' in 1997- it is not the case that job was abandoned by the workman – the plea that he was sick is duly proved by the medical certificates- Industrial Disputes Act is a benevolent legislation- merely because his leave was not sanctioned will not be sufficient to deny the benefit to him- appeal dismissed.

Title: State of H.P. and another Vs. Sobha Ram Page-107

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Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Larji Hydel Project- Land Acquisition Collector awarded compensation on the basis of classification of land – land owners filed a reference petition – reference Court enhanced the compensation and awarded the same irrespective of the classification – aggrieved from the award, present reference petition has been filed- held that land owners have proved on record the sale deeds as well as the previous award passed by District Judge regarding the land of adjoining village – respondents also relied upon the sale deeds pertaining to the year 1984- land was acquired in the year 1988 - sale deeds were not proximate in time and were rightly disregarded by the Trial Court – sale deed relied upon by the petitioner was executed six months prior to the publication of the notification – the market value of the land was reflected as Rs. 1,60,000/- per bigha – two other sale deeds were executed within six months and the market value of the land was Rs. 2 lacs per bigha – after making deduction of 25%, the value of the land comes to Rs. 1,50,000/- per bigha- District Judge had also awarded the compensation of Rs. 1,60,000/- per bigha irrespective of classification for the land acquired by way of separate notification for the same project – reference Court had not committed any error in awarding compensation @ Rs. 1,60,000/- per bigha in a previous reference petition – land owners also relied upon the evaluation reports prepared in the year 1997, whereas, Land Acquisition Collector had relied upon evaluation report prepared on the basis of cost of construction in the year 1987- Reference Court had rightly relied upon the same and had rightly awarded increase of 10% after taking into consideration the increase of price

index – the market value of the land was assessed on the basis of Harbans Singh Formula evolved in the year 1966- the land was acquired in the year 1988 and Reference court had rightly allowed four times the increase – no error was committed by the Reference Court- there is no error in the judgment passed by the Reference Court – appeal dismissed.

Title: The Himachal Pradesh State Electricity Board Vs. Nardu and others

Page- 779

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of the road – Reference Court awarded uniform compensation of Rs. 7 lacs per bigha for all categories of land irrespective of classification – aggrieved from the award, the present appeal has been filed- held that land was acquired for the construction of the road – the purpose of acquisition was same and the classification loses its significance – no error was committed by the Reference Court while awarding uniform compensation – the sale deed produced by the State was executed in the year 2001 and pertained to village D – the land was acquired in the year 2005 in Village T – the sale deed did not have proximity in time – the exemplar land was also not similar to the acquired land – 30% amount was rightly deducted by Reference Court – no rent/damage was awarded for the use of the land from the date of possession till date of notification – appeal dismissed, cross objection allowed and additional interest allowed @ 15% per annum from the date of possession till the date of notification.

Title: State of H.P. & Ors. Vs. Dhani Ram & another Page-421

Land Acquisition Act, 1894- Section 18- The Reference Court awarded compensation of Rs.1 lac per bigha in respect of acquired land - the petition was dismissed in default and was restored after 10 years- it was contended that claimant was not entitled to interest for this period- held that petitioner had itself agreed to pay Rs. 1 lac per bigha for the acquired land and no fault can be found with the award- petition was dismissed in default on 28.9.1992 but was restored on 3.5.1993- evidence of the claimant was closed on 19.5.1995- petition was dismissed in default on 18.4.1998 and was restored on 24.6.2008 – a Reference petition cannot be dismissed in default and the Court had wrongly dismissed the same- however, claimant should have taken steps to bring this fact to the notice of the Court- there was delay of 9 ½ years in filing the application-the claimant is not entitled to the interest from the date when the petition was dismissed in default and the date of filing of restoration application – appeal partly allowed.

Title: Nathpa Jhakri Project Corp. & Anr. Vs. Shri Shibu Page- 561

Land Acquisition Act, 1984- Section 18- The land was acquired for different purposes – the petitioners sought reference to the Court of District Judge who enhanced the compensation – aggrieved from the award, the present appeal has been filed – held that the petitioners have sought compensation @ Rs. 2,62,500/- per bigha, but PW-4 admitted in cross-examination that highest market value of the land was not more than Rs. 1,65,000/- per bigha – the sale instances of nearby vicinity were not placed on record – the Court had rightly relied upon the previous award and had granted compensation at a flat rate – Collector had assessed the compensation of fruit-bearing trees on the basis of Dr. Harbans Singh's formula – the formula came into being in the year 1966 and suitable increase should have been awarded by the Court- the increase of 400% should have been provided keeping in view the price increase- hence, the compensation of fruit-bearing trees enhanced by four times along with interest @ 9% per annum from the date of notification for the period of one year and thereafter @ 15% till deposit.

Title: Laxmi Nand Vs. L.A.C and another Page-111

Limitation Act, 1963- Article 40- A cheque was issued by the defendant which was presented by the plaintiff for encashment before his bank- the bank sent the cheque for collection to the bank of the defendant – however, the cheque was returned with the endorsement that alteration in the date required drawer's full signatures – the suit was decreed by the Trial Court - an appeal was

filed, which was dismissed- held in second appeal that the period of limitation for filing a suit on the basis of dishonoured cheque will arise on the date when cheque is dishonoured and not prior to that – the Courts had correctly held that Article 40 is applicable.

Title: Sardar Inder Mohan Singh Batra and others Vs. Ram Dev Page- 156

Motor Vehicles Act, 1988- Section 149- MACT awarded compensation of Rs. 2,24,845/- along with interest @ 8% per annum and directed the insurer to satisfy the award- aggrieved from the award, the present appeal has been filed – held that a driver possessing a licence authorizing him to drive light motor vehicle can drive transport vehicle of such class without any endorsement to this effect- RC shows the description of the vehicle as light goods vehicle whereas the licence authorized the driver to drive light motor vehicle – the driver was authorized to drive light goods vehicle as well and Insurance Company was rightly fastened with liability- however, amount of Rs. 54,000/- awarded towards loss of future earning, Rs. 10,000/- awarded towards transportation charges, Rs. 50,000/- awarded towards pain and suffering, loss of amenities of life and future discomfort are not supported by any evidence – hence, set aside.

Title: Bajaj Allianz General Insurance Company Vs. Suresh Kumar and another

Page-116

'M'

Motor Vehicles Act, 1988- Section 149- MACT awarded compensation of Rs. 3,51,000/- and directed the Insurance Company to satisfy the award- aggrieved from the award, the present appeal has been filed pleading that the Insurance Company was not liable to cover the risk of gratuitous passengers – held that it was pleaded in the petition that deceased was travelling as a gratuitous passenger- the evidence that deceased was travelling with the goods cannot be accepted beyond pleading- Insured had committed breach of the terms and conditions of the policy and Insurance Company is not liable to indemnify the insured- appeal allowed - judgment of the MACT modified and insured held liable to pay the compensation.

Title: National Insurance Company Ltd. Vs. Gorkhu Ram and others Page-514

'N'

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 700 grams charas – he was tried and acquitted by the Trial Court- held in appeal that the accused was told to exercise his option of being searched before a Magistrate, Gazetted Officer or the police – the accused has to be apprised of his right that he could get himself searched in the presence of Magistrate or the Gazetted Officer- the prosecution has not complied with the mandatory requirement of Section 50- the accused was rightly acquitted in these circumstances- appeal dismissed.

Title: State of Himachal Pradesh Vs. Ayub Mohammad Cr. Appeal No. 368 of 2008 (D.B.)

Page-212

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 700 grams charas, which was concealed under his belt and was tied around his waist – he was tried and acquitted by the Trial Court- held in appeal that the accused was told to exercise his option of being searched before a Magistrate, Gazetted Officer or the police – the accused has to be apprised of his right that he could get himself searched in the presence of Magistrate or the Gazetted Officer- the prosecution has not complied with the mandatory provision of Section 50- the accused was rightly acquitted in these circumstances- appeal dismissed.

Title: State of Himachal Pradesh Vs. Ayub Mohammad (D.B.) Page-218

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 450 grams charas- he was tried and convicted by the Trial Court- held in appeal that DW-1 proved that the ticket was issued

on 24.4.2014- DW-2, Conductor of the bus proved that accused was taken out of the bus- he was not possessing anything at that time- independent witness was not associated - the testimonies of the police officials are not trustworthy – defence version is equally probable- Trial Court had wrongly convicted the accused- appeal allowed and judgment of the Trial Court set aside- accused acquitted of the commission of offence punishable under Section 20 of N.D.P.S. Act.

Title: Shubham Verma Vs. State of HP Page-230

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 950 grams charas – he was tried and convicted by the Trial Court- held in appeal that recovery was effected from the bag and there was no requirement to comply with Section 50 of N.D.P.S. Act – the prosecution witnesses supported the prosecution version regarding recovery – no material was elicited in the cross-examination to shake their testimonies – the case property was duly exhibited in the Court – sample seals bear the signatures of the accused and the witnesses – lack of association of independent witnesses will not make prosecution case doubtful – the Trial Court had rightly convicted the accused- appeal dismissed.

Title: Shiv Ram Vs. State of H.P. Page-469

N.D.P.S. Act, 1985- Section 20(b)(i)(B)- Accused was found in possession of 900 grams charas – he was tried and convicted by the Trial Court- held in appeal that prosecution witnesses supported the prosecution version – defence witness admitted his presence on the spot, his signature on the recovery memo and the presence of the accused –he admitted the recovery of packets containing charas – the link evidence was proved and provisions of Section 42 were complied with – failure to produce the seal is not important as the fact that the case property remained intact is duly proved – the Trial Court had properly appreciated the evidence – appeal dismissed.

Title: Ashish Kumar Vs. State of Himachal Pradesh Page-323

N.D.P.S. Act. 1985- Section 43- An information was received that some persons were involved in smuggling of charas- the information was reduced into writing and was sent to Superintendent of Police- however, it was not mentioned that search warrant or authorization cannot be obtained without affording opportunity for concealment of evidence or facility for escape for offender – the recovery was effected after the sunset – there was non-compliance of Section 42 and the accused are entitled to acquittal on this ground – trial court had rightly acquitted the accused - appeal dismissed.

Title: Narcotic Control Bureau Vs. Ghambir Dass and others (D.B.) Page- 462

Negotiable Instruments Act, 1881- Section 138- Accused borrowed a sum of Rs. 1,70,000/- from the complainant for starting his business – he issued a cheque for Rs. 1,70,000/- for returning the amount- cheque was dishonoured with endorsement 'account closed'- money was not paid despite the receipt of a valid notice of demand- accused was tried and convicted by the Trial Court- an appeal was filed, which was also dismissed- held in revision that the dishonour of the cheque is duly proved and there is a presumption that cheque was issued for consideration – plea taken by accused that chequebook was misplaced is an afterthought and not acceptable- notice was served upon the accused but the payment was not made by him- Court had rightly convicted the accused- appeal dismissed.

Title: Ajay Kaundal Vs. Santosh Kumar Page-271

Negotiable Instruments Act, 1881- Section 138- Accused was convicted of the commission of an offence punishable under Section 138 of N.I. Act – an appeal was filed, which was dismissed- held that the plea of the accused that he was not served with the statutory notice is falsified by his

admission made under Section 313 Cr.P.C. regarding the service of notice – no other infirmity was shown in the judgments of the Courts- petition dismissed.

Title: M/s Gautam Sales Corporation and another Vs. Usha Rani Page-477

'P'

Protection of Children from Sexual Offences Act, 2012- Section 354- **Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989-** Section 3(1)(xi)- Prosecutrix belongs to scheduled caste category and is student of 8th class- accused runs a shop outside the school- prosecutrix and her friends used to visit the shop of the accused- accused fondled the prosecutrix and on protest promised not to repeat such act- however, accused again fondled the prosecutrix when she visited the shop- she narrated the incident to her mother- accused was tried and acquitted by the Trial Court- held in appeal that prosecutrix admitted that frooty might have been stolen by her sister- possibility of filing a false case, when the prosecutrix was found stealing the frooty cannot be ruled out- testimony of the prosecutrix is not satisfactory and the Trial Court had rightly discarded the same – appeal dismissed.

Title: State of Himachal Pradesh Vs. Desh Raj Page-591

Protection of Women from Domestic Violence Act, 2005- Section 12, 18, 19 and 20- Wife filed a complaint pleading that her husband started harassing her physically and mentally- he neglected and refused to maintain her and raised the demand of dowry – she was humiliated, tortured and maltreated – husband and his family members did not visit the wife, even when a child was born to her- the complaint was allowed by the Trial Court – an appeal was filed, which was dismissed – held that it is the responsibility of the husband to maintain his wife and not to commit any act which amounts to domestic violence – it is duly proved that husband is not looking after his wife and son and is not paying any maintenance to them- he has retained stridhan of the wife- the maintenance allowance of Rs. 6,000/- awarded by the Court cannot be said to be excessive – the Courts have passed just and reasoned order and no interference is required – petition dismissed.

Title: Sudhir Kumar & anr. Vs. Kalpna Kumari Page-353

Protection of Women from Domestic Violence Act, 2005- Section 21- An application for custody of minor was filed, which was opposed on the ground that wife is suffering from psychiatric disorder and is unable to take care of the minor- wife filed a certificate in which it was mentioned that she was not suffering from any psychiatric disorder – held that that the certificate has not been approved in accordance with law – hence, the case remanded to the Magistrate to enable the wife to prove the certificate and till then the custody of the minor entrusted to the wife with a right of visitation.

Title: Major Som Nath Palde Vs. Pooja Kashyap Page-800

Punjab Excise Act, 1914- Section 61 (1)(a)- A vehicle was intercepted and searched by the police - accused A was driving the vehicle while accused I was sitting with him- 24 cartons of English Liquor bearing mark 'XXX Rum Black Jack' each containing 12 bottles and 45 cartons of country liquor bearing mark 'Lal Kila' each containing 12 bottles were found in the vehicle – accused could not produce any permit on demand- three bottles of XXX Rum and three bottles of Lal Kila were taken as samples for analysis – the accused were tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused were acquitted- held in appeal that there are contradictions in the testimonies of official witnesses – there is no evidence that seal impression was also deposited in CTL – link evidence is missing – only 6 bottles were analyzed and it is not proved that all the bottles were containing liquor in them – the Appellate Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of H.P. Vs. Anish Mohammad Page-456

Punjab Excise Act, 1914- Section 61(1)(a)- A car was reversed on seeing the police party- police chased the vehicle- the driver stopped the vehicle after 10 k.m. and started throwing the cartons in a Nalla- the vehicle was searched and it was found to be containing two cartons of liquor 'Bagpiper' and one carton of 'McDowell' – the liquor in Nalla was counted - 48 bottles of Bagpiper, 26 bottles of McDowell and 12 bottles of Saroor were found in Nalla- 18 bottles of Mcdowell and five bottles of Saroor were found broken- the accused could not produce any permit for transportation – samples were taken – the accused was tried and convicted by the Trial Court- an appeal was filed, which was allowed- held that the link evidence is missing as there is no evidence that sample seals were also deposited with the samples – the Appellate Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Susheel Kumar Page- 585

Punjab Excise Act, 1914- Section 61(i)(a)- Accused were carrying a bag on a motorcycle – accused threw the bag and fled away on seeing the police party- police officials grabbed the accused D, while another accused ran away from the spot- 9 bottles of country liquor bearing mark 'Lal Kila' were found on the bag- accused could not produce any licence/permit for transporting the liquor- recovered bottles were taken into possession and sealed with seal impression 'A'- accused were tried and acquitted by the Appellate Court- held in appeal that no independent witness was associated – the seal was handed over to PW-1 after the use but PW-1 did not state that any seal was handed over to him- the possibility of tempering with the case property cannot be ruled out in these circumstances- the Appellate Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Diwan Chand and anr. Page-368

'S'

Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3(1)(x)- A complaint was filed stating that the accused entered into the premises of the complainant and demolished a portion of the kitchen constructed by her- they insulted, threatened and mentally harassed her in absence of her sons – the complaint was sent to the police for investigation and after the report was committed to the Special Judge – Special Judge acquitted the accused – aggrieved from the order, present appeal has been filed- held that the complainant had sent a written complaint to various authorities regarding the incident and when no action was taken, private complaint was filed – the witnesses of the complainant have given contradictory version and their statements cannot be relied upon – the Trial Court had rightly acquitted the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Ranjit Singh & Another Page-708

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3- **Indian Penal Code, 1860-** Section 354 and 509- Accused was posted as Tehsildar and had gone to the house of the informant in connection with the partition proceedings - however, proceedings could not be carried out – accused stayed in the house of the informant and directed him to massage his body - he demanded liquor and asked the informant and his wife to take liquor with him- accused caught hold of the wife of the informant and asked her to sleep with him- she shouted for help and was rescued by her husband- accused was tried and convicted by the Trial Court for the commission of offences punishable under Sections 354 and 509 of I.P.C and he was acquitted of the commission of offence punishable under Section 3 of SC and ST (Prevention of Atrocities) Act- held that testimonies of the informant and his wife were contradictory to each other – they had improved upon their previous version – wife of the informant did not understand Hindi and her statement was recorded in the Court with the help of a translator, however, Investigating Officer has not mentioned that her statement under Section 161 Cr.P.C was recorded with the help of Translator- matter was reported belatedly and no explanation for delay

was given- prosecution version was not proved beyond reasonable doubt- appeal allowed and judgment of Trial Court set aside.
Title: Krishan Dutt Premi Vs. State of H.P. Page-506

Specific Relief Act, 1963- Section 5**-** Land was allotted to the plaintiff and she was put in possession – however, the defendants forcibly obtained the possession without any right to do so- a legal notice was served upon the defendants – the defendants filed an appeal before Deputy Commissioner who ordered the resumption of land – the plaintiff filed a civil suit seeking possession – the defendants pleaded that plaintiff had failed to break up the land within the prescribed period and the land remained as forest land – the work of the construction of building of Range Office was started without any objection- when the defendants came to know about the allotment, they filed an appeal against the order, which was allowed – the suit was dismissed by the Trial Court - an appeal was filed, which was also dismissed- held in second appeal that the High Court can interfere with the concurrent finding of facts when the same is shown to be perverse or the Courts have ignored material evidence or acted on no evidence or the Court have drawn wrong inferences from the facts by applying the law erroneously – the allotment is not disputed - as per Rule 22 the land can be resumed, if it is not put to the purpose for which it was granted within two years – the prescribed period of limitation is 60 days but the power was exercised after 14 years – no sanction was obtained by the Deputy Commissioner to review the order of grant of nautor passed by Tehslidar –the Courts had not properly appreciated this position of law- the appeal allowed – judgments and decrees passed by Appellate Court and Trial Court set aside.
Title: Hima Devi (deceased) through LR's Bimla Devi and others Vs. State of Himachal Pradesh and another Page-749

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession pleading that he was owner in possession of the suit land- PWD authorities constructed the Nadaun-Hamirpur highway through the suit land – when the plaintiff came to know about this fact, he requested the defendants to handover the possession but when the possession was not handed over, he filed the civil suit for possession- the defendants pleaded that they are in possession of suit land since 1964 and have become owners by way of adverse possession – the suit was dismissed by the Trial Court – an appeal was filed which was dismissed – held in second appeal that a specific plea of adverse possession was taken but no issue was framed on the basis of same – plaintiff admitted that road was constructed in the year 1960 and he had purchased the land in 1965 – the possession of the land over which the road was constructed was not delivered to him- the entry in the missal hakiyat was recorded in the year 1994-95 but no steps were taken to get the entry corrected – suit for possession was filed after 36 years whereas the suit for possession could have been filed within a period of 12 years – the Courts had properly appreciated the evidence – appeal dismissed.
Title: Prem Dass (deceased) through LRs Dev Raj and others Vs. State of Himachal Pradesh and another Page- 711

Specific Relief Act, 1963- Section 5- Plaintiff pleaded that he had executed a gift deed in favour of defendant No. 1 – an agreement was executed in which it was agreed that defendants will look after the plaintiff till his lifetime and will pay a sum of Rs. 150/- per month to the plaintiff – the defendants failed to fulfill the conditions – hence, the suit was filed for setting aside the gift deed and to recover the possession- the defendants pleaded that gift was absolute and there was no right of revocation- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in the second appeal that the parties are governed by customary law and the same permits the revocation of conditional gift on failure to fulfill the condition- however, it has not been proved that gift was conditional- the Courts had properly appreciated the evidence- appeal dismissed.
Title: Ram Singh & another Vs. Kamla Devi & another Page-153

Specific Relief Act, 1963- Section 5- Plaintiffs filed a civil suit seeking possession pleading that a house was owned jointly by the plaintiffs– a portion of the house consisting of two rooms, one bathroom, one kitchen and common toilet was allowed to be used by the defendant as a licencee on the payment of licence charges of Rs.400/- per month- defendant was allowed to continue as a licencee on the enhanced charges of Rs.470/- per month- the defendant got married and handed over the possession to her parents- the licence was terminated by way of a registered notice- the licence fee was also not paid- hence, the suit was filed for seeking the relief of possession and mesne profits- the defendant pleaded that she was a student and her father had taken a three rooms set from the plaintiffs on a monthly rental of Rs.600/- subsequently, he shifted to a smaller room in the same house on the payment of the monthly rent of Rs.400/-- she was residing in Delhi with her husband and her parents are in possession as tenants and not licencees – the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that the execution of the licence is not disputed – it was executed between the plaintiffs and the defendant- mere stay of the parents of the defendant in the premises will not confer any right upon them. The notice terminating the licence was also proved on record – plaintiffs have a right to take possession on termination of the licence- the Trial Court had rightly decreed the suit – the appellate Court had wrongly held the parents to be the licencees- appeal allowed- judgment of the Appellate Court set aside and that of the Trial Court restored.

Title: Jai Gopal Attari (since deceased) through his LR's and others Vs. Seema Sharma

Page-675

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking specific performance of the contract and in the alternative for declaration that he has become the owner by way of adverse possession- it was pleaded that predecessor-in-interest of the defendants had agreed to sell the suit property to the plaintiff for a consideration of Rs. 45,000/- - plaintiff had paid part sale consideration of Rs. 10,000/-- plaintiff was already in possession as tenant- further amount was paid by the plaintiff- the suit property was mortgaged and vendor agreed to execute the sale deed after the redemption of the mortgage – plaintiff made repeated requests for executing the sale deed but was told that deed would be executed on redemption – the mortgage has been redeemed but the sale deed was not executed -hence, the suit was filed for seeking specific performance or in the alternative for declaration – the defendants pleaded that agreement was valid for one year and they were required to pay back a sum of Rs.40,000/- to the plaintiff – the limitation for filing the suit has expired – the Trial Court dismissed the suit – an appeal was filed, which was also dismissed- held in second appeal that High Court can interfere with the concurrent findings of fact, if they are perverse, Courts have ignored material evidence or acted on no evidence or they have drawn wrong inferences from the proved facts by applying the law erroneously or have wrongly cast the burden of proof- the sale deed was to be executed within one year of the agreement- it was provided that in case of failure to execute the deed the vender shall be liable to pay double the amount of the sum already paid by the purchaser to the vendor and Rs. 3,000/- as special damages – the Courts concluded that plaintiff was not entitled to the execution of the sale deed but only to the money- however, they had not taken into consideration the receipts extending the time – the period of limitation is mixed question of law and fact and has to be determined on the basis of the evidence – the property was to be got redeemed by the vendor within one year from the date of execution of the agreement – the period of limitation will start running from the date of redemption- the Courts had wrongly held that plaintiff is not entitled for the specific performance of the agreement – the Appeal allowed- judgments passed by Courts set aside and the suit filed by the plaintiff decreed.

Title: Shiv Saran Dass Vs. Rajindera Devi & Others Page-238

Specific Relief Act, 1963- Section 34- Plaintiff sought declaration that he is joint owner in possession of the suit land to the extent of half share – he pleaded that the suit land is joint Hindu family property – mutation in favour of the grand-mother of the plaintiff is wrong as she had no right to the joint Hindu family property – the suit was decreed by the Trial Court – an

appeal was filed, which was allowed – held in the second appeal that plaintiff has admitted in cross-examination that his grand-father had purchased the property – it was not proved that he had inherited the property from his immediate three ancestors – D being a widow was entitled to succeed to the property – she had executed a Will in her sound disposing state of mind in favour of the defendants – the Appellate Court had properly appreciated the evidence – appeal dismissed.
Title: Kuldip Singh Vs. Bali Ram & others Page-769

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration pleading that defendants were the previous owners of the suit land – they had orally mortgaged the suit land in favour of the plaintiffs with possession for a sum of Rs. 300/- - a mutation was entered but the same could not be sanctioned due to the absence of the defendants – the defendants have not redeemed the suit land – the period of limitation has expired and plaintiffs have become owners of the suit land by efflux of time – defendant No. 1 obtained an order of correction of revenue entries from Land Reforms Officer which was set aside by Divisional Collector, Amb in appeal – the order was restored by Divisional Commissioner, Kangra- the defendants are threatening to interfere in the possession of the plaintiffs on the basis of the order- the defendants pleaded that there was an oral understanding to mortgage the suit land but the full amount was not paid and the mortgage could not be effected – Rs.150/- paid by the plaintiffs were returned under a proper receipt – the suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that no period of limitation is applicable in case of redemption of usufructuary mortgage – the Appellate Court had wrongly allowed the appeal- judgment of the Appellate Court set aside and that of the Trial Court restored.
Title: Dharam Singh Vs. Faquir Chand & Others Page-55

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for seeking declaration and specific performance of the contract executed with M, the predecessor-in-interest of the defendants – it was pleaded that the property was to be sold for Rs.60,000/- - loan of Rs.7,300/- raised on the suit would be paid by the predecessor-in-interest of the plaintiffs – an amount of Rs.41,500/- was paid to M- the plaintiffs are ready and willing to perform their part of the agreement- the defendants denied that any agreement was executed – the suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that previous suit was withdrawn by the counsel as per the statement who had sought permission to institute a fresh suit- the Court had dismissed the suit as withdrawn keeping in view the statement of the counsel- implied permission to file a fresh suit was granted by the Court and the present suit is not barred- the agreement was duly proved – the Appellate Court had properly appreciated the evidence- appeal dismissed.
Title: Manoj Kumar & others Vs. China & others Page-679

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit seeking declaration that plaintiff No. 1 is the mohtmim and sole owner of the property and defendants No. 1 to 7 are not the owners of the property – sale deed executed in favour of defendant No.8 is illegal, unauthorized and ineffective - the suit was dismissed by the Trial Court- held that suit land was held to be a trust property by the Courts in the earlier proceedings- the plaintiff H had instituted a suit, which was dismissed as withdrawn –no liberty was granted to institute a fresh suit – the present suit was barred under Order 23 Rule 1 – appeal dismissed.
Title: Hans Raj and others Vs. Shayam Lal and others Page-796

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that predecessor of the parties were co-owners – an application for partition was filed and instrument of partition was prepared- the suit land is in possession of plaintiffs No. 2 to 13, although, the same was allotted to the defendants – plaintiffs have become the owners by way of adverse possession – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that no document

was produced by the defendants to show that they had taken steps for obtaining the possession of the land allotted to them – DW-1 admitted that suit land is in possession of the plaintiffs – it was also proved that plaintiffs were in permissive possession of the suit land with the consent of other co-sharers- a permissive possession cannot be converted into adverse possession- proceedings were taken after the partition – possession can be taken under Section 134 of H.P. Land Revenue Act within 3 years from the date of preparation of instrument of partition – if the possession is not taken in three years, a civil suit for possession can still be filed- a civil suit for seeking declaration that a person has become owner by way of adverse possession is not maintainable – the Courts had correctly dismissed the suit – appeal dismissed.

Title: Mohan Singh and others Vs. Jagdish Chand (deceased) through LR's Smt. Saloti Devi and others Page-118

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that their predecessor was non-occupancy tenant over the suit land – he had neither abandoned nor relinquished his tenancy rights- he was not ejected from the suit land – he had become the owner by way of operation of law –plaintiffs also claimed that they had become owners by adverse possession in the alternative- the Trial Court dismissed the suit- an appeal was filed, which was also dismissed- held in second appeal that the plaintiff could not connect the documents to the suit land – plaintiff cannot seek any declaration on the basis of adverse possession as the adverse possession can be used as a shield and not as a sword – the Courts had correctly appreciated the evidence.

Title: Parvati Devi and others Vs. Sabratu and others Page-185

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration with consequential relief of permanent injunction against the defendants pleading that defendant No.1 was owner in possession of suit land- he had borrowed a sum of Rs. 30,500/- from the plaintiff and had agreed to return the same within a period of one year and on failure to return the amount, plaintiff was to be treated as owner on the basis of oral sale – defendant No. 1 handed over the possession of the suit land to the plaintiff- Assistant Collector 1st Grade recorded the plaintiff in possession of the suit land with the consent of the defendant No. 1- defendants started interfering with the ownership and possession of the suit land- defendants damaged apple plants – plaintiff sought compensation of Rs. 20,000/- for damaging his apple plants- suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that a document creating title to immovable property having value of Rs.100/- should be registered and an unregistered document is not admissible in evidence- the value of the property was more than Rs.100/- - no ownership can be claimed by the plaintiff on the basis of the agreement – injunction cannot be granted against the true owner and the Appellate Court had erred in allowing the appeal- appeal allowed - judgment of Appellate Court set aside and that of the trial Court restored.

Title: Sonam Chomdan & Another Vs. Ranjit Singh Page-92

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit pleading that he came in possession of the suit land on the basis of the lease deed created by Mohatmim of temple Shri Ramanuj for a period of 99 years on a rent of Rs. 100/- per annum – temple officer unilaterally cancelled a lease deed and started interfering in the possession – the copy of order was not supplied - temple officer was not competent to cancel the lease and to take forcible possession- hence, the suit was filed for seeking declaration and injunction – the defendants pleaded that lease was cancelled for the breach of condition No. 6- it was not for the benefit of the temple and did not create any right, title or interest in favour of the plaintiff – plaintiff has left India and has settled abroad after 1974 – the suit was decreed by the Trial Court – an appeal was filed, which was allowed- held in second appeal that the power of Mohatmim to alienate the property is analogous to that of Manager for an infant heir – Mohatmim has no power to alienate the property except for his need or for the benefit of the estate – he cannot grant a permanent lease at a fixed

rent in absence of unavoidable necessity – lease was not executed in this case for the benefit of the temple or for the legal necessity – no mention of the same was made in the lease deed – the Appellate Court had rightly held that Mohatmim was not competent to execute the lease- the lease was void ab-initio and would not confer any right over the property- it was duly proved that possession of the land is with the defendant – witnesses of the plaintiff admitted that plaintiff had gone abroad and the land is lying vacant – plaintiff did not step into the witness box to prove his version and an adverse inference has to be drawn against her – the Appellate Court had rightly allowed the appeal- appeal dismissed.

Title: Urmil Gupta Vs. Commissioner Page-8

Specific Relief Act, 1963- Section 34 and 38- Plaintiff pleaded that he is joint owner in possession with proforma defendant No. 3 – plaintiff was aged 95 years and was residing with his wife- plaintiff had executed a Will in favour of R but he was compelled by defendant No. 1 who had greedy eyes on the property of the plaintiff – plaintiff was taken to the office of sub registrar for the cancellation of earlier will – subsequently, plaintiff came to know that the gift deed was got executed by defendant No. 1 – the defendants pleaded that the gift deed was executed in sound disposing state of mind – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that dismissal of the application to file the suit as indigent person does not bar the institution of a fresh suit – previous suit does not constitute res judicata as the validity of the gift deed was not challenged in the same – the Courts had rightly appreciated the evidence- appeal dismissed.

Title: Lekh Ram & another Vs. Kamla Devi & others Page-137

Specific Relief Act, 1963- Section 34 and 38- Plaintiff pleaded that he is owner in possession of the suit land, which was granted to him by way of nautor- suit land could not be transferred for a period of 20 years as per Rules- defendant No. 1 expressed his willingness to purchase the grass of his orchard- plaintiff agreed to sell the grass for a consideration of Rs. 5,000/- for two years- defendant No. 1 started interfering with the suit land and told on inquiry that two bighas of land had been sold to him- defendants pleaded that suit land was sold by the plaintiff for a consideration of Rs. 21,500/- - plants and house have been raised by defendant No. 1- a sum of Rs. 15,000/- was taken from defendant No. 2 by mortgaging the suit land- suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that nautor was granted in the year 1976 but sale deed was executed in the year 1994- there is prohibition against the alienation for a period of 15 years from the date of grant- period of 15 years was enhanced to 20 years but this would have no effect on the nautor granted earlier- sale deed was executed after the period of 15 years and cannot be said to be bad- appeal dismissed.

Title: Kripu Ram (since deceased) through his legal heirs Vs. Purshottam Lal & another Page-502

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit pleading that suit land was purchased by R and it was succeeded by B and P on his death - R had partitioned the property into two parcels- P executed a gift deed in favour of D- encroachment proceedings were initiated against the plaintiffs which are wrong- defendants denied the case of the plaintiffs and pleaded that plaintiffs have encroached on the suit land and proceedings were rightly initiated against them- suit was decreed by the Trial Court- appeal was filed, which was partly allowed- held in the second appeal that plea of adverse possession taken in the alternative was not proved- Appellate Court had rightly set aside the decree of the Trial Court to this extent- appeal dismissed.

Title: Madhu Bala & another Vs. State of H.P. Page-510

Specific Relief Act, 1963- Section 34 and 38- The predecessor-in-interest of the plaintiff was inducted as mortgagee and the mutation was attested to this effect – the land was vested in the

State but by that time plaintiffs and their predecessor had become the owners after the lapse of 30 years – the entry showing the plaintiffs to be mortgagee and the State to be owner are wrong – the defendant pleaded that the land vested in the State under H.P. Ceiling of Land Holdings Act, 1972 - the plaintiffs were mortgagee and are only entitled to receive the mortgage amount – the suit was decreed by the Trial Court – an appeal was filed, which was allowed and the judgment of Trial Court set aside- held that it is not disputed that the mortgage was executed in favour of the predecessor-in-interest of the plaintiff and the land had vested in the State- the vestment was not challenged – usufructuary mortgage can be redeemed any time – the Appellate Court had rightly reversed the judgment of the Trial Court- appeal dismissed.

Title: Puran Dutt & others Vs. State of H.P. Page-142

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking injunction pleading that he is a tenant of a shop in Lower Bazaar – the shop was having a rolling shutter which was worn out and required repair- he filed an application for obtaining permission – the permission was granted – Landlord made a complaint that plaintiff had carried out major additions and alterations in the shop- a notice was served upon the tenant that repair was not carried out in accordance with the plan- the sanction was withdrawn and plaintiff was directed to demolish the rolling shutter – plaintiff filed a writ petition in which liberty was granted to the plaintiff to file a civil suit to challenge the order of M.C. Shimla –the defendant pleaded that plaintiff has encroached upon the land of Municipal Corporation – the orders were passed in accordance with law- the Trial Court decreed the suit of the plaintiff – an appeal was filed which was allowed and the judgment of Trial Court was set aside- held in second appeal that the permission was granted for installing rolling shutter subject to the condition that no encroachment would be made over the municipal road/drain- original owner had filed eviction petition of the plaintiff on the ground that plaintiff had made material alterations and additions in the premises by fixing iron shutter – the plea regarding the deviation was not accepted by the Rent Controller – Municipal Corporation initiated proceedings despite the findings of the Court- the Appellate Court had wrongly ignored the previous findings of the Court – the defendant had not placed on record the sanctioned plan – plaintiff had proved that no deviation was made by him while no satisfactory evidence was led by the defendant to rebut the evidence- appeal allowed, the judgment passed by Appellate Court set aside and the judgment passed by the Trial Court restored.

Title: M/s. Chet Ram Telu Ram Vs. Municipal Corporation, Shimla Page-66

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land- the defendants forcibly entered into the suit land and started digging it – they have managed to occupy 9 biswansis of land during the pendency of the suit – the defendants opposed the suit pleading that plaintiff had sold 4 biswas of land in favour of defendant No.2 for a consideration of Rs.11,000/- and had delivered the possession of four biswas of land on the same day- the defendants are in possession of the suit land – the construction was raised with the consent of the plaintiff- the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that four biswas out of 6-6 bighas of land bearing khasra No. 1364/494 was purchased by the defendants- however, they have raised construction upon the land, which was beyond 4 biswas purchased by them- a Local Commissioner was appointed to conduct the demarcation- he submitted a report in which encroachment to the extent of 9 biswansis was detected – mere fact that the construction was in existence for more than 15 years cannot lead to an inference of estoppel against the plaintiff- the plaintiff came to know about the encroachment only on the demarcation – the Courts had rightly granted the injunction in these circumstances- appeal dismissed.

Title: Gadku Ram Vs. Krishani Devi & others Page-791

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land- defendants have no right, title or interest in the suit land- they

threatened to dispossess the plaintiff from the suit land- defendants pleaded that they had become the owners of land measuring 0-2 biswa and 0-9 biswa by way of adverse possession- suit was decreed by the Trial Court for permanent injunction- appeal was filed, which was allowed- held in second appeal that trial Court had relied upon the demarcation report but the Appellate Court held that demarcation report was not proved- Appellate Court appointed a Local Commissioner to conduct the demarcation who found that defendants had not encroached upon any portion of the suit land- no objection was filed to this report- Appellate Court had rightly placed reliance upon the report- appeal dismissed.

Title: Prema Vs. Surat Ram & others Page-520

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for injunction pleading that P is owner in possession of the suit land- the defendants encroached upon the suit land and raised construction of a single room without any right to do so- hence, the relief of injunction was sought- the defendants pleaded that no construction was raised on the suit land and the house existing on abadi deh was renovated – the suit was decreed by the Trial Court- an appeal was filed, which was allowed- held that the ownership of the plaintiff was not disputed - the defendants relied upon an agreement showing the exchange of the land but the same is not connected to the suit land- the person who carried out demarcation was not examined and the encroachment has not been proved – the Appellate Court had rightly dismissed the suit- appeal dismissed.

Title: Budhu Vs. Lal Man & another Page-745

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit pleading that suit land is jointly owned and possessed by them- revenue entry showing the defendant to be non-occupancy tenant and mutation regarding the conferment of proprietary rights is wrong, illegal and void- defendant pleaded that he was coming in possession for the last 30 years as tenant on the payment of Chakauta to the plaintiffs- defendant has become owner by operation of Law- suit was partly decreed by the Trial Court- appeal was filed, which was dismissed- held in second appeal that Civil Court has jurisdiction where the Revenue Officer had violated the principle of natural justice or acted without jurisdiction- the proprietary rights were conferred by A.C. 2nd Grade who had no jurisdiction- earlier order conferring the status of gair maurusi was set aside by the Settlement Collector and the case was remanded for recording the fresh decision- order of Settlement Collector was not complied by the Naib Tehsildar- hence, status of the defendant is under a cloud- Trial Court and Appellate Court had rightly held that Civil Court has jurisdiction- appeal dismissed.

Title: Gurdev Singh Vs. Om Prakash (since deceased) through his legal heirs & ors. Page-491

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit pleading that they had purchased 1/5th share of B by way of registered sale deed – the defendants were co-owners and were interfering with their joint possession – the defendants pleaded that B was not in possession – she had demanded the possession after the death of her father but it was not delivered to her – the defendants had become the owners by way of adverse possession- mutation of sale was rejected on the ground that seller was not in possession- B had filed an application for partition but the same was rejected – the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that no issue regarding the adverse possession was framed but it was specifically asserted in the written statement that defendants had become owners by way of adverse possession- there was no surprise to the plaintiff and failure to frame the issue will not cause any prejudice to the parties- the possession of the plaintiffs was not proved and the Courts had rightly dismissed the suit- appeal dismissed.

Title: Devinder Kumar & Ors. Vs. Girdhari Lal & Ors. Page-441

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for permanent prohibitory injunction for restraining the defendants from raising any construction over the suit land- it was pleaded that suit land was in possession of father of plaintiffs as Hissadar and he was having his abadi on the same – part of the suit land was being used as courtyard/bartan- the defendants got deleted the name of the plaintiffs from the possessory column in connivance with the consolidation authorities – the plaintiffs have installed water tank and stacked building material over the suit land – the defendants threatened to take forcible possession of the suit land – the defendants pleaded that plaintiffs have no concern with the suit land and defendants are exclusive owners in possession of the same – the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in the second appeal that part of the suit land was allotted to the defendants during consolidation- entry was recorded in the missal Hakiat to this effect –a presumption of correctness is attached to the acts of the public officials – there is a presumption of truth to the entries in the jamabandi- evidence of the plaintiff has not rebutted this presumption – the Appellate Court had rightly relied upon the missal hakiat – appeal dismissed.

Title: Tara Chand & Anr. Vs. Daulat Ram (Deceased) & Ors. Page-775

Specific Relief Act, 1963- Section 38 and 39- Plaintiff pleaded that she is owner in possession of the suit land- she had constructed a four-storeyed house prior to January, 2016 – defendant No. 1 purchased land adjacent to the land of the plaintiff – the defendants raised construction without leaving setbacks and making arrangement for drainage of water- the projection was extended towards the property of the plaintiff which has caused danger to the building – the defendants pleaded that house was raised in accordance with the permission granted by the competent authority – no encroachment was made – the suit was partly decreed by the Trial Court- separate appeals were filed and the Appellate Court dismissed the suit of the plaintiff- held in the second appeal that no evidence was led to prove that construction was being raised without any permission – encroachment was also not proved – Appellate Court had rightly dismissed the suit- appeal dismissed.

Title: Susheela Vs. Inder Singh & another Page-163

Specific Relief Act, 1963- Section 39- Plaintiff filed a civil suit for mandatory injunction seeking direction to hand over the possession of the suit property pleading that they are owners of the suit property- predecessors-in-interest of the defendants were in possession as licensee- they demanded the possession but the possession was not handed over – the suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in the second appeal that the Appellate Court must answer all important questions raised before it - it must record findings explaining as to how the reasoning of Trial Court is not correct - First Appellate Court had not appreciated the pleadings and the evidence in its right perspective – Trial Court had held that it was not clear as to how the plaintiffs had become the owners- Trial Court had further held that defendants were not proved to be licence- appeal allowed, judgment passed by the Appellate Court set aside and the case remanded for a fresh decision.

Title: Virender Kumar & others Vs. Sanjay Kumar & others Page-46

'W'

Workman Compensation Act, 1923- Section 4- Claimant was working as workman – he sustained injuries in the course of discharging his duties- he was brought to hospital and his index finger had to be amputated – he sustained 50% disability- claimant cannot use the left hand in view of amputation of left-hand index finger and fixed extension deformity on tissue in lateral aspect of the palm- claimant was discharging his duties on the machine – Commissioner awarded compensation of Rs. 39,127.50/- - held in appeal that claimant was being paid Rs. 2,700/- per month- he was aged 44 years at the time of incident- Doctors have determined the disability of the claimant to be 50%- however, nature of injury shows that claimant had suffered

total disablement- he cannot operate the machine any longer- claimant has been retrenched by the employer and cannot pursue any other vocation- hence disability has to be treated as complete and not partial - relevant factor will be 172.52 and after applying the functional disability to the extent of 100%, compensation will be Rs. 2,79,482/- - a sum of Rs. 16,000/- was spent by the employer on the treatment of the claimant, which has to be deducted and compensation of Rs. 2,63,482/- will be payable- claimant would be entitled to interest @ 12% per annum which comes to be Rs. 3,48,510/- - claimant is also entitled for penalty @ 30% - thus, total compensation of Rs. 7,95,590/- would be payable.

Title: Bhagat Ram Vs. Hemender Kumar Gupta Page-127

Workman Compensation Act, 1923- Section 4- Commissioner passed an award granting the interest from the date of application and not from the date of accident- award was silent regarding the entitlement of the claimants for interest- held that it has been laid down by Hon'ble Supreme Court repeatedly that interest has to be awarded from the date of accident and not from the date of award- Law declared by the Hon'ble Supreme Court is binding on all courts within the territory of India- Tribunal was bound to follow the Law laid down by Hon'ble Supreme Court- claimants are entitled to interest from the date of accident which will remain payable till the date of payment- there was no necessity of filing the appeal – application disposed of with this clarification.

Title: Guddi Devi and others Vs. The Nankhari Tehsil Co-Op. The M&C Union and another Page-550

Workmen Compensation Act, 1923- Section 4- Workman was serving as Gramin Dak Sevak Mail Carrier- he died in harness – an application for compensation was filed, which was allowed and compensation of Rs. 2,62,835/- was awarded along with interest @ 12% per annum- aggrieved from the order, the present appeal has been filed- held that claimant claims to be daughter of the deceased- she stated that she was divorced and was dependent upon the deceased for her livelihood- claimant had completed 24 years of age on the date of incident- a major daughter does not fall within the definition of dependent- she has to satisfy that she was wholly or in part dependent upon the earnings of the workman at the time of his death- claimant had not led any evidence to prove this fact- even the divorce was not granted by a court of law- Commissioner had wrongly held that claimant was dependent on the deceased - appeal allowed and order of the Commissioner set aside.

Title: Head Post Master of Post Office, Kullu Vs. Tulsi Devi alias Tulji Page-180

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

Commissioner of Income Tax ...Appellant.

Versus

H.P. State Electricity Board ...Respondent

ITA No.40 of 2016 a/w
ITA's No. 41,42 & 43 of 2016
Date of decision: 31.5.2017

Income Tax Act, 1961- Section 260-A- Assessee is a company engaged in Generation, Transmission & Distribution of Power in the State of Himachal Pradesh - it had made payment on account of wheeling charges/SLDC/Transmission charges- it was found in TDS inspection/ survey that payment was made without deduction of tax at source- assessee contended that payment was made by the payee- however, it was held liable for the interest and penalty- appeal was filed before the Commissioner Income Tax (Appeals), which was dismissed – further appeal was filed before Income Tax Appellate Tribunal which modified the order and issued a direction to re-compute the amount of interest- Assessing Officer imposed the penalty- appeal was filed which was dismissed – further appeal was filed before the Income Tax Appellate Tribunal which ordered the deletion of penalty- aggrieved from the order, the present appeal has been filed by the Income Tax Department- held in appeal that first proviso to Section 201 provides that if the returns have been filed by the recipients of income and he has paid the tax, the person referred in Section 201 shall not be treated as assessee in default – in the present case, the recipients of income had paid the tax and thus, assessee is not to be treated as a person in a default- Tribunal had rightly held that assessee is not liable to any tax - appeal dismissed. (Para-14 to 21)

Case referred:
CIT Vs. Eli Lilly & Co. Pvt. Ltd. 312 ITR 225(SC)

For the petitioner(s): Mr. Vinay Kuthiala, Senior Advocate, with Ms. Vandana Kuthiala, Advocate.

For the respondent(s): Mr. Rakesh Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Since in all the aforesaid ITAs, similar questions of law and fact are involved, as such, they are being taken up together and disposed of by a common judgment.

2. By way of instant appeal(s) filed under Section 260-A of the Income Tax Act, 1961, challenge has been laid to the order(s) dated 10.12.2015, passed by Income Tax Appellant Tribunal, Division Bench, Chandigarh in ITA No.38/Chd.2015 A.Y.2007-8, ITA No.39/Chd.2015 A.Y. 2008-09, ITA No.40 /Chd.2015 A.Y. 2009-10 and ITA No.41/Chd.2015 A.Y. 2010-11, whereby appeal(s) having been preferred by the assessee have been dismissed.

3. Briefly stated facts as emerge from the record are that the assessee is a company i.e. State Electricity Board incorporated under the Electricity Act, 1948, engaged in Generation, Transmission & Distribution of Power in the State of Himachal Pradesh, made certain payments on account of wheeling charges/SLDC/Transmission charges to the payee company i.e. PGCIL. On 11.02.2009 TDS inspection/survey under Section 133-A of the Income Tax Act, 1961 came to be conducted at the business premises of the above mentioned company M/s Himachal Pradesh State Electricity Board, Shimla **(for short "HPSEB")**, where it was noticed that the assessee deductor has made payments of transmission charges to PGCIL without deduction of tax at

source. Above named assessee deductor submitted before the Income Tax Authority that PGCIL has filed its return of income and has paid the entire amount of income tax payable by them and as such, there was reasonable cause for the deductor assessee not to deduct TDS at source. However, assessing Officer relying upon the judgment of the Hon'ble Supreme Court of India reported in 293 ITR 226(SC) in case titled ***Hindustan Coca Cola Beverages Private Limited*** and Circular No.275/201/95-IT(B) dated January 29,1997 issued by the Central Board of Direct Tax Act, wherein it has been notified that "No demand visualized under Section 201(1) of the Income Tax Act, should be enforced after the tax deductor has satisfied the office in Charge of TDS that taxes due have been paid by the deductee assessee, however, same will not alter the liability to charge interest under Section 201(1A) of the Act, till the date of order passed under Section 201 of the Income Tax Act, 1961. On 31.03.2010 case was referred for initiation of penalty proceedings under Section 271-C of the Income Tax Act, 1961 for not deducting tax at source under the provisions of Income Tax Act, 1961.

4. Aforesaid order passed under Section 201(1A) was laid challenge before Commissioner Income Tax (Appeals), but fact remains that Commissioner Income Tax (Appeals) came to the conclusion that the deductor/assessee was not prevented by any sufficient and reasonable cause for non-complying with the provisions of Section 194-C of the Income Tax Act, 1961 and thus made itself liable for penalty under Section 271C of the Income Tax Act, 1961 and accordingly deductor assessee was held in default and penalty amounting to Rs.1,36,00,187/-, Rs.2,48,13,453/-, Rs.2,76,67,625/- and Rs.5,71,017/- for the financial years 2006-07, 2007-08, 2008-09 and 2009-10 respectively came to be imposed against the assessee.

5. Being aggrieved and dissatisfied with the aforesaid order having been passed by learned Commissioner Income Tax(Appeals), assessee preferred an appeal before the Income Tax Appellate Tribunal(Chandigarh) **(for short" ITAT)**, who vide order dated 28.2.2012 upheld the order of assessing Officer made under Section 201(1A) with the direction to re-compute the amount of interest under Section 201(IA) till the date of payment of taxes by the payee in accordance with the contents laid down in circular No.275/201/95-IT(B), dated 29.1.1997, wherein it was clarified that payments of due taxes by the payee, will not alter the liability for payment of interest under Section 201(1A) or the liability for penalty under Section 271C of the income Tax Act.

6. Pursuant to aforesaid order, show cause notice under Section 271-C read with Section 274 of the Income Tax Act, came to be issued against the assessee on 16.5.2012. However, assessee at assessment stage pleaded that since the deductee i.e. PGCIL has already paid the tax, he cannot be held as assessee in default under Section 201 & 201(1A) and as such, no penalty is imposable on assessee. The assessing Officer imposed a penalty of Rs.1,36,00,187/-, Rs.2,48,13,453/-, Rs.2,76,67,625/- & Rs. 5,71,017/- for the financial year 2006-07, 2007-08, 2008-09 and 2009-10 respectively after arriving at a conclusion that there was no reasonable cause for the deductor assessee not to deduct the tax.

7. Aggrieved with the aforesaid order passed by assessing Officer, appeal came to be preferred before the Commissioner Income Tax(Appeals), wherein Commissioner Income Tax (Appeals) held that mere non violation of Section 201 does not exonerate the assessee as deductor to deduct tax within the specific provisions of Sections 192, 194, 194A etc. The Commissioner Income Tax(A) further held that failure to deduct tax invokes two types of sections, one section like 201, where assessee deductor is treated as assessee in default on behalf of tax liability of deductee and second penal provisions such as section 271-C, wherein failure to deduct tax is liable for penalty independently. Thus, interlinking of two sections 201 and 271-C is violation of the separate provisions of the Act. Plea having been made by the assessee that it was under honest belief that since transmission charge are regulated by CERC and it was not to deduct TDS on transmission charges was not accepted by the Commissioner Income Tax (A) as reasonable cause for failure to deduct tax and as such, appeal of the assessee was dismissed by

Commissioner Income Tax (A) upholding the levy of penalty under Section 271 of the Income Tax Act.

8. Aforesaid order passed by Commissioner Income Tax (Appeals) came to be adjudicated by the Income Tax Appellate Tribunal (Chandigarh) in the appeal having been preferred by the assessee. Learned Income Tax Appellate Tribunal (Chandigarh) taking note of the order passed by the ITAT Hyderabad in the case of ***ACIT Vs. M/s Good Health Plan Limited*** in MA No.155/Hyd/2013, held that since the assessee has not been treated as an assessee in default in terms of section 201 of the Act and as such, it is neither liable to deduct nor pay any tax as per Chapter XVIIB of the Act. Learned tribunal further concluded that there was a reasonable cause for not deducting the TDS on payment made by the assessee and as such, penalty imposed by assessing Officer was ordered to be deleted. In the aforesaid background, Income Tax Department preferred instant appeal (s) laying therein challenge to the order dated 10.12.2015, passed by the Income Tax Appellate Tribunal, Chandigarh on the ground that provisions contained under Sections 201 and 271-C of the Income Tax Act, 1961 are independent of each other and they operate in two different fields and apart from this it is matter of fact that assessee failed to deduct tax at source and as such, penalty under Section 271-C of the Income Tax Act, 1961 was rightly imposed by the Additional Commissioner, Income Tax, Shimla.

9. While laying challenge to the aforesaid order(s) dated 10.12.2015, passed by the Income Tax Appellate Tribunal, Chandigarh, appellant-department stated that following substantial questions of law arise for the determination of this Court:-

i). Whether in the facts and circumstances of this case the Ld. ITAT was right in law in deleting the penalties imposed U/s 271C for non deduction of tax at source u/s 194C even though the assessee has committed default to deduct the tax at source.

ii). Whether the Ld. ITAT disregarded/ misinterpreted the provisions of Section 271C and 201 of the Income Tax Act.

10. Mr. Vinay Kuthiala, learned Senior Advocate, duly assisted by Ms. Vandana Kuthiala, Advocate, while referring to the impugned order(s), contended that learned income Tax Tribunal has grossly erred in deleting the penalty under Section 271C of Income Tax Act, 1961 by accepting the plea of the assessee because assessee failed to fulfill its statutory duty to deduct and deposit the tax at source and pay to the Central Government, as required under provisions of Chapter XVII-B. He further contended that provisions as contained under Section 201 & section 271-C of the Income Tax, 1961 are independent and as such, findings returned by the Appellate Tribunal that assessee has not been treated as an assessee in default as per Section 201 of the Act and as such, it is not liable to deduct nor pay any tax as per Chapter XVII B deserves to be quashed and set-aside being erroneous and contrary to the aforesaid provisions of law. Learned counsel further contended that the assessee did not have a reasonable cause for not deducting tax at source and learned tribunal without going into the factual aspect of the matter could not have adjudicated on the sufficiency of the reasonable cause and as such, impugned order(s) deserve to be quashed and set-aside.

11. Learned counsel further contended that learned tribunal has failed to appreciate the legal position that section 271C is independent of the condition whether the assessee was held to be in default or not because interpretation given by the learned Tribunal is upheld in that eventuality section 201 of the Income Tax Act will have a restricted meaning, which could never be the intention of the legislature.

12. Mr. R.K.Sharma, learned counsel representing the respondent(s), while referring to the impugned order(s) passed by the learned tribunal contended that there is no illegality and infirmity in the same and as such, same deserves to be upheld. Learned counsel further contended that since PGCIL was found to have paid taxes on its income received from assessee,

assessee was not treated as an assessee in default under Section 201 of the Act by the ITO (TDS) vide his order dated 30.03.2010, which was further upheld by the learned tribunal in its order dated 28.2.2012 and as such, no penalty, if any, could be levied against the assessee under Section 271C of the Income Tax Act. While referring to first proviso to Section 201 of the Act, learned counsel stated that returns have been filed by the recipient of income and it has computed tax liability and has paid the tax and that person referred to under Section 201 of the Act shall not be treated as assessee in default, meaning thereby that the prayer would not be liable for payment of tax or deduction of tax. While supporting the impugned order passed by the learned Tribunal, learned counsel representing the respondent contended that admittedly in the instant case assessee has not been treated as an "assessee in default" in terms of Section 201 of the Act and as such, learned tribunal rightly arrived at a conclusion that it is neither liable to deduct nor pay any tax as per Chapter XVII B. With the aforesaid submissions, learned counsel representing the respondent prayed for dismissal of the present appeal(s).

13. We have heard learned counsel for the parties and have carefully gone through the record.

14. Before ascertaining the correctness of aforesaid submissions having been made by the learned counsel representing the parties viz-a-viz impugned order(s) passed by the learned tribunal, it would be profitable to take note of Section 271C of the Income Tax Act, 1961::-

271 C.(1) if any person fails to-

a. deduct the whole or any part of the tax as required by or under the provisions of Chapter XVII-B; or

b. pay the whole or any part of the tax as required by or under-

i. sub-section(2) of section 115-O; or

ii. the second proviso to section 194B

then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.

(2) Any penalty imposable under sub-section (1) shall be imposed by the joint Commissioner.

15. Undisputedly, aforesaid provisions of law provides that penalty under Section 271C is leviable for failure to deduct as tax, as required by provisions of Chapter XVII-B of the Income Tax Act, 1961. Vide aforesaid provisions of law penalty has been also quantified as being equal to the amount of tax which such person fails to deduct or pay in terms of the aforesaid provisions. Chapter XVII B specifically deals with the provisions relating to tax deduction at source and specifically provide that in case of default in deduction of tax at source or payment of the same, the person responsible shall be treated as an assessee in default. At this stage, it would be apt to take note of Section 201 of the Income Tax Act:-

Consequences of failure to deduct or pay

Section 201:-

1. Where any person, including the principal Officer of a company,-

a. Who is required to deduct any sum in accordance with the provisions of this Act; or

b. Referred to in sub-section (1A) of Section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to

any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax.

[Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the cum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident:-

i. has furnished his return of income under section 139;

ii. has taken into account such sum for computing income in such return of income; and

iii. has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed;]

Provided [further] that no penalty shall be charged under Section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax]

(1A). Without prejudice to the provisions of sub-section(1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,

i. at once per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and

ii. at once and one half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid'

and such interest shall be paid before furnishing the statement in accordance with the provisions of sub section (3) of section 200;]

[Provided that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first proviso to sub-section(1), the interest under clause(*I)* shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident].

2. Where the tax has not been paid as aforesaid after it is deducted, [the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1).

3. No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of seven years from the end of the financial year in which payment is made or credit is given].

4. The provisions of sub-clause(ii) of sub section(3) of section 153 and of Explanation 1 to section 153 shall, so far as may, apply to the time limit prescribed in sub-section (3).]

[Explanation:- For the purpose of this section, the expression "accountant" shall have the meaning assigned to it in the Explanation to sub-Section(2) of section 288.}

16. The first proviso to aforesaid section clearly provides that if returns have been filed by the recipient of income and he has computed tax liability and he has paid the tax, the person referred to under section 201 of the Act shall not be treated as assessee in default. It clearly emerge on the record from reading of aforesaid provisions of law that in case recipient of income computed tax liability and paid tax on the same, person would not be liable for payment of tax or deduction of tax.

17. In the instant case, assessee deductor specifically submitted before the authorities that PGCIL i.e. recipient of income has filed its return of income and has paid the entire amount of income tax payable by them and as such, there was no occasion to it to deduct tax at source. In the present case, it clearly emerge from the order passed by the income tax authorities that assessee was not treated as an assessee in default in terms of section 201 of the Act, and a such he could not be held liable to deduct or pay any tax in terms of provisions contained in Chapter XVII B. Since, assessee was not treated an assessee in default in terms of Section 201 of the Act, learned tribunal below rightly held that there is no question of levy of penalty under Section 271-C. It also emerge from the record that impugned sums stood reimbursed to the PGCIL i.e. recipient of the company and in these circumstances, learned tribunal rightly held that deducing TDS further by assessee would tantamount to double taxation. Section 273-B clearly provides that no penalty would be levied in case reasonable cause for the default committed is proved on record. Section 271-C provides that if any person fails to deduct the whole or any part of the tax, as required by the provisions of Chapter XVII-B, person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct. But, aforesaid provision cannot be read in isolation because, as has been observed above, section 273-B specifically provides that no penalty shall be leviable in cases where reasonable cause for default committed is proved on record, meaning thereby penalty under Section 271-C can only be levied in case assessee fails to place on record reasonable cause for default in deducting tax under Section 201 of the Income Tax Act.

18. In the instant case, as is clearly borne out from the record that assessee has not been treated as an assessee in default in terms of Section 201 of the Act, and as such, it is neither liable to deduct nor pay any tax as per Chapter XVII B and as such, learned tribunal rightly held that there is no question of levying penalty under Section 271-C of the Act. Leaving everything aside, reasonable cause has been shown by the assessee for not deducing TDS on the payment.

19. Reliance is placed upon the judgment of Hon'ble Apex Court in ***CIT Vs. Eli Lilly & Co. Pvt. Ltd.*** 312 ITR 225(SC); wherein it has been held that since assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company, penalty under Section 271-C was not leviable as reasonable cause was shown for not deducting tax at source. It would be profitable to reproduce relevant para of the judgment herein:

> **"Section 271C, inter alia, states that if any person fails to deduct the whole or any part of the tax as required by the provisions of Chapter XVII-B then such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct. In these cases we are concerned with Section 271C(1)(a). Thus, section 271C(1)(a) makes it clear that the penalty leviable shall be equal to the amount of tax which such personal failed to deduct. We cannot held this provisions to the mandatory or compensatory or automatic because under section 273B Parliament has enacted that penalty shall not be imposed in cases falling thereunder. Section 271C falls in the category of such cases. Section 273B states that**

notwithstanding anything contained in section 271C, no penalty shall be imposed on the person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on persons who do not have good and sufficient reason or not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the persons to prove such good and sufficient reason. In each of the 104 cases before us, we find that non-deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being eligible to deduction of tax at source under Section 192 was a nascent issue. It has not been considered by this Court before. Further, in most of these cases, the tax deductor-assessee has not claimed deduction under Section 40(a)(iii) in computation of its business income. This is one more reason for not imposing penalty under section 271C because by not claiming deduction under Section 40(a)(iii), in some cases, higher corporate tax has been paid to the extent of Rs.906.52 lakhs(See Civil Appeal No.1778 of 2006 titled CIT v. Bank of Tokyo-Mitsubishi Ltd). In some of the cases, it is undisputed that each of the expatriate employees have paid directly the taxes due on the foreign salary by way of advance tax/self-assessment tax. The tax deductor-assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/head office and, consequently, we are of the view that in none of the 104 cases penalty was leviable under section 271C as the respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source.

20. It is ample clear from the aforesaid law laid down by the Hon'ble Apex Court that provisions contained in Section 271-C are not mandatory or compensatory or automatic because under Section 273-B parliament has enacted that penalty shall not be imposed in cases falling thereunder. The Hon'ble Apex Court has categorically held in the aforesaid judgment that Section 271-C falls in the category of such cases. Section 273-B states that notwithstanding anything contained in Section 271-C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. The liability to levy of penalty can be fastened only on the person, who do not have good and sufficient reason for not deducting tax at source. In the instant case, assessee has/had good sufficient reason for not deducting tax at source and as such, penalty proceedings initiated by income tax department were rightly quashed by the learned appellate Tribunal.

21. After having carefully gone through the aforesaid relevant provisions of law as well as impugned order(s) passed by the learned Tribunal, this Court sees no illegality in the order(s) of learned tribunal that no penalty can be imposed under Section 271-C to the assessee for non deduction of tax at source because admittedly petitioner has rendered plausible/ genuine explanation for not deducing tax at source. Similarly, this Court sees no force in the arguments/ submissions made on behalf of the learned counsel representing appellant-department that learned appellate Tribunal misinterpreted the provision of Section 271-C and 201 of the Income Tax Act, because once assessee was not treated as an assessee in default in terms of Section 201 of the Act, he was not liable to deduct or pay any tax in terms of the provisions contained in Chapter XVII-B. On the top above everything, as has been discussed above, no penalty can be levied under Section 271(C), if the reasonable cause is shown by the assessee for not deducting TDS.

22. Substantial questions of law are answered accordingly.

23. Consequently, in view of the detailed discussion made hereinabove, the impugned order(s) is well reasoned and legal one, needs no interference. Accordingly, the impugned order(s) passed by the learned tribunal are upheld and the present appeal(s) stands dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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

Smt. Urmil Gupta ....Appellant-Plaintiff

Versus

Commissioner .....Respondent-Defendant

Regular Second Appeal No.331 of 2005
Judgment Reserved on: 04.07.2017
Date of decision: 21.07.2017

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit pleading that he came in possession of the suit land on the basis of the lease deed created by Mohatmim of temple Shri Ramanuj for a period of 99 years on a rent of Rs. 100/- per annum – temple officer unilaterally cancelled a lease deed and started interfering in the possession – the copy of order was not supplied - temple officer was not competent to cancel the lease and to take forcible possession- hence, the suit was filed for seeking declaration and injunction – the defendants pleaded that lease was cancelled for the breach of condition No.6- it was not for the benefit of the temple and did not create any right, title or interest in favour of the plaintiff – plaintiff has left India and has settled abroad after 1974 – the suit was decreed by the Trial Court – an appeal was filed, which was allowed- held in second appeal that the power of Mohatmim to alienate the property is analogous to that of Manager for an infant heir – Mohatmim has no power to alienate the property except for his need or for the benefit of the estate – he cannot grant a permanent lease at a fixed rent in absence of unavoidable necessity – lease was not executed in this case for the benefit of the temple or for the legal necessity – no mention of the same was made in the lease deed – the Appellate Court had rightly held that Mohatmim was not competent to execute the lease- the lease was void ab-initio and would not confer any right over the property- it was duly proved that possession of the land is with the defendant – witnesses of the plaintiff admitted that plaintiff had gone abroad and the land is lying vacant – plaintiff did not step into the witness box to prove his version and an adverse inference has to be drawn against her – the Appellate Court had rightly allowed the appeal- appeal dismissed. (Para-15 to 33)

Cases referred:

Sridhar Suar and another vs. Shri Jagan Nath Temple and others, AIR 1976 SC 1860
Harswarup vs. Ram Lok Sharma, 2000(3) Shim.L.C.160
Premji Ratansey Shah and Others vs. Union of India and Others, (1994)5 SCC 547
Kashi Math Samsthan & Anr. vs. Srimad Sudhindra Thirtha Swamy & Anr., AIR 2010 SC 296
Krishna Ram Mahale (dead) by his LRs. vs. Mrs.Shobba Venkat Rao, AIR 1989 SC 2097
B.M. Narayana Gowda vs. Shanthamma (Dead) by LRs. and Another, (2011)15 SCC 476
Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415
Santosh Hazari vs. Purushottam Tiwari, (2001)3 SCC 179

For the Appellant: Mr.G.D. Verma, Senior Advocate with Mr.B.C. Verma, Advocate.
For the Respondent: Mr.P.M. Negi and Mr.R.K. Sharma, Additional Advocate Generals.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 31.03.2005, passed by learned Additional District Judge, Sirmaur District at Nahan, in Civil Appeal No.22-N/13 of 2002, reversing the judgment and decree dated 11.03.2002 passed by learned Sub Judge Ist Class, Court No.1, Paonta Sahib, District Sirmuar, whereby suit of the plaintiff was decreed.

2. Briefly stated facts, as emerged from the record, are that on 20.12.1969, the plaintiff-appellant *(hereinafter referred to as the 'plaintiff'),* came in possession of the land comprised in Khata Khatauni No.12/15 min, Khasra No.135/1 *(now bearing Khata Khatauni No.486 min/609, Khasra No.594/437/269 min),* measuring 1 bigha, situated in Devinagar Mohalla in Paonta Sahib Town, District Sirmaur, H.P. *(hereinafter referred to as the suit land),* which was owned and possessed by Thakur Dwara Dei Ji Sahiba Mandir *(for short the 'Temple'),* on the strength of lease deed, created by *''Mohatmim' '* of the Temple Shri Ramanuj for a period of 99 years. It is averred by the plaintiff that the rent was agreed @ Rs.100/- per annum payable every year on 20th June and 20th December, respectively. It is further averred by the plaintiff that possession of the land was delivered to her and since then she is in continuous possession of the suit land and is paying the rent regularly. It is alleged by the plaintiff that the Temple Officer unilaterally cancelled the lease vide his order No.499 dated 4.7.1999 and started interfering in the possession. It is also averred by the plaintiff that she through her attorney Shri Dalip Singh made an application for obtaining copy of order, but neither the Temple Officer nor Patwari Halqua gave copy of the report of Roznamcha No.479 dated 13.8.1999. It is alleged that Temple Officer was not competent and authorized by law to cancel the lease and take forcible possession and as such, order No.499 dated 4.7.1999, is null and void. It is further averred by the plaintiff that she has not been afforded any opportunity of being heard against the order passed by the Temple Officer. It is further averred by the plaintiff that in November, 1999, defendant tried to take forcible possession, but his action was resisted. In this background, the plaintiff filed a suit for declaration that she is a permanent lessee of the suit land and that the order passed by the Temple Officer cancelling the lease is illegal, void and not binding on her rights. As a consequential relief, she also prayed for a decree of permanent injunction restraining the defendant from interfering with her possession over the suit land.

3. Defendant, by way of filing written statement, refuted the claim of the plaintiff on the grounds of maintainability, locus standi and jurisdiction. On merits, it is alleged by the defendants that the lease deed is illegal, void and that it has already been cancelled for breach of condition No.6. It is also pleaded that lease deed was not for the benefit of temple and it did not create any right, title and interest in favour of the plaintiff. It is claimed that Urmil Gupta has left India and settled in foreign country after 1974 and she is not in possession of the suit property and has not paid rent after 1974. It is further averred by the defendant the *'Mohatmim'* of the Temple was not competent to execute the lease deed. In nutshell, the defendant refuted the case of the plaintiff and prayed for dismissal of the suit.

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

> ***"1. Whether order dated 4.7.1999 passed by Temple Officer is illegal. If so, its effect?? OPP.***
>
> ***2. Whether plaintiff is entitled to the relief of injunction? OPP.***
>
> ***3. Whether plaintiff committed breach of term No.6. If so, its effect? OPD.***
>
> ***4. Whether this court has no jurisdiction in view of section 32 of H.P. Religious and Charitable Endowment Act, 1984? OPD***
>
> ***5. Relief"***

5. Subsequently, learned trial Court, on the basis of pleadings as well as evidence adduced on record by respective parties, decreed the suit of the plaintiff by declaring that lease deed executed on 20.12.1969 and registered on 22.12.1969 is still subsisting. The defendant was also restrained from interfering in possession of the plaintiff till plaintiff is dispossessed in accordance with law.

6. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, defendant preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned Additional District Judge, Sirmaur District at Nahan, who, taking note of the pleadings as well as evidence adduced on record by respective parties, allowed the appeal and set aside the judgment and decree passed by learned trial Court.

7. In the aforesaid background, appellant-plaintiff filed instant Regular Second Appeal laying therein challenge to the aforesaid judgment and decree passed by learned Additional District Judge, Sirmaur District at Nahan, whereby suit of the plaintiff was dismissed with a prayer to quash and set aside the same.

8. This Court vide order dated 12.07.2005 admitted the appeal on the following substantial question of law:-

> ***"(1) Whether lease deed admittedly having been executed between the parties could be set aside by the Temple Officer without affording reasonable opportunity of being heard to the concerned party?***
>
> ***(2) Whether the first appellate Court could have held that the defendant was in possession of the suit land without there being an issue to this effect?***

9. Shri G.D. Verma, learned Senior Counsel, representing the appellant-plaintiff, while inviting the attention of this Court to the impugned judgment passed by the learned first appellate Court, vehemently contended that the same is not sustainable in the eyes of law as the same is not based upon correct appreciation of evidence adduced on record. Shri Verma further contended that the learned appellate Court, while setting aside the judgment passed by learned trial Court, failed to appreciate that learned trial Court had allowed the suit of the plaintiff on the ground that method adopted by the defendant for determining the lease was violative of settled principle of law and trial Court had not returned any finding with regard to competence of '*Mohatmim'* to grant the lease in favour of the plaintiff. Learned counsel further contended that the judgment and decree passed by learned trial Court was to the effect that lease deed executed on 20.12.1969 is still subsisting and as such defendant is restrained from interfering in possession of the plaintiff till the plaintiff is dispossessed in accordance with law.

10. Learned counsel, while inviting the attention of this Court to the judgment passed by learned trial Court, further contended that suit of the plaintiff was decreed by learned trial Court on the ground that Order No.499 dated 4.7.1999, whereby lease in favour of the plaintiff was cancelled unilaterally, was not passed in a manner known to law and as such learned first appellate Court fell in grave error while pronouncing its judgment qua the validity of lease deed admittedly executed by '*Mohatmim'* in favour of the plaintiff. Mr.Verma further contended that since no specific issue, if any, with regard to validity of lease deed was framed by trial Court, there was no occasion for learned appellate Court to return findings that the learned trial Court has failed to frame material issue and also failed to return its findings on issue No.3.

11. Apart from above, learned counsel representing the appellant-plaintiff further contended that there was no issue framed by trial Court with regard to possession, if any, of the plaintiff on the land in question, but learned appellate Court, while returning findings on this issue, has actually transgressed the scope of appeal and as such same deserves to be quashed and set aside. While concluding his arguments, Mr.Verma, contended that, if for the sake of arguments, it is presumed that '*Mohatmim'* had no authority to execute lease deed in favour of the plaintiff, even in that eventuality, plaintiff could not be dispossessed by defendant by passing cancellation order without issuing any notice.

12. Mr.R.K. Sharma, learned Additional Advocate General, while referring to impugned judgment passed by learned trial Court, contended that there is no illegality and infirmity in the same and as such, the same is based upon correct appreciation of evidence available on record. Learned Additional Advocate General further contended that bare perusal of judgment and decree passed by learned trial Court itself suggests that learned trial Court, after having gone through the evidence adduced on record as well as provisions of law, was convinced and satisfied that '*Mohatmim'* of the temple had no authority, whatsoever, to execute lease in favour of plaintiff. Mr.Sharma, learned Additional Advocate General, further contended that once trial Court had formed an opinion that '*Mohatmim'* had no authority to execute the lease deed, there was no occasion, as such, for trial Court to conclude that plaintiff could not be evicted by the defendant without following due procedure of law.

13. Mr.R.K. Sharma, learned Additional Advocate General further contended that it is well settled that '*Mohatmim'* has/had no authority to execute lease deed and as such, lease deed, if any, made in favour of plaintiff is nullity in the eye of law. Document placed on record by the plaintiff is void ab initio and as such, same does not confer any right in favour of plaintiff and as such entries made in revenue record showing defendant to be the owner in possession of the suit land is correct. Mr.Sharma further contended that since alleged lease deed is/was void document, there was no requirement for department to cancel the same. Learned Additional Advocate General further contended that it stands duly proved on record that possession is with the defendant and as such there was no requirement for them to proceed with in accordance with law while evicting the plaintiff from the suit land.

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

Substantial Questions No.1 & 2:

15. Since both the substantial questions are inter-linked/inter-connected, therefore, the same are taken up together for consideration.

16. In the present case, even if facts/averments, as contained in plaint, are taken to be correct, one Ramanuj, who was '*Mohatmim'*, created a permanent lease in respect of the suit land in favour of the plaintiff by executing a lease deed Ex.PW-2/A for leased money at the rate of Rs.100/- per annum. '*Mohatmim'* Ramanuj, at the time of leasing out property, was acting like the guardian of temple and as such he had no authority, whatsoever, to lease out property belonging to the Deity. It is well settled that property given for maintenance of religious worship and of charities connected with it is inalienable and the powers of '*Mohatmim'* or a *Mahant* to alienate debutter property is analogous to that of a manager for an infant heir. '*Mohatmim'* has no power to alienate the property except for his need or for benefit of the estate.

17. Hon'ble Apex Court in case titled as ***Sridhar Suar and another vs. Shri Jagan Nath Temple and others, AIR 1976 SC 1860,*** which has also been taken note of by the learned first appellate Court, has categorically held that it is beyond the powers of a manager to grant a permanent lease at a fixed rent in the absence of unavoidable necessity; for, to fix the rent, though adequate at the time in perpetuity, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty on the part of the manager. It has been specifically held that the ''*Mohatmim'* has no power to alienate debutter property except in case of need or for benefit of the estate. Hon'ble Apex Court has further held in the aforesaid judgment that '*Mohatmim'* is not entitled to sell the property for the purpose of investing the price of it so as to bring in an income larger than that derived from the property itself. Nor can he, except for legal necessity grant a permanent lease of debutter property, though he may create proper derivative tenures and estates conformable to usage.

18. It would be profitable to take note of the following paras of the judgment *supra*:-

> ***"14. Now assuming without holding that the Sanand amounted to a lease, it cannot even then be held to be valid as permanent alienation of the temple***

debutter property is prohibited. The position is stated thus at page 489 of Mulla's Treatise on Principles of Hindu law (11th Edition):-

> ***"The power of a shebait or a mohunt to alienate debenture property is analogous to that of a manager for an infant heir as defined by the Judicial Committee in Hunooman Pershad v. Mussamat Babooee 6 M.I.A. 393. As held in that case, he has no power to alienate debutter property expect in a case of need or for the benefit of the estate. He is not entitled to sell the property for the purpose of investing , the price of it so as to bring in an income larger than that derived from the property itself. Nor can he, except for legal necessity grant a permanent lease of debutter property , though he may create proper derivative tenures and estates conformable to usage."***

15. In the present case, the position of the Raja of Puri who granted the Sanand (exhibit) was merely that of a shebait. He could not have granted a permanent lease of the property in question to the great grandfather of the plaintiff without necessity or without benefit to the estate which have not at all been made out in this case

16. Again the lease being a permanent one for a fixed rent could not have been granted at all by the Raja of Puri. Reference in this connection may usefully be made to page 931 of Mayne`s Treatise on Hindu Law (11th Edition), where the position is stated as follows:-

> ***"It is beyond the powers of a manager to grant a permanent lease at a fixed rent in the absence of unavoidable necessity; for, to fix the rent, though adequate at the time in perpetuity. in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty on the part of the manager. In Talaniappa Chetty v. Streemath Deivasikamony (1917) 44 I.A. 147. Lord Atkinson observed: "Three authorities have been cited which establish that it is a breach of duty on the part or a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debutter lands at a fixed rent. However adequate that rent may be at the time of granting, reason of the fact that, by this means, the debutter estate is deprived of the chance it would have, if the rent were variable of deriving benefit from the enhancement in value in the future of the lands leased."***

19. In the instant case, this Court after having carefully perused lease deed, Ex.PW-2/A, allegedly executed by '*Mohatmim'* in favour of plaintiff, sees substantial force in the arguments of learned Additional Advocate General that lease was not executed in favour of plaintiff for the benefit of temple or for the legal necessity. Bare perusal of leased document referred above nowhere finds mention, if any, with regard to aforesaid two conditions, which are required for execution of lease of property belonging to temple by its '*Mohatmim'* or manager. It is undisputed in the present case that "*Mohatmim'*; namely; Ramanuj created a permanent lease in respect of suit land in favour of the plaintiff for a period of 99 years that too for a meager amount of Rs.100/- per annum. Plaintiff has nowhere disputed the status of Ramanuj as '*Mohatmim'*, rather it is own case of plaintiff that property in question was leased out to her by '*Mohatmim'* of the temple for a sum of Rs.903/- for a period of 99 years. Hence, this Court sees no illegality and infirmity in the judgment passed by learned first appellate Court that lease deed Ex.PW-2/A, allegedly executed by '*Mohatmim'*, is illegal, null and void and creates no right, title or interest in favour of the plaintiff and as such the same was rightly cancelled by the Temple Officer vide order dated 4.7.1999. Since "*Mohatmim*' had no authority to create a lease in respect of suit land belonging to temple, document Ex.PW-2/A has/had no validity in the eye of law and as such learned trial Court wrongly came to the conclusion that lease deed Ex.PW-2/A is still subsisting.

This Court finds from the judgment of trial Court that even on the basis of pleadings as well as evidence adduced on record by respective parties that trial Court itself had come to conclusion that Ramanuj was not competent as a '*Mohatmim'* to execute the document of alienation without legal necessity. But, interestingly, learned trial Court, while disagreeing with the defence taken by defendant, came to the conclusion that Ramanuj '*Mohatmim'* has not executed the lease in the year 1969 for his personal use and even if it is assumed for the sake of arguments that lease deed was void, still plaintiff could not be dispossessed forcibly. The aforesaid finding returned by the trial Court was rightly rejected by the learned first appellate Court because once trial Court had come to conclusion that Ramanuj '*Mohatmim'* had no authority to execute document of alienation without any legal necessity, no right over the property allegedly leased out in favour of plaintiff could be claimed by plaintiff on the basis of invalid document.

20. As has been observed above that since lease deed Ex.PW-2/A was void ab initio, no right over suit property, if any, could be claimed by plaintiff on the basis of the same. Though plaintiff, while leading oral evidence as well as placing reliance on lease deed available on record, made an endeavor to prove on record that pursuant to execution of aforesaid lease deed, she was put into possession of the property and as such she could not be evicted from the suit land without following due procedure of law, but in the instant case, once plaintiff failed to prove on record that '*Mohatmim'* had any authority to execute lease deed or he was authorized to alienate the property of the temple or trust or he alienated the property for the legal necessity and for benefit of trust/temple, learned trial Court wrongly concluded that plaintiff's right over the suit land, on the basis of lease deed, has not been terminated lawfully. Since, it stands duly proved on record that '*Mohatmim'* Ramanuj had no authority to alienate property, lease executed on his behest in favour of plaintiff has/had no force and it creates/created no rights in favour of plaintiff. Though in the instant case, it is own case of plaintiff that cancellation order was passed by the Tehsildar (Temple Officer) on 4.7.1999, but this Court is of the view that since lease deed in question is/was void ab initio, there is/was no requirement, if any, for authorities concerned to issue notice to the plaintiff.

21. In the instant case, suit for declaration and injunction was filed by the plaintiff seeking declaration that she is permanent lessee for 99 years, on the basis of lease deed dated 20.12.1969. Defendant, while refuting the aforesaid claim of plaintiff, specifically denied authority, if any, with '*Mohatmim'* Ramanuj to execute lease deed and also denied possession, if any, of the plaintiff over the suit land. Since validity of lease deed Ex.PW-2/A was not proved before Court below, learned first appellate Court rightly, on the basis of evidence adduced on record by the respective parties, returned its findings qua the issue of possession of plaintiff over the suit land. Though plaintiff with the help of oral evidence made an attempt to prove on record that she was put into possession of the suit land after execution of lease deed and till date she is in possession of land in question, but careful perusal of statements of plaintiff witnesses clearly suggests that version put forth by them with regard to possession of plaintiff over the suit land is not only contradictory but no definite opinion can be formed with regard to alleged possession of plaintiff over the suit land, whereas defendant has successfully proved on record that temple is in the possession of the suit property and at no point of time plaintiff ever deposited the rent in terms of lease deed allegedly executed by the '*Mohatmim'* in favour of the plaintiff. It has specifically come in the statement of DW-2 Jai Nand Sharma, Tehsildar, Rajgarh, who remained posted as Tehsildar-cum-Temple Officer from 16.9.1998 to 18.6.2001, that the Temple is in possession of the suit land and the plaintiff Urmil Gupta never deposited rent since 1974.

22. It also emerge from the record that learned first appellate Court allowed appellant-defendant to examine AW-1 Shri Rajesh Sharma i.e. Patwari of the Temple, who categorically stated that the fencing of the suit land was done in the year 1997-98 and the barbed wires were fixed as per Ex.AW-1/A to Ex.AW-1/E. Careful perusal of aforesaid documents leaves no doubt in the mind of Court that possession of the suit land is with the defendant and the barbed wires have been fixed by the temple and as such learned first appellate Court rightly concluded that temple is in possession of the suit land. All the plaintiff witnesses have specifically stated that plaintiff; namely; Smt.Urmil Gupta had gone to foreign country and she

had fixed barbed wire around the land about 4-5 years ago. It has also come in their statements that suit land is lying vacant adjacent to the temple. This Court cannot loose sight of the fact that in the instant case plaintiff, in whose favour lease was executed by '*Mohatmim'* of the temple never stepped into the witness box, rather instant suit was filed by her attorney; namely; Shri Dalip Kumar, who appeared before the Court as PW-1 and deposed that Urmil Gupta had gone to the foreign country about 5-6 years ago. Since lease deed was executed in favour of the plaintiff, it was expected from the plaintiff to prove her case by stepping into witness box and state that she is in possession of the suit land. Once plaintiff failed to step into witness box, no reliance, if any, could be placed on the version put forth by PW-1 Dalip Singh i.e. Special Power Attorney of plaintiff, who, in his cross-examination, specifically admitted that he was not present at the time of execution of lease deed. By now it is well settled that where a party to a suit fails to enter into a witness box and states his/her own case on oath and does not offer himself/herself to be cross-examined by the other side, a presumption would arise that the case set up by him/her is not correct.

23. In this regard reliance is placed on the judgment of this Court in ***Harswarup vs. Ram Lok Sharma, 2000(3) Shim.L.C.160,*** wherein this Court has held as under:-

> ***"18. Be it stated that the tenant has not dared to step into the witness box to state about either the condition of the tenanted premises or the bona fide requirement of the landlord for rebuilding and/or reconstruction. Only his general attorney Kuldip Singh has appeared as RW5.***
>
> ***19. It has been held by the Apex Court in Ishwar Bhai C.Patel v. Harihar Behera and another, (1999(2) Current Civil Cases 171 (SC), that if a defendant does not enter the witness box to make a statement on oath in support of the pleadings set out in the written statement, an adverse inference would arise that what he had stated in the written statement was not correct.***
>
> ***20. This court in Gurdev Singh v. Gulaboo, R.S.A.No.302 of 1992, decided on 24.4.2000, has held that the appearance of a general attorney cannot be regarded as appearance of the party. The appearance of a general attorney is only as a witness in his personal capacity.***
>
> ***21. Therefore, in the present case, on the failure of the tenant to step into the witness box to make a statement on oath in support of his pleadings and to subject himself to cross-examinatin, an adverse inference will have to be drawn against him and it will have to be presumed that the tenantd premises are dilapidated and have become unfit and unsafe for human habitatin. The findings recorded by the learned Appellate Authority, therefore, call for no interference."***

24. It is well settled that injunction cannot be granted against the true owner and as such first appellate Court rightly rejected relief of declaration and injunction in favour of the plaintiff, who had admittedly no interest in the property. Even if, argument, having been made by Mr.G.D. Verma, learned Senior Counsel appearing for the appellant-plaintiff, is accepted that the plaintiff was having possession over the suit land, her possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser who gained unlawful possession, as against the respondent-defendant. In this regard reliance is placed upon ***Premji Ratansey Shah and Others vs. Union of India and Others, (1994)5 SCC 547,*** wherein the Hon'ble Apex Court has held as under:-

> ***"5. It is equally settled law that injunction would not be issued against the true owner. Therefore, the courts below have rightly rejected the relief of declaration and injunction in favour of the petitioners who have no interest in the property. Even assuming that they had any possession, their possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who***

gained unlawful possession, as against the owner. Pretext of dispute of identity of the land should not be an excuse to claim injunction against true owner." (p.550)

25. Hon'ble Apex Court in ***Kashi Math Samsthan & Anr. vs. Srimad Sudhindra Thirtha Swamy & Anr., AIR 2010 SC 296,*** has held as under:-

> ***"13. It is well settled that in order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. But it is equally well settled that when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted. Therefore, keeping this principle in mind, let us now see, whether the appellant has been able to prove prima facie case to get an order of injunction during the pendency of the two appeals in the High Court. In para 21 of the Judgment of the trial Court, it is found:***
>
> > ***".....the words 'certain and 'some' quoted above and 'when we are still in a position to carry on with the traditional duties', prima facie show that the 1st respondent has not surrendered all his rights, privilege and duties and that the 2nd petitioner has not been made as full fledged Mathadhipathi. As per the custom prevailing since continuous, vatu initiated into Sanyasa and named as successor, will become Mathadhipathi after the Mathadhipathi passes away."***
>
> ***From the aforesaid finding of the trial Court, it is clear that the respondent No. 1 had not abrogated all his powers as Mathadhipathi in favour of the appellant no.2 and he was only entrusted with certain powers. In para 22 of the Judgment of the trial Court, it was observed as follows :-***
>
> > ***"The following circumstances also go to support the version of the 1st respondent. The 2nd petitioner himself has addressed a letter dated 4/11/99 reads as follows:***
> >
> > > ***'In view of the recent events, we have kindly decided not to involve in the matters concerning the authority of Shri Samshtan (Adhikartha Vishayas) as well as Dharmic activities (Dharmic Vishayas) of the samaj. Therefore with pranamas, again and again we pray and request to relive us as early as possible.'***
> >
> > ***This prima facie shows that the 2nd petitioner has been still recognizing the 1st Mathadhipathi, and therefore requested him to relieve himself from "certain activities."***
>
> ***A careful reading of the aforesaid findings/observations made in para 22 of the judgment of the trial Court would show that the letter dated 4th of November, 1999 clearly enumerates the fact that the appellant No. 2 had wanted to be relieved from certain activities of the Math and he had in fact sought permission from the respondent no 1 in this regard. Therefore, in our view, it was rightly held by the trial Court in the final Judgment that the appellant No. 2 continued to consider the respondent No. 1 as the Mathadhipathi of the Math even after the alleged proclamation of 1994.***

The trial court again in para 24 had observed:

> ***"If all the circumstances are taken into consideration the irresistible conclusion that can be drawn at this stage is that, the 1st respondent has not abdicated all his powers and privileges as Mathadhipathi and only some powers and privileges have been conferred on 2nd petitioner. In view of the above discussion, I hold that the 2nd petitioner is not entitled for the injunction orders as claimed by him." (Emphasis supplied)***

In view of the aforesaid findings of the trial Court to the extent that appellant no. 2 was not entitled to the injunction order as claimed by him, it is difficult to find any illegality or infirmity with the findings of the trial court, as noted hereinabove, atleast prima facie in respect of which, the High Court had also agreed. We are, therefore, of the view that the powers of the Mathadhipathi of the Math were not abdicated in favour of the appellant No.2. It is well settled that such power of the Mathadhipathiship of the Math could devolve to any other person after the death of the existing Mathadhipathi or anyone else, who could succeed him as the Mathadhipathi of the Math according to the customs and traditions of the Math." (pp.299-300)

26. Mr.G.D. Verma, learned Senior Counsel, while placing reliance upon ***Krishna Ram Mahale (dead) by his LRs. vs. Mrs.Shobba Venkat Rao, AIR 1989 SC 2097,*** contended that it is well settled law that where a person is in settled possession of property, even on the presumption that he had no right to remain in charge of the property, he cannot be dispossessed by the owner of the property, except by recourse to law. Hon'ble Apex Court in the aforementioned case has held as under:-

> ***"8. Mr. Tarkunde, learned Counsel for defendant No. 3, the appellant herein, rightly did not go into the appreciation of the evidence either by the Trial Court or the High Court or the factual conclusions drawn by them. It was, however, strongly urged by him that the period of licence had expired long back and the plaintiff was not entitled to the renewal of licence. It was submitted by him that in view of the licence having come to an end, the plaintiff had no right to remain in charge of the business or the premises where it was conducted and all that the plaintiff could ask for was damages for unlawful dispossession even on the footing of facts as found by the High Court. We find ourselves totally unable to accept the submission of Mr. Tarkunde. It is a well-settled law in this country that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. If any authority were needed for that proposition, we could refer to the decision of a Division Bench of this Court in Lallu Yeshwant Singh v. Rao Jagdish Singh and Ors. AIR 1968 SC 620 (at pp.622-623). This Court in that judgment cited with approval the well-known passage from the leading privy Council case of Midnapur Zamindary Company Limited v. Naresh Narayan Roy 51 Ind App 293 at p. 299: (AIR 1924 PC 144), where it has been observed (p-208)(of SCR): (at p.622 of AIR):***
>
> > ***In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court."***
> >
> > ***(p.2100)***

27. This Court sees no reason to differ with the aforementioned argument having been made by Mr.G.D. Verma, learned Senior Counsel, which is based upon judgment passed by Hon'ble apex Court, but in the instant case, as has been discussed above, respondent-plaintiff

has not been able to prove her possession over the suit land. All the plaintiff witnesses have given altogether different version with regard to the possession of the plaintiff over the suit land. Most importantly, as has been discussed above, suit for injunction in the instant case as well as declaration in the instant case was filed by the plaintiff wherein she admittedly failed to prove her title as well as possession over the suit land. Since lease deed allegedly executed by Mohatmim is/was void ab initio, possession, if any, acquired by the plaintiff on the strength of same cannot be termed to be lawful. As has been observed above by Hon'ble Apex Court in ***Premji Ratansey Shah's*** case *supra,* no injunction can be issued against the true owner and possession, if any, without there being any title is only unlawful possession of trespasser.

28. As far as judgment passed by Hon'ble Apex Court in ***B.M. Narayana Gowda vs. Shanthamma (Dead) by LRs. and Another, (2011)15 SCC 476,*** is concerned, there cannot be any quarrel that in the first appeal parties have the right to be heard both in question of law as also on facts and the first appellate Court is required to address itself to all issues and decide the case by giving reasons.

29. In the instant case, it clearly emerge from the record that learned first appellate Court, while examining the correctness of judgment passed by learned trial Court, has dealt with each and every aspect of the matter and has also carefully perused the evidence led on record by respective parties, while differing with the findings returned by the trial Court. It also emerge from the judgment passed by learned first appellate Court that it has assigned specific reasons to differ with the findings returned by the trial Court and as such, this Court finds no force in the arguments of Shri G.D. Verma, learned Senior Counsel that learned first appellate Court has failed to address all issues.

30. Hon'ble Apex Court in ***Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415***, has specifically held that appellate Court is final Court of facts and as such its judgment must reflect application of mind and must record its findings supported by reasons. Hon'ble Apex Court in the aforesaid judgment, taking note of the earlier judgment passed in ***Santosh Hazari vs. Purushottam Tiwari, (2001)3 SCC 179,*** has held as under:

> ***"13. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in Vinod Kumar v. Gangadhar (2015) 1 SCC 391, it was held as under:-***
>
> ***"12. In Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)***
>
> > ***"15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."***
>
> ***The above view has been followed by a three-Judge Bench decision of this Court in Madhukar v. Sangram (2001) 4 SCC 756, wherein it was***

reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings."

31. Hence, this Court sees no force in arguments of Shri G.D. Verma, learned Senior Counsel for the appellant, that since no issue with regard to possession of plaintiff was framed by trial Court, there was no occasion for learned first appellate Court to return findings that defendant was in possession of the suit land. Learned trial Court may not have framed specific issue qua the possession, if any, of plaintiff over the suit land, pursuant to lease deed allegedly executed in her favour by "*Mohatmim'* Ramanuj, but since question with regard to validity of lease deed was before first appellate Court, there was no bar for it to make findings/observations with regard to possession, if any, of plaintiff over the suit land which was purely based upon the basis of lease deed executed in her favour by '*Mohatmim'*. Otherwise also, it was incumbent upon the learned first appellate Court, being last facts finding Court, to deal with all the issues and evidence led by the parties before recording its findings, as has been held in ***Laliteshwar Prasad Singh's*** case *supra*. Both the substantial questions are answered, accordingly.

32. Leaving everything aside, this Court finds from record that plaintiff; namely; Urmil Gupta resides in Australia and instant suit was filed on her behalf by her Special Power of Attorney; namely Dalip Singh. Whether suit, if any, could be filed on the basis of Special Power of Attorney is also a debatable question. Moreover, Perusal of the record nowhere suggests that even Special Power of Attorney allegedly executed by plaintiff in favour of PW-1 Dalip Singh was placed on record in accordance with law.

33. Consequently, in view of above, this Court sees no reasons to interfere with the well reasoned judgment passed by learned first appellate Court, which otherwise appears to be based upon correct appreciation of evidence as well as law laid down by Hon'ble Apex Court as well as by this Court from time to time. Accordingly present appeal fails and is dismissed accordingly.

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

****

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

Praveen Diwan & others ....Objectors/Petitioners.

Versus

Himachal Pradesh Agro Industries Corporation Limited ....Claimant/ Respondent.

Arb. Case No.11 of 2009
Judgment reserved on: 11.07.2017
Date of Decision: 24th July, 2017

Arbitration and Conciliation Act, 1996- Section 34(3)- Objectors established a company for processing fruits and vegetables – they approached the Corporation for equity assistance of Rs. 40 lacs, which was sanctioned – objectors entered into an agreement with the Corporation for direct equity participation – 4 lacs shares, each having a face value of Rs. 10/- were allotted in favour of the Corporation – objectors were to buy back the shares within five years from the date of disbursement and three years from the date of commercial production- the Corporation asked the objectors to buy back the shares but they refused on which the Corporation raised a demand of Rs. 1,20,91,082/- - the matter was referred to the Arbitrator – the Arbitrator passed an award in favour of the Corporation for a sum of Rs. 40 lacs along with interest @ 17.5% with half-yearly rests- the objectors filed the present objection petition – held that jurisdiction of the Court is limited while considering objections to the award of arbitrator - the Court can interfere with the

award in case of fraud or bias, violation of principle of natural justice and patent illegality etc. – the Court does not sit in appeal over the award and can consider the objection that the award is against the public policy – no allegation has been made that award is against the public policy – the Arbitrator had taken note of the agreement while returning the findings – there is no reason to interfere with the award – petition dismissed. (Para-12 to 23)

Cases referred:

Hindustan Tea Company v. M/s K. Sashikant & Company and another, AIR 1987 Supreme Court 81

M/s Sudarsan Trading Company v. The Government of Kerala and another, AIR 1989 Supreme Court 890

McDermott International Inc. v. Burn Standard Company Limited and others (2006) 11 Supreme Court Cases 181

Oil & Natural Gas Corporation Limited versus Western Geco International Limited (2014) 9 Supreme Court Cases 263;

Oil & Natural Gas Corporation Limited versus Saw Pipes Limited (2003) 5 Supreme Court Cases 705

Markfed Vanaspati & Allied Industries versus Union of India (2007)7 Supreme Court Cases 679

For the Petitioners Mr. Neeraj Gupta, Advocate.
For the Respondent Mr. Balwant Kukreja, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

By way of instant application/objections having been filed by the objectors-petitioners (***for short objectors***) under Section 34(3) of the Arbitration and Conciliation Act, 1996, challenge has been laid to the award dated 20th October, 2008, passed by the Principal Secretary (Horticulture) to the Government of Himachal Pradesh, in Arbitration Case No.1 of 2003, in respect of the dispute between the parties relating to the alleged buying back of the equity shares by the objectors in view of the sanction of the equity assistance of Rs. 40.00 lacs by the respondent-claimant (***for short claimant***) to the objectors.

2. Briefly stated facts as emerge from the record are that the objectors established a company M/s Himalayan Vegefruits Limited to set up an industrial unit for the processed fruits and vegetables at Parwanoo, District Solan, Himachal Pradesh and in this regard objectors approached claimant-Corporation for sanction of equity assistance amounting to Rs.40.00 lacs, which was sanctioned in their favour. Pursuant to aforesaid sanction made in favour of the objectors, objectors entered into an agreement with the claimant-Corporation for direct Equity Participation Agreement on 22.3.195 and 1.4.1997 respectively. Above named objectors-company allotted 4,00,000 shares of face value of Rs.10/- each in favour of the claimant-corporation and issued shares certificates for 4,00,000 shares in favour of the corporation on receipt of payment of Rs.40.00 lacs.

3. It also emerge from the record that as per clause 1 and 2 of the Agreement, objectors were to buy back the shares within five years from the date of first disbursement and after expiry of three years from the date of commercial production. The claimant-Corporation vide notices dated 31.3.2000 and 11.5.2001 called upon the objectors to buy back the shares, but since objectors failed to buy back the shares, the claimant-Corporation re-called the entire equity amount of Rs.40.00 lacs alongwith interest on 12.9.2002 and raised a demand of Rs.1,20,91,082/-. The aforesaid amount included face value of shares i.e. Rs.40.00 lacs and interest at the rate of 17.5% with effect from 1.4.1995 to 30.9.2002.

4. Aforesaid claim put forth by the claimant- Corporation was resisted by the objectors on the ground that agreement dated 22.3.1995 for direct equity participation agreement was for Rs.10.00 lacs and not for Rs.20.00 lacs, as alleged by the claimant-Corporation. Objectors further contended that in terms of the agreement, as referred above, Claimant-Corporation was required to invest in the objectors-company through their own funds and such, funds were to be arranged by the objectors-company from the Ministry of Food Processing Industries, Government of India (***for short 'MOFPI)*** or from National Horticulture Board, Government of India. As per objectors, Corporation never actually invested such funds after entering into agreements with the objectors. Objectors further claimed that there was a Tripartite Agreement between the corporation, 'MOFPI' and M/s Himalayan Vegefruits Limited, whereby objectors received funds from 'MoFPI' and from National Horticulture Board under this Tripartite Agreement. Since, there was a dispute *inter se* parties, matter came to be referred to the learned Arbitrator in terms of Arbitration clause contained in agreement dated 22.3.1995 and 1.4.1997. As per aforesaid agreement, Financial Commissioner (Development) to the Government of Himachal Pradesh (now the Principal Secretary(Horticulture) to the Government of Himachal Pradesh) was appointed as sole Arbitrator, who vide award dated 20th August, 2008, passed the award in favour of claimant- Corporation and against the objectors for a sum of Rs.40.00 lacs alongwith interest at the rate of 17.5% with half yearly rests from the date of disbursement of the aforesaid amount of Rs.40.00 lacs by the claimant corporation till realization of the entire amount. Learned Arbitrator further ordered that on receipt of full payment, claimant-corporation shall transfer the shares in favour of the objectors or their nominee.

5. Being aggrieved and dissatisfied with the aforesaid award passed by the learned Arbitrator, objectors have filed instant objections under Section 34(3) of Arbitration and Conciliation Act, 1996, praying therein for setting aside the award dated 20th October, 2008, passed by the learned Arbitrator.

6. In nutshell, submissions having been made by Mr. Neeraj Gupta, learned counsel representing the objectors are that award is unjust, unreasonable and is against the expressed terms of contract. Mr. Gupta, further contended that learned Arbitrator has acted contrary to the facts pleaded in the reply filed by the objectors and the award is thus opposed to the public policy of India. While referring to the impugned award passed by the learned Arbitrator, Mr. Gupta, argued that Arbitrator has travelled beyond its jurisdiction to misconstrue and misinterpret the agreement executed between the objectors and the claimant–Corporation on one hand and the Tripartite agreement executed between the claimant-Corporation, 'MOFPI' and M/s Himalayan Vegefruits Limited, on the other hand. Mr. Gupta, further contended that since objectors had taken a specific stand with regard to the claim made by the claimant corporation that since corporation failed to adhere to the terms and conditions of the Bi-agreement executed with the claimant-corporation, claim put forth by the corporation on the basis of Tripartite agreement is wholly unsustainable.

7. Mr. Gupta, further contended that impugned award itself suggests that learned Arbitrator has failed to give reasons in support of his findings qua three issues, which were framed for adjudication. Reasons assigned by the learned Arbitrator, nowhere satisfy the test laid down for "Reasons" by the Hon'ble Apex Court as well as this Court in various pronouncements and as such, impugned award cannot be said to be reasoned award, as required under the provisions of Section 31(3) of the Arbitration and Conciliation Act, 1996. Mr. Gupta, also submitted that since there was a breach of conditions of such clause and condition, therefore, for all intents and purposes, the agreement required for operation with respect to equity participation ought to have been the " Tripartite Agreement" and not the agreement executed between the claimant and the objectors. As per Mr. Gupta, the Bi-Agreement, on account of non performance by the claimant corporation and otherwise in view of the Tripartite Agreement was in fact a subordinate agreement which was also subservient to the operating clauses of the Tripartite Agreement. But such aspect of the matter was neither gone into by the learned Arbitrator nor any findings have been returned in this regard and as such, impugned award is liable to be set-aside.

8. While concluding his arguments, Mr. Gupta, forcibly contended that learned Arbitrator has fallen in error while arriving at a conclusion that buy back of 4,00,000 shares is to be governed by two agreements dated 1.4.1997 and 22.3.1995. Learned counsel further contended that since learned Arbitrator has failed to return specific findings as regards to the defence made by the objectors in the reply, wherein it was specifically contended that claimant corporation failed to comply with the conditions laid in Bi-Agreement executed between itself and the objectors company and as such, learned Arbitrator has committed an error of law and jurisdiction while holding that objectors have failed to buy back the shares. With the aforesaid submissions, Mr. Gupta, contended that the impugned award being opposed to settle law and against the Public Policy of India, is liable to be set-aside.

9. Mr. Balwant Kukreja, learned counsel representing claimant-Corporation, supported the impugned award and stated that there is no illegality and infirmity of the same, rather learned Arbitrator has dealt with each and every aspect of the matter very carefully while passing the award and as such, same deserves to be upheld. While refuting the aforesaid contention having been made by the learned counsel for the objectors, Mr. Kukreja, invited attention of this Court to clause 1 and 2 of the agreement to suggest that objectors were to buy back the shares within five years from the date of first disbursement and after expiry of three years from the date of commercial production and since petitioners/objectors failed to do the same, they were called upon by the claimant corporation to buy back the same vide repeated notices. But since no heed was paid to the aforesaid notices, claimant corporation finally recalled the entire equity amount of Rs.40.00 lacs alongwith interest and raised a demand of Rs.1,20,91,082. Learned counsel further stated that amount of Rs.40.00 lac was not invested or funds were not provided to the petitioner as alleged, rather in terms of tripartite agreement executed amongst Ministry of Food Processing Industry, Government of India, H.P. Agro Industries Corporation Limited and Himalayan Vegefruits Limited, a sum of Rs.20.00 lacs was provided by Ministry of Food Processing Industry, Government of India to H.P. Agro Industries Corporation Limited for further investment in Himalayan Vegefruits Limited and as per clause 1 of the agreement, remaining amount of Rs.20.00 lacs was to be provided by the claimant corporation to M/s Himalayan Vegefruits Limited . Learned counsel representing the claimant corporation contended that there is no scope of interference as far as this court is concerned, especially when it clearly emerge from the record that award is based on the proper appreciation of evidence and documents adduced on record by the respective parties.

10. Learned counsel further contended that though findings returned by the learned Arbitrator are based upon the correct appreciation of the material adduced on record by the respective parties, but even if it is presumed that the decision of the arbitrator is erroneous, same is not liable to be interfered by filing objections under Section 34 of the Act. Since, Arbitrator has not acted in violation of any law and as such impugned award passed by the learned Arbitrator deserve to be upheld.

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

12. Before adverting to the correctness of the aforesaid submissions having been made by learned counsel for the parties viz-a-viz impugned award passed by learned Arbitrator, this Court deems it fit to take note of the judgment passed by Hon'ble Apex Court in **Hindustan Tea Company v. M/s K. Sashikant & Company and another,** AIR 1987 Supreme Court 81; wherein it has been held as under:-

> **" Under the law, the arbitrator is made the final arbiter of the dispute between the parties. The award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts.**
>
> **Where the award which was a reasoned one was challenged on the ground that the arbitrator acted contrary to the provisions of Section 70 of the Contract Act, it was held that the same could not be set aside."**

13. Similarly, Hon'ble Apex Court in **M/s Sudarsan Trading Company v. The Government of Kerala and another**, AIR 1989 Supreme Court 890, has held as under:-

> "It is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator as to what impelled him to arrive at his conclusion. In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the award. In the absence of any reasons for making the award, it is not open to the Court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisement of evidence by the arbitrator is never a matter which the Court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator."

14. Reference is also made to the judgment passed by the Hon'ble Apex Court in ***McDermott International Inc. v. Burn Standard Company Limited and others*** (2006) 11 Supreme Court Cases 181. The relevant paras of the judgment are reproduced as under:-

> In terms of the 1996 Act, a departure was made so far as the jurisdiction of the court to set aside an arbitral award is concerned vis-a-vis the earlier Act. Whereas under Sections 30 and 33 of the 1940 Act, the power of the court was wide, Section 34 of the 1996 Act brings about certain changes envisaged thereunder. Section 30 of the Arbitration Act, 1940 did not contain the expression *" error of law..."*. The same was added by judicial interpretation.
>
> While interpreting Section 30 of the 1940 Act, a question has been raised before the courts as to whether the principle of law applied by the arbitrator was (a) erroneous or otherwise or (b) wrong principle was applied. If, however, no dispute existed as on the date of invocation, the question could not have been gone into by the Arbitrator.
>
> The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.
>
> The arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law;(b) the interests of India; (c) justice or morality; or (d) if it is patently illegal or arbitrary. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Lastly where the Arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of Section 34 of the Act.
>
> What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be

injurious to the public good at the relevant point, as contradistinguished from the policy of a particular government.

15. Careful perusal of the aforesaid judgments passed by the Hon'ble Apex Court clearly suggest that jurisdiction of this Court is limited while considering the award Under Section 34 of the Act. The award passed by the Arbitrator can only be interfered in case of fraud or bias, violation of the principles of natural justice etc. Apart from above, interference on the ground of "patent illegality" is permissible only if the same is going to the root of the matter. The public policy, violation should be so unfair and unreasonable as to shock the conscience of the Court. In the aforesaid judgment passed by the Hon'ble Apex Court, it has been held that what would constitute 'public policy' is a matter dependent upon the nature of the transaction and the statute.

16. It is quite evident from the reading of aforesaid judgments, referred hereinabove, that Court while deciding objections, if any, filed under Section 34 of the Act, against the award passed by the learned Arbitrator, does not sit in the appeal over the findings recorded by learned Arbitrator and there cannot be reappraisal of the evidence, on the basis of which learned Arbitrator has passed the award. In terms of Section 34 of the Act, court can consider the objections only, if the award is in any manner against the "public policy", which certainly has to be liberally interpreted keeping in view the facts of the case. But interestingly, in the present case, perusal of objections filed by the petitioner nowhere suggests that award is against public policy. Perusal of objections filed by the objectors shows that neither there are any specific allegations that the award was against 'public policy' nor it has been clarified as to which findings or objections made by the learned Arbitrator are against public policy save and except general allegations that the award is against the expressed terms of contract and is unjust, unreasonable, unsustainable and patently illegal.

17. This Court after carefully gone through the pleadings/objections having been filed by the objector, has no hesitation to conclude that objections are vague in nature and by no stretch of imagination, same cannot be termed to be against public policy. Perusal of impugned award passed by learned Arbitrator certainly compels this Court to agree with the contention having been made by Mr. Balwant Kukreja, learned counsel representing the claimant-Corporation that each and every aspect of the matter has been dealt with carefully by the learned Arbitrator while deciding the claims/counter-claims of the parties concerned. Learned Arbitrator taking note of claim as well as written statement having been filed by the respective parties formulated points for determination. It clearly emerges from the award that all the issues raised by the objectors/petitioners were taken for adjudication by the learned Arbitrator while passing the award. Apart from above, this Court having carefully gone through the impugned award finds that all the arguments having been made by the learned counsel representing the objectors/ petitioners in the present petition stands answered in the impugned award. Learned Arbitrator while holding Claimant Corporation entitled to a sum of Rs. 40.00 lacs alongwith interest has specifically taken note of agreements dated 22.3.1995 and 1.4.1997. Similarly, this Court finds that issue with regard to investment of funds in direct equity participation by Claimant Corporation has been carefully examined by the arbitrator by taking note of the reply/ written statement filed by the objectors/petitioners. While retuning findings qua issue No.3 i.e. "whether a Tripartite Agreement was executed between the parties and Bi Agreement between the parties was never complied, if so, what are its effects?", learned Arbitrator has rightly come to the conclusion that claimant corporation after execution of tripartite agreement dated 21.4.1995 entered into an agreement dated 1.4.1997 for Rs.20.00 lacs each. Vide aforesaid agreement, as referred above, MOFPI, Government of India provided an amount of Rs..20 lacs to H.P.Agro Industries Corporation Limited and by second agreement an amount of Rs.20.00 lac was to be provided to H.P. Agro Industries Corporation to the petitioners/objectors in terms of sanction letter dated 15.2.1995. Since, equity sum of Rs.40.00 lacs was provided to petitioners vide aforesaid agreements, learned Arbitrator rightly held that buy back of 4,00,000/- shares is/was to be governed by these two agreements dated 1.4.1997. Otherwise also perusal of clause 1 and 2 of the agreement, suggest that objectors/petitioners were to buy back the shares from the date of

first disbursement and after expiry of three years from the date of commercial production. Since, objectors failed to buy back the shares, claimant- Corporation recalled the entire equity amount with up to date interest in terms of agreements arrived inter se parties. It also emerge from the record that buyback of shares so invested by the claimant- corporation was to be governed by the agreements for buy back of shares as agreed vide agreement dated 1.4.1997. Since, petitioners/objectors failed to buy back the shares inspite of the notice which was duly acknowledged by them vide their letter dated 17.9.2012, learned Arbitrator rightly not found any fault with the action of claimant-Corporation in recalling the entire equity amount of Rs.40.00 lacs. It also emerge from the record that petitioners/objectors in the written statement filed before the learned Arbitrator specifically requested for deferment of the buyback of shares, meaning thereby they were liable to buy back the share held by H.P. Agro Industries Corporation Limited.

18. After having gone through the findings returned by the learned Arbitrator on the basis of evidence adduced on record by the respective parties, this Court sees no reasons to interfere with the impugned award in the instant proceedings by re-appreciating the evidence, as it would amount to hear the appeal as against the judgment of civil Court. At the cost of repetition, it may be observed that jurisdiction of this Court is limited and award can be set-aside only if it is against the "public policy", but unfortunately neither any material has been placed on record nor any argument has been made on behalf of the petitioner to substantiate that how the award is against the public policy. Needless to say, question of interpretation of the agreement and its terms and sufficiency of evidence was within the domain of the Arbitrator and actually objections having been filed by the petitioners/objectors deserve to be dismissed being unsustainable in the eyes of law.

19. At this stage, it would be apt to take note of the judgment passed by the Hon'ble Apex Court in ***Oil & Natural Gas Corporation Limited versus Western Geco International Limited (2014) 9 Supreme Court Cases 263***; wherein Hon'ble Apex Court taking note of the judgment passed by the Hon'ble Apex Court in **Oil & Natural Gas Corporation Limited versus Saw Pipes Limited** (2003) 5 Supreme Court Cases 705, has held as under:-

> "34. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India" a ground recognized under Section 34(2)(b)(ii) (supra). The expression "Public Policy of India" fell for interpretation before this Court in ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words: (SCC pp.727-28)
>
> > "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case 1994 Supp(1) SCC 644, it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:
> >
> > (a) fundamental policy of Indian law; or
> >
> > (b) the interest of India; or
> >
> > (c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

35. What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in Saw Pipes Ltd. (supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact that so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge."

20. It clearly emerge from the aforesaid judgment that the concept of public policy connotes some matter which concerns public good and the public interest. Similarly, award/judgment/decision likely to adversely affect the administration of justice has been also termed to be against "public policy".

21. Another arguments having been made by the learned counsel for the objectors that impugned award is not non-speaking order and no reasons, whatsoever have been given while passing the award, also deserve outright rejection. It has been observed hereinabove that each and every aspect of the matter has been dealt with carefully by the learned Arbitrator while passing the award. In this regard, reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***Markfed Vanaspati & Allied Industries versus Union of India*** (2007)7 Supreme Court Cases 679, wherein it has been held that Arbitration is a mechanism or a method of resolution of dispute that unlike court takes place in private, pursuant to agreement between the parties. The relevant para Nos. 10 to 17 of the judgment are reproduced as under:-

"10.In M/s Sudarsan Trading Co. v. Govt. of Kerala & Another (1989) 2 SCC 38 in para 29 at page 53, Sabyasachi Mukharji, J. speaking for the Court observed that the court in a non-speaking award cannot probe into the reasoning of the award. The Court further observed that only in a speaking award may the court look into the reasoning of the award, and it is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator as to what impelled him to arrive at his conclusion. Furthermore, the reasonableness of the arbitrators reasons cannot be challenged. The arbitrators appraisement of the evidence is never a matter for the court to entertain.

11. This Court in State of A.P. v. R.V. Rayanim (1990) 1 SCC 433 in para 6 at page 437, dealt with a non- speaking award. The court observed that it is not open to the court to

probe the mental process of the arbitrator where he has not provided the reasoning for his decision.

12. This Court, in Bijendra Nath Srivastava v. Mayank Srivastava & Others (1994) 6 SCC 117 in para 20 at page 133 and para 31 at page 138, observed that the arbitrator is under no obligation to give reasons in support of the decision reached by him, unless the arbitration agreement or deed of settlement so required. If the arbitrator or umpire chooses to give reasons in support of his decision, then it would be open to the court to set aside the award upon finding an error of law. The reasonableness of the reasons given by the arbitrator cannot, however, be challenged. It is not open to the court to look for the reasons and proceed to examine whether they were right or erroneous. The arbitrator is the sole judge of the quality as well as the quantity of the evidence. It will not be for the court to take upon itself the task of being a judge of the evidence before the arbitrator. The Court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal.

13. In New India Civil Erectors (P) Ltd. v. Oil & Natural Gas Corporation (1997) 11 SCC 75 in para 7 at page 78, the Court observed while dealing with a non- speaking award that the attempt of the court should always be to support the award within the letter of law.

14. In Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises & Another (1999) 9 SCC 283 in para 44 at page 309, the Court observed that in a non-speaking award the jurisdiction of the court is limited. It is not open to the court to speculate where no reasons are given by the arbitrator as to what impelled the arbitrator to arrive at his conclusion. It is also not possible to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award. Similar view has been taken in the following cases, namely, State of Bihar & Others v. Hanuman Mal Jain (1997) 11 SCC 40, P.V. Subha Naidu & Others v. Govt. of A.P. & Others (1998) 9 SCC 407, Star Construction and Transport Co. & Others v. India Cements Ltd. (2001) 3 SCC 351 and D.D. Sharma v. Union of India (2004) 5 SCC 325.

15. The decided cases of this Court demonstrate that this Court has consistently taken the view that scope of interference in a non-speaking award is extremely limited. The Court cannot probe into the mental process of the arbitrator. The court should endeavour to support a non-speaking arbitration award provided it adhered to the partiesagreement and was not invalidated due to arbitrators misconduct.

16. Russell on Arbitration 19th Edition at Pages 110-111 described the entire genesis of arbitration as under:-

> "An arbitrator is neither more or less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him; he is not a mere investigator but a person before whom material is placed by the parties, being either or both of evidence and submissions; he gives a decision in accordance with his duty to hold the scales fairly between the disputants in accordance with some recognized system of law and rules of natural justice. He is private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputantsagreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of those powers must not be contrary to the proper law of the contract or the public policy of England bearing in mind that the paramount public policy is that freedom of contract is not lightly to be inferred with."

Whatever has been mentioned by Russell in this paragraph is equally true for Indian Arbitrators.

17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavour of the court should be to honour and support the award as far as possible."

22. It clearly emerge from the aforesaid judgment passed by the Hon'ble Apex Court that scope of interference is extremely limited in non speaking award and it is not open to Court to probe mental process of the arbitrator. The Court should endeavour to support a non-speaking arbitration award and it is not open to court to probe mental process of the arbitrator where he has not provided the reasoning for his decision. The Hon'ble Apex Court in the judgment cited hereinabove, has categorically held that arbitrator is under no obligation to give reasons in support of the decision reached by him, unless the arbitration agreement or deed of settlement so required. In the instant case, learned counsel representing the petitioners was unable to point out conditions, if any, contained in the agreement making it incumbent upon the arbitrator to assign reasons in support of his/her findings.

23. Consequently, in view of the aforesaid detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, this Court sees no reason to interfere with the well reasoned award passed by the learned Arbitratior and as such present petition is accordingly dismissed alongwith pending applications, if any.

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

Rakesh Kumar @ Rakesh Thakur ....Petitioner-Accused

Versus

Vikram Sood ....Respondent-Complainant

Cr.M.M.O. No.121 of 2017
Judgment Reserved on: 03.07.2017
Date of decision: 24.07.2017

Code of Criminal Procedure, 1973- Section 311- A complaint under Section 138 of N.I. Act was filed against the accused- an application was filed by the accused seeking permission to examine Assessing Officer Income Tax Commissioner, Mandi Range to prove that penalty under Section 271-E of Income Tax Act, 1961 was imposed upon the accused – the application was dismissed by the Trial Court on the ground that accused had already been given an opportunity to lead his evidence and the application was filed to prolong the trial – held that the Court enjoys vast powers of summoning/recalling any witness, if his/her evidence appears to be essential for the just decision of the case- however, the power has to be exercised with circumspection – the notice was issued on 10.5.2016 and application was filed on 30.6.2016- the examination of the witness is essential for the just decision of the case- order set aside- accused permitted to examine the witness. (Para-11 to 25)

Cases referred:

Mannan SK and others vs. State of West Bengal and another AIR 2014 SC 2950
Raja Ram Prasad Yadav vs. State of Bihar and another, (2013)14 SCC 461
Zahira Habibullah Sheikh (5) and another vs. State of Gujarat and others (2006)3 SCC 374
Raja Ram Prasad Yadav vs. State of Bihar and another, (2013)14 SCC 461

For the Petitioner: Mr.Neeraj Gupta, Advocate.
For the Respondent: Mr.Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant petition filed under Section 482 of the Code of Criminal Procedure, a prayer has been made on behalf of the accused-petitioner *(hereinafter referred to as the 'accused')* for quashing and setting aside the order dated 17.12.2016 (Annexure P-4) passed by Judicial Magistrate Ist Class, Manali in Complaint No.357-1 of 2012, whereby application having been filed by the accused under Section 311 of the Code of Criminal Procedure *(for short 'Cr.P.C.')* has been dismissed.

2. Briefly stated facts, as emerged from the record, are that the respondent-complainant *(hereinafter referred to as the 'complainant')* instituted a complaint against the accused under Section 138 of the Negotiable Instrument Act *(for short the 'Act')* in the Court of learned Judicial Magistrate Ist Class, Manali, stating therein that the accused allegedly approached complainant on 14.10.2009 and made a request to advance a sum of Rs.19,05,000/- for expansion of business. Complainant advanced a sum of Rs.19,05,000/- to the accused, who in lieu of the same issued three cheques in favour of the complainant towards discharge of his liability. However, fact remains that aforesaid cheques were dishonoured, as a result of which, complainant was compelled to initiate proceedings under Section 138 of the Act.

3. Learned trial Court, taking note of preliminary evidence adduced on record by the complainant, put notice of accusation to the accused under Section 138 of the Act, which he pleaded not guilty and claimed trial. It also emerged from the record that complainant examined himself as well as other witnesses in support of the complaint. Thereafter statement of accused was also recorded under Section 313 Cr.P.C. on 16.6.2015. Accused, after closure of defence evidence, moved an application under Section 311 read with Section 91 Cr.P.C. seeking permission of learned trial Court to examine Assessing Officer, Income Tax Commissioner, Mandi Range District Mandi, H.P., *(for short AO, ITC, Mandi)* as a witness on the premise that the office of Additional Commissioner of Income Tax Mandi Range, District Mandi, issued a show cause notice on 10.5.2016, thereby imposing penalty under Section 271-E of Income Tax Act, 1961 upon the accused. The accused, with a view to prove his defence in the complaint instituted by complainant, intended to prove the aforesaid notice issued by AO, ITC, Mandi by examining him as a witness. Accused, by way of application, stated before the Court below that he wants to examine AO, ITC, Mandi, as a witness as he has sent legal notice to the accused regarding the payment of loan amounting to Rs.9,75,000/- in the relevant Assessment Year 2011-2012, which is quite necessary for the just adjudication of the above titled case as the complainant has submitted before the Commissioner of Income Tax that he has received the aforesaid amount from the accused.

4. Apart from above, accused submitted before the Court below that he has received notice during the pendency of the case, as such, he wants to tender the legal notice on record and to examine the aforesaid witness to prove the said document. Complainant, by way of filing reply to the application, opposed the aforesaid prayer of examination of AO, ITC, Mandi, stating therein that application has been filed at a belated stage in order to prolong the proceedings and, as such, the same deserves to be dismissed being not maintainable and without any merit. Complainant further stated before the Court below that proposed witness is not necessary to be produced and examined for just and final decision of the present case.

5. Learned trial Court vide order dated 17th December, 2016 dismissed the aforesaid application filed by accused on the ground that accused has already been given an opportunity to lead his evidence and as such, filing of the application, at this stage, appears to be an attempt to prolong the case. Learned Court below, after having gone through the pleadings, also came to conclusion that accused in his statement recorded under Section 313 Cr.P.C. has stated that the cheques in question pertain to his account, however, the same were given to complainant as a security and he has already been afforded an opportunity to lead defence evidence and in this regard he has produced Chuni Lal as a witness in defence. Learned trial Court while passing

impugned order further concluded that accused has failed to mention as to on what date the alleged notice from the AO, ITC. Mandi was received by him.

6. Mr.Neeraj Gupta, learned counsel representing the petitioner-accused, while inviting the attention of this Court to the application having been filed by the accused, stated that it was specifically mentioned in the application that accused has received legal notice from AO, ITC. Mandi, regarding repayment of loan amount of Rs.9,75,000/- in the relevant Assessment Year 2011-2012 during the pendency of the case. Mr.Gupta, further contended that since notice dated 10.5.2016 was placed on record alongwith application, no adverse inference could be drawn by Court for non-mentioning of date of alleged notice in the application. Mr.Gupta further contended that since notice, as referred above, was received after closure of defence evidence, application for placing the same and producing the witness could only be filed thereafter by the applicant. Mr.Gupta further contended that application for examining AO, ITC, Mandi was filed well within reasonable time i.e. 13.6.2016, after receipt of notice dated 10.5.2016 and as such, objection raised by the complainant that the application has been filed at a belated stage is not sustainable. While referring to provisions contained in Section 311 Cr.P.C., Mr.Gupta vehemently contended that impugned order passed by learned trial Court is not sustainable as the same is not in consonance with the provisions of Section 311 Cr.P.C., wherein Court has been given vast powers of summoning, re-calling any witness at any stage of proceedings, if his/her evidence appears to be essential for just decision of the case.

7. Mr.Gupta further contended that impugned order passed by learned trial Court is harsh and oppressive and no prejudice, whatsoever, would have caused to opposite party, in case learned trial Court had allowed the accused to examine the official of the Income Tax Department, rather it would have aided in bringing the real controversy to the fore between the parties. He further contended that if the mandatory part of Section 311 Cr.P.C. is read, the paramount consideration of Court should be of doing justice to the case and Court can and ought to examine witness at any stage and if it results in filling up of lacuna or loopholes then in that situation it is a subsidiary factor.

8. Mr.Sunil Mohan Goel, learned counsel representing the respondent-complainant, while opposing the aforesaid submissions having been made by learned counsel representing the petitioner-accused, contended that there is no illegality and infirmity in the impugned order dated 17.12.2016 and as such same deserves to be upheld. Mr.Goel further contended that it is undisputed that the evidence of the complainant was closed on 1.1.2015 and thereafter accused led his evidence, which was also closed on 16.6.2015. While inviting attention of this Court to the application having been filed by the accused, Mr.Goel contended that the same has been filed with a view to delay the proceedings because averments contained in the application nowhere suggest that any explanation worth the name has been/was rendered in the same qua inordinate delay in maintaining the application for examining the official of the Income Tax Commissioner, Mandi Range, District Mandi. Mr. Goel further contended that since this application was hopelessly time barred and there was no explanation for delay, learned Court rightly dismissed the same. He further stated that acceptance of prayer having been made by the accused in the application at this stage would have certainly amounted to filling up of lacuna, which has definitely crept in the defence set up by the accused and as such impugned order dated 17.12.2016 passed by learned trial Court deserves to be upheld.

9. Mr. Goel, while inviting the attention of this Court to the statement having been made by the accused under Section 313 Cr.P.C., contended that defence as set up by the accused before the Court below is/was that cheques in question were issued as security and it was none of the case of the accused that he had already returned the amount as stands mentioned in the alleged notice issued by the AO, ITC, Mandi. Mr.Goel further contended that though perusal of Section 311 Cr.P.C. clearly suggests that Court may, at any time, summon any person as a witness, or recall and re-examine any such person, provided that the same is necessary, for proper decision of the case, but this power is required to be exercised sparingly and with circumspection.

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

11. Before ascertaining the merits of the submissions having been made by learned counsel representing the respective parties vis-à-vis impugned order dated 17.12.2016 passed by the learned trial Court, this Court deems it fit to take note of the provisions of law as contained in Section 311 Cr.P.C., which clearly suggests that the Court may, at any time, summon any person as a witness, or recall and re-examine any witness provided that same is essentially required for just decision of the case. Section 311 Cr.P.C. provides as under:-

> ***"311. Power to summon material witness, or examine person present.-*** *Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."*

12. This Court, after having carefully perused the aforesaid provisions of Section 311 Cr.P.C., is of the view that second part of provisions contained in this Section rather makes it mandatory for the Court below to examine witness at any stage, if it is necessary for just and proper decision of the case. Paramount consideration of Court should be of doing just decision of the case. Bare perusal of the aforesaid provision suggests that the Court enjoys the vast powers of summoning, recalling any witness at any stage of proceedings, if his/her evidence appears to be essential for just decision of the case.

13. Hon'ble Apex Court in ***Mannan SK and others vs. State of West Bengal and another AIR 2014 SC 2950,*** has held as under:-

> ***"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re- examination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."***

14. Hon'ble Apex Court in ***Raja Ram Prasad Yadav vs. State of Bihar and another, (2013)14 SCC 461,*** has held that powers under Section 311 Cr.P.C. to summon any person or witness or examine any person already examined can be exercised at any stage

provided the same is required for just decision of the case. It may be profitable to take note of the following paras of the judgment:-

> ***"14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.***
>
> ***16. Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh vs. CBI (State) – Criminal Appeal No.709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 15 and 16:***
>
> > ***"15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to***

change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party.

The power conferred under Section 311 Cr.P.C. must, therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.

The very use of words such as 'any Court', 'at any stage', or 'or any enquiry', trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.) (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I. (2012) 3 SCC 387.)"

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) ***The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.***

e) ***The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.***

f) ***The wide discretionary power should be exercised judiciously and not arbitrarily.***

g) ***The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.***

h) ***The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.***

i) ***The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.***

j) ***Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.***

k) ***The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.***

l) ***The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.***

m) ***The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.***

n) ***The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."***

15. Hon'ble Apex Court in ***Zahira Habibullah Sheikh (5) and another vs. State of Gujarat and others (2006)3 SCC 374*** has held as under:-

> ***"27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.***
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> ***28. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.***
>
> ***29. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross- examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross- examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross- examination to the complainant. These aspects were highlighted in Jamat Raj Kewalji Govani v. State of Maharashtra, (AIR 1968 SC 178).***
>
> ***30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes***

underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court," Vice-Chancellor Knight Bruce said :

> ***"The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however, valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them.***
>
> ***The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination. Truth, like all other good things, may be loved unwisely may be pursued too keenly - may cost too much."***
>
> ***The Vice-Chancellor went on to refer to paying "too great a price .... for truth". This is a formulation which has subsequently been frequently invoked, including by Sir Gerard Brennan. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms: "The evidence has been obtained at a price which is unacceptable having regard to the prevailing community standards."***

32. Restraints on the processes for determining the truth are multi-faceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings. By the traditional common law method of induction there has emerged in our jurisprudence the principle of a fair trial. Oliver Wendell Holmes described the process:

> ***"It is the merit of the common law that it decides the case first and determines the principles afterwards ..... It is only after a series of determination on the same subject- matter, that it becomes necessary to "reconcile the cases", as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step."***

33. The principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation - peculiar at times and related to the nature of crime, persons involved - directly or operating behind, social impart and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

34. ***As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the law of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane, J. put it:***

"It is desirable that the requirement of fairness be separately identified since it transcends the context of more particularized legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law."

35. ***This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. The Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.***

36. ***The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or***

are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

38. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

39. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

16. After having gone through the provisions of law as contained in Section 311 Cr.P.C. as well as law referred above, there cannot be any dispute that the Court has vast power to summon a witness or recall or re-examine any witness at any stage of trial, provided the same is necessary for the just and proper decision of the case. But, Hon'ble Apex Court, in judgments referred above, has categorically observed that the words *'essential to the just decision of the case'* are the key words and in this regard, the court must form an opinion that for the just decision of the case, whether it is necessary to recall or re-examine the witness or not.

17. Similarly, Hon'ble Apex Court has further held that power is wide and as such its exercise has to be with circumspection. Otherwise, also it is well settled that wider the power greater is the responsibility on the courts which exercise it and exercise of such power cannot be untrammeled and arbitrary, rather same must be only guided by the object of arriving at a just decision of the case.

18. In the instant case, as clearly emerged from the record, notice dated 10.5.2016, which is/was sought to be placed on record by the accused was received by the accused after the closure of evidence. Though there is no mention of date of notice in the application filed under Section 311 Cr.P.C. by the accused, but the date as mentioned on the notice, copy of which is/was annexed with the application, clearly suggests that the same was issued by the Income Tax Department on 10.5.2016. Since application has been filed on 30.6.2016, it cannot be said that the same has been filed at a belated stage just to prolong the proceedings. Accused has specifically stated in the application that he wants to examine AO, ITC, Mandi as a witness as he has sent a legal notice to the accused regarding the repayment of loan amounting to Rs.9,75,000/-. Accused has further stated in the application that AO, ITC, Mandi, is required to be examined as a witness because the complainant has submitted before the Commissioner of Income Tax that he has received the aforesaid amount from the accused. This Court, after having carefully perused the legal notice sent by AO, ITC, Mandi finds that there is no specific mention with regard to repayment of loan amounting to Rs.9,75,000/- qua which he allegedly issued cheques, which are the subject matter of the complaint made before the learned trial Court.

19. As has been observed above by the Hon'ble Apex Court that words *"essential to the just decision of the case"* are the key words and in this regard Court below, while considering the application made under Section 311 Cr.P.C., was required to form an opinion, whether it is/was necessary to examine the witness or not in support of averments contained in the application or document proposed to be adduced on record. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case.

20. In the instant case, as has been discussed above, definitely with the receipt of legal notice from the AO, ITC, Mandi, as stands mentioned above, the accused got an opportunity to prove that he has already paid Rs.9,75,000/- in the year 2011-2012 and as such it was incumbent upon Court below to consider the request of the accused to arrive at just decision. This Court certainly cannot loose sight of dictum of Hon'ble Apex Court in the aforesaid judgments that exercise of powers under Section 311 Cr.P.C. cannot be un-trammeled and arbitrary, rather same must be guided by the object of arriving at just decision of the case.

21. In the case at hand, there appears to be no attempt on the part of learned trial Court to form an opinion that whether examination of witness proposed to be examined is essential for just decision of the case or not. Rather learned trial Court, taking note of the fact that accused has failed to mention as to on which date alleged notice of AO, ITC, Mandi, was received by hij, proceeded to dismiss the application having been filed under Section 311 Cr.P.C. Without making any comment/observation with regard to statement of accused recorded under Section 313 Cr.P.C., wherein accused, while admitting that cheques pertain to his account, stated that he gave cheques as security, this Court wish to observe that same could not be ground for Court below to deny opportunity to the accused to prove legal notice allegedly issued by Income Tax Authorities by examining Officer of the Income Tax Department. Otherwise also though perusal of statement recorded under Section 313 Cr.P.C. reveals that accused while denying the claim of the complainant has specifically stated that he had only issued cheques as security, but if statement of accused recorded under Section 313 Cr.P.C. is read in its entirety, it clearly suggests that accused denied the liability, if any, on his part towards the complainant.

22. Hon'ble Apex Court in ***Raja Ram Prasad Yadav vs. State of Bihar and another, (2013)14 SCC 461***, taking note of various judgments passed by Hon'ble Apex Court, has culled out certain principles which are required to be taken into account by the Courts, while considering the application under Section 311 Cr.P.C. In the aforesaid judgment, Hon'ble Apex Court has categorically held that the exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated and in case evidence of any witness appears to the Court to be essential for the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person. Most importantly, Hon'ble Apex Court has held that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case. Hon'ble Apex Court has very candidly held in aforesaid judgment that exercise of such powers cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice. On the top of everything, Court needs to satisfy itself that it was no doubt essential to examine witness in order to arrive at just decision of the case.

23. This Court, after having been taken note of the aforesaid principle laid down by Hon'ble Apex Court in ***Raja Ram's*** case *supra*, has no hesitation to conclude that the impugned order dated 17.12.2016, having been passed by learned trial Court, is not sustainable in the eyes of law, whereby the accused has been prevented from placing on record notice served by Income Tax Department as well as from examining the officer of the Income Tax Department, which otherwise would have helped the Court below to arrive at just and fair decision. Otherwise also, this Court sees that no prejudice would be caused to the complainant who otherwise shall be

eligible to rebut the evidence to be led by the accused. Hon'ble Apex Court in judgment referred above has further held that powers must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party. In the instant case, as has been discussed hereinabove, notice sought to be proved on record by examining AO, ITC, Mandi, would be material for proper adjudication of the case.

24. Hon'ble Apex Court in ***Mannan SK's*** case *supra* has observed that words *"essential to the just decision of the case"* are the key words and in this regard Court, keeping in view of all circumstances, needs to form an opinion, whether for the just decision of the case recall or re-examination is necessary or not. But, in the instant case, as has been discussed above, there is no attempt, if any, on the part of the Court below to form an opinion while arriving at a conclusion whether document sought to be proved on record by examining the officer of Income Tax Department is/was essential to the just decision of the case or not.

25. Consequently, in view of the discussion made hereinabove as well as law laid down by Hon'ble Apex Court, this Court is of the view that impugned order passed by Court below is not sustainable in the eye of law and as such same is quashed and set aside. Learned Court below is directed to take legal notice, as referred above, on record and thereafter allow the petitioner-accused to examine AO, ITC, Mandi as a witness to prove the same. Needless to say that the respondent-complainant shall be afforded opportunity of rebuttal as far as aforesaid document/witness is concerned.

26. Learned counsel representing the parties undertake to appear before the Court below on ***17th August, 2017***. Record of Court below be sent back forthwith to enable it to do the needful within stipulated time.

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

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

State of Himachal Pradesh ..... Petitioner.
Versus
Raj Kumar ..... Respondent.

Cr. Appeal No.221 of 2017
Date of Decision: 24th July, 2017

Indian Penal Code, 1860- Section 279 and 337- Accused was driving a motorcycle in a rash and negligent manner- the motorcycle hit a scooter due to which S sustained injuries- accused was tried and acquitted by the Trial Court- held in appeal that it was admitted by the complainant that the motorcycle was shifted after the incident - specific evidence regarding the rashness and negligence was not given- Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 23)

Cases referred:

Braham Dass v. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406
State of Karnataka v. Satish,"1998 (8) SCC 493
C. Magesh and others versus State of Karnataka (2010) 5 Supreme Court Cases 645
State of UP versus Ghambhir Singh & others, AIR 2005 (92) Supreme Court 2439
Harbeer Singh v. Sheeshpal and Ors., (2016) 16 SCC 418
Pawan Kumar and Kamal Bhardwaj versus State of H.P., latest HLJ 2008 (HP) 1150

For the Appellant Mr. M.L.Chauhan, Additional Advocate General.
For the Respondent Mr. Dushyant Dadwal, Advocate, with Ms. Chetna Thaur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral)

Instant Criminal appeal filed under Section 378 of the Code of Criminal Procedure, is directed against the judgment of acquittal dated 4.2.2017, passed by learned Judicial Magistrate, 1st class, Palampur, District Kangra, H.P., in Criminal case No.14-II/2002, whereby respondent ***(hereinafter referred to as the accused)*** has been acquitted of the notice of accusation put to him under Sections 279 and 337 of Indian Penal Code.

2. Briefly stated facts as emerge from the record are that complainant, Lokinder Singh got recorded his statement under Section 154 Cr.P.C (Ex.PW5/A), on the basis of which, FIR Ex.PW10/A came to be registered at police Station, Bhawarna, alleging therein that on 3.5.2011, at about 7:45 PM, accused was driving motorcycle bearing registration No. HP-37B-1453 on the public way in rash and negligent manner so as to endanger human life and public safety of others and dashed his motorcycle against scooter No. HP-55-4481 being driven by him, as a result of which, Sh. Sanjay Kumar, pillion rider sustained injuries. Police after completion of the investigation, presented the challan in the competent court of law.

3. The learned trial Court being satisfied that a prima-facie case exist against the accused, put notice of accusation to the accused under Sections 279 and 337 of IPC, to which he pleaded not guilty and claimed trial.

4. Subsequently, learned trial court vide judgment dated 4.2.2017, acquitted the respondent-accused of aforesaid notice of accusation put to him under Sections 279 and 337 of IPC. In the aforesaid background, appellant-State has approached this court by way of instant proceedings, seeking therein conviction of the respondent-accused after setting aside the impugned judgment of acquittal recorded by the learned trial Court.

5. Mr. M.L. Chauhan, learned Additional Advocate General, while inviting attention of this court to the impugned judgment of acquittal passed by the learned trial court, vehemently contended that same is not sustainable in the eye of law as the same is not based upon the correct appreciation of the evidence and as such, same deserves to be quashed and set-aside. Mr. Chauhan, further contended that bare perusal of the impugned judgment, suggest that learned court below while acquitting the respondent-accused has not dealt with the evidence adduced on record by the prosecution in its right perspective, as a result of which, erroneous findings have come on record and the respondent-accused has been let off on very flimsy grounds.

6. With a view to substantiate his aforesaid arguments, Mr. Chauhan, made this Court to travel through the statements of PW-4, Sh. Rajinder Kumar and PW-5, Sh. Lokinder Singh to demonstrate that the prosecution proved its case beyond reasonable doubt that on 3.5.2011 accused while driving his motorcycle in rash and negligent manner caused injury to Sanjay Kumar, who was pillion rider on the scooter being driven by the complainant. Mr. Chauhan, further made reference to statement of PW-7, Dr. Anjali, to state that injury caused in the accident was also proved in accordance with law and as such, there was no occasion for the learned court below to acquit the respondent-accused of notice of accusation put to him under Sections 279 and 337 of IPC. While concluding his arguments, Mr. Chauhan, contended that learned court below failed to take note of cogent, convincing and overwhelming evidence adduced on record by the prosecution suggestive of the fact that motorcycle at that relevant time was being driven in rash and negligent manner and as such, there was no occasion for the learned trial court to conclude that the prosecution was not able to prove its case beyond reasonable doubt that accused was driving the motorcycle in most rash and negligent manner so as to endanger human life and personal safely of others.

7. Mr. Dushyant Dadwal, Advocate duly assisted by Ms. Chetna Thakur, Advocate, representing the respondent-accused, while refuting the aforesaid submissions having been made by Mr. M.L.Chauhan, learned Additional Advocate General, contended that there is no illegality and infirmity in the impugned judgment passed by the learned trial Court and as such, same deserve to be upheld. While inviting attention of this Court to the evidence led on record by the prosecution, Mr. Dadwal, contended that bare perusal of the same suggest that no reliance, if any, could be placed upon the version of these prosecution witnesses because of material contradictions in their statements. Mr. Dadwal, further contended that PW-4, Rajinder Kumar, who happened to be sole eye witness of the occurrence was declared hostile by the prosecution as he was unable to support the story of the prosecution. Mr. Dadwal, further invited attention of this Court to statement of PW-9, Sanjay Kumar, who allegedly received injuries in the accident, to demonstrate that he was not even able to recognize the accused in the court as well as vehicle allegedly involved in the accident. While concluding his arguments, Mr.Dadwal, contended that there is nothing in the statements having been made by these prosecution witnesses, from where it could be inferred that at that time vehicle in question was being driven rashly and negligently and as such, no fault can be found with the impugned judgment passed by the learned Trial Court and as such same needs to be upheld.

8. I have heard learned counsel representing the parties and have carefully gone through the record made available.

9. During the proceedings of the case, this Court had an occasion to go through the impugned judgment of acquittal recorded by the learned trial Court viz-a-viz evidence adduced on record by the prosecution, perusal whereof, certainly not suggest that learned trial court below while acquitting the respondent-accused misread, misinterpreted and misconstrued the evidence adduced on record by the prosecution, rather this Court after having carefully perused the evidence led on record by the prosecution has no hesitation to conclude that the prosecution was not able to prove its case beyond reasonable doubt that at that relevant time, accused was driving his motorcycle rashly and negligently and as such, this court sees no illegality and infirmity in the findings recorded by the learned trial Court.

10. Though, in the instant case prosecution with a view to prove its case examined as many as 11 witnesses, but Statements having been made by PW-4, Rajinder Kumar, PW-5, Lokinder Singh (complainant) and PW-9, Sanjay Kumar, who allegedly received injuries in the accident, may be relevant for adjudication of the present case.

11. Before adverting to the statements having been made by aforesaid witnesses, it may be noticed that this is none of the case of the prosecution that at the time of alleged accident, three persons were sitting on the scooter allegedly dashed by the motorcycle being driven by the respondent-accused, whereas, statements having been made by these witnesses, especially PW-4 and PW-5 suggest that three persons were travelling on the scooter at the time of alleged accident. PW-4, Rajinder Kumar while deposing before the Court feigned his ignorance with regard to the alleged date of occurrence of offence. He simply stated that in the year, 2011, he witnessed the accident, wherein rider i.e. respondent-accused motorcycle was driving the motorcycle in a rash and negligent manner. It has also come in his statement that scooter rider was riding the scooter in his side. He further stated that accident occurred in his presence and photographs of the place i.e. Ex.PW1/A to Ex.PW1/E were taken by the photographer and immediately after the accident injured were taken to the Bhawarna Hospital. This witness categorically stated in his statement that one other man was sitting with him on the scooter. Similarly, in his cross-examination, he admitted the suggestion put to him that on the date of alleged accident complainant was sitting on the scooter with one Sh. Sanjay Kumar. Though, in his cross-examination he identified the accused present in court, but categorically denied that nothing had happened in his presence. Most importantly, it has come in his cross-examination that there were 10-12 persons present on the spot and also admitted that the scooter rider i.e. complainant is his neighbour. He also admitted that accused is not known to him.

12. PW-5, Lokinder Singh (complainant) reiterated the version put forth by PW-4 that when he was riding his scooter from Palampur, he met with an accident at about 7:30 to 7:40 PM near Shamshan Ghat, Bhawarna. He also stated that at that relevant time he was riding scooter in slow speed, whereas accused was driving motorcycle in high speed. It also come in his statement that motorcycle being driven by the accused dashed with the scooter, as a result of which, person namely Sanjay Kumar, pillion rider got severally injured and he was taken to the hospital. In his cross-examination, he admitted that at the time of the accident his driver Rajinder Kumar was also sitting behind him. He further stated before the court below that just after the accident he called his brother Vikas, who thereafter called up the police. It has also come in his cross-examination that at the time of the accident two other persons were sitting with him. Most interestingly, this witness admitted in his cross-examination that just after the accident they shifted the motorcycle on the other side of the road and the scooter was at his side. He also stated that photographs of the vehicle involved in the accident were taken thereafter. Similarly, he admitted the suggestion put to him that his statement was recorded in the police station.

13. PW-9, Sanjay Kumar, who allegedly received injuries in the accident, also feigned ignorance with regard to the exact date and time of accident allegedly took place on 3.5.2011. However, he stated that at about 6-6:30 Pm at Shamshan Ghat, Bhawarna, he was sitting on the scooter and they met with an accident. He also like PW-4 and PW-5 reiterated that motorcycle being driven in rash and negligent manner by the respondent- accused dashed against the scooter being driven by the complainant, as a result of which, he sustained injuries. But interestingly, this witness was unable to identify the accused in the court as well as vehicle involved in the accident, accordingly, he was declared hostile. In his cross-examination by defence counsel, he denied that at that relevant time PW-4, Rajinder Singh was also sitting alongwith him and the complainant. If the statement having been made by these three prosecution witnesses, who are alleged eye witnesses to the accident are read in its entirety juxtaposing each other, it can be safely concluded that all these three witnesses gave altogether different version with regard to sequence of event allegedly occurred at the time of the accident and as such, no reliance, if any, could be placed upon their version while examining the correctness of story put forth by the prosecution. As has been taken note above, there is no mention with regard to three persons travelling on the scooter involved in the accident at the time of the accident, but interestingly PW-4 and PW-5 specifically stated before the court below that at the time of the accident three persons namely Lokinder Singh, Rajinder Kumar and Sanjay Kumar were riding the scooter, which was allegedly struck/ dashed by the motorcycle being driven by the respondent accused.

14. PW-9, Sanjay Kumar, who received injuries in this accident categorically denied the suggestion put to him that at that time Rajinder Kumar was also sitting with him and as such, version put forth by these material witnesses does not appears to be trustworthy and was rightly not lent any credence by the court below while acquitting the respondent-accused from the charges framed against him.

15. PW-5, Lokinder Singh, complainant specifically admitted in his cross-examination that just after the accident they had shifted the motorcycle on the other side of the road and photographs were taken by the photographer lateron. PW-1, Surjeet Singh, photographer while deposing before the court below categorically stated that he visited the place of occurrence and had taken photographs Ex.PW1/A to Ex.PW1/E. In his cross-examination, he admitted that the movement he clicked the photographs of the vehicles, the rider of the said vehicles were not present there. PW-8, S.I. Mehar Deen in his cross-examination admitted that he reached at the spot at around 8:05 PM. He also admitted the suggestion put to him that when he reached the spot, he found that alleged motorcycle and the scooter were shifted at the side of the road in order to clear the traffic. It has also come in his cross-examination that PW-4, Rajinder Kumar works as a cleaner in the police station. It clearly emerge from the statements of PW-5 and PW-8 that immediately after the accident vehicles involved in the accident were removed from the site of the accident and as such, there is no relevance, if any, of the photographs allegedly clicked

by PW-1 on the spot because definitely these photos do not relate to the actual site of the accident. This Court, after carefully perused the statements given by PW-4, PW-5 and PW-9, sees no reasons to differ with the findings returned by the learned trial court. No reliance, if any, can be placed upon the version put forth by these prosecution witnesses.

16. Leaving everything aside, this Court was unable to lay its hand to any portion of the statements having been made by these witnesses suggestive of the fact that at the relevant time motorcycle in question was being driven rashly and negligently. Merely bald statement to the effect that vehicle was being driven rashly and negligently may not be sufficient to conclude that at the relevant time motorcycle was being driven rashly and negligently, rather it was incumbent upon the prosecution to bring on record specific evidence, if any, with regard to the alleged rash and negligent driving of the motorcycle by the respondent-accused. None of the witnesses have stated something specific with regard to the speed of the motorcycle being driven by the respondent-accused at the time of accident, which could be one of the guiding factors while ascertaining the rashness and negligence, if any, on the part of the respondent-accused.

17. Reliance is placed on judgment rendered by the Hon'ble Apex Court in **Braham Dass v. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406**, which reads as under:-

> ***"6. In support of the appeal, learned counsel for the appellant submitted that there was no evidence on record to show any negligence. It has not been brought on record as to how the accused- appellant was negligent in any way. On the contrary what has been stated is that one person had gone to the roof top and driver started the vehicle while he was there. There was no evidence to show that the driver had knowledge that any passenger was on the roof top of the bus. Learned counsel for the respondent on the other hand submitted that PW1 had stated that the conductor had told the driver that one passenger was still on the roof of the bus and the driver started the bus.***
>
> ***8. Section 279 deals with rash driving or riding on a public way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in a manner which endangered human life or was likely to cause hurt or injury to any other person. Obviously the foundation in accusations under Section 279 IPC is not negligence. Similarly in Section 304 A the stress is on causing death by negligence or rashness. Therefore, for bringing in application of either Section 279 or 304 A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved."***

18. The Hon'ble Apex Court in case titled "***State of Karnataka v. Satish,"1998 (8) SCC 493***, has also observed as under:-

> ***"1. Truck No. MYE-3236 being driven by the respondent turned turtle while crossing a "nalla" on 25-11-1982 at about 8.30 a.m. The accident resulted in the death of 15 persons and receipt of injuries by about 18 persons, who were travelling in the fully loaded truck. The respondent was charge-sheeted and tried. The learned trial court held that the respondent drove the vehicle at a high speed and it was on that account that the accident took place. The respondent was convicted for offences under Sections 279, 337, 338 and 304A IPC and sentenced to various terms of imprisonment. The respondent challenged his conviction and sentence before the Second Additional Sessions Judge, Belgaum. While the conviction and sentence imposed upon the respondent for the offence under Section 279 IPC was set aside, the appellate court confirmed the conviction and sentenced the respondent for offences under Sections 304A, 337 and 338 IPC. On a criminal revision petition being filed by the respondent before the High***

Court of Karnataka, the conviction and sentence of the respondent for all the offences were set aside and the respondent was acquitted. This appeal by special leave is directed against the said judgment of acquittal passed by the High Court of Karnataka.

2. We have examined the record and heard learned counsel for the parties.

3. Both the trial court and the appellate court held the respondent guilty for offences under Sections 337, 338 and 304A IPC after recording a finding that the respondent was driving the truck at a "high speed". No specific finding has been recorded either by the trial court or by the first appellate court to the effect that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the courts pressed into aid the doctrine of res ipsa loquitur to hold the respondent guilty.

4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.

5. There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged. Appeal dismissed."

19. Careful perusal of aforesaid judgment clearly suggests that there cannot be any presumption of rashness or negligence, rather, onus is always upon the prosecution to prove beyond reasonable doubt that vehicle in question was being driven rashly and negligently. In the aforesaid judgment, it has been specifically held that in the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking maxim *res ipsa loquitur*.

20. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large

number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:- (SCC p.704, para 14)***
>
> > ***" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.***

21. After perusing the statements of the prosecution witnesses as well exhibits placed on record, two views are possible in the present case and as such, the petitioner-accused is entitled to the benefit of doubt. The learned counsel for the petitioner-accused has placed reliance on the judgment passed by Hon'ble Apex Court reported in ***State of UP*** *versus* ***Ghambhir Singh & others****, AIR 2005 (92) Supreme Court 2439*, wherein the Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

> ***"6. So far as Hori Lal, PW-1 is concerned, he had been sent to fetch a basket from the village and it was only a matter of coincidence that while he was returning he witnessed the entire incident. The High Court did not consider it safe to rely on his testimony because he evidence clearly shows that he had an animus against the appellants. Moreover, his evidence was not corroborated by objective circumstances. Though it was his categorical case that all of them fired, no injury caused by rifle was found, and, only two wounds were found on the person of the deceased. Apart from this PW-3 did not mention the presence of either PW-1 or PW-2 at the time of occurrence. All these circumstances do create doubt about the truthfulness of the prosecution case. The presence of these three witnesses becomes doubtful if their evidence is critically scrutinized. May be it is also possible to take a view in favour of the prosecution, but since the High Court, on an appreciation of the evidence on record, has recorded a finding in favour of the accused, we do not feel persuaded to interfere with the order of the High Court in an appeal against acquittal. It is well settled that if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred."***

22. Reliance is also placed on judgment rendered by the Hon'ble Apex Court in "**Harbeer Singh v. Sheeshpal and Ors.**, (2016) 16 SCC 418, relevant para whereof is being reproduced herein below:-

> ***"11. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. [Vide Kali Ram Vs. State of Himachal Pradesh, (1973) 2 SCC 808; State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415; Upendra Pradhan Vs. State of Orissa, (2015) 11 SCC 124 and Golbar Hussain & Ors. Vs. State of Assam and Anr., (2015) 11 SCC 242]."***

23. The Hon'ble Division Bench of this Court vide judgment reported in ***Pawan Kumar*** *and* ***Kamal Bhardwaj*** *versus* ***State of H.P.***, *latest* HLJ 2008 (HP) 1150 has also concluded here-in-below:-

> ***"25. Moreover, when the occurrence is admitted but there are two different versions of the incident, one put forth by the prosecution and the other by the defence and one of the two version is proved to be false, the second can safely be believed, unless the same is unnatural or inherently untrue.***
>
> ***26. In the present case, as noticed hereinabove, the manner of occurrence, as pleaded by the defence, is not true. The manner of the occurrence testified by PW-11 Sandeep Rana is not unnatural nor is it intrinsically untrue, therefore, it has to be believed.***
>
> ***27.Sandeep Rana could not be said to have been established, even if the prosecution version were taken on its face value. It was pleaded that no serious injury had been caused to PW-11 Sandeep Rana and that all the injuries, according to the testimony of PW-21 Dr. Raj Kumar, which he noticed on the person of Sandeep Rana, at the time of his medical examination, were simple in nature.***

24. Consequently, in view of the aforesaid discussion made hereinabove as well as law laid down by the Hon' Apex Court, this court sees no illegality and infirmity in the impugned judgment passed by the learned trial Court, which appears to be based upon the correct appreciation of the evidence adduced on record and as such, same deserve to be upheld.

Accordingly, the present appeal is dismissed alongwith pending application(s), if any.

****

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

Virender Kumar & others ..Appellants-defendants.

Versus

Sanjay Kumar & others ..Respondents-plaintiffs

Regular Second Appeal No.403 of 2005
Judgment Reserved on: 18.07.2017
Date of decision: 24 .07.2017

Specific Relief Act, 1963- Section 39- Plaintiff filed a civil suit for mandatory injunction seeking direction to hand over the possession of the suit property pleading that they are owners of the suit property- predecessors-in-interest of the defendants were in possession as licensee- they demanded the possession but the possession was not handed over – the suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in the second appeal that the Appellate Court must answer all important questions raised before it - it must record findings explaining as to how the reasoning of Trial Court is not correct - First Appellate Court had not appreciated the pleadings and the evidence in its right perspective – Trial Court had held that it was not clear as to how the plaintiffs had become the owners- Trial Court had further held that defendants were not proved to be licence- appeal allowed, judgment passed by the Appellate Court set aside and the case remanded for a fresh decision. (Para-16 to 28)

Cases referred:

State of Rajasthan vs. Harphool Singh (Dead) through his LRs, (2000)5 SCC 652
Bhag Singh versus Smt. Piar Dassi and others 2017(2) Him.L.R.902
Babu Ram alias Durga Prasad versus Indra Pal Singh (dead) by L.Rs., AIR 1998 Supreme Court 3021 & 3027
Satya Gupta(SMT) Alias Madhu Gupta versus Brijesh Kumar, (1998) 6 Supreme Court Cases 423
Chitru Devi versus Smt. Ram Dei and others, AIR 2002 Himachal Pradesh 59
Ram Narain versus Murat and others, AIR 2002 Supreme Court 2417
Tirumala Tirupati Devasthanams versus K.M. Krishnaiah, (1998)3 Supreme Court Cases 331
Harish Kumar & others versus State of H.P. Latest HLJ 2001(HP) 192
Sadhana Lodh versus National Insurance Company Limited and another (2003) 3 Supreme Court Cases 524
Puran Ram versus Bhagu Ram and another, (2008) 4 Supreme Court Cases 102
Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415
Santosh Hazari vs. Purushottam Tiwari, (2001)3 SCC 179
Prem Singh versus H.P. State Forest Development Corporation 2017(2) Him. L.R.942

For the Appellants: Mr. Ramakant Sharma, Senior Advocate, with Mr. Basant Thakur, Advocate.
For Respondents : Mr. G.D.Verma, Senior Advocate, with Mr. B.C.Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, is directed against the judgment and decree dated 15.6.2005, passed by learned Additional District Judge, Solan, District Solan, H.P., in Civil Appeal No. 21-NL/13 of 2003, reversing the judgment and decree dated 28.3.2003, passed by the learned Sub- Judge, Nalagarh, District Solan, H.P., in civil Suit No.372/1 of 1998/2001, whereby suit for mandatory injunction and in the alternative suit for possession having been filed by the respondents/plaintiffs came to be dismissed.

2. Briefly stated facts as emerge from the record are that the respondents (***hereinafter referred to as the plaintiffs)*** filed suit for mandatory injunction and in the alternative suit for possession against the appellants (***hereinafter referred to as the defendants)*** seeking therein direction to the defendants to handover the possession of the suit property namely one Godown, measuring 19.50 Sq. mtrs, bearing Khasra No. 1034, comprised in khewat/khatauni No. 230/248 min situated in the area of ward No.5, up-muhal Naya Nalagarh, Tehsil Nalagarh, District Solan, H.P. and for mense profits at the rate of Rs.1000/- per month for

use and occupation of the disputed property since 11th October, 1998 till the date of handing over the possession and in the alternative for possession of the suit property.

3. In nutshell, plaintiffs' case before the court below was that they are owners of the suit property, which was inherited by them from their predecessor-in-title Smt. Vidyawati. As per plaintiffs, predecessor-in-title of the defendants Sh. Madan Lal and Smt. Vidyawati were in possession of the property and there was litigation and the possession of same property was handed over by Smt. Vidyawati to Sh. Madan Lal, who further handed over the possession to Smt. Vidyawati in Khangi Panchayat. Sh. Madan Lal requested said Smt. Vidyawati to give him a store to keep articles as he was in shortage of place and accordingly Smt. Vidyawati handed over the possession to Sh. Madan Lal. After the death of Sh. Madan Lal, defendants continued to be in possession of said store. Since, the plaintiffs were in need of suit property for their own use, they terminated the licence issued on 21.9.1998 and demanded possession on or before 10.10.1998. Since, the defendants failed to handover the possession, plaintiffs filed the instant suit.

4. Defendants opposed the aforesaid claim of the plaintiffs by filing written statement taking therein preliminary objections regarding maintainability and cause of action. Defendants further claimed that Bansi Mal and Banarsi Dass constituted the joint Hindu Family and Bansi Lal was adopted by Sh. Telu Dass and he got the property from Sh. Sh. Telu Dass. Defendants further claimed that Sh. Banarsi Dass was having three sons namely Madan Lal, Bimal Kumar and Jain Dass. Sh. Bansi Mal was helping the family of Sh. Banarsi Dass. Sh. Bimal Kumar wanted to start some business in the year, 1960 and Bansi Mal gave his shop to Bimal Kumar, wherein he started the business of making Tin boxes. Sh. Madan Lal was carrying out his business in the rented shop in front of the shop bearing old khasra No.832 and part of the house. Sh. Bansi Mal sold the shop bearing khasra No.832 and part of the house vide sale deed No.16, dated 9.1.1959 to Sh. Madan Lal. But, since the shop was under the possession of Jain Dass, who was conducting Karyana business, he made a proposal that Jain Dass should not be disturbed and it was agreed that shop in possession of Sh. Bimal Kumar shall remain in his possession and this shop will remain in the possession of Jain Dass. Sh. Bansi Mal gave the suit property to Sh.Madan Lal in the month of February, 1959. The predecessor-in-title of defendants, Sh. Madanl Lal and thereafter the defendants are in peaceful uninterrupted possession as owners and they have become the owners by way of adverse possession.

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

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

"1. Whether the plaintiffs are owners in possession of the suit property? OPP.

2. Whether the defendants are in use and occupation of the property as licensee? OPP

3. Whether the Licence of the defendants has been revoked? OPP.

4. Whether this suit is property valued for the purpose of Court fee and jurisdiction? OPP.

5. Whether the plaintiffs are entitled for decree of possession? OPP.

6. Whether this suit is not maintainable? OPD.

7. Whether the defendants are owners by way of sale deed No.16, dated 9.1.1959?OPD.

8. Whether the defendants have become owner by way of adverse possession? OPD.

9. Relief:-

7. Learned trial Court vide judgment and decree dated 28.3.2003, dismissed the suit of the plaintiffs.

8. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, plaintiffs filed an appeal in the Court of learned Additional District Judge, Solan, under Section 96 of the Code of Civil Procedure, which came to be registered as Civil Appeal No.21-NL/13 of 2003. Aforesaid appeal came to be allowed, as a result of which, judgment and decree passed by the learned trial court was quashed and set-aside. In the aforesaid background, the present appellants-defendants approached this Court by way of instant proceedings, praying therein for restoration of the judgment and decree passed by the learned trial court after setting aside the judgment and decree passed by the learned First Appellate Court.

9. The instant appeal was admitted on 18.5.2006 on the following substantial questions of law:-

"1 Whether the impugned judgment and decree is the result of non-consideration of the provisions of Section 15 of the Hindu Succession Act.

2. Whether the impugned judgment and decree is the result of complete misreading, misinterpretation as well as misappreciation of EX.P-1 compromise between the parties.

3. Whether the learned lower appellate court being last court of fact has failed to consider the entire oral as well as documentary evidence as required of it in view of the law laid down by the Hon'ble Apex Court reported in 2000(5) SCC 652.

4. Whether the learned lower appellate Court is right in not considering the admission made by PW-2 Sh. Rattnu as well as document Ex.P-1, P-9 and P-10.

5. Whether the learned lower appellate court is right in not considering the fact that in 1959 since the Transfer of Property Act was not applicable and the appellants had purchased the premises in dispute for a sum of Rs.90/-.

10. Mr. Ramakant Sharma, learned Senior Advocate, duly assisted by Mr. Basant Thakur, Advocate, vehemently argued that the impugned judgment passed by learned first appellate Court is not sustainable in the eyes of law as the same is not based upon the correct appreciation of the evidence and as such, same deserve to be quashed and set-aside. While referring to the impugned judgment passed by the learned first appellate Court, Mr. Sharma, contended that impugned judgment and decree passed by the learned first appellate Court, is result of complete misreading, misinterpretation as well as misappreciation of the oral as well as documentary evidence adduced on record by the respective parties. Mr. Sharma, forcibly contended that learned Additional District Judge, has failed to return distinct and separate findings on all the issues while determining the correctness and genuineness of the judgment and decree passed by the learned trial Court and as such, same is not sustainable in the eyes of law. While placing reliance upon the judgment passed by the Hon'ble Apex Court in ***State of Rajasthan vs. Harphool Singh (Dead) through his LRs, (2000)5 SCC 652***, Mr. Sharma, strenuously argued that it was incumbent upon the learned first appellate Court being last facts finding Court to consider all the issues and then decide the same by assigning reasons. Mr. Sharma, further contended that first appellate court is final court of fact and as such it ought to have considered and decided all the issues before deciding the appeal having been preferred by the plaintiffs. Learned counsel further contended that it is well settled that when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasoning of the trial court are erroneous.

11. While specifically inviting attention of this court to issues No.1 and 2, having been framed by the learned trial court, Mr. Sharma, contended that when plaintiffs were not held to be owners in possession of the suit land and defendants were also not held to be in use and occupation of the property as licencee by learned trial court, it was incumbent upon the first appellate court to deal with these issues specifically assigning specific reasons for not concurring with the findings returned by the court below qua these issues. While referring to the findings returned by the court below qua issues, as referred above, learned counsel contended that it was incumbent upon the first appellate Court to consider the provisions of Sections 11 and 15 of the Hindu Succession Act, which was taken into consideration by the trial court while holding the plaintiffs not to be owners in possession of the suit land. Learned counsel further contended that once issue with regard to defendants having become owners by way of adverse possession was decided against the appellants/ defendants and thereafter no appeal was preferred against that findings by the appellants/defendants, there was no occasion for the first appellate Court to pass its judgment merely on the issue of adverse possession. While referring to the impugned judgment passed by the learned first appellate Court, Mr. Sharma, contended that there is no discussion, if any, with regard to specific issues having been framed by the learned trial court and entire judgment is based upon the pleas of adverse possession having been taken by the defendants in the written statement. While concluding his arguments, Mr. Sharma, contended that since the first appellate court has failed to assign specific reasons while differing with the reasoning assigned by the learned trial Court, present matter deserve to be remanded back to first appellate court for rendering its findings on all the issues framed by the learned trial court on the basis of the pleadings/evidence adduced on record by the respective parties. In this regard, he placed reliance upon the judgment passed by this Court in **Bhag Singh versus Smt. Piar Dassi and others 2017(2) Him.L.R.902.**

12. Mr. G.D.Verma, learned Senior Advocate, duly assisted by Mr. B.C.Verma, Advocate, supported the impugned judgment passed by the learned first appellate court and stated that there is no illegality and infirmity in the impugned judgment passed by the learned first appellate court and as such, same deserve to be upheld. While refuting the aforesaid submissions having been made by the learned counsel for the appellants/defendants, Mr. Verma, made this court to travel through the judgment passed by the learned first appellate court to demonstrate that each and every aspect of the matter has been carefully dealt with by the learned first appellate court while disagreeing with the findings returned by the learned trial court below. Mr. Verma, while inviting attention of this court to written statement having been filed by the appellants/ defendants, contended that there was no occasion for the court below to render specific findings qua issues No.1 and 2 framed by the learned trial court in view of the candid admission having been made by the appellants/defendants with regard to ownership of plaintiffs over the suit land.

13. Mr. Verma, while inviting attention of this Court to the pleadings, contended that defendants have categorically admitted the plaintiffs to be owners in possession of the suit land by raising plea of adverse possession. He further contended that it has also come in the written statement that shop/ Godown in question was leased out to them by original owner Smt. Vidyawati and similarly there is plea of oral sale having been effected in their favour, which was not proved in accordance with law. While inviting attention of this Court to the revenue entries, Mr. Verma contended that presumption of correctness is attached to the revenue entries, but at no point of time challenge, if any, was ever laid by the defendants to such revenue entries, where plaintiffs were shown to be owners in possession of the suit property.

14. While placing reliance upon the judgment passed by the Hon'ble Apex Court in **Babu Ram alias Durga Prasad versus Indra Pal Singh (dead) by L.Rs.,** AIR 1998 Supreme Court 3021 & 3027, Mr. Verma, contended that appellants cannot be allowed to make/raise new plea in the Regular Second Appeal, especially when same was not raised/made before the court below. Mr. Verma, further contended that findings of possession is a finding of fact and cannot be upset in RSA even if other view is possible. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **Satya Gupta(SMT) Alias Madhu Gupta versus Brijesh Kumar,**

(1998) 6 Supreme Court Cases 423, Chitru Devi versus Smt. Ram Dei and others, AIR 2002 Himachal Pradesh 59 and Ram Narain versus Murat and others, AIR 2002 Supreme Court 2417. While inviting attention of this Court to the substantial questions of law framed at the time of admission of the instant appeal, Mr. Verma, contended that questions of law framed in the instant appeal cannot be stated to be substantial questions of law, in any manner. In this regard, he placed reliance upon the judgment passed by Hon'ble Apex Court in **Tirumala Tirupati Devasthanams versus K.M. Krishnaiah, (1998)3 Supreme Court Cases 331 and the judgment passed by this Court in Harish Kumar & others versus State of H.P. Latest HLJ 2001(HP) 192.** Mr. Verma, further contended that there is no perversity in the findings of learned first appellate court and as such, there is no scope of interference of this court in the instant proceedings. He placed reliance upon the judgment passed by Hon'ble Apex Court in **Sadhana Lodh versus National Insurance Company Limited and another** (2003) 3 Supreme Court Cases 524 ***and Puran Ram versus Bhagu Ram and another,*** (2008) 4 Supreme Court Cases 102.

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

16. Taking note of the submissions having been made by learned counsel for the parties viz-a-viz impugned judgment passed by learned first appellate court, this court intends to take substantial question No.3 at first instance.

17. It is well settled that first appeal is a valuable right of the parties and parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons in support of such findings. Though, the courts would be justified in taking a different view on questions of fact but that should be done after adverting to the reasons given by trial Judge in arriving at findings in question. But court of first appeal must cover all important questions involved in case and they should not be general and vague. When first appellate court reverses findings of the trial court, it must record the findings in clear terms explaining how the reasoning of the trial court is erroneous. In this regard, reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415***, wherein it has been specifically held that appellate Court is final Court of facts and as such its judgment must reflect application of mind and it must record its findings supported by reasons. Hon'ble Apex Court in the aforesaid judgment, taking note of the earlier judgment passed in ***Santosh Hazari vs. Purushottam Tiwari, (2001)3 SCC 179,*** has held as under:

> ***"13. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in Vinod Kumar v. Gangadhar (2015) 1 SCC 391, it was held as under:-***
>
> ***"12. In Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)***
>
> > ***"15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then***

> ***assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."***

The above view has been followed by a three-Judge Bench decision of this Court in Madhukar v. Sangram (2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

13. In H.K.N. Swami v. Irshad Basith (2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3) "3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

14. Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court observed as follows: (SCC p. 303, para 2)

15. Again in B.V. Nagesh v. H.V. Sreenivasa Murthy (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)

> ***"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:***
>
> ***(a) the points for determination;***
>
> ***(b) the decision thereon;***
>
> ***(c) the reasons for the decision; and***
>
> ***(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.***
>
> ***4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, SCC p. 188, para 15 and Madhukar v. Sangram (2001) 4 SCC 756 SCC p. 758, para 5.)***

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasonings of the trial court are erroneous." (Emphasis supplied)

18. In the aforesaid judgment, as referred above, Hon'ble Apex Court has specifically concluded that learned first appellate court while concurring with the findings returned by the learned trial Court, is not expected to reiterate reasons given by the trial Court, rather mere expression of general agreement with the reasons given by the trial Court is sufficient. However, when learned first appellate reverses findings of learned trial Court, it must record the findings in clear terms explaining how the reasoning of the trial court is erroneous. This Court in **Prem Singh versus H.P. State Forest Development Corporation 2017(2) Him. L.R.942** placing reliance of aforesaid judgment passed by Hon'ble Apex Court has also held that first appellate court being last fact finding court is required to consider all the issues and decide the same by assigning reasons.

19. After having carefully perused the impugned judgment passed by the learned first appellate Court viz-a-viz evidence adduced on record, especially judgment and decree passed by the learned trial court, this court sees substantial force in the argument having been made by Mr. Ramakant Sharma, learned Senior Advocate, that learned first appellate court has failed to appreciate the pleadings as well as evidence available on record in its right perspective. Similarly, this court finds from the judgment passed by the learned trial court, which has been further set-aside by the learned first appellate court that specific issue with regard to ownership and possession of plaintiffs over the suit land was framed, learned trial court while deciding aforesaid issue against the plaintiffs specifically concluded that it is not clear that how the plaintiffs have become owners after the death of Smt. Vidyawati. Learned trial Court further held that since Vidyawati died issueless and as such, property would have developed upon her heirs and husband in terms of Section 15 of the Hindu Succession Act. Learned trial court below further concluded that even if the plaintiffs are treated to be the heirs of husband, their father Jain Dass is alive and has appeared as PW-4 during the suit. Sh. Jain Dass would be class-II hair and brother has been mentioned in entry –III, while the brother's son has been mentioned at entry-IV. Section 11 of the Hindu Succession Act, provides that the property intestate shall be divided between the heris specified in any one entry in class-II of the schedule so that they share equally. Learned trial Court taking note of the fact that only in absence of brother, brother's son will succeed to the property held that the plaintiffs will not succeed to the property assuming that

Smt. Vidyawati died intestate. Learned trial Court taking note of the fact that no evidence was adduced on record by the plaintiffs to prove their title be it in the shape of evidence of any testamentary succession or "Will" specifically held that plaintiffs cannot claim title either on the basis of intestate succession or testamentary succession.

20. Similarly, it emerged from the judgment passed by the learned trial court that specific issue was framed "whether the defendants are in use and occupation of the property as licencee?" and learned trial court held defendants not to be occupation of the property as licencee. Interestingly, learned first appellate Court while setting aside the judgment passed by the learned trial court has not touched the aforesaid aspects of the matter and based its findings merely on the plea of adverse possession having been taken by the appellants/defendants in the written statement. Since, trial court had specifically made reference to Section 11 and 15 of the Hindu Succession Act, while exploring answer to issues No.1 and 2, learned first appellate Court ought to have examined the matter from that angle and should have returned its findings on these issues.

21. Bare perusal of the impugned judgment passed by the learned First Appellate Court, nowhere suggests that there is discussion, if any, qua aforesaid issues having been specifically framed by the trial court while dismissing the suit of the plaintiffs. Rather, learned first appellate court proceeded to decide the appeal in favour of the plaintiffs on the premise that since plea of adverse possession having been taken by the defendants was decided against them, defendants acknowledged the plaintiffs to be the true owners and as such, they are entitled to decree of injunction. If for the sake of arguments, it is presumed that the decree of injunction could be passed against the appellants/ defendants on the basis of their so called admission with regard to title of plaintiffs, decree of possession qua the suit property could not be passed by court below without adjudicating issue of title, which was under serious dispute and specific issue qua the same was framed by the court below. Otherwise also, if the matter is viewed from other angle, once the trial court had specifically held respondents/plaintiffs not to be owners in possession of the suit land taking note of Sections 11 and 15 of the Hindu Succession Act, was it not incumbent upon the trial court to specifically deal with that issue and return its findings on the same?.

22. At the cost of repetition, it may be reiterated that first appeal is a valuable right of the parties and parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons in support of such findings. True, it is that learned first appellate court is entitled to give all together different view on question of facts after adverting to the reasons given by the trial Judge in arriving at the findings in question, but same time it is also required to cover all important questions involved in the case after having gone through the pleadings as well as evidence in detail. Most importantly, as has been held by the Hon'ble Apex Court in **Laliteshwar Prasad Singh's case** supra whenever first appellate court reverses findings of trial Court, it is expected to record findings in clear terms specifically stating therein, in what manner, reasoning given by the trial court is erroneous.

23. In the instant case, this court after having carefully perused the impugned judgment passed by the learned first appellate Court, sees no reasons to agree with the contention having been made by Mr. G.D.Verma, learned Senior Advocate that first appellate Court has dealt with each and every aspect of the matter very carefully.

24. In the instant case, learned first appellate Court while reversing the findings of learned trial court, has come to the conclusion that since defendants have not been able to substantiate that the suit property was purchased by them by way of oral sale, they cannot be said to have acquired title to the suit property by way of adverse possession. Since, issue with regard to adverse possession was decided against the appellants/defendants, there was no occasion at all for the learned first appellate Court to return its findings on the same, especially when no challenge was laid by the appellants/ defendants qua this findings returned by the learned trial court. Once, it had been specifically held by the learned trial Court that plaintiffs

cannot claim ownership and possession of the suit land in view of the provisions contained in Section 11 and 154 of the Hindu Succession Act, it was not open for the first appellate Court that too without going into correctness of the aforesaid findings returned by the trial court, to hold respondents/ plaintiffs to be in possession of the suit property in the light of findings returned by the learned trial Court qua the plea of adverse possession having been taken by the appellants/ defendants in their written statement.

25. This Court after having carefully perused the impugned judgment as well as record is fully convinced and satisfied that learned first appellate court has not covered all the questions/ issues involved in the case and no reasons, whatsoever, have been assigned for differing with the judgment/findings returned by the learned trial court, while accepting the appeal of the respondents/plaintiffs. Since, this court taking note of the illegalities and irregularities committed by the learned first appellate Court, as discussed above, intends to remand the case back to the learned first appellate Court, it may not be proper for this Court at this stage to make any observation with regard to correctness of other findings returned by the courts below while dealing with the suit and appeal having been filed by the respective parties. Since this Court purposes to remand the case back, there is no occasion for this court to answer/return its findings qua other substantial questions of law and as such, they are left open at this stage.

26. Similarly, in view of above, this court sees no necessity to take note of the judgments cited by the learned counsel representing appellants/defendants at this stage.

27. Consequently, in view of detailed discussion made hereinabove, impugned judgment passed by the learned first appellate Court is quashed and set-aside and matter is remanded back to the learned first appellate Court with the direction to decide the matter afresh taking note of the observations made in the instant judgment as well as law laid down by the Hon'ble Apex Court in **Laliteshwar Prasad Singh's case,** as has been taken note above**.** Needless to say, court below while deciding the matter afresh, shall afford an opportunity of being heard to both the parties. Since, the matter is hanging fire since 1998 i.e. for the last 19 years, this court hope and trust that needful shall be done by the court below expeditiously, preferably within a period of two months from the date of passing of this judgment to dispose of the instant appeal.

28. Parties through their respective counsel are directed to appear before the learned court below on **1st August, 2017.** Copy of this order/judgment may be sent directly to the concerned court with complete records forthwith to enable it to do the needful within stipulated time.

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

****

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

Dharam Singh ....Appellant-Defendant No.1

Versus

Faquir Chand & Others ...Respondents-Plaintiffs

Regular Second Appeal No.282 of 2007.
Date of decision: 25.07.2017

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration pleading that defendants were the previous owners of the suit land – they had orally mortgaged the suit land in favour of the plaintiffs with possession for a sum of Rs. 300/- - a mutation was entered but the same could not be sanctioned due to the absence of the defendants – the defendants have not redeemed the suit land – the period of limitation has expired and plaintiffs have become owners of the suit land by efflux of time – defendant No. 1 obtained an order of correction of revenue entries

from Land Reforms Officer which was set aside by Divisional Collector, Amb in appeal – the order was restored by Divisional Commissioner, Kangra- the defendants are threatening to interfere in the possession of the plaintiffs on the basis of the order- the defendants pleaded that there was an oral understanding to mortgage the suit land but the full amount was not paid and the mortgage could not be effected – Rs.150/- paid by the plaintiffs were returned under a proper receipt – the suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that no period of limitation is applicable in case of redemption of usufructuary mortgage – the Appellate Court had wrongly allowed the appeal- judgment of the Appellate Court set aside and that of the Trial Court restored. (Para- 14 to 22)

Cases referred:
Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and Others, AIR 2014 SC 3447
Hem Ram & Another vs. Bhagwan Dass & Others, I L R 2016 (VI) HP 1052
Ram Kishan & Ors. vs. Sheo Ram & Ors., AIR 2008 Punjab & Haryana 77
Bhandaru Ram vs. Sukh Ram, AIR 2012 HJP 1

For the Appellant: Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellant-defendant No.1 against the judgment and decree dated 30.3.2007, passed by the learned Additional District Judge, Fast Track Court, Una, H.P., reversing the judgment and decree dated 29.06.2000, passed by the learned Sub Judge, Ist Class, Court No.2, Amb, District Una, H.P., whereby the suit filed by the plaintiffs-respondents has been dismissed.

2. Briefly stated facts, as emerged from the record, are that the respondents-plaintiffs *(hereinafter referred to as the 'plaintiffs')* filed a suit for declaration to the effect that they are owners in possession of land measuring 0-20-16 Hects. comprised in Khewat No.8 min, Khatauni No.41, Khasra No.18 (0-00-57), 20 (0-13-89) and 19 (05-70) as entered in Misal Haquiat Bandobast for the year 1986-87, situated in village Seri, Tehsil Amb, District Una, H.P. *(hereinafter referred to as the 'suit land').* It is averred that previously the defendants were owners of the suit land but in the year 1952 the they orally mortgaged the suit land in favour of the plaintiffs with possession for a sum of Rs.300/-. Though a mutation No.461 was entered regarding the mortgage, but the same could not be sanctioned because the defendants failed to appear before the Revenue Officer at the time of attestation of the mutation and accordingly the same was rejected. However, the plaintiffs were put in possession of the land in dispute by the defendants at the time of mortgage and they continued in possession and rather still in possession of the suit land. It is averred that the defendants did not redeem the suit land till today and the period of redemption has already been lapsed and now the plaintiffs have become owners of the suit land by afflux of time and the defendants have lost all right, title and interest in the same. It is further averred that defendant No.1 was the Lamberdar of the village and was having influence over the local revenue field staff and revenue officials. It is also averred that defendant No.1 had moved an application for correction of entries and due to his influence, he was able to obtain an order dated 16.2.1990 from the Land Reforms Officer, Amb in his favour for correction of entries of possession of the suit land as *'Khud Kasht'*. This order of Land Reforms Officer was set aside by the Divisional Collector, Amb in appeal vide order dated 7.12.1990, but the same was again revised by Divisional Commissioner, Kangra Division Dharamshala vide order dated 27.11.1991 and the aforesaid order of Land Reforms Officer was restored. It is averred that the orders dated 27.11.1991 and 16.2.1990 passed by Divisional Commissioner Kangra and Land Reforms Officer, Amb, are wrong, illegal, baseless, misconceived and not sustainable in the eyes

of law or the same are not binding upon the legal rights of the plaintiffs as owners in possession. It is the claim of the plaintiffs that they are still in possession of the suit land and the defendants have left with no right, title or interest therein. It is averred that on the basis of aforesaid orders of Land Reforms Officer and Divisional Commissioner the defendants are threatening to interfere in the possession of the plaintiffs and to take forcible possession of the suit land by raising construction etc., though they have no right to do so. It is also averred that the plaintiffs requested the defendants time and again to admit their claim, but they are not ready to do so. Hence, the plaintiffs filed a suit for a decree for declaration to the effect that the plaintiffs are owners in possession of the suit land as they have perfected their title as owners by afflux of time being mortgagees with possession and the orders dated 27.11.1991 passed by Divisional Commissioner, Kangra Division Dharamshala and that of Land Reforms Officer, Amb dated 16.2.1990 to the contrary, ordering change of entries of possession in the name of defendants are wrong, illegal baseless and not sustainable nor binding upon the rights of the plaintiffs as owners in possession and for issuance of permanent injunction as a consequential relief restraining the defendants from interfering in any manner or raising any sort of construction etc. and from taking forcible possession of the suit land in any manner, with a prayer for recovery of possession in case the defendants succeed to taking forcible possession of the suit land during the pendency of the suit.

3. Defendant No.1 & 3, by way of filing joint written statement, refuted the claim of the plaintiffs on the grounds of maintainability, locus-standi, res-juidicata, constructive res-judicata, limitation and estoppel. On merits, it is alleged that defendants No.1 and 2 never mortgaged the suit land with the plaintiffs. It is averred that in fact there was an oral understanding between them to mortgage the suit land, but the same could not be matured for want of payment of full mortgage amount i.e. Rs.300/- as the plaintiffs had paid only Rs.150/-, which was immediately returned by the defendants to the plaintiffs against a proper receipt dated 15.5.1953 and consequently the mutation was rejected. It is further averred that since there was no mortgage, the plaintiffs never came in possession of the suit land at any point of time in any capacity. It is further averred that defendant No.3 has purchased the entire suit land from defendants No.1 and 2 vide two different sale deeds dated 5.6.1995 and 31.10.1995 for a valuable consideration and now neither the plaintiffs nor defendants No.1 and 2 have any right, title or interest in the suit land and defendant No.3 is exclusive owner in possession of the same.

4. Defendant No.2, by way of filing separate written statement, also refuted the claim of the plaintiffs on the grounds of maintainability, estoppel and jurisdiction. On merits, this defendant has also denied the factum of mortgage and delivery of possession. It is alleged by him that there was no mortgage so the question of delivering the possession to the plaintiffs does not arise and the defendants No.1 and 2 are in possession of the suit land. However, the present suit has been filed by the plaintiffs at the instance of defendant No.1, who is jealous of defendant No.2 and wants to put defendant No.2 in loss.

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

"1. Whether defendants mortgaged suit land with possession in 1952 with the plaintiffs? OPP.

2. Whether plaintiffs became owners by afflux of time? OPP.

3. Whether order dated 27.11.1991 of Divisional Commissioner, Kangra and order dated 16.2.1990 of L.R.O. are illegal and ineffective, if so its effect? OPP.

4. Whether plaintiffs are entitled to the relief of permanent injunction ? OPP.

5. Whether plaintiffs are entitled to the relief of possession? OPP.

6. Whether mortgage was for Rs.150/- as alleged? OPD.

7. Whether plaintiffs received back Rs.150/- on 15.5.1953 if so its effect? OPD.

8. Whether suit is not maintainable? OPD.

9. Whether defendants are owners in possession of the suit land? OPD.

10. Whether suit is time barred? OPD.

11. Relief."

6. Subsequently vide judgment and decree dated 29.6.2000 learned trial Court dismissed the suit of the plaintiffs. Being aggrieved and dis-satisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiffs preferred an appeal before the learned Additional District Judge, Fast Track Court, Una, which came to be registered as Civil Appeal No.215/2000 RBT 164/04/2000. Learned Additional District Judge allowed the appeal and set aside the judgment and decree passed by the learned trial Court. Resultantly, the suit of the plaintiffs was decreed declaring them as owners in possession of the suit land as they have perfected their ownership in the suit land by afflux of time being mortgagees with possession. Hence present Regular Second Appeal has been preferred by the appellant-defendant No.1 praying therein for setting aside the impugned judgment and decree dated 30.3.2007 passed by the learned appellate Court below.

7. This Court vide order dated 10.12.2007 admitted the appeal on the following substantial questions of law:-

"1. Whether the learned first appellate court below misread and mis-appreciated oral and documentary evidence particularly documents Ext.D-2 an D-3, thus, the impugned judgment and decree as passed stand vitiated?

2. Whether return of money vide receipt is a compulsory register-able document as per section 17 of the Registration Act, if not, findings returned by learned first appellate court below vitiated the impugned judgment and decree?

3. Whether suit of the plaintiff is hit by article 58 of the Limitation Act and learned first appellate court below have not returned contrary findings, thus, vitiated the impugned judgment and decree?"

8. Mr.Ajay Sharma, learned counsel representing appellant-defendant No.1, vehemently argued that judgment passed by first appellate Court is not sustainable in the eyes of law as the same is not based upon proper appreciation of facts as well as law on the point and as such same deserves to be quashed and set aside. Mr.Sharma further contended that learned first appellate Court misread the provisions of redemption of mortgage and wrongly arrived at a conclusion that the plaintiffs have become owners of the suit land by afflux of time and suit of plaintiffs is within limitation. While inviting the attention of this Court to the judgment passed by trial Court, Mr.Sharma strenuously argued that learned trial Court rightly came to the conclusion that plaintiffs have failed to prove that defendants mortgaged the suit land with possession in the year 1952 with the plaintiffs and they have become owners by afflux of time.

9. Mr.Sharma, while referring to the judgment passed by learned trial Court, contended that though plaintiff was not able to prove on record that defendants mortgaged the suit land for Rs.300/- to one Shri Babu Ram, but even if it is presumed that suit land was mortgaged by the plaintiffs in favour of defendants, defendants were well within their right to get it redeemed at any time. Mr.Sharma further contended that though learned trial Court, taking note of Article 58 of Limitation Act, held that limitation to seek declaration is three years from the date of accrual of cause of action and as such held the suit of respondents-plaintiffs to be barred by limitation. But, learned first appellate Court decreed the suit of plaintiffs on the ground that they have become owners of the land by afflux of time, since the defendants failed to get the mortgage redeemed within prescribed period of limitation. Mr.Sharma invited the attention of

this Court to the judgment passed by Hon'ble Apex Court in case titled: ***Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and Others, AIR 2014 SC 3447*** and stated that special right of usufructuary mortgagor under Section 62 of the Transfer of Property Act to recover possession commences when mortgage money is paid out of rents and profits or partly by payment or deposit by the mortgagor. He further contended that until then, limitation does not start for the purposes of Article 61 of the Schedule to the Limitation Act. While placing reliance upon the aforesaid judgment, Mr.Sharma forcefully contended that an usufructuary mortgagee is not entitled to file a suit for declaration that he has become an owner merely on the expiry of 30 years from the date of the mortgage. Mr.Sharma further contended that it is own case of the plaintiffs-respondents that the defendants mortgaged the suit land with possession in the year 1952 with the plaintiffs and it was usufructuary mortgage as the possession of the property was delivered to the mortgagee with authority to enjoy all rights of the owner.

10. Lastly, Mr.Sharma strenuously argued that now in view of the latest judgment passed by Hon'ble Apex Court in ***Singh Ram's*** case *supra*, judgment having been passed by learned first appellate Court is not sustainable because in the judgment referred above it has been specifically held that mere expiry of 30 years from the date of mortgage does not extinguish the right of mortgage under Section 62 of the Transfer of Property Act. Mr.Sharma also placed reliance upon the judgment of this Court passed in ***RSA No.428 of 2006, titled: Hem Ram & Another vs. Bhagwan Dass & Others, decided on 29.11.2016,*** wherein same issue has been decided by this Court.

11. Mr.Tara Singh Chauhan, learned counsel representing the respondents-plaintiffs, while supporting the impugned judgment passed by learned first appellate Court, contended that since plaintiffs had lost their right of redemption in the year 1982, learned first appellate Court rightly decreed the suit of plaintiffs holding that the plaintiffs have become owners of the suit land by afflux of time and the suit of plaintiffs is within limitation. Learned counsel further contended that specific period of limitation for redemption of mortgage is prescribed under Limitation Act and grace period of 7 years has further been provided for old cases and as such learned trial Court below wrongly arrived at the conclusion that plaintiffs have failed to prove that they have become owners by afflux of time. While inviting the attention of this Court to the judgment passed by learned trial Court, Mr.Tara Singh Chauhan contended that there is total mis-reading, mis-appreciation and mis-construction of evidence adduced on record by the plaintiffs by learned trial Court while dismissing the suit of the plaintiffs, whereas learned first appellate Court correctly appreciated the evidence in its right perspective and rightly came to the conclusion that the plaintiffs have become owners of the suit land by afflux of time.

12. At this stage, it may be noticed that learned counsel representing the plaintiffs was unable to dispute the factum with regard to judgment passed by Hon'ble Apex Court in ***Singh Ram's*** case *supra*, wherein it has been held that special right of usufructuary mortgagor under Section 62 of the Transfer of Property Act to recover possession qua mortgaged property commences when mortgage money is paid out of rents and profits or partly by payment or deposit by the mortgagor.

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

14. After having carefully perused pleadings adduced on record by respective parties as well as provisions of law applicable in the present case and more particularly judgment passed by Hon'ble Apex Court in ***Singh Ram's*** case *supra,* this Court deems it fit to take all the substantial questions of law together for adjudication as they are closely linked to each other.

15. This Court, after having carefully perused the law laid down by Hon'ble Apex Court in ***Singh Ram's*** case *supra*, sees no occasion/reason to go into the correctness of findings returned by both the Courts below with regard to mortgage of suit land, if any, made in favour of plaintiffs by the defendants. It is undisputed before this Court that the suit land was originally owned and possessed by the defendants, which in the year 1952 allegedly mortgaged to the

plaintiffs and as such question which requires to be decided by this Court is, ***"whether defendants could redeem their land mortgaged by them only within a period of 30 years, as provided under Limitation Act, 1963 or beyond that period?".*** There is no dispute with regard to the fact that earlier period of redemption of mortgage was 60 years, but after coming into operation of Limitation Act, 1963, it was reduced to 30 years. It is also not in dispute that in cases where old Limitation Act was applicable, period of 7 years was given as a grace period. Shri Tara Singh Chauhan, learned counsel representing the plaintiffs-respondents, contended that as per Limitation Act, only 30 years period is provided for redemption of mortgage and as such defendants could redeem land mortgaged in favour of plaintiffs only within a period of 30 years from the date of mortgage i.e. 1952. Since defendants failed to do so within prescribed period of limitation, plaintiffs become owners qua the suit land by afflux of time.

16. After having carefully gone through the aforesaid judgment passed by Hon'ble Apex Court, this Court sees no force in the contention put forth by learned counsel representing the respondents-plaintiffs. In the aforesaid judgment, Hon'ble Apex Court has specifically held that usufructuary mortgagor right under Section 62 of the Transfer of Property Act continues till mortgaged money is paid and mere expiry of period of 30 years from the date of mortgage does not extinguish right of mortgagor under Section 62 of the Transfer of Property Act and as such provisions of Limitation Act, 1963 may not be applicable in the case at hand. It is not the case of the plaintiffs that defendants did not mortgage the suit land in their favour and it was not usufructuary mortgage. Admittedly possession of property was delivered to mortgagee with authority to enjoy all rights of the owners.

17. Hon'ble Apex Court in ***Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and others, AIR 2014 SC 3447,*** upheld the view taken by Full Bench of Punjab and Haryana High Court in ***Ram Kishan & Ors. vs. Sheo Ram & Ors., AIR 2008 Punjab & Haryana 77,*** and over-ruled the judgment passed by Full Bench of this Court in ***Bhandaru Ram vs. Sukh Ram, AIR 2012 HJP 1,*** wherein Full Bench of this Court had held that for redemption of usufructuary mortgage, where no time fixed for redemption of mortgage money, limitation period would be 30 years as prescribed under Article 60 of Limitation Act.

18. At this stage, it would be apt to reproduce the view taken by Full Bench of Punjab and Haryana High Court in ***Ram Kishan's*** case supra:-

> ***"Since the mortgage is essentially and basically a conveyance in law or an assignment of debt or for discharge of some other obligation for which it is given, the security must, therefore, be redeemable on the payment or discharge of such debt or obligation. Fact that at one point of time the mortgagor for one or the other reason mortgaged his property to avail financial assistance on account of necessities of life, the mortgagor's right cannot be permitted to be defeated only on account of passage of time. The mortgagee remains in possession of the mortgaged property; enjoys the usufruct thereof and, therefore, not to lose anything by returning the security on receipt of mortgage debt.***
>
> ***The limitation of 30 years under Article 61(a) beings to run "when the right to redeem or the possession accrues". The right to redemption or recover possession accrued to the mortgagor on payment of sum secured in case of usufructuary mortgage, where rents and profits are to be set off against interest on the mortgage debt, on payment or tender to the mortgagee, the mortgage money or balance thereof or deposit in the Court. The right to seek foreclosure is coextensive with the right to seek redemption. Since right to seek redemption accrues only on payment of the mortgage money or the balance thereof after adjustment of rents and profits from the interest thereof, therefore, right of foreclosure will not accrue to the mortgagee till such time the mortgagee remains in possession of the mortgaged security and is appropriating usufruct of the mortgaged land towards the interest on the***

mortgaged debt. Thus, the period of redemption or possession would not start till such time usufruct of the land and the profits are being adjusted towards interest on the mortgage amount. In view of the said interpretation, the principle that once a mortgage, always a mortgage and, therefore, always redeemable would be applicable. The plea that after the expiry of period of limitation to sue for foreclosure, the mortgagees have a right to seek declaration in respect of their title over the suit property would not be tenable. The mortgage cannot be extinguished by any unilateral act of the mortgagee. Since the mortgage cannot be unilaterally terminated, therefore, the declaration claimed is nothing but a suit for foreclosure. It is equally well settled that it is not title of the suit, which determines the nature of the suit. The nature of suit is required to be determined by reading all averments in plaint. Such declaration cannot be claimed by an usufructuary mortgagee. Therefore, in case of usufructuary mortgage, where no time-limit is fixed to seek redemption, the right to seek redemption would not arise on date of mortgage but will arise on date when mortgagor pays or tenders to the mortgagee or deposits in Court, the mortgage money or the balance thereof. Thus, it was held that once a mortgage always a mortgage and is always redeemable."

19. Hon'ble Apex Court, in view of conflicting decision on the point having been rendered by Full Benches of two High Courts, referred hereinabove, laid down law in ***Singh Ram's*** case *supra,* affirmed the view taken by Full Bench of Punjab and Haryana High Court as under:-

> ***"10. We have given our anxious consideration to the question of law arising in the cases.***
>
> ***11. We are in agreement with the view taken in the impugned judgment that in a usufructuary mortgage, right to recover possession continues till the money is paid from the rents and profits or where it is partly paid out of rents and profits when the balance is paid by the mortgagor or deposited in Court as provided under Section 62 of the T.P. Act.***
>
> ***12. It will be appropriate to refer to the statutory provisions of the T.P. Act and the Limitation Act:-***
>
> ***"T.P. Act***
>
> ***58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged" defined.***
>
> ***(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.***
>
> ***The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.***
>
> ***(b) Simple mortgage-Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment***

of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale-Where, the mortgagor ostensibly sells the mortgaged property-

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

PROVIDED that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) 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, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

(e) English mortgage-Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re- transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds-Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title- deeds.

(g) Anomalous mortgage - A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

60. Right of mortgagor to redeem At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage- money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in

writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a court.

xxx xxx xxx

62. Right of usufructuary mortgagor to recover possession

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,-

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,-when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money, when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it in court hereinafter provided.

xxx xxx xxx

Limitation Act:-

Art. 61 By a mortgagor

a)	***To redeem or recover possession of immovable property mortgaged.***	***Thirty years***	***When the right to redeem or to recover possession accrues***
b)	***xxxxxxxxx***	***xxxxxx***	***xxxxxxxxx***

(emphasis supplied)

A perusal of above provisions shows that Article 61 refers to right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the T.P. Act, the right of usufructuary mortgagor to recover possession is specially dealt with under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage. The said right of usufructuary mortgagor though styled as 'right to recover possession' is for all purposes, right to redeem and to recover possession. Thus, while in case of any other mortgage, right to redeem is covered under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the usufructs and partly on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the T.P. Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be

treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the T.P. Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition under Section 62 of the T.P. Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary mortgage. Accordingly, we uphold the view taken by the Full Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the T.P. Act."

20. Hon'ble Apex Court in case *supra*, taking note of its earlier judgments on the point, held as under:-

"13. We may now refer to decisions of this Court.

(i) ... ...

(ii) ... ...

(iii) ... ...

(iv) ... ...

(v) ... ...

(vi) ... ...

(vii) In Hamzabi & Ors. vs. Syed Karimuddin & Ors., (2001) 1 SCC 414, it was observed:-

"2. The right of the mortgagor to redeem had its origin as an equitable principle for giving relief against forfeiture even after the mortgagor defaulted in making payment under the mortgage deed. It is a right which has been jealously guarded over the years by courts. The maxim of "once a mortgage always a mortgage" and the avoidance of provisions obstructing redemption as "clogs on redemption" are expressions of this judicial protection. (See: Pomal Kanji Govindji v. Vrajlal Karsandas Purohit (1989) 1 SCC 458 in this context.) As far as this country is concerned, the right is statutorily recognised in Section 60 of the Transfer of Property Act. The section gives [pic]the mortgagor right to redeem the property at any time after the principal money has become due by tendering the mortgage money and claiming possession of the mortgaged property from the mortgagee. The only limit to this right is contained in the proviso to the section which reads:

"Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a court."

3. While the expression "decree of court" is explicit enough, the phrase "act of parties" has given rise to controversy. One such act may be when the mortgagor sells the equity of redemption to the mortgagee. This Court in Narandas Karsondas v. S.A. Kamtam, (1977) 3 SCC 247 has said that: (SCC p. 254, para 34)"

(viii) Contrary view has been expressed in Sampuran Singh & Ors. vs. Smt. Niranjan Kaur (smt.) & Ors., (1999) 2 SCC 679 as follows:-

"14. Submission was, as aforesaid, that right to redeem only accrues when either the mortgagors tender the amount of mortgage or the mortgagees communicate satisfaction of the mortgage amount through the usufruct from the land. This submission is misconceived,

as aforesaid, if this interpretation is accepted, then till this happens the period of limitation never start running and it could go on for an infinite period. We have no hesitation to reject this submission. The language recorded above makes it clear that right of redemption accrues from the very first day unless restricted under the mortgage deed. When there is no restriction the mortgagors have a right to redeem the mortgage from that very date when the mortgage was executed. Right accruing means, right either existing or coming into play thereafter. Where no period in the mortgage is specified, there exists a right to a mortgagor to redeem the mortgage by paying the amount that very day in case he receives the desired money for which he has mortgaged his land or any day thereafter. This right could only be restricted through law or in terms of a valid mortgage deed. There is no such restriction shown or pointed out. Hence, in our considered opinion the period of limitation would start from the very date the valid mortgage is said to have been executed and hence the period of limitation of 60 years would start from the very date of oral mortgage, that would be from March 1893. In [pic]view of this, we do not find any error in the decision of the first appellate court or the High Court holding that the suit of the present appellants is time-barred."

However, facts mentioned in para 3 show that possession remained with mortgagor and it was not a case of usufructuary mortgage.

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 to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on 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 or 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. On this conclusion, the view taken by the Punjab and Haryana High Court will stand affirmed and contrary view taken by the Himachal Pradesh High Court in Bhandaru Ram (D) Thr. L.R. Ratan Lal vs. Sukh Ram (supra) will stand over-ruled." (pp.3452-3464)

21. Since Hon'ble Apex Court has held that mere expiry of period of 30 years from the date of mortgage does not extinguish the right of the mortgagor under Section 62 of the Transfer of Property Act, there may not be any application of provisions of Limitation Act, 1963. Since this Court proceeded to decide instant appeal purely on the basis of law laid down by Hon'ble Apex Court in judgment *supra*, wherein it has been specifically held that mere expiry of 30 years from the date of mortgage would not extinguish right of the mortgagor under Section 62 of the Transfer of Property Act to redeem the mortgage land/property, all the substantial questions of law, referred hereinabove, have become redundant and it is not necessary for this Court to look into that, otherwise also it is case of the plaintiff that defendants mortgaged the suit land in favour of the plaintiffs-respondents but since he failed to redeem within prescribed period

of limitation, plaintiffs have become owners by afflux of time. Only question which was required to be decided by this Court was, ***"whether defendants could redeem the suit land after expiry of 30 years or not"***. Once Hon'ble Apex Court has specifically answered aforesaid question, finding, if any, returned by Courts below with regard to mortgage allegedly made by defendants in favour of the plaintiffs is of no consequence.

22. Consequently, in view of detailed discussion made hereinabove and law laid down by Hon'ble Apex Court, this Court sees valid reasons to interfere with the judgment passed by learned first appellate Court, which is apparently against the law laid down by Hon'ble Apex Court and as such same deserves to be quashed and set aside. This appeal is allowed, judgment and decree passed by learned first appellate Court is set aside and that of the learned trial Court is upheld and the suit filed by the plaintiffs is dismissed, accordingly. There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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

M/s. Chet Ram Telu Ram ....Appellant-Plaintiff

Versus

Municipal Corporation, Shimla ....Respondent-Defendant

Regular Second Appeal No.578 of 2006
Judgment Reserved on:11.07.2017
Date of decision: 28.07.2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for seeking injunction pleading that he is a tenant of a shop in Lower Bazaar – the shop was having a rolling shutter which was worn out and required repair- he filed an application for obtaining permission – the permission was granted – Landlord made a complaint that plaintiff had carried out major additions and alterations in the shop- a notice was served upon the tenant that repair was not carried out in accordance with the plan- the sanction was withdrawn and plaintiff was directed to demolish the rolling shutter – plaintiff filed a writ petition in which liberty was granted to the plaintiff to file a civil suit to challenge the order of M.C. Shimla –the defendant pleaded that plaintiff has encroached upon the land of Municipal Corporation – the orders were passed in accordance with law- the Trial Court decreed the suit of the plaintiff – an appeal was filed which was allowed and the judgment of Trial Court was set aside- held in second appeal that the permission was granted for installing rolling shutter subject to the condition that no encroachment would be made over the municipal road/drain- original owner had filed eviction petition of the plaintiff on the ground that plaintiff had made material alterations and additions in the premises by fixing iron shutter – the plea regarding the deviation was not accepted by the Rent Controller – Municipal Corporation initiated proceedings despite the findings of the Court- the Appellate Court had wrongly ignored the previous findings of the Court – the defendant had not placed on record the sanctioned plan – plaintiff had proved that no deviation was made by him while no satisfactory evidence was led by the defendant to rebut the evidence- appeal allowed, the judgment passed by Appellate Court set aside and the judgment passed by the Trial Court restored. (Para-11 to 31)

Cases referred:

Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415
Santosh Hazari vs. Purushottam Tiwari, (2001)3 SCC 179

For the Appellant: Mr.Bhupender Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate.
For the Respondent: Mr.Hamender Chandel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 08.11.2006, passed by learned District Judge (Forest), Shimla, in Civil Appeal No.63-S/13 of 2006/04, reversing the judgment and decree dated 31.03.2003 passed by learned Sub Judge Ist Class, Court No.3, Shimla, whereby suit of the plaintiff was decreed.

2. Briefly stated facts, as emerged from the record, are that the appellant-plaintiff *(hereinafter referred to as the 'plaintiff')* is a tenant of Shop No.20, Lower Bazar Shimla and the said shop was having a rolling shutter which was worn out and required repairs. It is averred by the plaintiff that, with a view to replace the existing rolling shutter, he submitted an application to the respondent-defendant *(hereinafter referred to as the 'defendant)* for obtaining permission to repair the said rolling shutter alongwith its plan. The said proposal of the plaintiff was accepted by the defendant and thereafter the plaintiff replaced the rolling shutter. It is averred by the plaintiff that the landlord of this shop made a complaint to the defendant that the plaintiff has carried out major additions and alterations in the said shop when the rolling shutter was installed. It is alleged that the landlords of the shop, in connivance with the defendant, got a notice served upon the plaintiff that he has not replaced the rolling shutter in accordance with the plan sanctioned by the defendant and as such the sanction granted to the plaintiff was withdrawn. It is further averred by the plaintiff that the proceedings were initiated against the plaintiff under the provisions of the then Municipal Corporation Act and thereafter vide orders dated 27.7.1987 and 1.8.1987, the plaintiff was ordered to demolish the said rolling shutter, which orders were assailed by the plaintiff firstly before the Divisional Commissioner, exercising the appellate powers under the Municipal Corporation Act and thereafter by filing a writ petition before this Court. It is further averred by plaintiff that in the writ petition this Court vide its order dated 22.7.1997 gave a liberty to the plaintiff to institute a regular civil suit challenging the orders of the Municipal Corporation, Shimla. In this background, the plaintiff has filed the suit praying therein for issuance of decree for permanent prohibitory injunction restraining the defendant from demolishing the aforesaid rolling shutter.

3. The defendant, by way of filing written statement, refuted the claim of the plaintiff on the grounds of want of notice under Section 392 of the Himachal Pradesh Municipal Corporation Act, 1994, suppression of material facts and maintainability of the suit for non compliance of the provisions of Order 30 Rule 1 CPC. It is alleged by the defendant that while raising the construction of rolling shutter, the plaintiff has encroached upon the Municipal Corporation road/drain and, as such, he was found to have encroached upon 1' and 7" of the Municipal Corporation Land. It is denied by the defendant that these orders were passed by the defendant in connivance with the landlords of shop No.20. It is averred by the defendant that the orders of withdrawal of sanction dated 27.7.1987 and 1.8.1987 are legal and within the jurisdiction of the defendant. In the aforesaid background, the defendant sought dismissal of the suit filed by the plaintiff.

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

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

"1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction as prayed? OPP.

2. Whether the suit is bad for non compliance of the section 392 of HPMC Act, 1994? OPD.

3. Whether the suit si not maintainable? OPD.

4. Whether the plaintiff is estopped from filing the suit due to his own act and conduct etc.? OPD.

5. Relief."

6. Subsequently, learned trial Court, on the basis of pleadings as well as evidence adduced on record by respective parties, decreed the suit of the plaintiff.

7. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, defendant preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned District Judge (Forest), Shimla, who, taking note of the pleadings as well as evidence adduced on record by respective parties, allowed the appeal and set aside the judgment and decree passed by learned trial Court.

8. In the aforesaid background, appellant-plaintiff filed instant Regular Second Appeal laying therein challenge to the aforesaid judgment and decree passed by learned District Judge (Forest), Shimla, whereby suit of the plaintiff was dismissed with a prayer to quash and set aside the same.

9. This Court vide order dated 07.12.2007 admitted the appeal on the following substantial questions of law:-

"1. Whether the Lower Appellate Court has acted in an erroneous and perverse manner to raise adverse inferences against the plaintiff-appellant for non producing of record by ignoring the fact that such record was in the custody of the defendant who failed to produce the same? Has not the Lower Appellate Court misunderstood and misapplied the principles of Evidence Act in unnecessarily drawing adverse inferences against the plaintiff when the relevant acts which ought to have been proved by the defendant-respondent, remained un-substantiated for want of legal evidence?

2. Whether the Lower Appellate Court has acted arbitrarily by recording erroneous and perverse findings by ignoring the most material documentary evidence i.e. Ex.PW1/D and PW1/E by brushing aside the findings of the competent authority recorded on the basis of the evidence of the officials of the defendant?

3. Whether the impugned judgment and decree of the Lower Appellate Court stand vitiated on account of misreading of relevant and material evidence and ignoring from consideration the overwhelming evidence of the plaintiff establishing that the impugned action of the defendants was not only without jurisdiction but was illegal against the relevant provisions of Municipal Corporation Act

4. Whether the Lower Appellate Court has committed grave error of law and jurisdiction in not properly understanding the relevant provisions of H.P. Municipal Corporation Act and recording such findings which are based on no evidence, vitiating the same?"

Substantial Questions of Law No.1 to 4:

10. Since all the substantial questions of law are interconnected, therefore, they are being taken up together for consideration.

11. It is not in dispute that the plaintiff, who was tenant qua the premises in question, was granted permission vide communication dated 2.2.1985 Ex.PW-1/C by defendant for installing rolling shutter as per drawing submitted by the plaintiff subject to the condition that no encroachment would be carried out over the municipal road/drain. It is also not in dispute that pursuant to aforesaid permission granted by the defendant, plaintiff installed rolling shutter in the year 1985 itself. Similarly, there is no dispute that show cause notice Ex.PW-1/G came to

be issued against the plaintiff on I.8.1987, whereby he was called upon to remove unauthorized construction within a period of three days from the receipt of order. Further, perusal of Ex.PW-1/F i.e. order dated 27.7.1987 suggests that plaintiff, pursuant to notice issued by the Commissioner, Municipal Corporation, Shimla, presented himself before the authority concerned, wherein he was informed that he has not fixed/erected rolling shutter as per plan. Vide aforesaid order, it was informed that the plaintiff has deviated from the plan and as such has encroached upon 1' 7" land of Municipal Corporation. It also emerge from the record that complaint with regard to alleged encroachment over the Municipal Corporation land by the plaintiff was filed by one Shri Purshottam Kumar Dalmia and others, who happened to be owners of the premises occupied by the plaintiff.

12. It has specifically come in the statement of DW-1 i.e. sole witness produced by the defendant-Corporation that proceedings came to be initiated for alleged encroachment having been made by the plaintiff on Municipal Corporation land on the complaint of Shri Purshottam Kumar Dalmia i.e. original owner of the tenanted premises occupied by the plaintiff. It also emerge from the order dated 27.7.1987 Ex.PW-1/F that the plaintiff specifically intimated the defendant-authorities that the order, if any, with regard to alleged encroachment made by the plaintiff, shall effect him adversely in the civil litigation already going on with the landlord.

13. It also emerge from para-5 of the plaint filed by the plaintiff that factum with regard to filing of proceedings by landlord under H.P. Urban Rent Control Act, 1971 were also made known to the Municipal Corporation. While denying aforesaid contention of plaintiff, defendant specifically denied that its official connived with the owner of the tenanted premises. Defendant further contended that while fixing the rolling shutter, the plaintiff increased the length of the shop from 18'-0" to 21'-2" and the front wall was projected by 1'-7" beyond the sanction/completed/plan.

14. It may also be taken note of the fact that the plaintiff also placed on record copy of judgment passed by learned Rent Controller-4, Shimla in case No.6/2 of 88, Ex.PW-1/D, to demonstrate that original owner had filed eviction petition under Section 14 of the H.P. Urban Rent Control Act,1971 inter alia on the ground that respondent (plaintiff herein) has made material alterations and additions in the premises in question by fixing iron shutter. Careful perusal of judgment, referred above passed by learned Rent Controller, clearly suggests that aforesaid plea of encroachment by plaintiff was not accepted. Interestingly, in the case referred above, two conflicting reports were placed on record with regard to alleged encroachment on the part of the plaintiff. One Shri A.L. Gupta, in his report, submitted that rolling shutter was fixed as per the sanctioned plan i.e. Ex.PC, but Shri S.K. Sharma, J.E. of Municipal Corporation stated that sanction plan in question was of 1908 and there is deviation between sanctioned plan and completion plan. However, fact remains that issue with regard to encroachment, if any, by the plaintiff, who had allegedly fixed rolling shutter without there being permission from Municipal Corporation, was decided against original owner. Perusal of Ex.PW-1/E, judgment dated 4.12.1992 passed by learned Appellate Authority, Shimla, in appeal No.19-S/14 of 91, having been preferred by original owner Purshottam Kumar Dalmia and others against the judgment of Rent Controller, further suggests that aforesaid findings returned by trial Court under Rent Act were upheld. But since defendant Municipal Corporation, despite there being specific findings rendered by Courts below qua the issue of encroachment allegedly made by the plaintiff by fixing rolling shutter provided to initiate proceeding against the appellant under Municipal Corporation Act, plaintiff approached this Court by way of writ petition, which was disposed of with the direction to plaintiff to approach civil court for redressal of his grievance.

15. In the aforesaid background, instant suit came to be filed against the defendant for perpetual prohibitory injunction restraining the defendant from taking any action on the basis of orders dated 27.7.1987 and 1.8.1987, whereby order was issued to demolish the shutter of shop No.20, Lower Bazar, Shimla tenanted/occupied by plaintiff. Learned trial Court, on the basis of evidence adduced on record by respective parties, decreed the suit and restrained the defendant from giving effect to demolition order passed by the Municipal Corporation.

16. After having carefully perused judgment passed by learned first appellate Court, this Court sees considerable force in arguments raised by Shri Bhupender Gupta, learned Senior Counsel, representing the plaintiff that there is total mis-appreciation, mis-reading and mis-construction of evidence led on record by first appellate Court, while setting aside the judgment and decree passed by the Court below. Learned first appellate Court, while dismissing the objections having been made by defendant with regard to maintainability and jurisdiction of civil court, proceeded to conclude that learned trial Court had no occasion to place reliance, if any, on documents Ex.PW-1/D and Ex.PW-1/E i.e. orders passed in proceedings initiated by original owner to the suit property in Rent Control Act, wherein admittedly issue with regard to encroachment, if any, on the part of plaintiff was decided against the owner. Learned first appellate Court, while disagreeing with the findings returned by the trial Court, observed that issue involved in the proceedings under the Rent Act was altogether different because their dispute was whether plaintiff made material additions or alterations in the shop or not. But, perusal of judgment passed by Rent Controller, Ex.PW-1/D, clearly suggests that it was specifically alleged in that suit that respondent (plaintiff herein) has made material alterations and additions in premises in question by fixing iron shutter, which is also subject matter of the present suit and as such learned first appellate Court erred in concluding that issue before learned trial Court in those proceedings was not with regard to encroachment of Municipal Corporation land by plaintiff. Once it stood duly admitted by DW-1 i.e. Shri Subhash Chander, Assistant Executive Engineer of Municipal Corporation that proceedings were initiated by defendant on the complaint of the landlord of the plaintiff- firm, it was incumbent upon first appellate Court below to examine the entire case in the light of findings returned by Rent Controller vide judgments Ex.PW-1/D and Ex.PW-1/E. Since, similar issue with regard to encroachment allegedly made by plaintiff over the Municipal Corporation land was involved in earlier proceedings having been filed by owner of the tenanted premises, first appellate Court ought to have taken into consideration findings returned by Rent Controller and thereafter by appellate Authority while deciding appeal having been filed by the defendant in the instant case.

17. After having carefully perused the judgments referred hereinabove, this Court has no hesitation to conclude that finding of learned first appellate Court that no importance should have been given to the orders Ex.PW-1/D and Ex.PW-1/E by trial Court while decreeing the suit of the plaintiff, is erroneous and without any basis. Similarly, this Court, after having carefully peeped into the record of the case, is persuaded to agree with the contention of Shri Bhupender Gupta, learned Senior Counsel representing the appellant that learned first appellate Court wrongly arrived at conclusion that best piece of evidence, which could be material in adjudicating the present case, was withheld by the plaintiff.

18. At the cost of repetition, it may be stated that suit for permanent perpetual injunction restraining the defendant from taking any action on the basis of orders dated 27.7.1987 and 1.8.1987, i.e. order of demolition of the shutter of the tenanted premises issued by defendant-Corporation. Defendant, while refuting the claim of the plaintiff, specifically admitted in the written statement that permission was granted to the plaintiff vide letter No.MCS/47/RB/85-268, dated 2.2.1985 containing therein specific condition that no encroachment shall be made on the Municipal road/drain. Defendant also averred in the written statement that while fixing rolling shutter, plaintiff increased the length of the shop from 18'-0" to 21'-2" and the front wall was projected by 1'-7" beyond the sanction/completed/plan. Since defendant took specific stand with regard to encroachment over Municipal Corporation land by the plaintiff by way of erecting rolling shutter beyond plan, was it not incumbent upon defendant to place on record sanctioned/completed plan?

19. As has been taken note above, in the instant suit, having been filed by the plaintiff, prayer was made to restrain the defendant from effecting demolition in terms of demolition order passed by the Municipal Corporation, defendant with a view to sustain its demolition order ought to have placed on record sanctioned plan which was admittedly issued in favour of plaintiff on 2.2.1985, otherwise also perusal of sanctioned letter dated 2.2.1985 Ex.PW-1/C clearly suggests that no encroachment was to be made on the municipal road/drain by the

plaintiff-firm, while fixing the rolling shutter. But interestingly no evidence worth the name was led on record by the defendant to prove encroachment, if any, over the municipal road/drain. DW-1 i.e. sole defendant witness nowhere stated that plaintiff encroached over the municipal drain by erecting rolling shutter in terms of sanctioned letter dated 2.2.1985. Similarly, as has been taken note above, no document worth the name was led on record suggestive of the fact that the plaintiff carried out unauthorized construction on the spot. DW-1 categorically admitted in cross-examination that defendant-Corporation has not placed any such document on record to prove unauthorized construction on spot by the plaintiff-firm. He further in his cross-examination admitted that he cannot say that before 1960 whether there was any wall in existence as shown in the photograph Ex.P-5 on the point 'A' to 'A'.

20. Apart from above, it clearly emerge from the record that it has not been disputed anywhere that since 1957 plaintiff-firm is tenant in the premises and since then rolling shutter was fixed and same was sought to be replaced by the plaintiff after having obtained due permission/sanction in the year 1985.

21. In the instant case, learned first appellate Court drew adverse inference against the plaintiff for not placing on record sanctioned plan to prove that construction was carried out in terms of sanctioned plan. Though this Court, from perusal of judgment passed by the trial Court, finds that no specific issue was framed with regard to construction made by plaintiff beyond sanctioned plan, otherwise, it clearly emerge from record that rolling shutter was fixed by the plaintiff after having obtained sanction on 2.2.1985. This Court finds from the record that the plaintiff had also placed on record drawing plan of shop No.20 Ex.PW-3/B to demonstrate that no encroachment was made over municipal land/drain, while fixing rolling shutter, but, no document was placed on record by defendant-Corporation to rebut aforesaid plan placed on record by the plaintiff.

22. Needless to say, defendant, being custodian of record pertaining to the properties situated within its limits, is always presumed to be in possession of record including sanction/permission having been granted by it to the plaintiff for erecting rolling shutter. It is not understood why learned Court below not insisted upon defendant to place on record plan sanctioned by it while granting permission to plaintiff for fixing rolling shutter on the tenanted premises. Record was available with the defendant-Corporation, who failed to produce and prove the same and as such there was no occasion for first appellate Court to draw adverse inference against plaintiff for non-production of the same. In these circumstances, onus was upon defendant to prove by placing original sanction plan on record that drawing submitted by the plaintiff was not sanctioned one and it has carried construction on the spot beyond permissible limits.

23. Similarly, this Court has no hesitation to conclude that defendant was not able to rebut overwhelming evidence adduced on record by the plaintiff with regard to construction made by it strictly in accordance with the plan sanctioned by the defendant, evidence of defendant was absolutely lacking to establish the fact that rolling shutter was fixed on the land of Municipal Corporation.

24. This Court also finds from record that learned first appellate Court failed to appreciate oral evidence in its right perspective, as a result of which, erroneous findings came on record to the detriment of plaintiff, who by way of leading cogent and convincing evidence successfully proved on record that rolling shutter was fixed on the tenanted premises strictly in accordance with the permission granted by defendant-Corporation.

25. PW-1 Shri D.P. Kapoor, PW-2 Shri Kapil Dev and PW-3 Shri H.S. Bisht, Technical Expert, specifically proved on record that construction of rolling shutter is/was in accordance with the drawing Ex.PW-3/D as well as sanction letter dated 2.2.1985 Ex.PW-1/F. On the other hand, defendant's sole witness DW-1 Shri Subhash Chander, Assistant Executive Engineer, categorically admitted that no document has been placed on record by the defendant-Corporation to demonstrate unauthorized construction raised on spot by plaintiff-firm

26. Leaving everything aside, as has been observed above, proceedings, if any, were initiated against the plaintiff on the ground that it has violated terms and conditions in sanction letter dated 2.2.1985, whereby he was advised not to encroach upon Municipal Corporation road/drain by erecting rolling shutter on the tenanted premises. But, interestingly, neither in the pleadings nor in the oral deposition made by DW-1 it has come that plaintiff in the process of fixing shutter encroached upon Municipal Corporation land and drain.

27. This Court also finds no merit in the findings returned by Court below that the plaintiff was not able to prove on record that orders passed by Municipal Corporation on 27.7.1987 and 1.8.1987 are null and void. It emerge from the record that since no declaration was sought by the plaintiff to declare aforesaid orders passed by the defendant-Corporation to be null and void, plaintiffs were not held entitled by the first appellate Court for relief of injunction as was granted by trial Court below. In this regard, it may be observed that though it may not have been specifically stated by the plaintiff in the plaint that the aforesaid orders be declared null and void, but in the prayer clause the plaintiff specifically, while praying for decree for permanent prohibitory injunction against defendant restraining them from taking action against the orders dated 27.7.1987 and 1.8.1987, prayed that any other relief to which plaintiff may be entitled in the facts and circumstances of the case may be awarded to the plaintiff, hence, in view of aforesaid specific prayer made by plaintiff in the plaint, this Court sees no merit in the aforesaid findings returned by the Court below. This Court, after having carefully perused ample evidence adduced on record by the plaintiff, has no hesitation to conclude that there was no occasion for the defendant-Corporation to issue letter dated 27.7.1987 when it stood duly proved on record that rolling shutter was erected in the tenanted premises strictly in conformity with the plan sanctioned by the Corporation itself.

28. Since findings qua issue of maintainability and jurisdiction raised by the defendant has attained finality as no appeal was preferred against the judgment passed by the learned first appellate Court by defendant, this Court sees no reason to entertain plea of jurisdiction and maintainability having been raised by Shri Hamender Chandel, learned counsel representing the defendant at this stage and as such same is rejected.

29. This Court sees substantial force in the arguments of Shri Bhupender Gupta, learned Senior Counsel, that learned first appellate Court, while disagreeing with the judgment passed by the Court below, has not dealt with each and every issue involved in the case and has not assigned any reason to differ with the findings returned by the trial Court.

30. In this regard reliance is placed upon ***Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415***, wherein the Hon'ble Apex Court has specifically held that appellate Court is final Court of facts and as such its judgment must reflect application of mind and must record its findings supported by reasons. Hon'ble Apex Court in the aforesaid judgment, taking note of the earlier judgment passed in ***Santosh Hazari vs. Purushottam Tiwari, (2001)3 SCC 179,*** has held as under:

> ***"13. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in Vinod Kumar v. Gangadhar (2015) 1 SCC 391, it was held as under:-***
>
> ***"12. In Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)***
>
> ***"15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of***

> ***the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."***

The above view has been followed by a three-Judge Bench decision of this Court in Madhukar v. Sangram (2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

13. In H.K.N. Swami v. Irshad Basith (2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3) "3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

14. Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court observed as follows: (SCC p. 303, para 2)

15. Again in B.V. Nagesh v. H.V. Sreenivasa Murthy (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)

> ***"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:***
>
> ***(a) the points for determination;***
>
> ***(b) the decision thereon;***
>
> ***(c) the reasons for the decision; and***
>
> ***(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.***
>
> ***4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the***

parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, SCC p. 188, para 15 and Madhukar v. Sangram (2001) 4 SCC 756 SCC p. 758, para 5.)

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasonings of the trial court are erroneous." (Emphasis supplied)

31. Consequently, in view of detailed discussion made hereinabove, this Court sees valid reason to interfere in the judgment passed by first appellate Court, which is apparently not based upon the proper appreciation of evidence as well as law. Accordingly judgment passed by learned first appellate Court is quashed and set aside and that of the learned trial Court is restored. There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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

Commissioner of Income Tax, Shimla ....Appellant

Versus

M/s Shoghi Communication Ltd. ....Respondent

ITA No.5 of 2007
Judgment Reserved on : 28.06.2017
Date of decision: 03.08.2017

Income Tax Act, 1961- Section 80 IB and 80 HHC- Assessee is engaged in the manufacture of voice and fax encryption system – he imported necessary hardware and software from United States and integrated the same at its premises at Shoghi- he claimed deduction, which was

disallowed by Assessing Officer- an appeal was filed, which was dismissed – Income Tax Appellate Tribunal set aside the orders on further appeal and remanded the matter to the Assessing Officer for fresh adjudication – aggrieved from the order, the present appeal has been filed- held that the assessee is engaged in the manufacture of software which is an Encryption Algorithm and manufacture of Serial Encryption Hardware- sale of Computer software falls within the scope of sale of goods- the judgment of Appellate Tribunal upheld and appeal dismissed. (Para-11 to 39)

Cases referred:
Tata Consultancy Services vs. State of Andhra Pradesh 271 ITR 401 (SC)
Paul Mathews and sons v. CIT, 263 ITR 101
ISBC Consultancy Services Ltd. vs. DCIT, 88 ITD 134 (Mum)
Infotech Enterprises Ltd. vs. JCIT, 85 ITD 325 (Hyd).
Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar, (1999) 3 SCC 722
Panchugopal Barua v. Umesh Chandra Goswami, (1997) 4 SCC 713,
Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179
K. Raj and Anr. v. Muthamma (2001) 6 SCC 279
Mahavir Woolen Mills v. C.I.T. (Delhi) (2000), 2000 245 ITR 297 Delhi

For the Appellant: Mr.Vinay Kuthiala, Senior Advocate with Ms.Vandana Kuthiala, Advocate.
For the Respondent: Mr.Rupesh Jain and Ms.Tim Saran, Advocates.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.:

Instant appeal filed under Section 260-A of the Income Tax Act, 1961 *(hereinafter referred to as 'IT Act')* is directed against the order dated 4.8.2006, passed by Income Tax Appellate Tribunal, Chandigarh Bench 'A' Chandigarh in Income Tax Appeal No.359/Chandi/2005 for the assessment year 2001-2002 *(hereinafter referred to as the 'Appellate Tribunal')*, whereby learned Tribunal, while partly allowing appeal having been filed by the respondent-assessee, held that since all the four conditions contained in Section 80 1B(2) of the IT Act are fulfilled by the assessee, it is entitled for deductions as claimed under Section 80 IB and 80 HHC.

2. Necessary facts for adjudication of the case, as emerged from the record, are that respondent-assessee, who is engaged in the manufacture of voice and fax encryption systems, imported the necessary hardware as well as corresponding software from the United States and subsequently imported hardware was integrated at the assessee's premises at Shoghi, District Shimla, Himachal Pradesh and the software was customized and modified before loading it to the hardware. Respondent-assessee claimed deductions under Section 801B and 80 HCC for the assessment purpose, which came to be disallowed by the Assessing Officer vide assessment order under Section 143(3) dated 1.3.2004.

3. Being aggrieved and dis-satisfied with the aforesaid assessment order dated 1.3.2004, respondent-assessee preferred an appeal under Section 250(6) of Income Tax Act before the Commissioner, Income Tax (Appeals), Shimla, which came to be registered as IT/182/2003-04/SML. However, fact remains that aforesaid appeal preferred by respondent-assessee was dismissed, as a result of which order of assessment passed by Assessing Officer dated 1.3.2004 under Section 143(3) came to be upheld.

4. Respondent-assessee, being dis-satisfied with the aforesaid rejection of appeal preferred by it, filed an appeal before the learned Income Tax Appellate Tribunal. Learned Appellate Tribunal, taking into consideration the facts of the case vis-à-vis orders impugned before it, having been passed by Assessing Officer and further upheld by Commissioner, Income

Tax (Appeals), set aside the same and remanded the case back to the Assessing Officer for fresh adjudication in accordance with law after giving due and reasonable opportunity of being heard to the assessee. Learned Appellate Tribunal, while allowing appeal of respondent-assessee, categorically held that since assessee has fulfilled all the four conditions, as contained in Section 80 1B(2), it was eligible for deductions under Section 80 1B of the IT Act.

5. In the aforesaid background, appellant Income Tax Department has approached this Court by way of instant appeal, which was admitted on 2.3.2007 on the following substantial questions of law:-

> ***"1. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was right in law in holding that the assessee was engaged in the manufacture of encryption software and was hence eligible for the deduction under section 801B of the Income-tax Act, when the assessee was merely importing such software and customizing the same to suit the needs of its customers?***
>
> ***2. Whether on the facts and in the circumstances of the case, the Hon'ble Appellate Tribunal was right in law in holding that the condition specified in section 801B(2)(iv) was fulfilled by the assessee, when the assessee had failed to establish that ten or more workers were employed by the undertaking during the relevant year, and the onus was on the assessee to establish this fact for availing of the deduction?***
>
> ***3. Whether on the facts and in the circumstances of the case, the Hon'ble Appellate Tribunal was correct in holding that the non-maintenance of separate books of account including production records, in respect of the eligible business, and consequent failure to fulfill the condition laid down in section 801B(13) read with section 801A(5), did not justify the rejection of the claim for deduction under section 801B in the present case?***
>
> ***4. Whether on the facts and in the circumstances of the case, Hon'ble Tribunal was right in law in holding that statements of several persons admittedly recorded under section 133A(3)(iii) of the income-tax Act in the course of survey under-section on the assessee's premises did not have any evidentiary value, since the said section does not provide for recording a statement on oath, and since the statements recorded in the present case did not indicate the concerned officer/authority who recorded the same?"***

6. Ms.Vandana Kuthiala, learned counsel representing the appellant-department, vehemently argued that impugned order passed by learned Appellate Tribunal is not sustainable as the same is contrary to the facts as well as law. While referring to the impugned judgment passed by learned Appellate Tribunal, Ms.Vandana Kuthiala, strenuously argued that no manufacturing activity was actually carried out by respondent-assessee and as such deduction claimed by assessee under Section 80 1B and 80 1C was rightly disallowed by Assessing Officer. She further stated that so called integration of software in the assessee's premises at Shogi did not amount to manufacture and as such software could not/ought not be said an article or thing. Mrs.Kuthiala, learned counsel further contended that learned Appellate Tribunal wrongly applied ratio of judgment passed by Hon'ble Supreme Court in case of ***Tata Consultancy Services vs. State of Andhra Pradesh 271 ITR 401 (SC)*** because aforesaid decision of Hon'ble Apex Court only implies that software loaded on to a tangible medium would constitute "goods" and it does not deal with issue as to whether customization of software amounts to manufacture. She further stated that learned Appellate Tribunal wrongly interpreted Circular dated 7.10.2005 issued by CBDT, wherein, taking note of aforesaid judgments of Hon'ble Apex Court, it was clarified that software is to be regarded as goods and service tax is leviable on any service in relation to maintenance or repair or servicing of software. Learned counsel contended that aforesaid circular, having been taken into consideration by learned Appellate Tribunal while

allowing appeal of respondent-assessee, was actually issued by CBEC in relation to service tax and not by CBDT and as such same had no binding force on Income Tax Authorities.

7. Learned counsel representing the appellant-department further contended that in the instant case learned Appellate Tribunal has failed to examine the precise activity carried on by the assessee because it is evident from the record that encryption hardware and software were imported by the assessee and thereafter the only development stated to have been done was to customize the software in accordance with the needs of the customers. The assessee imported encryption software and sold the same and no change was made in the commercial identity of the commodity being sold and as such the same could not be held to be an article or thing and even if it is presumed that development of new and original software amounts to manufacture, it cannot be said that the assessee carried out any manufacture or production by the mere process of customization. While concluding her arguments, Mrs.Vandana Kuthiala, learned counsel stated that under Copyright Law, the right to modify or customize a copyrighted article has to be specifically transferred. But, in the instant case, there is nothing on record to suggest that whether such right was obtained by the assessee and whether any royalty was paid as consideration for the same.

8. Learned counsel, while inviting the attention of this Court to the assessment order passed by the Assessing Officer, which was further upheld by the Commissioner, Income Tax (Appeals), stated that it clearly emerge from the record that assessee did not employ more than 10 workers in any manufacture unit and also not maintained separate books of accounts in respect of the eligible manufacturing activity/business and as such, he failed to fulfill the conditions contained in Section 80 1B of the IT Act entitling him to claim deductions under the same.

9. Per contra Mr.Rupesh Jain, learned counsel appearing for the respondent-assessee, supported the impugned order passed by learned Appellate Tribunal. While refuting the aforesaid submissions having been made by learned counsel representing the appellant-department, Mr.Rupesh Jain, while inviting the attention of this Court to the questions of law framed at the time of admission, vehemently contended that by no stretch of imagination the same can be termed to be the substantial questions of law, rather the same are pure questions of facts, which have been rightly adjudicated by learned Appellate Tribunal taking into consideration the material adduced on record by both the parties. Mr.Jain further contended that bare examination of aforesaid arguments, having been made by learned counsel representing the appellant-department, nowhere suggest that questions of law much less substantial have been raised in the appeal, which could persuade this Court to interfere in the well reasoned order passed by the learned Appellate Tribunal. While concluding his arguments, learned counsel made this Court to travel through the impugned order passed by learned Appellate Tribunal to demonstrate that all the questions raised before this Court have been answered in detail by learned Tribunal taking note of Rules occupying the field as well as judgment passed by the learned Appellate Tribunal. Mr.Jain further contended that issue whether software developed by assessee comes under the category of manufacture of thing, stands answered in the judgment passed by the Hon'ble Apex Court in case of ***Tata Consultancy Services*** *supra.*

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

11. Before ascertaining the genuineness and correctness of the aforesaid submissions having been made by learned counsel representing the parties vis-à-vis impugned order passed by learned Appellate Tribunal, this Court deems it fit to take note of Section 80 1B, which is reproduced as under_

> ***"80-IB. (1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections (3) to (11), (11A) and (11B) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of***

this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely :—

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of an industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(iii) it manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India :

Provided that the condition in this clause shall, in relation to a small scale industrial undertaking or an industrial undertaking referred to in sub-section (4) shall apply as if the words "not being any article or thing specified in the list in the Eleventh Schedule" had been omitted.

Explanation 1.—For the purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely :—

(a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the assessee.

Explanation 2.—Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with;

(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power."

12. Perusal of aforesaid provisions of law suggests that industrial undertaking, which is not formed of splitting up or reconstruction of business already in existence, is entitled to deduction in respect of profit and gains. In the instant case, assessee claimed that it manufactured software, which was an Encryption Algorithm and also manufactured Serial

Encryption Hardware. Assessee also claimed that the Encryption Algorithm was programmed & down loaded on the hardware device. The moot question, which arose for determination of the learned Appellate Tribunal below was whether the software developed by the assessee comes under the category of manufacture of thing or not.

13. Before ascertaining the correctness and genuineness of findings of learned Appellate Tribunal below qua the aforesaid issue, it may be pertinent to take note of findings returned by learned Commissioner, Income Tax (Appeals) in para-4 of order which is reproduced as under:-

> ***"4. I have perused the facts and carefully considered the submissions. As regards the issue whether the assessee's business is formed by splitting up of business already in existence, the AO has observed that the Directors of the appellant company and M/s.Secure Telecome Ltd., Delhi were common. They have shared common expenses and that appellant company paid a sum of Rs.24,68,153/- to M/s.Secure Telecom Ltd. during the year towards its share of common expenses. In my considered view, the appellant company is not formed by splitting up of the business already in existence. The concept of splitting up involves a break-up of the integrity of the business. In order to hold that an Industrial undertaking was formed by splitting up business already in existence, there must be some material to hold that either some assets of the existing business is divided and another business is set up from such splitting of assets, or that the two businesses are the same and the one formed was an integral part of the earlier one. Where there is no tangible evidence of transfer of any assets from an earlier business to the new business, a conclusion can not be reached that the new business is formed by the splitting up of the business already in existence (T.Satish U.Pai Vs. CIT, 119 ITR 877 (kar.). In the present case, no machinery has been transferred from M/s Secure Telecom Ltd., Delhi. Both the companies are doing their business, though there is sharing of expenses as the corporate office of the two companies is at the same place and the directors are common. In such a case, it can not be held that this is a case of splitting up of the business already in existence. Thus, the appellant does not violate conditions laid down u/s 801B(2)(i) of the Act."***

14. Learned Commissioner, Income Tax (Appeals) in the aforesaid order has categorically held that respondent-Company is not formed of splitting up of business already in existence. Commissioner, Income Tax(Appeals) further held that in the present case, no machinery has been transferred from M/s Secure Telecom Ltd., Delhi and both the companies are doing their business, though there is sharing of expenses as the Corporate Office of the two Companies is at the same place and the Directors are common and it can not be held that this is a case of splitting up of the business already in existence. As such, the assessee does not violate conditions laid down u/s 80 1B(2)(i) of the IT Act.

15. Interestingly, aforesaid findings having been returned by the Commissioner, Income Tax (Appeals) were not challenged by the appellant-department and as such it can be safely concluded that respondent-assessee-Company being industrial undertaking is entitled to deductions under the 80 1B of the IT Act. Another condition to be eligible for benefit of deductions under Section 80 1B is that assessee did not manufacture or produce any article or thing, specified in the list in the Eleventh Schedule. In the instant case, claim of the respondent-assessee is that it produced software and it is/was eligible for deduction under Section 80 IB of the IT Act. The Central Excise Tariff Act defines the "software" and states that any representation of instructions, data, sound or image including source code and object code recorded in a machine readable form and capable of being manipulated or providing interactivity to a user by means of an automatic data processing machine.

16. Hon'ble Apex Court in the case of ***Tata Consultancy Service vs. State of Andhra Pradesh,*** which has already been taken note by learned Appellate Tribunal, has held as under:-

> ***"The term "goods", for the purposes of sales tax, cannot be given a narrow meaning. It has been held that properties which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed etc. are "goods" for the purposes of sales tax. The submission of Mr. Sorabjee that this authority is not of any assistance as a software is different from electricity and that software is intellectual incorporeal property whereas electricity is not, cannot be accepted. In India the test, to determine whether a property is "goods", for purposes of sales tax, is not whether the property is tangible or intangible or incorporeal. The test is whether the concerned item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed etc. Admittedly in the case of software, both canned and uncanned, all of these are possible. Intellectual property when it is put on a media becomes goods.***
>
> ***A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a sale of a software programme on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD."***

17. It is ample clear from the aforesaid law laid down by the Hon'ble Apex Court that software both, canned and uncanned, comes under the category of goods. In the instant case also claim of the respondent-assessee is that software developed by the assessee is put on hardware and then marketed, so, it comes under the category of goods.

18. The CBDT in ***Circular No.81/2/2005-ST*** dated 7th October, 2005, taking note of the judgment passed by Hon'ble Apex Court in ***Tata Consultancy Services*** case *supra,* has clarified that "All the tests required to satisfy the definition of goods are possible in the case of software and in computer software the intellectual property has been incorporated on media for the purposes of transfer and software and media cannot be split up. Therefore, sale of computer software falls within the scope of sale of goods. Hon'ble Supreme Court has also observed that they are in agreement with the view that there is no distinction between the branded and unbranded software."

19. Taking note of the aforesaid judgment passed by the Hon'ble Apex Court, the CBDT issued following instructions:-

> ***"Software being goods, any service in relation to maintenance or repair or servicing of software is leviable to service tax u/s 65(105)(zzg) read with section 65(64) of the Finance Act, 1994".***

20. After having carefully perused the aforesaid instructions issued by the CBDT, arguments having been made by learned counsel representing the appellant-Department, that Circular dated 7.10.2005 was issued by CBEC in relation to service tax and not by CBDT and as such it does not have binding on Income Tax Authorities deserve outright rejection.

21. True, it is that aforesaid instructions/ clarifications, if any, have specifically been issued with regard to levy of service tax under Section 65(64) of the Finance Act, 1994, but in the clarification/instructions "software" has been specifically referred/termed to be as "goods". Once CBDT has considered the "software" as "goods", which levying service tax, appellant Income Tax Department cannot be allowed to state that "goods" defined under service tax are different from meaning construed by Income Tax. Aforesaid circular having been issued by the CBDT makes it ample clear that software comes under definition of "goods" and there is no distinction between branded and unbranded software and learned Appellate Tribunal, taking note of aforesaid instructions issued by CBDT, rightly considered the development of software as manufacturing activity. Since, in the instant case, learned Appellate Tribunal, on the basis of aforesaid notification as well as other documents, came to the conclusion that software developed is manufactured by the assessee and as such rightly concluded that assessee fulfilled the conditions laid down under Section 80 IB(2)(iii) as the software is not an article/ thing specified in the list of 11th Schedule.

22. Apart from above, this Court finds that plant and machinery installed by the respondent-assessee was verified by the G.M., D.I.C. after having got spot verification and personal inspection. Similarly, there appears to be no dispute that the assessee was having General Sales Tax and Central Sales Tax exemption and also Central Excise Duty was not leviable in accordance with the Central Excise Tariff Act, 2005. The Sales Tax Department also framed the assessment vide order dated 26.3.2003, wherein the total sales had been accepted at Rs.3,30,88,268/-, out of which sale within the State was at Rs.39,249/-. It is not understood that why sale, which was assessed by the Sales Tax Department, was accepted by the Income Tax Department also, so it cannot be said that the assessee was not dealing with the software.

23. Another condition laid down in aforesaid Section 81 1B is that where the industrial undertaking manufactures or processing the articles or things, must be employed ten or more workers in the manufacturing process carried out with the aid of power. Clause (iv) of sub-section (2) of Section 80 1B provides that deduction under Section 80 1B of the IT Act is allowable to an industrial undertaking if it manufactures or produces articles or things and employs 10 or more workers in a manufacturing process carried on with the aid of power or employs 20 or more workers in the manufacturing process carried on without the aid of power.

24. Record suggests that Assessing Officer disallowed the claim of the assessee taking note of the fact that at the time of survey carried on 19.2.2002, out of a list of 20 employees, only 10 were present and out the list of 29 persons for the month of March, 2001 only the names of four persons appeared in the list of employees given by the representative of the assessee in his statement dated 19.4.2002, only seven persons were covered under the Provident Fund Contribution Scheme.

25. Learned Appellate Tribunal, after having carefully perused the record, rightly concluded that since case relates to assessment year 2001-02, the number of employees at the time of survey on 19.2.2002 is not important since the previous year relevant to the Assessment year under consideration ended on 31.3.2001, as such, the employees in the year ending on March 31, 2001 were required to be considered to decide whether the assessee employed the requisite number of workers in the industrial undertaking or not. Learned Tribunal, after having peeped into the record, carefully examined/analyzed evidence adduced on record by the assessee vis-à-vis order having been passed by Assessing Officer and concluded that the majority of the employees were having the technical educations who were engaged in the manufacturing process i.e. in development of the software and it is not necessary that each and every employee alone should do all the works in the manufacturing process.

26. Learned Tribunal, while deciding the question whether assessee required requisite number of employees during the relevant period to avail benefit of deduction under Section 80 1B of the IT Act, after having carefully perused the record as furnished by the assessee, which was also taken note by Assessing Officer in its assessment order dated 1.3.2004, rightly concluded that once the expenses claimed by the assessee for temporary and part time workers amounting to Rs.10,25,180/- were allowed and the expenses on account of establishment debited to P&L Account amounting to Rs.25,56,188 were taken into consideration as genuine, there was no scope left to doubt that the workers employed by the assessee were less during the relevant period.

27. Learned Tribunal, taking note of assessment order passed by Assessing Officer, held that when the wages paid to the workers and the payment made to the part time/temporary workers were considered to be genuine, no scope was left for Assessing Officer to doubt the list submitted by the assessee with regard to workers employed by the assessee. It also emerge from the record that Assessing Officer failed to place on record any material to substantiate that assessee had not employed the workers as mentioned in the list dated 31.1.2004 for the period relevant to the assessment year under consideration and merely on the basis that the old employees were not there at the time of survey, rejected the claim of assessee for deduction under Section 80 IB. Since Assessing Officer did not doubt the payment of salary and wages to 29 workers and had also allowed expenses paid to the temporary and casual workers, there was no occasion for Assessing Officer to take into consideration statement, if any, recorded during the course of survey.

28. The Hon'ble Kerala High Court in the case of ***Paul Mathews and sons v. CIT, 263 ITR 101***, which has also been taken note by learned Appellate Tribunal, has categorically held that:

> ***"A power to examine a person on oath is specifically conferred on the authorized officer only u/s 132(4) in the course of any search or seizure. Thus, the IT act, whenever it thought fit and necessary to confer such power to examine a person on oath, has expressly provided for it, whereas section 133A does not empower any ITO to examine any person on oath. Thus in contradistinction to the power u/s 133A, section 132(4) of IT Act enables the authorized officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the IT Act. On the other hand, whatever statement recorded u/s 133A of the IT Act is not given an evidentiary value."***

29. It also emerge from the impugned order passed by learned Appellate Tribunal that the learned Income Tax Appellate Tribunal, Mumbai Bench 'C' in the case of ***ISBC Consultancy Services Ltd. vs. DCIT, 88 ITD 134 (Mum)*** has already held that process of customization of software amounts to manufacture. In case referred above, learned Income Tax Appellate Tribunal held that rendering standard software operational by adding new programs, keeping in view the commercial needs, requirement and applications to be implemented by the customers, would amount to manufacture and further for the purpose of Section 10A, since manufacture includes 'any process' and as such customization of software would be eligible for the deduction under Section 10A. Learned Appellate Tribunal in the aforesaid case has categorically held that development of software falls within the definition of production as defined under Section 10A and 10B.

30. It also emerge from the record that similar view has been taken by learned Income Tax Appellate Tribunal Hyderabad Bench 'B' in the case of ***Infotech Enterprises Ltd. vs. JCIT, 85 ITD 325 (Hyd).*** Learned counsel representing the appellant-department was unable to dispute aforesaid findings returned by learned Income Tax Appellate Tribunals Mumbai and Hyderabad Benches in cases referred above and as such ratio laid down in the aforesaid cases were rightly applied in the instant case by the learned Income Tax Appellate Tribunal Chandigarh Bench.

31. Though this Court, after having gone through material adduced on record by appellant-department vis-à-vis impugned order passed by learned Appellate Tribunal, is of the view that no substantial question of law arises for determination of this Court, but otherwise also, as has been discussed hereinabove, learned Tribunal has correctly dealt with each and every aspect of the matter, taking into consideration law laid down by Hon'ble Apex Court as well as rule occupying the field.

32. This Court, after having carefully examined the text of questions of law formulated in the appeal vis-à-vis findings recorded by learned Appellate Tribunal, find that questions framed by the appellant-department are pure questions of fact, which definitely cannot be looked into in the present proceedings, and as such present appeal deserves to be dismissed. Section 260-A of the Income Tax Act, 1961 provides that *"An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law."*

33. Taking note of the aforesaid provisions of law, the foremost question for consideration is as to whether any substantial question of law arises in this case or not. In this regard reliance is placed upon ***Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar, (1999) 3 SCC 722,*** wherein the Hon'ble Apex Court has held as under:-

> ***"6. If the question of law termed as a substantial question stands already decided by a larger bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in Reserve Bank of India v. Ramakrishan Govind Morey, AIR (1976) SC 830 held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference."***

35. In **Panchugop*al* Barua v**. **Umesh Chandra Goswami,** ***(1997) 4 SCC 713***, it has been laid down by Hon'ble Apex Court that existence of substantial question of law is sine qua non for the exercise of jurisdiction. The Hon'ble Apex Court has held as under:-

> ***"7. A bare look at Section 100 C.P.C. shows that the jurisdiction of the High Court to entertain a second appeal after the 1976 amendment is confined only to such appeals as involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the High court. Of course, the proviso to the Section shows that nothing shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. The proviso presupposes that the court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated ate by it. The existence of a "substantial question of law" is thus, the sine-qua-non for***

the exercise of the jurisdiction under the amended provisions of Section 100 C.P.C."

36. In ***Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179,*** the court reiterated the statement of law that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law.

> ***"9. The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal and if it does so it acts illegally and in abnegation or abdication of the duty cast on Court. The existence of substantial question of law is the sine qua non for the exercise of the jurisdiction under the amended Section 100 of the Code. [See Kshitish Chandra Purkait Vs. Santosh Kumar Purkait, (1997) 5 SCC 438, Panchugopal Barua Vs. Umesh Chandra Goswami, (1997) 4 SCC 413 and Kondila Dagadu Kadam Vs. Savitribai Sopan Gujar, (1999) 3 SCC 722].***
>
> ***10. At the very outset we may point out that the memo of second appeal filed by the plaintiff-appellant before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on "substantial question of law involved in the case". An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction."***

37. All the aforesaid judgments have been referred to in the later judgment of ***K. Raj and Anr. v. Muthamma (2001) 6 SCC 279***. A statement of law has been reiterated regarding the scope and interference of the court in second appeal under Section 100 of the Code of Civil Procedure.

38. Reliance is also placed upon the decision of the Hon'ble Delhi High Court in ***Mahavir Woolen Mills v. C.I.T. (Delhi) (2000), 2000 245 ITR 297 Delhi***, wherein meaning of "substantial question of law" has been explained. The Hon'ble Court has held as under:-

> ***"6. The issue raised by the assessee in the appeal cannot be said to involve any question of law, much less a substantial question of law. A question of fact becomes a question of law, if the finding is either without any evidence or material, or if the finding is contrary to the evidence, or is perverse or there is no direct nexus between conclusion of fact and the primary fact upon which that conclusion is based. But, it is not possible to turn a mere question of fact into question of law by seeking whether as a matter of law the authority came to a correct conclusion upon a matter of fact.***

7. In Edward Vs. Bairstow, (1955) 28 ITR 579, (H. L.), Lord Simonds observed that even a pure finding of fact may be set aside by the Court if it appears that the Commissioner has acted without a any evidence or on a view of the facts which could not be reasonably entertained. Lord Radcliffe stated that no misconception may appear on the face of the case, but it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances the Court may intervene.

8. The words "substantial question of law" has not been defined. But the expression has acquired a definite connotation through a catena of judicial pronouncements. Usually five tests are used to determine whether a substantial question of law is involved. They are as follows:

1. Whether, directly or indirectly, it affects substantial rights of the parties, or

2. the question is of general public importance, or

3. Whether it is an open question in the sense that the issue has not been settled by pronouncement of the Supreme Court or Privy Council or by the Federal Court, or

4. The issue is not free from difficulty, and

5. It calls for a discussion for alternative view."

39. Consequently, in view of detailed discussion made hereinabove, it cannot be said that any question of law much less substantial is involved in this appeal, which needs adjudication by this Court, therefore, judgment passed by the learned Appellate Tribunal is upheld and the present appeal is dismissed.

40. All interim orders are vacated and all the miscellaneous pending applications are disposed of.

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

State of H.P. .....Petitioner.
Versus
Bishambhar Dass .....Respondent.

Cr. Appeal No.778 of 2008
Date of Decision: 4th August, 2017

Indian Penal Code, 1860- Section 354- Prosecutrix was studying in class-IV – accused was working as a teacher- accused called the prosecutrix and asked him to sit on his lap- when she refused to do so, accused forcibly caught hold of her and placed his hand on her leg - remaining students were asked to go outside the room- accused was tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused was acquitted – held in appeal that there was a delay of seven days in reporting the matter to the police – no explanation was given for the same- defence witnesses proved the good conduct of the accused and that he had dispute with the management over the salary- accused was given beating and he had reported the matter to the police after which present FIR was registered- there are contradictions in the testimonies of the prosecution witnesses- prosecution version that accused had committed indecent assault on the prosecutrix in the presence of the students appears to be improbable – testimony of the child witness has to be seen carefully- Appellate Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-11 to 30)

Cases referred:
Chhinder Kaur @ Chhipkali & Ors versus State of Rajasthan 2008(3) Criminal Court Cases 949
State of U.P. v. Ashok Dixit and Anr. (2000)3 SCC 70
State of M.P. versus Ramesh (2011) 4 SCC 78
C. Magesh and others versus State of Karnataka (2010) 5 Supreme Court Cases 645

For the Petitioner Mr. M.L.Chauhan, Additional Advocate General.
For the Respondent Mr. Sudhir Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral)

Instant Criminal appeal filed under Section 378 of the Code of Criminal Procedure, is directed against the impugned judgment dated 31.7.2008, passed by learned Additional Sessions Judge, Solan, District Solan, H.P., in Criminal Appeal No.13-S/10 of 2008, reversing the judgment of conviction and sentence dated 8.1.2008, passed by learned Judicial Magistrate 1st Class, Kandaghat(Camp at Solan) in Criminal Case No.2/2 of 2007/2006, whereby learned trial court while holding respondent (***hereinafter referred to as the accused)*** guilty of having committing the offence punishable under Section 354 of Indian Penal Code (***hereinafter referred to as IPC),*** convicted and sentenced him to undergo simple imprisonment for one year and to pay fine of Rs.2000/- and in default of payment of fine, to further undergo simple imprisonment for two months.

2. Briefly stated facts as emerge from the record are that complainant Smt. Vidya Devi (PW-1) lodged complaint at police Station, Solan alleging therein that on 1.4.2004 the accused, who was working as Teacher in Primary School, Brewery, District Solan indecently assaulted her daughter namely Hema (PW-2) studying in 4th class. As per the complainant, victim was called by the accused and thereafter was asked to sit on his lap and when she refused to do so, accused forcibly caught hold of her and placed his hand on her leg, whereas remaining students were asked to go outside the room. As per complainant, accused placed his hand inside the salwar of the victim, upon which victim started weeping. Thereafter, accused left her and called all the children inside the class. Aforesaid incident was brought to the notice of the complainant, who happened to be mother of the victim on the same day, but since her father was not at home complaint could not be made on the same day. The mother of victim revealed the matter to her brother namely Sh. Amarjit. Aforesaid fact was brought to the notice of the management of the school by Sh. Amarjit. However, fact remains that FIR came to be registered only on 8.4.2004, whereby police registered the case against the accused under Section 354 of IPC. Police after completion of the investigation, presented the challan in the competent Court of law.

3. The learned trial Court being satisfied that a prima-facie case exist against the accused, put notice of accusation to the accused under Section 354 of IPC, to which he pleaded not guilty and claimed trial.

4. Prosecution with a view to prove its case examined as many as eight witnesses, whereas accused in his statement recorded under Section 313 Cr.P.C, denied the case of the prosecution in toto. Accused termed allegations made against him to be false and stated that he has been falsely implicated by the management of the school, as he was having some altercation with the management on the issue of salary. The accused also led evidence in his defence. Learned trial Court on the basis of the material adduced before it by the prosecution, held accused guilty of having committed offence punishable under Section 354 of IPC and accordingly convicted and sentenced him, as per the description already given hereinabove.

5. Feeling aggrieved and dissatisfied with the impugned judgment dated 8.1.2008, passed by the learned trial Court, accused preferred an appeal under Section 374 of the Code of Criminal Procedure before the learned Additional Sessions Judge, Solan, which came to be registered as Criminal Appeal No.13-S/10 of 2008. The learned Additional Sessions Judge, Solan vide judgment dated 31.7.2008 set-aside the impugned judgment of conviction and sentence recorded by the learned trial Court and acquitted the accused of the notice of accusation put to him under Section 354 of IPC. In the aforesaid background, present appellant-State approached this Court by way of instant criminal appeal, praying therein for his conviction after quashing and setting aside the impugned judgment of acquittal recorded by the learned Additional Sessions Judge, Solan.

6. Mr. M.L.Chauhan, learned Additional Advocate General, representing the appellant-State, while inviting attention of this Court to the impugned judgment dated 31.7.2008, vehemently contended that same is not sustainable in the eye of law as the same is not based upon the correct appreciation of the evidence and as such, same deserves to be quashed and set-aside. Mr. Chauhan, further contended that bare perusal of the impugned judgment passed by the learned Additional Sessions Judge, Solan suggest that the evidence adduced on record by the prosecution was not read in its right perspective, as a result of which, erroneous findings have come on record and well reasoned judgment of conviction recorded by the learned trial Court has been set-aside without any valid reason.

7. With a view to substantiate his aforesaid argument, Mr. Chauhan, made this Court to travel through the evidence led on record by the prosecution to demonstrate that prosecution successfully proved its case beyond reasonable doubt that accused committed an offence punishable under Section 354 of IPC and as such, there was no scope left for the learned Additional Sessions Judge to differ with the findings returned by the learned trial Court. Mr. Chauhan, further contended that judgment passed by the learned trial court whereby respondent-accused was convicted for an offence punishable under Section 354 of IPC clearly suggest that each and every aspect of the matter was dealt with very meticulously and carefully by the learned trial Court and there was no illegality and infirmity in the impugned judgment passed by the learned trial Court and as such, same was required to be upheld by the learned Additional sessions Judge, Solan. Mr. Chauhan, while inviting attention of this court to the statements having been made by the prosecution witnesses, contended that all the prosecution witnesses including the victim categorically stated before the court below that respondent-accused indulged in indecent behaviour and made an attempt to outrage the modesty of victim as well as other students. Mr. Chauhan, further stated that since prosecution successfully proved its case beyond reasonable doubt, judgment of conviction recorded by the learned trial court ought to have been upheld by the learned first appellate Court and as such, judgment of acquittal passed by the learned Additional Sessions Judge, Solan deserve to be quashed and set-aside by this Court.

8. Mr. Sudhir Thakur, learned counsel representing the respondent-accused, while refuting the aforesaid submission having been made by learned Additional Advocate General, strenuously argued that there is no illegality and infirmity in the impugned judgment of acquittal recorded by the learned Additional Sessions Judge, Solan, rather perusal of the same suggest that same is based upon the correct appreciation of the evidence adduced on record by the respective parties and as such, no interference whatsoever, of this court is called for. Mr. Thakur, while inviting attention of this Court to the statements having been made by the victim as well as other material prosecution witnesses, contended that no reliance, if any, could be placed upon their version, especially in view of the material contradictions in their statements with regard to date of alleged incident. While inviting attention of this Court to the statements of PW-1, Smt. Vidya Devi and PW-2, Hema, Mr. Thakur stated that as per these witnesses incident occurred on 1st April, 2004, whereas as per statements having been made by Himachali (PW-3) and Arjun (PW-4), who were allegedly present at the site of alleged incident, incident occurred on 5th April, 2004. While referring to the statements having been made by PW-1 and PW-2, learned counsel, further contended that it has specifically come in their statements that persons working in the

management were directly related to victim as well as complainant and as such, no reliance, if any, could be placed upon their version, especially in view of the statement having been given by respondent-accused under Section 313 Cr.P.C.

9. While inviting attention of this Court to the defence evidence led on record in support of the case of respondent-accused, Mr. Thakur, stated that all the defence witnesses unequivocally stated before the Court that character of the respondent-accused was above board during his service career and at no point of time complaint, if any, of this nature was ever received against the respondent-accused. While making this court to travel through the statements having been made by these defence witnesses, learned counsel also made an attempt to persuade this court to accept his contention that respondent-accused was falsely implicated in view of the old dispute *inter se* the respondent-accused and school management over the issue of salary. While concluding his arguments, Mr. Thakur, contended that no reliance, if any, could be placed upon the statements of minor children, who admittedly made deposition before the Court at the behest of their parents or management of the school. With the aforesaid submissions, Mr. Thakur, prayed that present appeal be dismissed.

10. I have heard learned counsel representing the parties and have carefully gone through the record made available.

11. Before adverting to the merits of the rival contentions having been made by learned counsel representing the parties, this Court deems it proper to deal with the aspect of delay in lodging of the FIR by the complainant. Admittedly, in the instant case, as per the version put forth by the complainant, she was narrated alleged incident on 1st April, 2004. It is also not in dispute that FIR came to be lodged on 8.4.2004 i.e. seven days of alleged incident.

12. This Court, after having carefully perused the version put forth by the material prosecution witnesses especially PW-1, Smt. Vidya Devi (complainant), sees substantial force in the arguments of learned counsel representing the respondent-accused that there is no explanation much less plausible rendered by the prosecution with regard to delay in lodging the FIR. As per the allegations contained in the FIR, accused outrage the modesty of the victim as well as other students inside the class room on 1.4.2004, whereas FIR that too at the behest of mother of the victim came to be lodged at police station, Solan on 8.4.2004. As per PW-1 since father of victim was out of station, she disclosed the aforesaid incident to her brother, who further brought it to the notice of the management. But if the statement having been made by PW-1, is read carefully and in its entirety, it clearly suggests that father of victim had come on the next date of incident i.e.2.4.2004 and there is no explanation rendered on record by the prosecution that what prevented father for almost six days to lodge FIR against the respondent-accused that too in such a serious crime allegedly committed by the respondent-accused. Even if the version put forth by PW-1 is accepted that since father of victim was not in station on the date of alleged incident, she had disclosed aforesaid incident to her brother Sh. Amarjit, who could always visit police station to lodge the FIR against the respondent-accused. As per PW-1, Amarjit brought the alleged incident to the notice of the management, but there is nothing on record from where it can be inferred that management lodged complaint/FIR, if any, against the respondent-accused after the alleged incident. Perusal of the record clearly suggests that FIR came to be registered on 8.4.2004 that too at the behest of the mother of victim PW-2, Hema.

13. Though, perusal of the record suggest that respondent-accused not only made an attempt to outrage the modesty of the victim, rather he made similar act of indecency with other students, but none of students made complaint to the police with regard to aforesaid alleged incident. This Court, after having carefully perused the material adduced on record by the prosecution, sees no illegality and infirmity in the findings returned by the learned Additional Sessions Judge, qua the aspect of delay in lodging the FIR. Since, there is no explanation rendered on record by the prosecution with regard to delay in lodging the FIR, no much reliance, could be placed on the story put forth by the prosecution.

14. At this stage, this Court deems it fit to take note of the defence taken by the respondent-accused in his statement recorded under Section 313 Cr.P.C, wherein he while

denying the case of the prosecution in toto specifically stated that he has been falsely implicated by the management of the school as he had some dispute with the management qua the salary. Respondent-accused with a view to prove his stand as taken in his statement recorded under Section 313 Cr.P.C. examined DW-1, Smt. Savita Chandel, HC Kishan Kumar DW-3, and Sh. Daya Kishan DW-4. All these aforesaid defence witnesses had been working with the accused during his service career. It is also admitted case of the parties that respondent-accused had been teaching/working in the school being managed by the private management for the last 34 years. All the aforesaid witnesses categorically stated that accused was having good conduct and nothing offending was ever reported against him by any of the students or the staff members.

15. True, it is that aforesaid defence witnesses were not present at the time of alleged incident, but if their statements are read in its entirety, it gives some strength to the statement/stand taken by the accused in his statement recorded under Section 313 Cr.P.C that he had some dispute with the management over the issue of salary. It has also come in the statements of aforesaid defence witnesses that teachers including respondent-accused had dispute with the management over the issue of salary and some of the employees were rather asked/advised by the management to leave the institution.

16. DW-3, HC Kishan Kumar while producing rapat rojnamcha register of police Station, Solan categorically stated that rapat No.15 came to be registered at the behest of the respondent-accused, who reported that 2nd April, 2004 that he was given beating at 10:00 AM near Solan Brewery School gate. It also emerge from record that pursuant to aforesaid rapat, FIR came to be registered under Sections 341,323, 34 of IPC against Amarjit, Rajinder Kumar, Ved Prakash and Shiv Kumar, who allegedly gave beatings to the respondent-accused after obstructing his way. Perusal of Ex.DW5/A clearly suggest that pursuant to aforesaid FIR lodged at the behest of the respondent-accused case came to be registered against aforesaid persons under Sections 341, 323, 34 of IPC and persons named above, were taken into custody by the police. After having carefully perused the rapat rojnamcha, on the basis of which FIR Ex.DW5/A came to be registered, there appears to be some force in the arguments of Mr. Sudhir Thakur, learned counsel representing the respondent-accused that FIR Ex. PA was counter blast to the FIR lodged by the respondent-accused, who admittedly had made a complaint against Amarjit, Ved Prakssh, Rajinder Kumar and Shiv Kumar on 2nd April, 2004.

17. True it is FIR Ex. DW5/A came to be registered on 8th April, 2004, but DW-3, HC Kishan Kumar has categorically stated that complaint with regard to beating allegedly given by the aforesaid persons came to be registered on 2nd April, 2004 at the behest of respondent-accused. It has specifically come in the statement of PW-1 that she at first instance disclosed alleged accident to her brother namely Amarjit, who further disclosed the same to the management. As has been observed above, there is no explanation, worth the name, on record that what prevented Amarjit to lodge FIR on the same day or day after, rather after having carefully perused Ex.DW5/A, this Court sees reasons to conclude that FIR lodged by complainant i.e. PW-1 was counter blast to the FIR lodged by respondent-accused.

18. While inviting attention of this Court to the cross-examination conducted upon PW-1 and PW-2, learned counsel representing the respondent-accused specifically pointed out that Amarjit, Ved Prakash, Rajinder Kumar and Shiv Kumar all were connected with the management in one way or other. As per own admission of PW-1, Amarjit who happened to be a part of the management is brother of complainant Smt. Vidya Devi. After having gone through the aforesaid aspect of the matter qua delay in lodging FIR, this Court has no hesitation to conclude that learned trial Court below failed to consider the aforesaid aspect of the matter in the light of the defence taken by the respondent-accused in his statement under Section 313 Cr.P.C, as a result of which, erroneous findings have come on record.

19. While exploring answer to the correctness of the submissions having been made by learned counsel for the parties, this Court had an occasion to peruse the oral as well as documentary evidence adduced on record by the prosecution to prove alleged incident, perusal whereof, certainly not compels this court to agree with the contention of learned Additional

Advocate General that there has been misreading, misappreciation and misconstruction of evidence led on record by the prosecution, rather this court is compelled to observe that learned trial court while holding respondent-accused guilty of having committed offence punishable under Section of 354 of IPC, swayed with the emotion and wrongly ignored the material contradictions in the statements of the prosecution witnesses.

20. Complainant Smt. Vidya Devi (PW-1) and victim Hema (PW-2) in their statements stated that alleged incident occurred on 1st April, 2004, whereas PW-3 and PW-4, who as per prosecution story were present at the site of occurrence, categorically deposed before the court below that incident occurred on 5th April, 2004. It is not understood how court below in the teeth of such material contradictions could proceed to hold respondent-accused guilty of having committed the offence punishable under Section 354 of IPC. Contradiction, if any, with regard to alleged date of incident in the statement of PW-1 could be ignored, but statements having been made by PW-3 and PW-4, who were actually present at the site of the incident, were required to be dealt with carefully by the court below. Contradictions in the statements of aforesaid witnesses could not be ignored by the court below keeping in view their presence at the time of alleged occurrence because aforesaid witnesses had an occasion to see the incident with their eyes. It has come in the statement of PW-3, Himachali that after alleged incident matter was reported to class teacher namely Smt. Sudesh, otherwise also if statements having been made by these prosecution witnesses are read in its entirety, there appears to be no consistency and as such, could not be taken into consideration by the court below while holding accused guilty of having committed the offence punishable under Section 354 of IPC.

21. Most importantly, as has been observed above, respondent-accused had made an attempt to outrage the modesty of victim as well as other students including PW-3, Himachali, but there is no mention in the FIR allegedly lodged at the behest of the mother of victim. Interestingly, version put forth by these child witnesses otherwise does not appear to be trustworthy for the reason that it is difficult to digest that respondent-accused committed such heinous crime in the presence of number of students that too in the class room. Though, it has come in the statement of PW-2, PW-3 and PW-4 that students were given beating by accused and as such, they did not make any hue and cry, but aforesaid story/version narrated by such witnesses is not acceptable in teeth of material contradictions in the statements having been made by these child witnesses. It has also come in the statements of these witnesses that while accused was committing this alleged act with the victim, teacher namely Sudesh was watching it from outside.

22. Apart from above, it has come in the statements of aforesaid witnesses that matter was reported to class teacher namely Sudesh immediately after alleged accident. It has also come on record that class teacher namely Sudesh after having seen the alleged incident left the place and thereafter she was talking to one Sh. Om Prakash, who was employee of the school, but prosecution has not cared to cite class teacher Smt. Sudesh, as prosecution witness. As per story of the prosecution Smt. Sudesh was the first person to know the alleged incident, but for the reasons best known to the prosecution she was not cited as prosecution witness.

23. Admittedly, on the date of alleged incident PW-5, Smt. Kuldeep Kaur, who happened to be head mistress, was on leave. Though, in her statement she stated that when she returned on 2.4.2004 she was informed about the incident that accused has outraged the modesty of the girl after consuming liquor. She also stated that she had forwarded letter Ex.PW5/A to the management. There is no explanation, if any, on the part of PW-5 that why she did not lodge the FIR immediately after having come to know about the alleged incident.

24. PW-5, Smt. Kuldeep Kaur and PW-1, Smt. Vidya Devi categorically stated that matter had come to the notice of the management on 2nd April, 2004, but no steps whatsoever, taken by the management to report the matter to the police. Matter came to be lodged on 8th April, 2004 that too at the behest of the complainant, who happened to be mother of the victim. If timing of lodging FIR Ex.PA is seen, this certainly compels this court to agree with the contention having been made by learned counsel for the respondent- accused that entire story was

concocted by the management and its functionaries including Amarjit, Ved Prakash, Rajinder Kumar and Shiv Kumar, who were named in the FIR lodged by the respondent-accused i.e. Ex.DW5/A, which though was registered on 8th April, 200,4 but report was made on 2nd April, 2004.

25. True, it is that perusal of judgment of conviction recorded by the learned trial court suggests that it had taken due care and caution before recording the statement of child witnesses. But, it is well settled that statement, if any, made by the child witness is required to be dealt with greatest caution and circumspection by the courts while ascertaining the correctness of the statement having been made by child witness because possibility of tutoring cannot be ruled out as far as child witness is concerned. In the instant case, as has been noticed above, no reliance upon the statements of minor witness could be placed by the court in view of the contradictions in their statements with regard to date of alleged incident as well as presence of students in the class room.

26. The Hon'ble Rajasthan High Court in ***Chhinder Kaur @ Chhipkali & Ors versus State of Rajasthan*** 2008(3) Criminal Court Cases 949; wherein it has been held as under:-

> **6.** Privy Council in **Mohammed Sunal v. King AIR 1946 PC 3** indicated thus:-
>
> *" In England where provision has been made for the reception of unsworned evidence, from a child it has been always been provided that the evidence must be corroborated in some material particulars implicating the accused. But in Indian Acts there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence, court can act upon. It is sound rule in practice not to act on the uncorroborated evidence of a child, whether sworned or unsworned, but this is a Rule of prudence and not of law."*
>
> *"7. It is well settled that the testimony of a child witness should only be accepted after the greatest caution and circumspection. The rational for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose about things which he has not seen and once having been tutored, he goes on repeating in a parrot like manner what he has been tutored to state."*

27. The Hon'ble Apex Court in case titled -***State of U.P. v. Ashok Dixit and Anr.*** **(**2000)3 SCC 70, wherein it has been held as under:-

> *" Thus, it is well settled in law that the Court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. Needless to say, the corroboration is not a must to record a conviction, but as a rule of prudence, the Court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, applies to a child witness who is competent and whose version is reliable."*

28. The Hon'ble Apex Court in ***State of M.P. versus Ramesh*** (2011) 4 SCC 786, wherein it has been held as under:-

> " 14. In view of the above, the law on the issue can be summarized to the effect that deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to

show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

29. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> *"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)*
>
> > *" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."*
>
> *46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.*

30. Consequently, in view of the detailed discussion made hereinabove, this Court sees no reason to differ with the findings returned by the learned Additional District Judge, which otherwise appears to be based upon the correct appreciation of the evidence as well as law on the point and as such same is upheld.

Accordingly, the present criminal appeal is dismissed alongwith pending application(s), if any.

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

Sonam Chomdan & Another ....Appellants-Defendants

Versus

Ranjit Singh ....Respondent-Plaintiff

Regular Second Appeal No.257 of 2005
Judgment Reserved on: 11.07.2017
Date of decision: 11.08.2017

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration with consequential relief of permanent injunction against the defendants pleading that defendant No.1 was owner in possession of suit land- he had borrowed a sum of Rs.30,500/- from the plaintiff and had agreed to return the same within a period of one year and on failure to return

the amount, plaintiff was to be treated as owner on the basis of oral sale – defendant No. 1 handed over the possession of the suit land to the plaintiff- Assistant Collector 1st Grade recorded the plaintiff in possession of the suit land with the consent of the defendant No. 1- defendants started interfering with the ownership and possession of the suit land- defendants damaged apple plants – plaintiff sought compensation of Rs. 20,000/- for damaging his apple plants- suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that a document creating title to immovable property having value of Rs.100/- should be registered and an unregistered document is not admissible in evidence- the value of the property was more than Rs.100/- - no ownership can be claimed by the plaintiff on the basis of the agreement – injunction cannot be granted against the true owner and the Appellate Court had erred in allowing the appeal- appeal allowed - judgment of Appellate Court set aside and that of the trial Court restored. (Para-10 to 40)

Cases referred:

Suraj Lamp and Industries Private Limited Through Director vs. State of Haryana and Another, (2009)7 SCC 363
SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited, (2011)14 SCC 66
M/s.Kamakshi Builders vs. M/s. Ambedkar Educational Society & Ors., AIR 2007 SC 2191
Satyawan and others vs. Raghubir, AIR 2002 Punjab and Haryana, 290
Delhi Development Authority vs. Gaurav Kukreja, (2015)14 SCC 254
Kamlesh Rani vs. Balwant Singh, 2010(3) Shim.L.C. 141
Premji Ratansey Shah and Others vs. Union of India and Others, (1994)5 SCC 547
Kashi Math Samsthan & Anr. vs. Srimad Sudhindra Thirtha Swamy & Anr., AIR 2010 SC 296
Krishna Ram Mahale (dead) by his LRs. vs. Mrs.Shobba Venkat Rao, AIR 1989 SC 2097,
Roshan Lal vs. Krishan Dev, Latest HLJ 2002(HP) 197
Deepak Prakash vs. Sunil Kumar, 2014(2) Shim.L.C. 822
C.Mackertich vs. Steuart & Co.Ltd., AIR 1970 SC 839
Paras Nath Thakur vs. Smt.Mohani Dasi (deceased) and others, AIR 1959 SC 1204,
Tirumala Tirupati Devasthanams vs. K.M. Krishnaiah, (1998)3 SCC 331
Mohan Lal vs. Nihal Singh, (2001)8 SCC 584
Lisamma Antony and Another vs. Karthiyayani and Another, (2015)11 SCC 782,
Vishwanath Agrawal S/o Sitaram Agrawal vs. Sarla Vishwanath Agrawal, (2012)7 SCC 288
Rachna Sharma vs. Meena Kumari Sharma, 2013(1) Shim.L.C. 428

For the Appellant: Mr.Rajnish K.Lall, Advocate vic Mr.Sanjeev Sood, Advocate.
For the Respondent: Mr.G.D. Verma, Senior Advocate with Mr.B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 04.03.2005, passed by learned District Judge, Kinnaur at Rampur Bushahr, in Civil Appeal No.49 of 2004, reversing the judgment and decree dated 26.06.2004 passed by learned Civil Judge (Senior Division), District Kinnaur at R/Peo, H.P., whereby suit of the plaintiff was dismissed.

2. Briefly stated facts, as emerged from the record, are that the plaintiff-respondent *(hereinafter referred to as the 'plaintiff')* filed a suit for declaration with consequential relief of permanent injunction against the defendants on the allegations that defendant No.1 Furbu Dandup (since deceased) was owner in possession of land comprised in Khasra No.349, measuring 0-10-01 hectare, situated in revenue estate Kanam, Up Mohal Kanam Khas, Tehsil Pooh, Distt.Kinnaur. It is averred by the plaintiff that on 17.12.1983, deceased defendant No.1

borrowed a sum of Rs.30,500/- from the plaintiff and agreed to return the same to him within a period of one year, failing which, the plaintiff was to be treated owner in possession of the suit land by oral sale thereof. It is further averred that on 17.12.1983, the possession of the suit land was handed over to the plaintiff by defendant No.1. It is also averred that defendant No.1 did not honour the oral agreement, dated 17.12.1983 and as such, the plaintiff had acquired rights of ownership of possession of the suit land. Thereafter, the plaintiff applied for correction of entries in the books of the Collector. It is further claim of the plaintiff that the Assistant Collector Ist Grade, Pooh, vide its order dated 7.5.1995, with consent of defendant No.1, recorded the plaintiff in possession of the suit land and therefore, defendants No.1 to 3 had no right, title or interest in the suit land. It is averred that defendants No.1 to 3 started interfering with the ownership and possession of the plaintiff over the suit land w.e.f. 17.11.1995 and defendants No.2 and 3 trespassed into the suit land on the night intervening 17.11.1995 and 18.11.1995 and damaged apple plants thereby causing loss of Rs.20,000/- to the plaintiff. In this background, the plaintiff instituted the suit for declaration of his ownership and possession qua the suit land and defendants No.1 to 3 were sought to be restrained from interfering with the ownership and possession of the plaintiff by issuance of a decree of perpetual injunction against them. The plaintiff also sought compensation of Rs.20,000/- from defendants No.1 to 3 for causing damage to his apple plants. It is also averred that during the pendency of the suit, on 9.9.2001 defendant No.1 died and defendant No.2 Sonam Chomdan was brought on record as his legal heir.

3. Defendants No.2 and 3, by way of filing written statement, refuted the claim of the plaintiff on the grounds of limitation, maintainability and valuation for the purposes of court fee and jurisdiction. It is averred that defendant No.1 was deaf and dumb and could not have been sued except through guardian and defendants No.2 and 3 denied the ownership and possession of the plaintiff over the suit land. Defendants No.2 and 3 also denied oral sale of the suit land by defendant No.1 in favour of the plaintiff on 17.12.1983 or at any time thereabout. It is averred by defendants No.2 and 3 that defendant No.1 had not borrowed a sum of Rs.30,500/- from the plaintiff on 17.12.1983 and had not agreed to pay the same to him within a period of one year. It is further averred by the defendants that the suit land was not deemed to have been sold in favour of the plaintiff on the alleged failure of the defendant No.1 in returning the amount of Rs.30,500/- to the plaintiff. Defendants No.2 and 3 denied having interfered with the ownership and possession of the plaintiff over the suit land as well as having damaged apple plants of the plaintiff. According to defendants No.2 and 3, defendant No.1 was owner in possession of the suit land and the alleged contract, dated 17.12.1983, pleaded by the plaintiff, was stated to be void. It is alleged that that defendant No.1 was deaf and could not have entered into any contract without representation of his interest by his next friend/guardian. It is further alleged that the plaintiff was not entitled to any relief much less to the discretionary relief of permanent injunction. In the aforesaid background, the defendants sought dismissal of the suit filed by the plaintiff.

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

"1. Whether plaintiff is owner in possession over the suit land and defendants are interfering with the possession of the plaintiff over the suit land, as alleged? OPP.

2. Whether the defendants have caused damage to the tune of Rs.20,000/- (price of 45 apple plants) belonging to the plaintiff over the suit land as the peaceful possession of the suit land was taken by the plaintiff with the consent of the defendant No.1, as alleged? OPP.

3. Whether this suit is not maintainable against the defendant No.1 as he being deaf, cannot be sued without appointing a guardian? OPD.

4. Whether suit of the plaintiff is barred by limitation as alleged? OPD.

5. Whether the suit of the plaintiff is not properly valued for the purpose of court fee and jurisdiction? OPD.

6. Whether the defendant No.1 had never taken any loan from the plaintiff, and the question of handing over the suit land to the plaintiff by the defendant No.1 does not arise, if so its effect? OPD.

7. Whether defendant No.1 along with defendant No.2 had planted three apple trees on the suit land in the intervening winter 1981-82, which are at fruit bearing stage, if so, its effect? OPD.

8. Whether plaintiff had not been in possession of the suit land? OPD.

9. Even if, defendant No.1 had entered into any contract with the plaintiff, without the consent of the defendant No.2, whether that contract was void ab initio, as defendant No.1 being deaf was not competent to enter into a contract with plaintiff, if so, its effect? OPD-2 & 3.

10. Relief"

5. Subsequently, learned trial Court, on the basis of pleadings as well as evidence adduced on record by respective parties, dismissed the suit of the plaintiff.

6. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned District Judge, Kinnaur at Rampur Bushahr, H.P., who, taking note of the pleadings as well as evidence adduced on record by respective parties, allowed the appeal and set aside the judgment and decree passed by learned trial Court.

7. In the aforesaid background, appellants-defendants filed instant Regular Second Appeal laying therein challenge to the aforesaid judgment and decree passed by learned District Judge, Kinnaur Civil Division at Rampur Bushahr, H.P., whereby suit of the plaintiff was decreed, with a prayer to quash and set aside the same.

8. This Court vide order dated 24.07.2006 admitted the present appeal on the following substantial questions of law:-

"1. Whether, while rejecting the plea of the respondent-plaintiff that he is owner of the suit land, was the first Appellate Court right in granting the decree of injunction and damages, holding that the respondent-plaintiff was in possession, pursuant to an oral sale, even though plea of part performance, under Section 53-A, has not been specifically raised in the plaint?

2. Whether the first Appellate Court could not have passed a decree for damages, when it did not pass an order for payment of Court fee?"

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

10. **Substantial Question No.1:**

Mr.Rajnish K.Lall, learned counsel, appearing for the appellants-defendants, while inviting the attention of this Court to the impugned judgment passed by first appellate Court, whereby first appellate Court, while accepting appeal having been preferred by the respondent-plaintiff, held that the plaintiff could not be treated owner of the suit land, but he is in possession of the suit land on account of oral sale made in his favour by defendant No.1, contended that once plaintiff was not held to be treated as owner of the suit land, there was no occasion for the first appellate Court to hold the plaintiff in possession of the suit land, especially when plaintiff was allegedly put into possession of the suit land on the strength of oral sale made in his favour by defendant No.1. It clearly emerge from the pleadings as well as impugned judgments and decrees passed by Courts below that plaintiff claimed himself to owner in possession of the suit land on the strength of oral agreement allegedly entered *interse* him as well as defendant No.1 in the year 1983. As per plaintiff, defendant No.1 took a loan of Rs.30,500/- on 17.12.1983 from him on the condition to repay the same within one year and in case

defendant No.1 failed to repay the same within one year then he would handover the possession of the suit land to the plaintiff and thereafter plaintiff shall be deemed to be the owner in possession of the suit land.

11. This Court, after having carefully perused averments contained in the plaint as well as agreement, sees substantial force in the aforesaid arguments having been made by learned counsel representing the appellants-defendants that no finding qua possession, if any, of respondent-plaintiff qua the suit land could be returned by first appellate court in the teeth of specific finding returned by it that plaintiff could not be treated owner of the suit land. Perusal of impugned judgment passed by first appellate Court clearly suggests that Court below, taking note of the fact that defendant No.1 failed to pay an amount of Rs.30,500/- to the plaintiff within the stipulated period i.e. one year, came to the conclusion that suit land is deemed to have been sold orally in favour of the plaintiff.

12. Apart from above, first appellate Court placed heavy reliance upon the statement Ex.PX allegedly having been made by defendant No.1 before Assistant Collector Ist Grade, Pooh *(for short 'AC 2nd Grade').* Since defendant No.1 failed to make payment in terms of agreement, plaintiff applied for correction of entries of books of Collector and accordingly AC 2nd Grade allowed the plaintiff vide order dated 7.8.1995 Ex.PA, whereby plaintiff was ordered to be recorded in possession of the suit land and since no appeal was filed, order passed for correction of entries of books by AC 2nd Grade attained finality. Though this Court need not to go into the correctness of findings returned by the first appellate Court qua the aspect of alleged agreement *inter se* the parties as well as presumption drawn by Court with regard to oral sale allegedly made in favour of plaintiff-respondent, in view of specific findings returned by first appellate Court to the effect that the plaintiff cannot be treated as owner of the suit land, but since respondent-plaintiff has been held to be in possession of suit land on the basis of agreement, whereby defendant No.1 had undertaken to repay loan amount of Rs.30,500/- within a period of one year, failing which respondent-plaintiff was to be treated as owner of the suit land, this Court deems it necessary to go into the question of validity of agreement allegedly executed by defendant No.1 in favour of respondent-plaintiff. At this stage, even, for the sake of arguments, if it is presumed that agreement, as referred above, was executed by defendant No.1 agreeing therein to give his suit land to respondent-plaintiff in the event of non-payment of loan amount of Rs.30,500/- allegedly taken by him from the plaintiff, the question which arises for determination of this Court is, ***"Whether respondent-plaintiff could be held to have acquired title, if any, qua the suit land on the strength of agreement which is admittedly not a registered document?"***

13. At this stage, this Court deems it fit to take note of Sections 17 and 49 of the Registration Act, 1908, which is reproduced hereinbelow:-

> ***"17. Documents of which registration is compulsory.—***
>
> ***(l) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—***
>
> ***(a) instruments of gift of immovable property;***
>
> ***(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;***
>
> ***(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and***

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

[1][(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:]

Provided that the [2][State Government] may, by order published in the [3][Official Gazette], exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

[4] [(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A 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 53A.]

(2) Nothing in clauses (b) and (c) of sub-section (l) applies to—

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) [5][any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court [1] [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or

(vii) any grant of immovable property by [2][Government]; or

(viii) any instrument of partition made by a Revenue-Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists, Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

[3][(xa) any order made under the Charitable Endowments Act, 1890, (6 of 1890) vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-Officer. [4][Explanation.—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.]

(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered. ... ...”

14. Section 49 of the Registration Act, 1908 reads as under:-

“49. Effect of non-registration of documents required to be registered.—No document required by section 17 [1][or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: [1][Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877)[2,3] [***] or as evidence of any collateral transaction not required to be effected by registered instrument.]... ... ...”

15. Perusal of aforesaid Section 17 clearly suggests that document/instrument, which intends/purports to create right/title to an immovable property having value of Rs.100/- should be registered. Similarly, perusal of Section 49 of the Act suggests that documents, which are required to be registered under Section 17 shall not affect any immovable property; comprised therein or confer any power to adopt or to receive any evidence to any transaction affecting the said property or conferring power unless it has been registered.

16. After having carefully perused aforesaid provisions of law, this Court is of the view that agreement Ex.P_, which was admittedly not registered document, as prescribed/defined under Section 17 of the Act, could not be read in evidence by first appellate Court, especially, in the absence of any registered agreement made by the defendant No.1 in favour of the plaintiff.

17. As per Section 17 of the aforesaid Act, any document or instrument, which purports or intends to create title should be registered and in case same is not registered, it would not affect any immovable property comprised therein or moreover it could not be allowed as evidence of any transaction affecting such property.

18. In this regard, this Court deems it fit to rely upon the judgment passed by Hon'ble Apex Court in ***Suraj Lamp and Industries Private Limited Through Director vs. State of Haryana and Another, (2009)7 SCC 363,*** wherein the Hon'ble Apex Court has held as under:-

> ***"15. The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.***
>
> ***16. Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs.100 and upwards to or in immovable property.***
>
> ***17. Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.***
>
> ***18. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified. (pp.367-368)***

19. Perusal of aforesaid law, having been laid by Hon'ble Apex Court, clearly suggests that title of immovable property, having value of more than Rs.100/-, can only be transferred by registered documents, as provided under Section 17 of the Registration Act, 1908. Similarly, it also emerge from the aforesaid judgment that no document as required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property unless it is registered.

20. Reliance is also placed upon ***SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited, (2011)14 SCC 66***, wherein the Hon'ble Apex Court has held as under:

> ***"11. Section 49 makes it clear that a document which is compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited***

purposes. First is as evidence of a contract in a suit for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registrable) is a collateral transaction, in respect of which such unregistered document can be received as evidence under the proviso to section 49 of the Registration Act. (p.71)

21. In ***M/s.Kamakshi Builders vs. M/s. Ambedkar Educational Society & Ors., AIR 2007 SC 2191***, the Hon'ble Apex Court has held:

"***24. Acquiescence on the part of Respondent No.3, as has been noticed by the High Court, did not confer any title on Respondent No.1. Conduct may be a relevant fact, so as to apply the procedural law like estoppel, waiver or acquiescence, but thereby no title can be conferred.***

25. It is now well-settled that time creates title.

26. Acquisition of a title is an inference of law arising out of certain set of facts. If in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of other.

27. It may be true that Respondent No.1 had constructed some buildings; but it did so at its own risk. If it thought that despite its status of a tenant, it would raise certain constructions, it must have taken a grave risk. There is nothing on record to show that such permission was granted. Although Respondent No.1 claimed its right, it did not produce any document in that behalf. No application for seeking such permission having been filed, an adverse inference in that behalf must be drawn." (p.2196)

22. In ***Satyawan and others vs. Raghubir, AIR 2002 Punjab and Haryana, 290,*** the Hon'ble Court has held as under:-

"18. It was submitted that there is no difference between exchange and sale. Except that, in sale, title is transferred from the vendor to the vendee in consideration for price paid or promised to be paid. In exchange, the property of 'X' is exchanged by "A" with property "Y" belonging to "B". In this manner, the property is received in exchange of property. There is transfer of ownership of one property for the ownership of the other. It was submitted that prior to when decree dated 20.10.1992 was not passed, there was no title of "A" in property "Y" and there was no title of "B" in property "X". It was submitted that for the first time, the right was created in immovable property by decree and, therefore, that decree required registration. It was submitted that if there was no pre-existing right in the property worth more than Rs.100/- and the right was created in the immovable property for the first time by virtue of decree, that decree would require registration. In my opinion, oral exchange was not permissible in view of the amendment of Section 49 of the Registration Act brought about by Act No. 21 of 1929, which by inserting in Section 49 of the Registration Act the words "or by any provision of the Transfer of Property Act, 1882" has made it clear that the documents of which registration is necessary under the Transfer of Property Act but not under the Registration Act falls within the scope of Section 49 of the Registration Act and if not registered are not admissible as evidence of any transaction affecting any immovable property comprised therein, and do not affect any such immovable property. Transaction by exchange

which required to be affected through registered instrument if it was to affect any immovable property worth Rs.100 or more."(p.297)

23. Reliance is placed upon the judgments of Hon'ble Supreme Court in ***Delhi Development Authority vs. Gaurav Kukreja, (2015)14 SCC 254*** and our own High Court in ***Kamlesh Rani vs. Balwant Singh, 2010(3) Shim.L.C. 141.*** Hon'ble Apex Court in ***Delhi Development Authority's*** case *supra* has held as under:-

> ***"16. Further a three Judge Bench of this Court in Suraj Lamp & Industries Pvt. Ltd.(2) vs. State of Haryana & Anr., (2012) 1 SCC 656, considered the validity of such SA/GPA/WILL transaction and observed thus:***
>
> > ***"23. Therefore, an SA/GPA/WILL transaction does not convey any title nor creates any interest in an immovable property. The observations by the Delhi High Court in Asha M. Jain v. Canara Bank, (2001) 94 DLT 841, that the 'concept of power-of-attorney sales has been recognised as a mode of transaction' when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognised or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognise or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.***
> >
> > ***24. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognised or valid mode of transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognised as deeds of title, except to the limited extent of Section 53-A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in municipal or revenue records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered assignment of lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales." (pp.260-261)***

24. In the case at hand, this Court was unable to lay its hand to any document suggestive of the fact that alleged agreement was registered in terms of Section 17 of the Indian Registration Act. Once document, as referred above, was not registered as required under law, respondent-plaintiff was not entitled to claim ownership of the suit land on the basis of the same and as such both the Courts below rightly held him not to be owner of the suit land. Now, question, which remains to be examined, whether possession, which was purely on the strength of alleged agreement executed between plaintiff and defendant No.1, could be termed to be a lawful possession or not. Since it is admitted case of the plaintiff that he came to be recorded in possession of suit land on the strength of alleged agreement, first appellate Court erred in concluding that the plaintiff is in possession of the suit land on account of oral sale made in his favour by defendant No.1. It is not understood that once first appellate Court had returned categorical finding that the plaintiff could not be treated owner of the suit land, how plaintiff could be held to be possession of the suit land on account of oral sale which was admittedly based upon agreement, if any, arrived *interse* parties.

25. It is well settled that injunction cannot be granted against the true owner and as such first appellate Court erred in concluding that the plaintiff cannot be dispossessed from the suit land except in accordance with law. Even if arguments having been made by Shri G.D. Verma, learned Senior Counsel, representing the respondent-plaintiff is accepted that plaintiff was having possession over the suit land, his possession is wholly unlawful possession of a trespasser and injunction cannot be issued in favour of a trespasser, who gained unlawful possession, as against the appellant-defendant. In this regard reliance is placed upon ***Premji Ratansey Shah and Others vs. Union of India and Others, (1994)5 SCC 547,*** wherein the Hon'ble Apex Court has held as under:-

> ***"5. It is equally settled law that injunction would not be issued against the true owner. Therefore, the courts below have rightly rejected the relief of declaration and injunction in favour of the petitioners who have no interest in the property. Even assuming that they had any possession, their possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession, as against the owner. Pretext of dispute of identity of the land should not be an excuse to claim injunction against true owner." (p.550)***

26. Hon'ble Apex Court in ***Kashi Math Samsthan & Anr. vs. Srimad Sudhindra Thirtha Swamy & Anr., AIR 2010 SC 296,*** has held as under:-

> ***"13. It is well settled that in order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. But it is equally well settled that when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted. Therefore, keeping this principle in mind, let us now see, whether the appellant has been able to prove prima facie case to get an order of injunction during the pendency of the two appeals in the High Court. In para 21 of the Judgment of the trial Court, it is found:***
>
> > ***".....the words 'certain and 'some' quoted above and 'when we are still in a position to carry on with the traditional duties', prima facie show that the 1st respondent has not surrendered all his rights, privilege and duties and that the 2nd petitioner has not been made as full fledged Mathadhipathi. As per the custom prevailing since continuous, vatu initiated into Sanyasa and named as successor, will become Mathadhipathi after the Mathadhipathi passes away."***
>
> ***From the aforesaid finding of the trial Court, it is clear that the respondent No. 1 had not abrogated all his powers as Mathadhipathi in favour of the appellant no.2 and he was only entrusted with certain powers. In para 22 of the Judgment of the trial Court, it was observed as follows :-***
>
> > ***"The following circumstances also go to support the version of the 1st respondent. The 2nd petitioner himself has addressed a letter dated 4/11/99 reads as follows:***
> >
> > > ***'In view of the recent events, we have kindly decided not to involve in the matters concerning the authority of Shri Samshtan***

(Adhikartha Vishayas) as well as Dharmic activities (Dharmic Vishayas) of the samaj. Therefore with pranamas, again and again we pray and request to relive us as early as possible.'

This prima facie shows that the 2nd petitioner has been still recognizing the 1st Mathadhipathi, and therefore requested him to relieve himself from "certain activities."

A careful reading of the aforesaid findings/observations made in para 22 of the judgment of the trial Court would show that the letter dated 4th of November, 1999 clearly enumerates the fact that the appellant No. 2 had wanted to be relieved from certain activities of the Math and he had in fact sought permission from the respondent no 1 in this regard. Therefore, in our view, it was rightly held by the trial Court in the final Judgment that the appellant No. 2 continued to consider the respondent No. 1 as the Mathadhipathi of the Math even after the alleged proclamation of 1994.

The trial court again in para 24 had observed:

"If all the circumstances are taken into consideration the irresistible conclusion that can be drawn at this stage is that, the 1st respondent has not abdicated all his powers and privileges as Mathadhipathi and only some powers and privileges have been conferred on 2nd petitioner. In view of the above discussion, I hold that the 2nd petitioner is not entitled for the injunction orders as claimed by him." (Emphasis supplied)

In view of the aforesaid findings of the trial Court to the extent that appellant no. 2 was not entitled to the injunction order as claimed by him, it is difficult to find any illegality or infirmity with the findings of the trial court, as noted hereinabove, atleast prima facie in respect of which, the High Court had also agreed. We are, therefore, of the view that the powers of the Mathadhipathi of the Math were not abdicated in favour of the appellant No.2. It is well settled that such power of the Mathadhipathiship of the Math could devolve to any other person after the death of the existing Mathadhipathi or anyone else, who could succeed him as the Mathadhipathi of the Math according to the customs and traditions of the Math." (pp.299-300)

27. Mr.G.D. Verma, learned Senior Counsel, while placing reliance upon ***Krishna Ram Mahale (dead) by his LRs. vs. Mrs.Shobba Venkat Rao, AIR 1989 SC 2097,*** contended that it is well settled law that where a person is in settled possession of property, even on the presumption that he had no right to remain in charge of the property, he cannot be dispossessed by the owner of the property, except by recourse to law. Hon'ble Apex Court in the aforementioned case has held as under:-

"8. Mr. Tarkunde, learned Counsel for defendant No. 3, the appellant herein, rightly did not go into the appreciation of the evidence either by the Trial Court or the High Court or the factual conclusions drawn by them. It was, however, strongly urged by him that the period of licence had expired long back and the plaintiff was not entitled to the renewal of licence. It was submitted by him that in view of the licence having come to an end, the plaintiff had no right to remain in charge of the business or the premises where it was conducted and all that the plaintiff could ask for was damages for unlawful dispossession even on the footing of facts as found by the High Court. We find ourselves totally unable to accept the submission of Mr. Tarkunde. It is a well-settled law in this country that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be

dispossessed by the owner of the property except by recourse to law. If any authority were needed for that proposition, we could refer to the decision of a Division Bench of this Court in Lallu Yeshwant Singh v. Rao Jagdish Singh and Ors. AIR 1968 SC 620 (at pp.622-623). This Court in that judgment cited with approval the well-known passage from the leading privy Council case of Midnapur Zamindary Company Limited v. Naresh Narayan Roy 51 Ind App 293 at p. 299: (AIR 1924 PC 144), where it has been observed (p-208)(of SCR): (at p.622 of AIR):

> ***In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court."***

(p.2100)

28. This Court sees no reason to differ with the aforementioned argument having been made by Mr.G.D. Verma, learned Senior Counsel, which is based upon judgment passed by Hon'ble Apex Court, but in the instant case, as has been discussed above, possession of respondent-plaintiff is/was solely based upon agreement allegedly executed by defendant No.1, but since aforesaid agreement has been held to be invalid on account of its non-registration under Section 17 of the Indian Registration Act, possession, if any, of the respondent-plaintiff over the suit land on the strength of above mentioned agreement cannot be said to be lawful possession.

29. Most importantly, as has been taken note above, suit for declaration as well as injunction in the instant case was filed by the plaintiff specifically claiming himself to be owner in possession on the strength of agreement allegedly executed by defendant No.1, onus was upon him to prove his possession over the suit land by leading cogent and convincing evidence. But, to prove the aforesaid document, there is no evidence, be it ocular or documentary, adduced on record by the respondent-plaintiff from where it can be inferred that respondent-plaintiff was in possession of the suit land. In the case at hand, none of the plaintiff witnesses stated something specific with regard to possession of plaintiff over the suit land. None of the plaintiff witnesses stated something specific with regard to alleged agreement executed *inter se* parties.

30. Leaving everything aside, this Court is unable to lay its hand to evidence, if any, adduced by plaintiff to prove the factum of payment of Rs.30,500/- and thereafter delivery of possession of the suit land by defendant No.1. True, it is that plaintiff, while placing reliance upon order dated 7.8.1995 passed by AC 2nd Grade, Pooh, Ex.PA, made an attempt to prove on record that possession was delivered to respondent-plaintiff on the statement having been made by defendant No.1. Though factum with regard to statement, if any, having been made by defendant No.1, who allegedly was a deaf and dumb person, also stands refuted by the defendants, but, even if, for the sake of argument, as has been observed above, it is presumed that such statement was made by defendant No.1, could respondent-plaintiff held to be owner in possession of the suit land merely on the basis of statement having been made by defendant, who happened to be the true owner of the suit land. Apart from above, overwhelming evidence in the shape of revenue entries available on record suggests that the name of respondent-plaintiff never came to be recorded as owner in possession of the suit land in the revenue record, despite the fact that after alleged statement having been made by defendant No.1 settlement took place in the village. Though question with regard to validity, if any, of alleged agreement is not a question before this Court, but otherwise also this Court finds from the record that the plaintiff in his statement categorically admitted that alleged contract/agreement was executed in presence of S/Shri Rajender Singh and Bali Ram, but interestingly, none of them was examined by the plaintiff in support of his claim. There is no evidence at all on record to prove the payment of loan amounting to Rs.30,500/- by the plaintiff to defendant No.1 on 17.12.1983. Since plaintiff specifically failed to prove factum with regard to advancement of loan, if any, in favour of defendant No.1, Court below wrongly arrived at a conclusion that defendant No.1 handed over possession of the suit land to him in the year 1984, after having failed to repay the aforesaid loan amount, in term of agreement. Since, entire case of respondent-plaintiff with regard to his

possession over the suit land is/was based upon alleged agreement, which in no terms could be said to be valid document, first appellate Court fell in grave error while granting decree of injunction and damages holding respondent-plaintiff to be in possession that too pursuant to oral sale. Interestingly, it emerge from the record that at no point of time plea of part performance as envisaged under Section 53-A was specifically raised by the plaintiff in the plaint.

31. Mr.G.D. Verma, learned Senior Counsel also placed reliance upon ***Roshan Lal vs. Krishan Dev, Latest HLJ 2002(HP) 197,*** to suggest that it is settled law that where a person is in settled possession of the property and even if it assumed that he had no right to remain in the property, he cannot be dispossessed by owner except by recourse of law. But, as has been observed above, the plaintiff has not led evidence, if any, on record suggestive of the fact that he was in possession of the suit land save and except agreement which has been already held to be invalid being unregistered document.

32. Mr.Verma, while placing reliance upon ***Deepak Prakash vs. Sunil Kumar, 2014(2) Shim.L.C. 822*** and ***C.Mackertich vs. Steuart & Co.Ltd., AIR 1970 SC 839,*** contended that no amount of evidence beyond pleading can be looked into. There cannot be any quarrel with regard to aforesaid proposition of law as laid down in the case referred above. It is well settled that evidence adduced beyond the pleadings would not be admissible nor can any evidence may be permitted to be adduced which are at variance to the pleadings. However, contention having been made by Mr.Verma cannot be accepted that since no plea with regard to non-registration of agreement, on the basis of which plaintiff came into possession over the land, was raised in written statement having been filed by appellant-defendant, they cannot be allowed to raise this plea in the instant appeal because of the fact that submission with regard to non-registration of agreement relied upon by the plaintiff to claim ownership and possession of the suit land is purely legal submission and can be raised/made at any stage of the case.

33. While referring to the judgments passed by Hon'ble Apex Court in ***Paras Nath Thakur vs. Smt.Mohani Dasi (deceased) and others, AIR 1959 SC 1204, Tirumala Tirupati Devasthanams vs. K.M. Krishnaiah, (1998)3 SCC 331, Mohan Lal vs. Nihal Singh, (2001)8 SCC 584*** and ***Lisamma Antony and Another vs. Karthiyayani and Another, (2015)11 SCC 782***, learned counsel representing the plaintiff stated that this Court cannot go into questions of fact in second appeal, however erroneous the findings of fact recorded by the courts of fact may be. Learned Senior counsel, while relying upon aforesaid judgments, further contended that concurrent findings of Courts below regarding possession of suit land cannot be interfered with.

34. It is true that in second appeal, a finding of fact, even if erroneous, will generally not be disturbed, but Hon'ble Apex Court in ***Vishwanath Agrawal S/o Sitaram Agrawal vs. Sarla Vishwanath Agrawal, (2012)7 SCC 288*** has specifically held that where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue. Hon'ble Apex Court has further held that an issue pertaining to perversity comes within the ambit of substantial question of law. In this regard reliance is placed on the following paras of aforesaid judgment:-

> *"34. Keeping in view the aforesaid enunciation of law pertaining to mental cruelty, it is to be scrutinized whether in the case at hand, there has been real mental cruelty or not, but, a significant one, the said scrutiny can only be done if the findings are perverse, unreasonable, against the material record or based on non-consideration of relevant materials. We may note here that the High Court has, in a singular line, declined to interfere with the judgment and decree of the courts below stating that they are based on concurrent findings of fact. The plea of perversity of approach though raised was not adverted to.*
>
> *35. It is worth noting that this Court, in Kulwant Kaur v. Gurdial Singh Mann, (2001)4 SCC 262 has held that while it is true that in a second appeal, a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and*

conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue. An issue pertaining to perversity comes within the ambit of substantial question of law. Similar view has been stated in Govindaraju v. Mariamman, (2005)2 SCC 500.

36. In Major Singh v. Rattan Singh (1997)3 SCC 546, it has been observed that when the courts below had rejected and disbelieved the evidence on unacceptable grounds, it is the duty of the High Court to consider whether the reasons given by the courts below are sustainable in law while hearing an appeal under Section 100 of the Code of Civil Procedure.

37. In Vidhyadhar v. Manikrao and another, (1999)3 SCC 573, it has been ruled that the High Court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the courts below are perverse being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion. We may note here that solely because another view is possible on the basis of the evidence, the High Court would not be entitled to exercise the jurisdiction under Section 100 of the Code of Civil Procedure. This view of ours has been fortified by the decision of this Court in Abdul Raheem v. Karnataka Electricity Board (2007)14 SCC 138." (p.302)

35. It may be observed that in the instant case Courts below have not returned concurrent findings qua the possession of the plaintiff over the suit property rather judgment passed by trial Court whereby suit of the plaintiff was dismissed, came to be reversed in the first appeal before learned District Judge and as such this Court is not excluded to analyze/examine evidence available on record to ascertain correctness of judgment passed by learned first appellate Court reversing the judgment of trial Court. Moreover, as has been discussed in detail hereinabove, findings returned by the learned first appellate Court qua the possession of the plaintiff over the suit land is totally erroneous being contrary to the evidence available on record.

36. Hon'ble Apex Court in ***Vishwanath Agrawal's*** case *supra* has categorically held that findings, if any, returned by Court below are based on no evidence or record and no reasonable person could have come to that conclusion are to be termed as perverse. Hence, this Court has no hesitation to conclude that finding returned by first appellate Court qua the possession is perverse and as such deserves to be quashed and set aside. Substantial question of law is answered accordingly.

Substantial Question No.2:

37. There appears to be merit in the contention of Shri Rajnish K.Lall, learned counsel representing the appellants-defendants, that no decree for damages should have been passed by Court below in the absence of requisite Court fee. It clearly emerge from record that respondent-plaintiff, while filing the suit for declaring him to be owner in possession of the suit land with consequential relief of permanent prohibitory injunction, also sought damages amounting to Rs.20,000/- on account of damage caused to appellant-plaintiff and in this regard Court fee amounting to Rs.1856/- was paid. But, interestingly Court fee amounting to Rs.20-00 was paid at the time of filing of appeal against the judgment of trial Court, whereas, respondent-plaintiff was required to affix Court fee of Rs.1856/- in the appeal while claiming damages of Rs.20,000/-. Interestingly, Court below, ignoring aforesaid omission on the part of respondent-plaintiff, proceeded to hold respondent-plaintiff entitled for damages to the tune of Rs.20,000/- on account of compensation for damages to his apple plants alongwith interest @ 9% per annum w.e.f. date of institution of suit till payment.

38. Shri G.D. Verma, learned Senior Counsel representing the appellant-plaintiff, while inviting the attention of this Court to Order 7 Rule 11B, contended that aforesaid omissions, if any, to pay Court fee, could be rectified by respondent-plaintiff in case same was pointed out or asked by Court below. But, since no such order, as envisaged under Order 7 Rule

11B, was ever passed by first appellate Court, claim of respondent-plaintiff qua damages cannot be rejected on the ground of non-payment of requisite Court fee.

39. Perusal of Order 7 Rule 11B clearly suggests that omission, if any, to pay requisite Court fee could be rectified by Court below by passing appropriate order directing respondent-plaintiff to make deficiency good in Court fee, but there is no order available on record suggestive of the fact that order, if any, was ever passed by learned first appellate Court under Order 7 Rule 11B. Otherwise also, as has been taken note above, respondent-plaintiff is not entitled to any damages allegedly caused to his apple trees allegedly grown by him over the suit land on account of specific finding returned by this Court that respondent-plaintiff is/was not entitled to the possession of the suit land on the basis of unregistered agreement allegedly executed by defendant No.1. Substantial question of law is answered accordingly.

40. In this regard reliance is placed upon ***Rachna Sharma vs. Meena Kumari Sharma, 2013(1) Shim.L.C. 428,*** wherein this Court has held as under:-

> *"25. At this stage, except assertions of petitioner in the application, under Order 7 Rule 11 read with Section 151 CPC and Section 7 of the Act, there is no material to ascertain the market value of the built up structures pleaded in the plaint. In Kamaleshwar Kishore Singh (supra), it has been held that defence taken in the written statement may not be relevant for the purpose of deciding the payment of Court fee by the plaintiff. In M/s.Commercial Aviation and Travel Company (supra), the Supreme Court has held that if the Court cannot determine the correct valuation of the relief claimed, it cannot require the plaintiff to correct the valuation and consequently, order 7 Rule 11(b) will not be applicable. In these circumstances, the Court is not in a position to determine the correct valuation of the built up structure referred in the plaint, and, therefore, plaint cannot be rejected under order 7 Rule 11 of the Code for want of correct valuation for the purpose of Court fee. The trial Court, therefore, while framing issues shall also frame the issue regarding the valuation of the suit property for the purpose of Court fee and decide the issue in accordance with law after giving opportunity to the parties to lead evidence."* (pp.436-437)

41. Consequently, in view of detailed discussion made hereinabove, this Court sees valid reason to interfere in the judgment passed by first appellate Court, which is apparently not based upon the proper appreciation of evidence as well as law. This appeal is allowed. Judgment passed by first appellate Court is set aside and that of the learned trial Court is restored. There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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

State of H.P. and another ....Petitioners.

Versus

Sobha Ram ....Respondent.

CWP No. 6113 of 2011.
Decided on: 17.08.2017.

Industrial Disputes Act, 1947- Section 25- Workman was denied the benefit of regularization on the ground that he had not completed more than 240 days' continuous service- a reference was made to the Labour Court and the Labour Court answered it in favour of the workman- aggrieved from the award, the present appeal has been filed- held that workman had rendered more than 240 days' continuous service in each year except 1997- workman had served 212 days' in 1997- it is not the case that job was abandoned by the workman – the plea that he was sick is duly

proved by the medical certificates- Industrial Disputes Act is a benevolent legislation- merely because his leave was not sanctioned will not be sufficient to deny the benefit to him- appeal dismissed. (Para-7 to 10)

For the petitioners Mr. Vikram Thakur, Dy. AG.
For the respondent Mr. Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, the State has challenged the award passed by the Court of learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Dharamshala, in Reference No. 165/2006, dated 04.12.2010, vide which learned Reference Court while allowing the reference petition, granted the following relief in favour of the workman therein i.e. the present respondent.

> *"For the foregoing reasons discussed the reference is allowed. The respondents are directed to regularize the period of absence of the petitioner on account of sickness in the year 1997. As a sequel thereto the seniority of the petitioner shall be reckoned w.e.f. 1994 for the purposes of his regularization. The reference is answered in the following terms. Copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room."*

2. Primarily the said award stands assailed on the ground that learned Labour Court erred in not appreciating that as the workman had neither intimated the factum of his illness to his superior authority, nor he had applied for or obtained any medical leave in this regard, the period of alleged sickness could not have been included for determining "continuous service" as was rendered by the workman in the year 1997, as is contemplated in Section 25-B of The Industrial Disputes Act, 1947. No other point was urged.

3. The factual matrix involved in this case is in a narrow compass. The respondent herein (hereinafter referred to as workman) was denied the benefit of regularization as per the regularization policy of the State on the ground that he had not completed more than 240 days' continuous service in the year 1997. Feeling aggrieved, the workman had taken the recourse to the remedies available under the Industrial Disputes Act, which resulted in following reference being sent by the appropriate Government for adjudication to the learned Labour Court.

> *"Whether the action of the Superintending Engineer, I&PH Circle, Sunder Nagar, District Mandi, H.P. not to consider the medical leave period on production of medical certificate by Shri Sobha Ram S/o Shri Mahi workman for counting the same towards regularization of his service is proper and justified? If not, what relief of service benefits, regularization and amount of compensation Shri Sobha Ram is entitled to."*

4. It is not in dispute that in the year 1997, workman had put in 212 days' service. As per the workman, on account of his sickness, he was unable to perform his work and to demonstrate that his absence from duty was not willful but was on account of sickness, he submitted before the authorities Ext. PA to Ext. PC which are medical certificates issued in his favour by the Medical Officer(s) of Government Hospital, Rati, District Mandi, which demonstrate that during the period mentioned therein, the workman was ill. Medical Certificates so submitted by the workman were not taken into consideration for computing continuous service by the department *inter alia* on the ground, as is stated in the reply so filed to the claim petition, that (a) medical leave was not got sanctioned by the workman from his immediate superior at the relevant time; (b) no medical leave was sanctioned in favour of the workman for his illness; (c) workman had not submitted any proof for his illness as indoor patient, nor he had applied or was granted

any medical leave; (d) the workman had not submitted any fitness certificate subsequently in proof of his having remained as indoor patient.

5. Learned Labour Court while dispelling the stands so taken by the State answered the reference petition in favour of the workman by holding that as per provisions of Section 25-B of the Industrial Disputes Act, 1947, a workman is said to be in continuous service by including the period of service which may be interrupted on account of sickness or authorized leave etc. Learned Labour Court held that sickness *per se* in itself was a ground for interruption, which could be reckoned for counting continuous service. It further held that respondent-State while issuing instructions on absence on medical grounds had tried to curtail the statutory right of the workman by framing the instructions which were in derogation to the statutory provisions of the Industrial Disputes Act. Learned Labour Court held that notification issued by the Government could not supersede the statutory provisions of the Industrial Disputes Act as was purported to be so done vide notification Ext. RW1/D. On these bases, it was held by learned Labour Court that there was no merit in the stand of the State and the period of sickness of the workman in the year 1997 had to be counted while calculating continuous service.

6. I have heard learned Counsel for the parties and gone through the records of the case as well as the award passed by the learned Labour Court.

7. It is not in dispute that save and except for the year 1997, the workman had rendered more than 240 days continuous service in each calendar year. It is also not in dispute that in the year 1997, the workman had served for 212 days. It was not the case of the respondent-State before the learned Labour Court that after serving for 212 days in the year 1997, the workman had voluntarily abandoned the job. The factum of the workman being sick stands proved on record from the medical certificates Ext. PA to Ext. PC which were issued in his favour by the concerned Medical Officer of Government Hospital Rati, District Mandi, which demonstrates that the workman was in fact sick for about 50 days in the year 1997 and on account of said sickness of his, he could not perform his duties. Therefore, it is not a case where the workman has relied upon medical certificates so issued either by some private hospital or by some private medical practitioner to demonstrate that he was sick. The reasons, in my considered view, which stand assigned in the reply so filed by the State in rejecting the case of the workman, are hyper technical. In fact a perusal of the reply so filed by the State before the learned Labour Court demonstrates that the factum of workman not completing more than 240 days continuous service in the year 1997 on account of his illness has not been disputed in so many words by the State, but the State has justified its act of not counting the period towards continuous service for which the workman was sick by enumerating the reasons which already have been elaborated by me above.

8. Industrial Disputes Act is a benevolent legislation which aims towards protecting the interest of the workman. Section 25B(1) of the Industrial Disputes Act provides as under:-

> *"25B(1). A workman shall be said to be in continuous service for a period if he is, for that period, in interrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman."*

9. The above statutory provisions thus categorically demonstrate that *inter alia* period on account of sickness is to be taken into consideration while calculating continuous service. Now the expression used supra is "on account of sickness, or authorized leave". In my considered view, a person can not comprehend that he is going to fall sick and in such situation, first he would got sanctioned his medical leave from the competent authority on the pretext that he is likely to fall ill. May be that in the present case, the workman had not got his leave period in the year 1997 post facto sanctioned from the competent authority but that, in my considered view, can be termed as an irregularity and not illegality. Even said irregularity can not deny the benefit of Section 25B of the Industrial Disputes Act to a workman. Learned Labour Court has

rightly held that notifications so issued by the State dealing with the leave on medical grounds are in derogation to the statutory provisions of the Industrial Disputes Act. This Court concurs with the findings which have been so returned by the learned Labour Court. Any notification which the State can issue for the furtherance of the cause, as is contained in the statutory provisions of the Industrial Disputes Act, at the most can supplement the cause so contained *inter alia* in the Act but the same cannot supplant the cause as is contained in the Industrial Disputes Act. Even otherwise, as I have already held above, the stand taken by the State, on the basis of which the period of sickness of workman was not taken into consideration while calculating continuous service is a hyper technical stand, which otherwise also is not sustainable in the eyes of law.

10. In view of above discussion, as there is not any infirmity in the award so passed by the learned Tribunal below, therefore, I do not find any merit in this petition and the same is accordingly dismissed being devoid of any merit.

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

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

State of Himachal Pradesh ....Petitioner.
Versus
Mehar Chand @ Nikka ....Respondent.

Cr. Appeal No. 451 of 2017
Decided on: 18.08.2017.

Code of Criminal Procedure, 1973- Section 320- Matter was compounded before the Appellate Court on the basis of the consent given by Learned Public Prosecutor- held that the effect of the composition shall be acquittal – the mere fact that Appellate Court had not mentioned it in the order will not make any difference – appeal dismissed. (Para-3 to 6)

For the appellant : Mr. Vikram Thakur, Dy. AG.
For the respondent : Mr. Sanjeev K. Suri, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

Cr.MPM No. 1299 of 2016.

Heard. Leave to appeal granted. Application stands disposed of. Registry is directed to register the appeal.

Cr. Appeal No. 451 of 2017

2. Heard. By way of this appeal, order passed by the Court of learned Additional Sessions Judge (II), Una, Circuit Court at Amb, District Una, stands assailed, vide which application so filed by the present respondent/appellant before the learned Appellate Court under Section 320 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.' for short) for compounding of the case was allowed by the learned Appellate Court and that too on the basis of consent so given by the learned Public Prosecutor before the said Court that the State has no objection in case this case is compounded by the Court.

3. The grievance raised by way of this appeal is that there is an infirmity in the order so passed by the learned Appellate Court to the extent that learned Appellate Court erred in ordering that in view of compounding of the case, FIR and challan stood "dismissed" whereas the word which ought to have been used in the order should have been 'quashed' and further that there ought to have been a specific line in the order that the judgment of conviction so passed by the learned trial Court stood set aside and that the appellant was further ordered to have been acquitted.

4. In my considered view, this appeal is totally misconceived. This is for the reason that it is not the case of the State that compounding of the case was done by the learned Appellate Court despite the objection of the State and/or that it stood erroneously recorded in the order that State had no objection if the case was so compounded.

5. Section 320 (8) of the Cr.P.C. clearly contemplates that when the case is ordered to be compounded, the effect of the same shall be as if the accused stands acquitted. Vide order under challenge, learned Appellate Court has compounded the case which stood filed against the accused in which he was convicted by the learned trial Court. Now when the case itself, which led to the conviction of the accused by the learned trial Court stood compounded by the learned Appellate Court and that too on the basis of no objection which was so given by the State, the same automatically amounts to acquittal of the accused, especially in view of the statutory provisions as are contemplated under Section 320(8) of Cr.P.C.

6. Therefore, in my considered view, the recording of setting aside of judgment of conviction by learned Appellate Court not finding mention in the order so passed by learned Appellate Court is of no consequence. Further the contention of the State that the order is otherwise unsustainable as learned Appellate Court has erred in dismissing the FIR and challan rather than quashing the same, in my considered view, is non-consequential because the intent of the order so passed by learned Appellate Court was that the case which was registered against the petitioner stood compounded with all consequential effects and the same can be easily inferred from the order.

Accordingly, in view of above discussion, as there is no merit in the present appeal, the same is dismissed, so also pending miscellaneous application(s), if any.

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

Laxmi Nand .....Appellant.
Versus
L.A.C and another .....Respondents.

RFA No. 265 of 2005 with
RFA No. 266 of 2005.
Decided on: 24th August, 2017

Land Acquisition Act, 1984- Section 18- The land was acquired for different purposes – the petitioners sought reference to the Court of District Judge who enhanced the compensation – aggrieved from the award, the present appeal has been filed – held that the petitioners have sought compensation @ Rs. 2,62,500/- per bigha, but PW-4 admitted in cross-examination that highest market value of the land was not more than Rs. 1,65,000/- per bigha – the sale instances of nearby vicinity were not placed on record – the Court had rightly relied upon the previous award and had granted compensation at a flat rate – Collector had assessed the compensation of fruit-bearing trees on the basis of Dr. Harbans Singh's formula – the formula came into being in the year 1966 and suitable increase should have been awarded by the Court- the increase of 400% should have been provided keeping in view the price increase- hence, the compensation of

fruit-bearing trees enhanced by four times along with interest @ 9% per annum from the date of notification for the period of one year and thereafter @ 15% till deposit. (Para-7 to 10)

Cases referred:
Rajinder Singh V. Agro Industrial Packaging India Limited, 2002(3) SLC 222
Union of India and others V. Khazana Ram and others 1998(1) SLC 479
Raj Pal Chauhan v. State of H.P. 2007 Suppl. Current Law Journal (HP) 109; 2007 (3) SLC 530

For the appellant(s): Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondent(s): Mr. Pramod Thakur, Addl. A.G for respondent No.1.
Mr. Ashok Sharma, ASGI with Ms. Sukarma, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)**.**

This judgment shall dispose of both the appeals arising out of the same award dated 6.9.2003 passed by learned District Judge, Kinnaur, Civil Division at Rampur Bushahr, District Shimla, H.P.

2. The appellants (hereinafter referred to as the petitioners) are residents of Village Averi, P.O. Nogli, Tehsil Nirmand, District Kullu. The beneficiary, Union of India, the 2nd respondent has acquired the land belonging to them and others situated in village Averi through 1st respondent, the Collector Land Acquisition, District Kullu for defence purposes. Notification in this regard was issued under Sections 4 and 6 of the Land Acquisition Act and on completion of all codal formalities, the 1st respondent has made award No. 1/98 and thereby awarded the compensation @ Rs.31,500/- per bigha. The completion with regard to fruit trees and non-fruit trees was assessed separately on the basis of ***Dr. Harbans Singh's*** formula. A sum of Rs.16,537/- was awarded as compensation towards fruit trees and Rs.412/- qua non-fruit trees in favour of Laxmi Nand, whereas, to Durga Devi Rs.7581/- towards fruit bearing trees and Rs.9793/- towards non-fruit trees. The compensation with respect to the structures allegedly acquired was also stated to be inadequate. The Petitioners aggrieved by the award of compensation with respect to the acquired land, fruit trees, non-fruit trees and the structures allegedly in existence on the acquired land have preferred the references under Section 18 of the Act. The 1st respondent has referred the same to the Court of learned District Judge, Kinnaur at Rampur Bushahr. The petition preferred by Laxmi Nand aforesaid was registered as Land Reference Petition No. 30/2000, whereas, that of Durga Devi Land Reference Petition No. 33/2000. The references made by the other right holders were also clubbed. The lead case was Land Reference Petition No. 30/2000 filed by Laxmi Nand aforesaid. Learned District Judge on the basis of pleadings of the parties has framed the following issues:

1. Whether the Collector Land Acquisition had inadequately assessed the market value of the land under acquisition? OPP.

2. Whether the Collector Land Acquisition had passed the award, dated 19.3.1998, after the stipulated period of 2 years and acquisition proceedings had lapsed? If so, with what effect? OPP.

3. Relief.

3. On appraisal of the evidence produced by the parties on both sides, while answering issue No. 1, the compensation i.e. Rs.31,500/- per bigha awarded by the 1st respondent was held to be inadequate, hence enhanced to Rs.60,000/- per bigha, irrespective of the nature and classification of the acquired land. The claims regarding enhancement of compensation awarded qua fruit trees and non-fruit trees and also the structures allegedly in

existence thereon were, however, rejected. Issue No. 2 was answered in negative i.e. against the petitioners. The references were answered as per the findings recorded on issue No.1.

4. Both the petitioners aggrieved by the impugned award have questioned the legality and validity thereof on the grounds *inter-alia* that the reference Court below while deciding issue No. 1 has went wrong in assessing the market value of the acquired land @ Rs.60,000/- per bigha at flat rates. The evidence suggesting that the acquired land was irrigated and ignored the evidence showing the market value of the acquired land as 2,62,500/- as assessed by the Patwari (PW-2), Department of Irrigation and Public Health has vitiated the findings recorded by learned trial Court. The testimony of PW-2 that facility of irrigation was provided to the acquired land has erroneously been ignored. By way of application, CMP No. 828/2013 decided on 2.7.2013, the petitioners were held entitled to raise all grounds including the award of interest as indicated in the application.

5. On behalf of the petitioners, Mr. G.C. Gupta, learned Senior Advocate assisted by Ms. Meera Devi, Advocate has vehemently argued that the compensation should have not been awarded at flat rate and rather taking into consideration, the nature of the acquired land. Since the land in question, according to Mr. Gupta was 'Kayar Avval', the market value thereof was proved to be Rs.2,62,500/-, hence the compensation should have been enhanced accordingly. As regards the compensation towards fruit trees, according to Mr. Gupta, Harbans's formula pertains to the year 1966 and in view of there being substantial increase in the price index up to 1996, when the land in question was acquired, the compensation on this score should have been enhanced appropriately. He, however, has not pressed the increase in the compensation with respect to the structures, if any, in existence over the acquired land. Similarly, the claim qua benefit under the rehabilitation scheme, if any, to the petitioners, it is left open to be agitated separately in appropriate proceedings strictly as per scheme.

6. Now if coming to the arguments addressed on behalf of the respondents, learned Assistant Solicitor General of India assisted by Mr. Pramod Thakur, learned Additional Advocate General has come forward with the version that learned District Judge has rightly re-determined the market value of the acquired land and awarded compensation @ Rs.60,000/- per bigha i.e. at flat rates, irrespective of nature and classification of the acquired land. Also that, when no case is made out qua maintenance and up keep of the orchard belonging to the petitioners and plantation made scientifically i.e. after taking proper space in terms of *Dr. Harbans Singh's* formula, learned District Judge has rightly refused to enhance the compensation with respect to the fruit trees, which were in existence over the acquired land. The compensation, on this score, awarded by the Land Acquisition Collector, as such, is stated to be just and reasonable.

7. As pointed out, at the out set, it is only the assessment of compensation on two counts i.e. that of the acquired land and the fruit trees in existence thereon needs adjudication in the present lis. The petitioners have claimed the compensation at enhanced rates i.e. Rs.2,62,500/- per bigha on the basis of statement made by Mela Ram, Patwari I&PH Sub-Division, Nirmand, District Kullu, H.P. His testimony goes to show that the acquired land situated in village Averi is having facility of irrigation provided by the Lift Irrigation Scheme from river Satluj in the year 1980. Merely that the land is irrigated one, is not sufficient to conclude that its market value is Rs.2,62,500/- per bigha. Similarly, reliance qua this aspect of the matter has also been placed on the statement of Lal Singh (PW-4) and Bala Ram (PW-5). PW-4 belongs to village Barawali, Teshil Rampur Bushahr, whereas, PW-5 to village Ralu, Tehsil Nirmand, District Kullu. While in the witness box, they have only said that their land was also acquired for the same public purpose @ Rs.1,65,000/- per bigha. However, nothing as to how much was the distance of their land from that of the acquired land, in which mohal the same was situated, its potentiality and classification has come in their statement. On the other hand, PW-4 in his cross-examination has admitted that highest market value of the land in village Averi was not Rs.1,65,000/- per bigha. Being so, it is difficult to place reliance on their testimony and to arrive at a conclusion that the market value of the acquired land was Rs.1,65,000/- per bigha. Petitioners Laxmi Nand while in the witness box as PW-7 and Durga Devi as PW-8 have also

stated that land of Layak Ram, Lal Singh, Agya Ram, Bala Nand etc, was also acquired and the compensation paid to them @ Rs.1,65,000/- per bigha. However, their testimony is hardly of any help to their case for the reasons recorded hereinabove and also for want of documentary proof to show that the land of aforesaid persons was adjoining to that of the petitioners having same potentiality and classification etc. The reference Court below, as such, has rightly concluded that the petitioners have failed to prove the market value of the acquired land @ Rs.2,62,500/- per bigha and for that matter even Rs.1,65,000/- per bigha also. As a matter of fact, best piece of evidence to determine the market value of the acquired land are the sale instances of same mohal/chak or nearby vicinity having taken place proximate to the date of issuance of Notification under Section 4 of the Act. Previous award of the Court are again important piece of evidence in this regard, however, the petitioners have failed to produce any such evidence and as such, learned reference Court below was absolutely justified in taking into consideration the previous awards passed by it qua acquisition of land for the same public purpose and under same Notification. No doubt, particulars of such award(s) considered by learned reference Court below find mentioned in the impugned award, however, the award being the record of the Court; hence the observations therein should be believed to be true and correct. Therefore, when learned reference Court below has itself made the award and thereby awarded Rs.60,000/- per bigha as compensation with respect to the land acquired for the same public and under the same Notification, irrespective of its nature and classification, the award of compensation at such rates to the petitioners herein cannot be said to be illegal or contrary to the record of the case. Otherwise also, it is well settled at this stage that when the land is acquired for the same public purpose, its classification looses significance and the compensation can be awarded at flat rates, irrespective of classification and category of the acquired land. I am drawing support in this regard from the judgment of this Court in ***Dadu Ram*** v. ***Land Acquisition Collector and others, RFA No. 246 of 2008 along-with its connected matters, decided on 29th March, 2016***, which reads as follows:

> "18. Now, if coming to the 2nd point, it is seen that learned reference Court has categorized the land in two categories i.e. 'Majrua' and 'Gair Majrua', of course on the request of the petitioners, as is apparent from the perusal of award announced by the Land Acquisition Collector. In view of the evidence available on record, prior to inception of Kol Dam Project, no developmental activities had taken place there by that time. Meaning thereby that the entire area was in the process of being developed. The land was acquired for the construction of project. Therefore, taking into consideration, the purpose for which the land was acquired, the same should not have been classified 'Majrua' or 'Gair Majrua' for the reason that the land was acquired for the construction of project and as such, the classification of the acquired land completely looses significance. I am drawing support in this regard from the judgment of this Court in ***Executive Engineer and another*** v. ***Dila Ram, Latest HLJ 2008 (HP) 1007***, the relevant portion of the judgment reads as follows:
>
> > "12. The Collector has awarded compensation of the acquired land as per classification of the land. The learned District Judge has enhanced the compensation of the acquired land as per classification. One of the questions in the above appeals is whether awarding of compensation as per classification of the land is proper or not. The purpose of the acquisition in the present case is for construction of road and for that purpose classification completely looses significance. The acquired land is to be used/developed as a single unit for the construction of road. In ***H.P. Housing Board vs. Ram Lal and others, 2003 (3)Shim.L.C 64*** the acquisition was made for construction of housing board colony and compensation was assessed as per classification by the Collector. In the High Court the persons interested limited their claim for enhancement of compensation to Rs. 400/- per square meter irrespective of classification.

> On those facts, a learned single Judge of this court has held that when the land is being developed for constructing housing colony, the classification completely looses significance and awarded compensation on the flat rate of Rs. 200/- per square meter for the entire land irrespective of classification or nearness to the road. In ***Union of India vs. Harinder Pal Singh and others 2005 (12) SCC 564***, the Hon'ble Supreme Court has approved the view of the High Court assessing the market value of the lands under acquisition in the five villages at uniform rate of Rs. 40,000/- per acre, irrespective of their nature or quality and whether the same was situated nearer to the road or at some distance therefrom. In the present case also, the acquired land is to be used/developed for the construction of the road as a single unit and, therefore, classification of the land looses significance. In these circumstances, the persons interested are entitled to compensation at the rate of Rs. 6,000/- per biswa of Rs. 1,20,000/- per bigha of the acquired land irrespective of classification, which is more than the market value assessed by learned District Judge."

8. In view of the discussion hereinabove, the petitioners have failed to persuade this Court to form an opinion that the compensation should have been awarded to them @ Rs.2,62,500/- per bigha, taking into consideration the classification of the land and not Rs.60,000/- per bigha at flat rates. The findings recorded by learned reference Court below, in this behalf, therefore, calls for no interference.

9. Now if coming to the claim of the petitioners for enhancement of compensation towards fruit trees. It is worth mentioning that the Collector Land Acquisition has assessed the compensation payable to Laxmi Nand, one of the petitioners towards fruit bearing trees as Rs.16,537/-, whereas, to Durga Devi Rs.7581/-. The same has been assessed on the basis of *Dr. Harbans Singh's* formula. There is no denial to such averments in the reference petition. *Dr. Harbans Singh's* formula admittedly came into being in the year 1966. The petitioners have claimed increase on the basis of price index being maintained by the Labour Bureau, Government of India. The increase as per averments in the petition is 400 times up to 1996 when the land was acquired. The respondents in reply to para 5 of the petition have not disputed such increase in the price index, however, according to them, the compensation was assessed on the basis of estimate received from the Department of Horticulture. Be that as it may, however, the fact remains that the petitioners were entitled to appropriate suitable increase in the compensation assessed by the Land Acquisition Collector towards fruit trees for the reason that *Harbans Singh's* formula pertains to the year 1966, whereas, the land was acquired much much after that i.e. in the year 1996. A Division Bench of this Court in ***Rajinder Singh*** V. ***Agro Industrial Packaging India Limited, 2002(3) SLC 222*** though has approved three time increase in compensation towards fruit trees which was awarded by the reference Court, however, refused to further increase the same for want of evidence such as plantation of fruit plants scientifically as prescribed in *Harbans Singh's* formula as well as qua up keep and maintenance of the orchard by the claimants. Be it stated that in an earlier judgment by a Division Bench in ***Union of India and others*** V. ***Khazana Ram and others 1998(1) SLC 479***, five times increase in the compensation already awarded was approved, keeping in view the increase in price index. A Single Bench of this Court in ***Raj Pal Chauhan*** v. ***State of H.P. 2007 Suppl. Current Law Journal (HP) 109; 2007 (3) SLC 530*** has held that keeping in view the increase in the price index from the year 1966 till 1986 at 478 percent by reducing 111 percent, the price index in the year 1966 out of it has considered the increase i.e. 331 percent, in round figure three times as appropriate and enhanced the damages payable to the plaintiffs in that case accordingly. This Court, however, deems it appropriate to place reliance on the latest judgment rendered by a Division Bench of this Court in ***Rajinder Singh's*** case supra. Learned reference Court below keeping in view the increase in the price index, which as per averments in the reference petition was 400 percent should have increased the compensation awarded to the petitioners towards

fruit trees by four times because the averments to this effect in para 5 of this appeal remained un-controverted. Therefore, Laxmi Nand appellant-petitioner is entitled to award of (Rs.16,537X4=Rs.66,148), whereas, the appellant-petitioner Durga Devi (Rs.7581X4=Rs.30,324) as compensation towards fruit trees, which were in existence over the acquired land. They are also entitled to all statutory benefits including interest @ 9% from the date of Notification under Section 4 i.e. 16.11.1994 for the period of one year and thereafter @ 15% till the deposit/payment of enhanced compensation to them. They are entitled to interest payable in terms of Section 23(1-A) of the Act again from the date of issuance of Notification.

10. The award under challenge is modified to this extent only. Both the appeals stand disposed of accordingly. Pending application(s), shall also stand disposed of.

Copy of this judgment duly authenticated be placed on the record of the connected appeal.

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

Bajaj Allianz General Insurance Company. .....Appellant.

Versus

Suresh Kumar and another. .....Respondents.

FAO No.: 64 of 2017
Date of Decision: 25/08/2017

Motor Vehicles Act, 1988- Section 149- MACT awarded compensation of Rs.2,24,845/- along with interest @ 8% per annum and directed the insurer to satisfy the award- aggrieved from the award, the present appeal has been filed – held that a driver possessing a licence authorizing him to drive light motor vehicle can drive transport vehicle of such class without any endorsement to this effect- RC shows the description of the vehicle as light goods vehicle whereas the licence authorized the driver to drive light motor vehicle – the driver was authorized to drive light goods vehicle as well and Insurance Company was rightly fastened with liability- however, amount of Rs. 54,000/- awarded towards loss of future earning, Rs. 10,000/- awarded towards transportation charges, Rs. 50,000/- awarded towards pain and suffering, loss of amenities of life and future discomfort are not supported by any evidence – hence, set aside. (Para- 2 to 5)

For the Appellant: Mr. Jagdish Thakur, Advocate.
For the respondent No1.: Mr. Vijay Bir Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (oral)*

The instant appeal is directed against the impugned award rendered by the learned Motor Accident Claims Tribunal-II, Kangra at Dharamshala, District Kangra, H.P. (hereinafter referred to as Tribunal) upon MACP No. 19-1/II/2013/2012 whereby a sum of Rs. 2,24,845/- alongwith interest @ 8% per annum stood assessed as compensation amount vis-à-vis the claimant.

2. Under the impugned award, the learned Tribunal fastened the apposite indemnificatory liability upon the insurer of the offending vehicle. The insurer is aggrieved by the pronouncement recorded by the learned MACT, hence it has instituted the instant appeal before this Court.

3. The learned counsel for the appellant does not contest the legality of the findings returned by the learned Tribunal upon the issue appertaining to the rash and negligent driving of

the offending vehicle by respondent No.1. However, he contends that findings occurring in the impugned award qua fastening of liability upon the insurer qua its liquidating the compensation amount vis-à-vis the claimant, suffer, from an infirmity given at the time contemporaneous to the taking place of the ill-fated occurrence, the driver of the offending vehicle, not, holding a valid and effective licence to drive it.

4. He contends that the driving licence borne in Ext.RW-2/B does not hold depiction(s) therein of respondent No.1 being authorized to drive a transport vehicle, whereas the apposite RC borne in Ext. RW-2/A makes a disclosure of the offending vehicle being registered as a "Light Goods Vehicle" hence with its evidently falling in the category of "Light Goods Vehicle" enjoined therein occurrence of the aforesaid depiction whereas non occurrence whereof in Ext. RW-2/B rendered him unauthorized to drive it also thereupon with breach of the terms and conditions of the insurance cover hence surfacing, also rendered vitiated, any, fastening of the apposite indemnificatory liability vis-à-vis the Insurance Company. Moreover, in view of a judgement of the Hon'ble Apex Court pronounced in Civil Appeal No. 5826 of 2011 decided on 3rd July, 2017 titled as Mukund Dewangan vs. Oriental Insurance Company Limited, wherein in paragraph 46(iv) thereof occurring at page 60, it held as extracted hereunder:

> "(iv) The effect of amendment of Form 4 by insertion of "transport vehicle" is related only to the categories which were substituted in the year 1994 and the procedure to obtain driving licence for transport vehicle of class of "light motor vehicle" continues to be the same as it was and has not been changed and there is no requirement to obtain separate endorsement to drive transport vehicle, if a driver is holding licence to drive light motor vehicle he can drive transport vehicle of such class without any endorsement to that effect."

besides propounded that in respect of testing the validity(s) of driving licence(s) issued in respect of "light motor vehicles", licence(s) in respect whereof stand issued subsequent to the year 1994 besides for testing the concomitant trite factum in respect of holder's thereof, possessing, a valid and effective driving licnece to drive the vehicle concerned, an, allusion is to be made to the earmarked category of the offending vehicle borne in the registration certificate concerned. It has also been propounded therein that subsequent to 1994 driving licences issued in respect of "Light Motor Vehicles" concerned though holding only an endorsement therein for their holder being authorized to drive "light motor vehicle" as is the reflected category of the offending vehicle in the apposite RC hereat thereupon dehors no reflection(s) occurring in the driving licence(s) concerned qua its holder(s) being authorized to drive a transport vehicle yet not rendering the apposite licence(s) to be stripped of its/their validity. Consequently, the aforesaid submission is rejected.

5. The learned counsel for the Insurance Company contends with vigour that the learned Tribunal has miscomputed compensation vis-à-vis the claimant comprised in a sum of Rs.54,000/- towards loss of future earnings, especially with neither firm oral or documentary evidence of the medical expert standing adduced. The aforesaid submission is accepted by this Court, given a traversing of the evidence, not, unraveling qua the claimant leading into the witness box, the doctor concerned who examined the injuries besides who on analysing the injuries proclaimed qua their severity, whereupon the claimant stood disabled to perennially perform his duties. Consequently, any assessment of Rs. 54,000/- towards loss of income, by, the learned Tribunal vis-à-vis the claimant is quashed and set-aside. The learned Tribunal has under head "transportation charges" quantified a sum Rs.10,000/- vis-à-vis the claimant. However, in respect thereof the claimant has not adduced any tangible documentary evidence, hence compensation qua transportation charges, as computed by the learned Tribunal, is also quashed and set-aside. Furthermore, the learned Tribunal has under the head "pain and suffering" and loss of amenities of life and towards future discomfort, respectively assessed compensation in sum(s) of Rs.50,000/- each, dehors its anchoring the aforesaid quantification(s) upon any firm evidence existing on record. Nowat when this Court is constrained for reasons aforesaid constrained to decline vis-à-vis the claimant, any, computation of compensation amount vis-à-vis loss of future earnings, thereupon the quantification(s) of compensation

amount(s) aforesaid under the aforesaid heads is also quashed and set-aside. The impugned award is modified to the above extent. The appeal is disposed of accordingly, so also the pending application(s), if any.

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

Mohan Singh and others ...Appellants

Versus

Jagdish Chand (deceased) through LR's Smt. Saloti Devi and others ...Respondents

RSA No. 77 of 2005 with
RSA No. 406 of 2011
Reserved on: August 1, 2017
Date of decision: August 29, 2017

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that predecessor of the parties were co-owners – an application for partition was filed and instrument of partition was prepared- the suit land is in possession of plaintiffs No.2 to 13, although, the same was allotted to the defendants – plaintiffs have become the owners by way of adverse possession – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that no document was produced by the defendants to show that they had taken steps for obtaining the possession of the land allotted to them – DW-1 admitted that suit land is in possession of the plaintiffs – it was also proved that plaintiffs were in permissive possession of the suit land with the consent of other co-sharers- a permissive possession cannot be converted into adverse possession- proceedings were taken after the partition – possession can be taken under Section 134 of H.P. Land Revenue Act within 3 years from the date of preparation of instrument of partition – if the possession is not taken in three years, a civil suit for possession can still be filed- a civil suit for seeking declaration that a person has become owner by way of adverse possession is not maintainable – the Courts had correctly dismissed the suit – appeal dismissed. (Para-11 to 28)

Cases referred:

Gajinder Singh and others versus Narotam Singh and others, 1995(2) Sim. L.C. 314
Gopi Chand and another versus Sonam Dass and others, 1998(2) S.L.J. 1058
Gurdwara Sahib v. Gram Panchayat Village Sirthala, (2014) 1 SCC 669
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd., (2005) 1 SCC 705

For the Appellants:	Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate, for the appellants in RSA No. 77 of 2005 and for respondents No. 1 to 10 in RSA No. 406 of 2011.
For the Respondents:	Mr. Ravinder Thakur, Advocate for the appellants in RSA No. 406 of 2011 and for respondents No. 2 to 4 in RSA No. 77 of 2005. None for other respondents in RSA No. 77 of 2005. Respondent No. 7 (b) in RSA No. 77 of 2005, ex parte.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Since dispute involved in these appeals is qua same land and between same parties, appeal were tagged together for hearing and are being disposed of vide this common

judgment. However, for the sake of clarity, facts of both the appeals are being discussed separately.

RSA No. 77 of 2005

2. Appellants in this case, filed a suit under Section 34 of the Specific Relief Act, 1963 and Section 9 CPC, for decree of declaration to the effect that plaintiff No.1-Mohan Singh had become owner of the land comprised in Khewat No. 39, Khatauni No. 78 Khasra Nos. 27(8-10 Bigha) and plaintiffs No.2 to 13 had become owners of land comprised in Khewat No. 39, Khatauni No. 77, Khasra Nos. 33 (2-13 Bigha), No. 26 (5-5 Bigha), No. 28 (4-3 Bigha) situated in Village Uttamwala, Baraban, Tehsil Nahan, District Sirmaur, Himachal Pradesh as per Jamabandi for the year 1999-2000 by way of adverse possession and respondents-defendants have no right, title or interest over the suit land. Suit was registered as Civil Suit No. 55/1 of 2002. It was averred in the plaint that the predecessor-in-interest of the plaintiff as well as defendants namely Netar Singh, Jagat Singh, Jiwan Singh and Pratap Singh were cosharers of land situate at Village Uttamwala Baraban, Tehsil Nahan, District Sirmaur, HP as per Jamabandi for the year 1999-2000. Plaintiffs further claimed that plaintiff No.1 was sole owner in possession of Khasra No. 27 measuring 8-10 Bigha, which was given to him by his father Shri Netar singh and was recorded in the revenue records and no co-owner- had any right, title or interest over the same. It was further averred in the plaint that an application for partition, i.e. Jiwan Singh versus Jagat Singh, being Case No. 19/9 instituted on 9.7.1974 and decided on 9.8.1977 was filed. Instrument of partition was prepared on 28.7.1979. Netar Singh, predecessor-in-interest of plaintiff No.1 was allotted land in Khasra Nos. 26/2, 27/9, 28/2, 33/4, Jagat Singh was allotted land in Khasra Nos. 27/3, 33/ and 28/1. Similarly, Jiwan Singh was allotted land in Khasra Nos. 27/2, 33/2 and Pratap Singh was allotted land in Khasra Nos. 26/1, 271 and 33 /3. Plaintiffs are successors-in-interest of Netar Singh and defendants are successor-in-interest of Jagat Singh, Jiwan Singh and Pratap Singh. Plaintiffs No.2 to 13 further claimed that they are in continuous possession of Khasra Nos. 33, 26 and 28, even though this land had been allotted to the defendants, but they did not get possession of this land, which was in their possession since the time, instrument of partition was framed. It was further claimed that plaintiff No.1-Mohan Singh had become owner of land comprised in Khasra No. 27, by way of adverse possession. Plaintiffs further claimed that suit land is in their possession since 9.8.1972, when instrument of partition was framed. Plaintiff further claimed that he has become owner-in-possession qua the entire area of suit land, by way of adverse possession, holding the same adversely to the defendants, even from the date of physical partition as described above. Plaintiffs further claimed that they have become owners of land in their possession, which was allotted to the defendants, as such, all the rights, title and interest of theirs are extinguished and entries recorded in revenue record, showing cosharers in the column of ownership are against facts and not valid and legal.

3. Defendants by way of a joint written statement, disputed aforesaid claim of plaintiffs on the ground of maintainability, cause of action, non-joinder of parties, as well as valuation. Defendants specifically denied that the plaintiffs have become owners by way of adverse possession qua the suit land. Defendants admitted that one of the cosharers i.e. Jiwan Singh had filed a partition application for the partition of the suit land including Khasra No. 27. Defendants, further stated that partition application was contested in different revenue courts, but, later on, partition was not acted upon due to mutual consent and parties to the suit are in possession of land, of each other, in different villages and even in the same village, because of mutual understanding and consent.

By way of replication, plaintiffs reiterated and reasserted the claim as set up in the plaint and denied the claim of the defendants.

4. Learned trial Court framed following issues for determination on 25.3.2003:

> "(1) Whether the plaintiff No. 1 Mohan Singh has become the owner of suit land comprised under khasra No. 27 measuring 8-10 bighas by way of adverse possession, as prayed?

(2) Whether the plaintiffs No. 2 to 13 have become the owners of land comprised under Khasra No. 33, measuring 2-13 bighas measuring 4-3 bighas by way of adverse possession, as alleged?

(3) Whether the revenue entries showing ownership of defendants qua the suit land are illegl, and not binding on the right of plaintiffs, as alleged?

(4) Whether the suit in the present form is not maintainable?

(5) Whether no enforceable cause of action accrued to the plaintiffs to file the present suit?

(6) Whether the suit is bad for want of proper court fees?

(7) Whether the suit is bad for non-joinder/mis-joinder of necessary parties?

(8) Relief."

5. Subsequently, learned trial Court, on the basis of evidence adduced on record by the respective parties, dismissed the suit for declaration having been filed by the plaintiffs, vide judgment and decree dated 113.2.2004. Plaintiffs being aggrieved and dissatisfied with aforesaid judgment and decree passed by trial Court, preferred an appeal before the District Judge, under Section 96 CPC, which came to be registered as civil appeal No. 22-CA/13 of 2004. However, fact remains that aforesaid appeal was also dismissed, as a result of which, judgment and decree dated 11.3.2004 passed by Civil Judge (Senior Division), Sirmaur District at Nahan, came to be upheld. In the aforesaid background, appellants approached this Court by way of instant proceedings, praying therein for decreeing the suit after setting aside impugned judgments and decrees. Instant appeal was admitted on 9.3.2005, on the following substantial question of law:

"Whether respondents having admitted that land in suit was ordered to be partitioned by revenue authorities on 28.7.1979 and as per their own admission, order for partition of land having not been executed, therefore, right title and interest of the Respondents over the suit land came to an end they being debarred to execute the same."

RSA No. 406 of 2011

6. Appellants in this case namely Joginder Singh and others filed a suit for possession of land comprised in Khasra No. 26/1, 27/1 and 33/3, measuring 0-6 Bigha, 1-12 Bigha and 0-9 Bigha, respectively Kita 3 situate in Mouza Uattamwala, Badaban, Tehsil Nahan, District Sirmaur, HP. As per averments made in the plaint, plaintiffs, defendants and proforma defendants were cosharers /joint owners of land bearing Khewat No. 39/36 Khatauni No. 77 to 80, comprised in Khasra Nos. 25, 26, 27, 28 and 33 measuring 1-6 Bigha, 5-5 Bigha, 8-10 Bigha, 4-3 Bigha and 2-13 Bigha respectively, total measuring 21-17 Bigha situated in Mauja Uttamwala, Badaban, Tehsil Nahan, District Sirmaur, HP, as per Jamabandi for the years 1999-2000. Plaintiffs further claimed that aforesaid land was got partitioned amongst the then cosharers through competent court i.e. Assistant Collector 1st Grade, Nahan on an application bearing No. 19/9 of 1974, titled Jiwan Singh etc. vs. Jagat Singh etc., dated 9.7.1974, which was finally decided on 9.8.1977 and instrument of partition was accordingly prepared on 28.7.1979 and in the said partition, plaintiffs were allotted Khasra No. 25 measuring 1-6 Bigha, Khasra No. 26/1 measuring 0-6 Bigha, Khasra No. 27/1 measuring 1-14 Bigha and Khasra No.33/3 measuring 0-9 Bigha, Kita 4, total measuring 3-13 Bigha, situated in Mauza Uttamwala, Badaban Tehsil Nahan, District Sirmaur, Himachal Pradesh. It is further averred that the proforma defendants were allotted Khasra Nos. 27/3, 33/1, 28/1, 27/2 and 33/2 measuring 7.6 Bigha. As per plaint, plaintiffs and proforma defendants No. 12 to 17 except plaintiff No. 3 namely Shri Bachan Singh are not presently residing in Village Uttamwala, Badaban, Tehsil Nahan, District Sirmaur, Himachal Pradesh, where suit land is situated and suit land is mostly in the physical possession of defendants No.1 to 6. After the partition, possession of land allotted to the plaintiffs and proforma defendants could not be taken by them because initially defendant No.1-Mohan Singh, contested and disputed the matter in different revenue courts upto Financial Commissioner till November/December, 1991, but thereafter the matter remained pending due to

mutual consent/agreement of the parties. Plaintiffs further averred that even after 1991, possession of suit land and land allotted to proforma defendants remained with the defendants in terms of mutual understanding and consent arrived inter se parties because all the contesting defendants had agreed to hand over possession of the land of plaintiffs and proforma defendants. Plaintiffs further alleged that defendants, in breach of trust reposed upon them by the plaintiffs, wanted to grab suit land as well as land allotted to the proforma defendants and as such he filed civil suit No. 55/1 of 2002 titled as Mohan Singh and others versus Jagdish Chand and others in the Court of learned Civil Judge (Senior Division), Sirmaur at Nahan, for decree of declaration that defendant No.1 Mohan Singh had become owner of land comprised in Khasra No. 27 measuring 8-10 Bigha by way of adverse possession and defendants No.2 to 11 had become owners of land comprised in Khasra Nos, 33, 26 and 28, as such, defendants had no right, title or interest in the said same. Defendants in that suit contested the claim of plaintiffs. Suit came to be dismissed on 11.3.2004. Defendants being aggrieved with judgment and decree dated 11.3.2004, preferred an appeal bearing No. 22-CA/13 of 2004 dated 21.4.2004, titled as Mohan Singh and others versus Jagdish Chand and others before District Judge, Sirmaur at Nahan, however, said appeal was dismissed on 2.12.2004 by learned District Judge, as a result of which judgment and decree dated 11.3.2004 came to be upheld.

7. Since defendants failed to deliver the possession of suit land and land of proforma defendants after passing of aforesaid judgments and decrees by civil Courts in the case, referred to above, plaintiffs filed present suit praying therein for decree of possession of suit land denoted by Khasra Nos. 26/1 (0-6 Bigha), No. 27/1 (1-12 Bigha), 33/3 (0-9 Bigha) and No. 25 (1-5 Bigha) situated in Mauja Uttamwala Badaban, Tehsil Nahan, District Sirmaur, Himachal Pradesh. Learned trial Court, vide judgment and decree dated 15.12.2009, decreed the suit having been fled by the plaintiffs and held them entitled to possession of suit land comprising of Khasra No. 25(1-6 Bigha), No. 26/1 (0-6 Bigha), No. 27/1 (1-12 Bigha) and No. 33/3 (0-9 Bigha), in total 3-13 Bigha, situate in Mauza Uttamwala Badaban, Tehsil Nahan, District Sirmaur, Himachal Pradesh, as depicted in Naksha 'J' attached to instrument of partition (Ext. PW1/E) and also in order dated 9.8.1977 (Ext. PW1/D.

8. Defendants being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, preferred an appeal before the learned District Judge, Sirmaur at Nahan, which came to be registered as Civil Appeal No. 17-CA/13 of 2010. Learned first appellate Court, accepted the appeal having been preferred by the defendants, as a result of which, judgment and decree passed by learned trial Court, as mentioned above, came to be set aside.

9. In the aforesaid background, appellants-plaintiffs approached this Court by way of instant proceedings, praying therein for restoration of judgment and decree passed by learned trial Court, after setting aside judgment of reversal passed by the learned District Judge, Sirmaur at Nahan.

10. The instant regular second appeal was admitted on 20.9.2011, on the following substantial questions of law:

> "1. Whether in the absence of specific objection in the pleadings regarding non-maintainability of suit in view of Section 10 CPC and non-framing of specific issue to this effect in the suit , the findings returned by the ld. First appellate court are sustainable and legal?
>
> 2. Whether the suit of the appellants deserves to be kept alive till the outcome of RSA No. 77/2005?"

RSA No. 77 of 2005 and RSA No. 406 of 2011

11. At the cost of repetition, it may be again noticed that since dispute involved in the present appeal is qua same land and between same parties, arguments having been made by the learned counsel for the parties, were heard in both the appeals simultaneously.

12. Keeping in view specific substantial question of law No. 2, framed in RSA No. 406/2011 i.e., "*Whether the suit of the appellants deserves to be kept alive till the outcome of RSA No. 77/2005?*", this Court deems it fit to deal with the substantial question of law, framed in regular second appeal No. 77 of 2005, at the first instance.

13. While hearing submissions having been made by the learned counsel for the parties, this Court had an occasion to peruse judgment passed by the learned first appellate Court assailed in RSA No. 77 of 2005, perusal whereof certainly does not persuade this Court to agree with the contentions having been made by Mr. G.D. Verma, learned senior Advocate, that both the Courts below, while dismissing suit of the plaintiffs, misread, misconstrued and misinterpreted evidence adduced on record by the plaintiffs in support of his claim, rather, this Court, after having carefully perused the same, sees substantial force in the arguments having been made by Mr. Ravinder Thakur, learned counsel representing appellants in RSA No. 406 of 2011, ...that suit having been filed by the plaintiffs for declaration is not maintainable in view of specific plea of adverse possession having been taken by the plaintiffs. Appellants-plaintiffs filed Civil Suit No. 55/1 of 2002 under Section 34 of Specific Relief Act and Section 9 CPC, seeking therein declaration that plaintiff No.1-Mohan Singh has become owners of suit land by way of adverse possession. At this stage, this Court deems it necessary to take note of head note of plaint as well as relief clause of the plaint filed by the plaintiff in Civil Suit No. 55/1 of 2002:

> "Civil Suit praying for granting a decree of declaration that the plaintiff No. 1 Mohan Singh has become owner of the land comprised in Khewat No. 39, Khatauni No. 78, Khasra Nos. 27 measuring 8-10 Bighas, situated in vill. Uttamwala Baraban, Teh. Nahan, Disttt. Sirmaur, HP per Jamabandi 1999-2000by adverse possession and the plaintiffs No.2 to 13 havebecome owners of land comprised in khewat No.39 khatauni 77,khasra No.33 measuring 2-13 bighas and khasra Nos.26 measuring 5.5 bighas and 28 measuring 4.3 bighas, situated in village Uttamwala Baraban, Teh. Nahan,Sirmaur,HP., and the defendants have no right, title or interest in the same in any manner whatsoever, under section 34 of Specific Relief Act,1963 and section 9 of the C.P.C. Therefore, it is humbly prayed that a decree of declaration that the plaintiff No. 1 Mohan Singh has become the owner of the land comprised in khewat No.39, Khatauni No. 78, Khasra No. 27, measuring 8-10 bighas; situated at vill. Uttamwala Baraban, Teh. Nahan, Distt. Sirmaur, HP., per Jamabandi for the year 1999-2000 by adverse possession and plaintiffs No. 2 to 13 have become owners of land comprised in khewat No.39, khatauni No. 77 khasra No.33, measuring 2-13 bighas and khasra No. 26, measuring 5.5 bighas and 28 measuring 4.3 bighas situated in village Uttamwala Baraban, Tehsil Nahan, Distt. Sirmaur, HP., and the defendants have no right, title or interest in the same in any manner whatsoever and the revenue entries to the extent of interest of defendants shown in ownership column are illegal and not binding on the rights of the plaintiffs and or any other relief which this ld.court deems fit, may kindly be passed in favour of the plaintiffs and against the defendants with costs of the suit, in the interest of justice."

14. Perusal of plaint clearly suggests that suit for declaration having been filed by plaintiffs was purely based upon title allegedly acquired by the plaintiffs qua suit land by way of adverse possession. Plaintiffs specifically admitted factum with regard to order dated 9.8.1977 passed by learned Assistant Collector 1st Grade in partition proceedings instituted on 9.7.1974, whereafter instrument of partition was prepared on 28.7.1979. It is also admitted case of the plaintiffs that predecessor-in-interest of plaintiff Nos. 1 to 13 was allotted land comprised of Khasra No. 26/2, 27/9, 28/2, 33/4, whereas, Jagat Singh, Jiwan Singh and Pratap Singh i.e. predecessor-in-interest of the defendants, were allotted Khasra Nos. 27/3, 33/1, 28/1, Khasra Nos. 27/2 and 33/2, and, Khasra Nos. 25, 26/1, 27/1, 33/3, respectively, total measuring 3-13 Bigha. Plaintiffs, while claiming themselves to be in continuous possession of Khasra Nos. 33, 26 and 28, specifically admitted that this land was allotted to the defendants, who, failed to get the

delivery of possession of land, after preparation of instrument of partition on 28.7.1979 and as such, plaintiff No. 1 Mohan Singh, became owner of land comprised in Khasra No. 27, by way of adverse possession. No plea of limitation was ever raised by the plaintiffs while refuting claim of the defendants and as such, at this stage, Mr. G.D. Verma, learned senior Advocate, can not be allowed to state that since defendants failed to take possession of their share pursuant to instrument of partition prepared on 28.7.1979 within a period of three years, plea of adverse possession having been taken by the plaintiffs could not be rejected by the learned Court below.

15. Undoubtedly, there is no document available on record suggestive of the fact that steps, if any, were taken by the defendants for procuring possession of their share of land, pursuant to instrument of partition prepared on 28.7.1979, but there is overwhelming evidence adduced on record by the defendants suggestive of the fact that it was agreed mutually between the parties that they shall remain in possession of each others land, in other villages and even in the same village, till the time, they are asked to give possession qua specific portion of land in terms of partition deed. Mohan Singh, while appearing as PW-1, specifically admitted in his cross-examination that after partition, parties did not take possession as per partition proceedings and remained in possession of respective shares by their mutual consent. DW-1 Joginder Singh also stated that suit land is in possession of plaintiffs with their consent. He specifically denied that he applied to the Courts of Tehsildar and SDM for taking warrant of possession of suit land. It has also come in the statement of PW-1 Mohan Singh, that in the year 1992-93, he had obtained stay from the court, restraining the defendants from taking possession of suit land, in terms of partition deed. On the other hand, DW-1 specifically stated that dispute regarding partition continued till 1991 since plaintiffs had been filing appeals before higher revenue courts against the order of partition passed by Assistant Collector.

16. True it is, that there is no documentary evidence placed on record by the defendant to prove factum of filing appeal, if any, by the plaintiffs in the revenue courts, laying therein challenge to the instrument of partition as prepared on 28.7.1979, but PW-1 Mohan Singh himself admitted in his cross-examination that in the year 1992-93, he had obtained stay from the Court, restraining the defendants from taking possession of the suit land pursuant to partition deed.

17. Version put forth by the defendants in their written statement as well as statement made by DW-1 appears to be correct that that dispute regarding partition continued upto 1991, where after parties to lis agreed to remain in possession of their respective shares by their mutual consent/agreement.

18. DW-2 namely Gian Chand, who happened to be President of Gram Panchayat Bankala, from 1970 to December, 1971, categorically stated that parties had mutually agreed in his presence that the plaintiff shall continue to cultivate suit land, till the defendants are residing outside the village. He further stated that it was agreed that when defendants would desire to cultivate suit land, possession would be handed over to the defendants.

19. This Court, after having carefully perused depositions having been made by DW-1 Joginder Singh, DW-2 Gian Chand, sees no force in the contention of Mr. G.D. Verma, learned senior Advocate, that there was no mutual understanding inter se parties, whereby plaintiffs were allowed to cultivate suit land, even after drawing of partition deed on 28.7.1979.

20. It is not in dispute that as per Section 134 of the HP Land Revenue Act “an owner or tenant to whom any land or portion of a tenancy, as the cases may be, is allotted in proceedings for partition shall be entitled to possession thereof, as against the other parties to the proceedings and their legal representatives, and a Revenue Officer shall, on application made to him for the purpose by any such owner or tenant at anytime within three years from the date recorded in the instrument of partition give effect to that instrument so as it concerns the applicant as if it were a decree for immovable property.

21. Pleadings as well as evidence adduced on record by the respective parties, clearly proves on record that plaintiff was in permissive possession of the suit land with consent of other

co-owners. It is well settled law that permissive possession can not be converted into adverse possession unless person in possession first returns possession to the owner of the property and then re-enters into property to claim hostile title. In the instant case, as has been taken note above, merely instrument of partition was drawn and owners had not taken actual possession of the land allotted to them, in the partition. Mr. G.D. Verma, learned Senior Advocate while placing reliance upon judgment of this Court in case **Gajinder Singh and others** versus **Narotam Singh and others,** 1995(2) Sim. L.C. 314 and another judgment of this Court in case **Gopi Chand and another** versus **Sonam Dass and others**, 1998(2) S.L.J. 1058, contended that matter with regard to delivery of possession of land in dispute, consequent to partition before revenue officer, falls within exclusive jurisdiction of revenue officer under the ambit of Section 134 of Land Revenue Act. He further contended that since the plaintiff failed to obtain possession under Section 134 of the Act ibid, he is estopped to approach civil court for such relief of possession.

22. This Court, sees no reason to differ with aforesaid exposition of law but, in the case at hand, both the parties, pursuant to partition agreed to remain in possession over the land of each other, till the time, they are asked to vacate the same, as such, provisions as contained in Section 134 of Land Revenue Act, may not be applicable in the present case. Moreover, plaintiffs have specifically admitted that suit land belongs to defendants but since they failed to take possession within specified time, they have become owners by way of adverse possession. There is no dispute with regard to title of the defendants qua the suit land and plea of adverse possession having been taken by the plaintiffs, Mohan Singh and others, was not available in terms of judgment passed by Hon'ble Apex Court in **Gurdwara Sahib** v. **Gram Panchayat Village Sirthala**, (2014) 1 SCC 669.

23. Otherwise also, it emerges from plaintiff No.1's own deposition made before the Court that he being aggrieved with the instrument of partition recorded on 28.7.1979, had obtained stay from the court, restraining defendants from taking possession of suit land by the defendants. Though there is no record adduced by the defendants that immediately after recording of partition deed, plaintiffs had filed appeals before higher revenue courts, but, it has specifically come in the statement of DW-1 that Mohan Singh, plaintiff No.1, had been filing appeals before higher revenue courts and there is nothing in the cross-examination conducted on this witness, from where it can be inferred that aforesaid version put forth by DW-1 was ever rebutted. It has specifically come in the statement of DW-1 that he never applied to the courts of Tehsildar and SDM for obtaining warrant of possession of suit land, in view of mutual agreement, arrived inter parties.

24. Though, Section 134 of the Land Revenue Act, as reproduced herein above, suggests that delivery of possession pursuant to partition deed could be taken by the party concerned, within a period of three years, from the date of recording of partition, but, bare reading of provisions contained Section 134 of Land Revenue Act, nowhere suggests that after expiry of period of three years from the date of recording of partition, party , who was unable to procure partition within three years, as prescribed under Section 134 of the Land Revenue Act, is estopped from filing civil suit for recovery of possession pursuant to partition deed. Most importantly, in the instant case, despite there being partition deed, admittedly drawn on 28.7.1979, parties continued to be shown/reflected as co-owners in the column of ownership, which entries, subsequently, came to be challenged by way of suit having been filed by the appellants-plaintiffs.

25. Leaving everything aside, the suit of the plaintiffs for decree of declaration to the effect that he became owner of suit land by way of adverse possession is/was not maintainable in light of the judgment passed by Hon'ble Apex Court. Their lordships of the Hon'ble Supreme Court in **Gurdwara Sahib** v. **Gram Panchayat Village Sirthala**, (2014) 1 SCC 669, have held that even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Their lordships have held as under:

> "8. There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in

adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

26. At this stage, this Court also deems it necessary to deal with the specific objection raised by the learned counsel representing the respondents with regard to maintainability and jurisdiction of this Court, while examining correctness of the concurrent findings of facts recorded by the Courts below. Mr. Ravinder Thakur, learned Advocate, while inviting 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,** contended that the present appeal deserves to be dismissed. The Hon'ble Supreme Court in the aforesaid judgment has held as under:

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

27. 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, but as emerges from the case referred above, there is no complete bar for this Court to upset the concurrent findings of the Courts below, if the same appears to be perverse. However, in the instant case, findings returned by the learned Courts below, appear to be based upon proper appreciation of evidence as well as law, and as such, by no stretch of imagination, findings of the learned Courts below can be termed to be perverse, as such, this Court sees no reason to interfere with the concurrent findings of facts recorded by Courts below.

28. After having carefully perused record vis-à-vis impugned judgments passed by courts below, this Court sees no illegality and infirmity in the judgments and decrees passed by learned Courts below. The substantial question of law is answered accordingly.

RSA No. 406 of 2011

29. It is not in dispute that after passing of judgment and decree dated 11.3.2004, in Civil Suit No. 55/1 of 2002, having been filed by Mohan Singh and others (appellants in RSA No. 77 of 2005), which was further upheld in appeal, by the learned District Judge, Sirmaur, vide judgment and decree dated 2.12.2004, Joginder Singh and others (appellants in RSA No. 406 of 2011), preferred a suit for possession in the Court of Civil Judge (Junior Division), Nahan, District Sirmaur, which came to be registered as Civil Suit No. 146/1 of 2005. It is also not in dispute that aforesaid suit was decreed and Joginder Singh and others were held entitled for possession of suit land, in terms of instrument of partition, and order dated 9.8.77. Being aggrieved and dissatisfied with the aforesaid judgment and decree, Mohan Singh and others preferred appeal before learned District Judge, Sirmaur, which came to be registered as CA No. 17-CA/13 of 2010. Learned District Judge, vide judgment and decree dated 7.6.2011, accepted

the appeal having been preferred by Mohan Singh and others, as a result of which, judgment and decree passed by trial Court came to be set aside.

30. Careful perusal of judgment and decree dated 7.6.2011, passed by learned District Judge, clearly suggests that judgment and decree passed by learned Court below was set side only on the ground that plea of *res sub judice* as envisaged under Section 10 CPC could not be waived. Learned first appellate Court taking note of the fact that Mohan Singh and others had filed Regular Second Appeal in this Court, against judgment and decree passed by learned District Judge on 2.12.2004 in Civil Appeal No. 22-CA/13 of 2004, whereby civil suit No. 55/1 of 2002 filed by Mohan Singh and others was dismissed, held that learned Court below erred in concluding that there was waiver on the part of defendant No. 1 Mohan Singh to the principle of *res sub judice*. Learned District Judge, further held that it was incumbent upon as well as legally enjoined upon learned Court below to have revered said principle and as such, judgment and decree passed by learned trial Court is bad in law.

31. After having taken note of aforesaid judgment passed by learned District Judge, it can be safely concluded that there is no discussion, if any, qua other issues, save and except principle of *res sub judice*.

32. It is not in dispute that the ultimate aim of principle of *res sub judice* is to avoid multiplicity of litigation, as well as to abort/avoid frivolous litigation, however in the instant case, as clearly emerges from the judgment passed by learned trial Court, that at no point of time, Mohan Singh and others placed on record document, if any, suggestive of the fact that that High Court, while entertaining Regular Second Appeal, having been preferred by Mohan Singh against judgment and decree dated 2.12.2004, passed in first appeal, whereby judgment and decree passed in Civil Suit No. 55/1 of 2002 were upheld, granted stay. Otherwise also, plea of *res sub judice* as encompassed under Section 10 CPC, is required to be taken specifically by way of preliminary objections in the written statement, if any, filed on behalf of the defendants.

33. Interestingly, there is no objection, if any, taken by the defendants in the written statement that the suit having been filed by Joginder Singh and others is required to be stayed in view of the pendency of the Regular Second Appeal before this Court. Moreover, it clearly emerge from the written statement having been filed by Mohan Singh and others, in the suit for possession filed by Joginder Singh and others, that factum with regard to partition inter se parties, as claimed by Joginder Singh in the instant suit as well as earlier suit having been filed by Mohan Singh, was totally denied, rather, defendant No.1- Mohan Singh claimed himself to be in exclusive possession of the suit land, after having acquired title qua the suit land, by way of adverse possession.

34. Learned trial Court, while decreeing subsequent suit filed by Joginder Singh, rightly held that since no specific plea with regard to pendency of Regular Second Appeal was taken in the written statement, plea of *res sub judice* was waived. Apart from above, this Court was unable to find any document in the record, from where it could be inferred that copy of stay, if any, issued by High Court, against judgments and decrees passed by learned Courts below, in Civil Suit No. 55/1 of 2002, was ever placed on record. Moreover, perusal of record pertaining to RSA No. 406 of 2011 titled Joginder Singh and others versus Mohan Singh and others, nowhere suggests that judgment and decree passed by learned first appellate Court upholding judgment and decree passed in Civil Suit No. 55/1 of 2002, was ever stayed by this Court in the RSA having been filed by Mohan Singh.

35. Their lordships of the Hon'ble Apex Court in **Atma Ram Properties (P) Ltd.** v. **Federal Motors (P) Ltd.**, (2005) 1 SCC 705, have held that mere filing of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the Court below. Their lordships have held as under:

> "8. It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against

has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in the Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate Court would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate Court is that in spite of the appeal having been entertained for hearing by the appellate Court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the Court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the Court dealing with a prayer for the grant of stay asks to itself is: Why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted."

36. Since RSA No. 77 of 2005 stands decided vide instant judgment, substantial question of law No.2, framed in RSA No. 77 of 2005, requires no discussion.

37. The case law relied upon by Mr. G.D. Verma, learned Senior Advocate, i.e. **AIR 2003 Karnataka 380**, is not applicable in the present case. In the case referred /relied upon above, it has been held that concurrent findings of fact that defendant had proved her title, can not be interfered with in the second appeal. In the case at hand, as has been held above, plea of adverse possession could not be taken by the plaintiffs while filing suit for declaration, declaring them to be owner of the suit land by way of adverse possession.

38. Consequently, in view of detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, RSA No. 406 of 2011 is allowed, after setting aside judgment and decree dated 7.6.2011 passed by District Judge, Sirmaur at Nahan in Civil Appeal No. 17-CA/13 of 2010.

39. RSA No. 77 of 2005 is dismissed. Judgment and decree dated 11.3.2004 passed in Civil Suit No. 55/1 of 2002 by the Civil Judge (Senior Division), Sirmaur at Nahan, which was upheld in Civil Appeal No. 22-CA/13 of 2004 by the District Judge, Sirmaur at Nahan, is further upheld.

Pending applications, in both the appeals, are disposed of. Interim orders, if any, are vacated.

****

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

FAO No. 86 of 2007 alongwith
FAO No. 107 of 2007.
Date of Decision : August 30, 2017

1. FAO No. 86 of 2007

Bhagat Ram ...Appellant

Versus

Hemender Kumar Gupta ...Respondent

2. FAO No. 107 of 2007

Hemender Kumar Gupta ...Appellant

Versus

Bhagat Ram ...Respondent

Workman Compensation Act, 1923- Section 4- Claimant was working as workman – he sustained injuries in the course of discharging his duties- he was brought to hospital and his

index finger had to be amputated – he sustained 50% disability- claimant cannot use the left hand in view of amputation of left-hand index finger and fixed extension deformity on tissue in lateral aspect of the palm- claimant was discharging his duties on the machine – Commissioner awarded compensation of Rs. 39,127.50/- - held in appeal that claimant was being paid Rs. 2,700/- per month- he was aged 44 years at the time of incident- Doctors have determined the disability of the claimant to be 50%- however, nature of injury shows that claimant had suffered total disablement- he cannot operate the machine any longer- claimant has been retrenched by the employer and cannot pursue any other vocation- hence disability has to be treated as complete and not partial - relevant factor will be 172.52 and after applying the functional disability to the extent of 100%, compensation will be Rs. 2,79,482/- - a sum of Rs. 16,000/- was spent by the employer on the treatment of the claimant, which has to be deducted and compensation of Rs. 2,63,482/- will be payable- claimant would be entitled to interest @ 12% per annum which comes to be Rs. 3,48,510/- - claimant is also entitled for penalty @ 30% - thus, total compensation of Rs. 7,95,590/- would be payable. (Para- 15 to 31)

Cases referred:

Pratap Narain Singh Deo vs. Srinivas Sabata & another, (1976) 1 SCC 289 (Four Judge)
S. Suresh vs. Oriental Insurance Company Limited & another, (2010) 13 SCC 777
Puran Dutt vs. H.R.T.C., 2006 (3) Shim.LC 222
Oriental Insurance Company Limited vs. Mohd. Nasir & another, (2009) 6 SCC 280

For the appellant	:	Mr. R.K.Sharma, Senior Advocate with Ms. Anita Parmar, Advocate, for the appellant in FAO No. 86 of 2007.
		Mr. B.P.Sharma, Senior Advocate with Mr. Arun Kumar, Advocate, for the appellant in FAO No. 107 of 2007.
For the respondent	:	Mr. R.K.Sharma, Senior Advocate with Ms. Anita Parmar, Advocate, for the respondent in FAO No. 107 of 2007.
		Mr. B.P.Sharma, Senior Advocate with Mr. Arun Kumar, Advocate, for the respondent in FAO No. 86 of 2007.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ. (Oral)

In these appeals, so filed under the provisions of the Workmen's Compensation Act, 1923 (hereinafter referred to as the Act), both Bhagat Ram (claimant) and Hemender Kumar Gupta (employer) have assailed same award dated 19.2.2007, passed by the Commissioner under the Workmen's Compensation Act, Karsog, District Mandi, H.P., in File No. 4, titled as *Sh. Bhagat Ram vs. Sh. Hemender Kumar Gupta*.

2. Appeal filed by the claimant, being FAO No. 86 of 2007, titled as *Bhagat Ram vs. Hemender Kumar Gupta,* stands admitted on the following substantial questions of law:-

> "1. Whether the judgment of the Workmen Compensation Commissioner, can be sustained, assessing the liability of the petitioner against the medical evidence produced on the record.
>
> 2. Whether the assessment of the amount awarded to the petitioner is in accordance with the proved wages and the Workmen Commissioner committed an error in relying solely on the evidence of the respondent?"

3. Appeal filed by the employer, being FAO No. 107 of 2007, titled as *Hemender Kumar Gupta vs. Bhagat Ram,* stands admitted on the following substantial question of law:-

> "1. Whether the Workmen Commissioner has committed irregularity by not deducting/adjusting the amount paid by the appellant in lieu of compensation and for treatment to the workmen while calculating the compensation,

particularly when compensation has been calculated for 100% disability of index finger of workmen, whereas, the disability caused to the workmen is only 50%?"

4. Having heard learned counsel for the parties, primarily following issues arise for consideration in the instant appeals:-

1. As to whether findings returned by the Commissioner Workmen with regard to the nature of workmen's engagement, employment and deployment are borne out from the record or not?

2. Whether the Commissioner Workmen should have applied the factor of 14% so prescribed in Schedule I, Part II or should have applied Schedule I, Part II, sub-Clause 4, considering the nature of injury suffered by the claimant?

3. Whether the disability, functional or otherwise, is to the extent of 50% or 100% considering that workman cannot continue to discharge the duties which he was so performing prior to the date of the incident in question?

4. Whether the employer is liable to pay, if at all, the amount of interest and penalty on the compensation so awarded by the Commissioner Workmen and such sum which may be enhanced by this Court?

5. Certain facts are not in dispute. Claimant was working as a workman with the employer. While on duty and in the course of discharge of his duties, claimant sustained injury as a result of an accident. Fault is not attributable to him. Accident took place on 21.8.2004 while working on the machine (stone crusher) installed by the employer. Immediately claimant was brought by the employer to the Indira Gandhi Medical College & Associated Hospital, Shimla, for treatment, where he was hospitalized for few days. His index finger had to be amputated. Medical Board so constituted to examine the disability opined such percentage to be 50%. Dr. R. K. Gupta (PW-3) has proved certificate (Ext.PW-3). Quite apparently, claimant cannot use the left hand in view of amputation of left hand index finger and fixed extension deformity on tissue in lateral aspect of the palm. This Court has also seen the claimant and quite apparently the hand cannot be used for performing any job.

6. It was pointed out that the claimant was actually not discharging the duty of a 'loader' on the crusher/machine but that of a 'munshi/clerk'. But then this fact is not borne out from the record. Also Commissioner Workmen has found the claimant to have been employed and engaged for discharging the duties on the machine.

7. In his testimony, claimant Bhagat Ram (PW-1) does state that even though the disability certificate so issued by the Medical Board is to the extent of 50% but in effect, he is not able to discharge and perform such duties as he was so performing immediately prior to the occurrence of the accident.

8. It is a matter of record that the employer has also stepped into the witness box and from his testimony (RW-1), nature of employment and engagement of the claimant as workman cannot be disputed. Also he stood disengaged subsequent to the occurrence of the accident.

9. Now significantly, there is no material on record indicating that the claimant was engaged to discharge the duties of a 'munshi/clerk'. As such having appreciated the material on record, this Court is of the view that the claimant was employed and engaged to discharge the duties of a crusher operator on the machine and as a resultant to the accident, cannot continue to perform the same with a single hand.

10. There is also not much dispute with regard to the wages. A sum of Rs.90/- per day was being paid to the claimant.

11. It is a matter of record that the Commissioner Workmen, on the basis of pleadings of the parties, framed following issues for consideration:

"1. Whether the petitioner was deployed as Driver/operator/servant with/by the respondent No. 1 in his stone crusher at the monthly wages of Rs. 5000/- excluding Rs. 20/- per day towards fooding etc. and comes within the definition of workmen under the W.C. Act? (OPP)

2. Whether the petitioner received/sustained injuries while working on the said stone crusher and lost his fingers of his left hand leading to permanent disablement and is therefore entitled to receive Rs.4,87,056/-? (OPP)

3. Whether the petitioner was employed as Munshi on daily wages @ Rs. 90/- per day by the respondent No. 1? (OPR)

4. Whether the petitioner himself took the risk and lost his one finger of left hand and as such the petitioner does not fall in the definition of workmen and therefore the petitioner is not entitled for any compensation from the respondent No. 1? (OPR)

5. Relief."

12. Issues No. 1, 2 and 3 were decided partly in favour of the claimant, for he was held to be gainfully employed, on daily wages, payable @ Rs.90/- per day unlike his claim of Rs.5000/- per month and issue No. 4 was also decided in his favour for it was found that the cause of accident was not a result of mistake or negligence on the part of the claimant. Thus the Commissioner Workmen held the claimant entitled to compensation in the following terms:

1.	**Monthly wages of the petitioner**	**90 X 30 = 2700.00**
2.	**Age of the injured. (As per birth certificate)**	**44 years.**
3.	**Relevant Factor**	**172.52**
	Total compensation (As provided u/s 4(1)(b)	**An amount equal to 60% of the monthly wages of the injured workman multiplied by the relevant factor.** **OR** **An amount of Ninety thousand rupees, which ever is more.** **2700 X 60 =1620.00** **100** **1620 X 172.52 = 279482.40**
	Percentage of loss of earning capacity quantified at (As per schedule I Part II	**14%**
	Total compensation	**279482 x 14** **100** **= 39127.50**

13. Wages of the claimant is not in dispute. He was paid a sum of Rs.2700/- per month. At the time of accident he was 44 years of age.

14. The expression "total disablement" has been defined in Section 2(1)(l) of the Act as under:

> "(l) *"total disablement"* means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement:
>
> [Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more;]" [Emphasis supplied]

15. The expression "partial disablement" is defined under Section 2(1)(g) of the Act, which also reads as under:

> "(g) *"partial disablement"* means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time; provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement;"

16. By virtue of Section 3 of the Act, liability to pay compensation to the workman is that of the employer. Clause (b) of sub-section (1) of Section 3 of the Act carves out an exception and that being in respect of any injury, not resulting into death or permanent total disablement, caused by an accident which is directly attributable to the workman under the influence of drugs or alcohol; disobedience to comply with the orders for securing the safety of the workmen; or willful removal/disregard of the workman of any safety guard provided for the purpose of securing the safety of workmen.

17. In the instant case, exception so carved out in Section 3 of the Act is not applicable. Thus liability to pay is squarely that of the employer.

18. The question which arises for consideration is as to how the amount of compensation is to be determined. Mr. B.P.Sharma, learned Senior Counsel, while inviting attention of the Court to the provisions of Clause (b) of sub-section (1) of Section 4 and Schedule I, Part II and Schedule IV of the Act contends that the Commissioner Workmen, correctly determined the compensation under the Act. Whereas, on the other hand, Mr. R.K. Sharma, learned Senior Counsel, relying upon the very same provisions contends that Note 71 so inserted in Part II of Schedule I specifically prescribes that "complete and permanent loss of the use of any limb or member referred to in the Schedule shall be deemed to be the equivalent of the loss of that limb or member".

19. Now Sr. No. 4 of Part II of the said Schedule reads as under:

> "4. Loss of a hand or of the thumb and four fingers of one hand or amputation from 11.43 cms. below tip of olecranon"

The statute defines the percentage of the loss of earning capacity as a result of loss of hand to be 60%.

20. In the instant case, even though the Doctors have opined the disability of the claimant, permanent in nature, to be 50%, but however, if one were to apply the principle of law laid down by the Apex Court in *Pratap Narain Singh Deo vs. Srinivas Sabata & another,* (1976) 1 SCC 289 (Four Judge), it can be said that the petitioner has suffered total disablement. In the said decision, the Court observed that:

> "5. The expression "total disablement" has been defined in Section 2(1)(l) of the Act as follows:

> (l) *"total disablement"* means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

> The injured workman in this case is carpenter by profession . . . . By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only.

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to Item 3 of Part II of Schedule I, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less that $4^{1/2}$" below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established."

21. In a case where leg of a driver as a result of accident had to be amputated, the Apex Court in *S. Suresh vs. Oriental Insurance Company Limited & another,* (2010) 13 SCC 777 held loss of disability to be 100% by equating the disability with the earning capacity and not to be the one so certified by the Medical Board.

22. A Coordinate Bench of this Court in *Puran Dutt vs. H.R.T.C.,* 2006 (3) Shim.LC 222 has also held to similar effect.

23. If one were to peruse the statement of the Doctor (PW-3), it is quite apparent that the claimant cannot use whole of his hand. Thus, this court is of the considered view that the principle of law laid down by the Apex Court in *Pratap Narain Singh Deo* (supra) is squarely applicable to the instant case. With the amputation of one finger and the tissues of the hand being damaged, resulting into the hand not being used for the discharging of duties, which the claimant was otherwise performing prior to the occurrence of the accident, disability, functional in nature, is actually to the extent of 100%. He cannot operate the machine any longer. Also his services were retrenched by the employer. He cannot pursue any other vocation, for he is not educated. He can also not till his agricultural land. Thus, this Court is of the considered view that the Commissioner Workmen erred in not correctly appreciating and applying the law to the attending facts and circumstances of the case.

24. Claimant is thus entitled to compensation, higher than what stands awarded by the Commissioner Workmen, in the following terms:

1.	**Monthly wages of the workman**	**Rs.90 X 30 = Rs.2700.00**
2.	**Age of the injured.**	**44 years.**
3.	**Relevant Factor**	**172.52**
	Total compensation (As provided u/s 4(1)(b)	**An amount equal to 60% of the monthly wages of the injured workman multiplied**

		by the relevant factor. **OR** **An amount of Ninety thousand rupees, which ever is more.** **2700 X 60 = Rs.1620.00** **100** **1620 X 172.52** **= Rs.279482.40**
4	**Disability, functional in nature.**	**100%**
5	**Principal amount of compensation**	**279482 x 100** **100** **= Rs.279482/-**

25. Now in the instant case, the claimant was not paid the amount within the stipulated period. No doubt he was taken to the hospital and undisputedly expenditure of a sum of Rs.16,000/- was incurred by the employer for treatment of the claimant and charges for maintenance of the attendant, which amount Sh. R.K. Sharma, learned Senior counsel fairly states should be deducted from the principal of the amount of compensation so determined supra. Thus the amount of compensation payable by the employer to the claimant would be Rs.2,79,482 - Rs.16,000 = Rs.2,63,482/-.

26. The next issue which arises for consideration is whether the claimant is entitled to interest on the aforesaid amount and as to whether the employer is liable to pay any penalty or not?

27. Penalty and interest has to be paid from the date of default as is so held by the Apex Court in *Oriental Insurance Company Limited vs. Mohd. Nasir & another,* (2009) 6 SCC 280.

28. As has already been held by the Apex Court in *Mohd. Nasir* (supra) the amount which falls due as compensation is required to be deposited by the employer with the Commissioner Workmen. It could have also been paid to the workman which was not so done. In fact, no amount was paid to the claimant. Only an amount of Rs.39,127/-, so awarded by the Commissioner in terms of the impugned Award was deposited with the Commissioner Workmen Compensation, Karsog on 17.3.2007 i.e. within one month from the date of passing of the award. As such claimant would be entitled to simple interest @ 12% in terms of Section 4-A(3)(a) of the Act on a sum of Rs.2,24,355/- [Rs.2,63,482 minus Rs.39,127] from 21.9.2004 i.e. one month after the date of the accident, till today (12 years, 11 months & 10 days) which comes to Rs.3,48,510/-.

29. As such, the total amount of compensation, due and payable to the claimant on account of compensation claim including the simple interest would be Rs.2,63,482 + Rs.3,48,510 = Rs.6,11,992/-. But the issue of penalty is still left.

30. In the instant case, there was no fault on the part of the workman in claiming compensation. Also there is no justification on the part of the employer exempting him from depositing the amount of compensation. As such, this Court is of the considered view that the

claimant shall also be entitled for penalty @ 30% on the aforesaid amount of Rs.6,11,992/- which comes to Rs.1,83,598/-.

31. Thus, the total amount of compensation to which the claimant shall be entitled to would be Rs.2,63,482 + Rs.3,48,510 + Rs.1,83,598 = Rs.7,95,590/-. The aforesaid amount of Rs.7,95,590/- shall be paid by employer Hemender Kumar Gupta.

32. Mr. Arun Kumar, learned counsel states that the employer shall deposit the amount within a period of four months from today. Ordered accordingly.

Substantial questions of law are answered accordingly. Both the appeals stand disposed of as also pending applications, if any.

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

Dr. Rajesh K. Sharma. ..... Petitioner

Vs.

Union of India and others ..... Respondents

CWP No. 176 of 2011
Date of decision: 30.8.2017

Constitution of India, 1950- Article 226- Respondent No. 2 invited applications for the post of lecturers including lecturer in Material Science and Engineering- the petitioner was selected and was granted extension of joining time till 30.12.2009 subject to the condition that no further extension would be granted to him- the petitioner claimed that respondent No. 2 was aware that petitioner was selected for one year contract with University Montpellier 2 France for research in the field of nano technology – he was wrongly granted extension for a period of 6 months- held that petitioner had sought to improve his career prospect on his own and had accepted 12 months contract with the University at France- no consent was given by the respondent No. 2 for the same – the option lies with the petitioner to serve either at France or to report to the respondents- the interest of students has to be taken into consideration- maximum extension of 6 months can be granted which was granted in favour of the petitioner – no legal duty of the petitioner has been violated by the respondents – petition dismissed. (Para-4 to 17)

Cases referred:

G. Atchaiah vs. Registrar, Kakatiya University 2000 (3) ALD 403 : 2000 (3) ALT 192.
Zonal Manager, Central Bank of India vs. Devi Ispat Limited and others (2010) 11 SCC 186

For the petitioner — Ms. Ranjana Parmar, Senior Advocate, with Ms. Rashmi Parmar, Advocate.

For the respondents — Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Adarsh Sharma, Advocate, for respondent No.1.
Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The facts lie in narrow campus. The National Institute of Technology, Hamirpur (for short NIT), i.e. respondent No.2 herein, invited applications for the posts of

Lecturers including lecturer in Material Science and Engineering. The interviews for the said recruitment were conducted in February, 2009 and the petitioner was offered an opportunity to appear before the selection committee through video conferencing from South Korea. The petitioner was selected and on his request (Annexure P-9) he was granted extension in joining time upto 30.12.2009 subject to the condition that no further extension would be granted to him (Annexure P-10).

2. Now, the grievance of the petitioner is that the respondent No.2 Institute despite knowing fully well that the petitioner had been selected for one year contract with University Montpellier 2 France for research in the field of nanotechnology, illegally granted only six months time to the petitioner to join knowing fully well that it would be impossible for him to join within the time so granted. Feeling aggrieved, the petitioner has filed the instant writ petition for grant of following substantive reliefs:

(a) That the order of cancellation of the appointment of the petitioner as lecturer in material science at National Institute Technology, Hamirpur dated 20th January, 2010 issued by the Registrar of NIT, Hamirpur be quashed and set-aside.

(b) *That the respondents be further directed to consider appointing the petitioner to the post of Lecturer in Material Science & Engineering giving effect to letter No. NIT-HMR-Admn-Apptt-282-2009-1211-15 dated 1st of June, 2009 (Annexure P-8) vide which the petitioner was appointed to the post of lecturer at NIT, Hamirpur.*

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

3. It is vehemently argued by Ms. Ranjana Parmar, Senior Advocate assisted by Ms. Rashmi Parmar, Advocate that the action of the respondents in granting only six months extension to the petitioner is vitiated because of the non-application of mind by the respondents as it was within their knowledge that it would be impossible for the petitioner to join within six months as he had already entered into one year contract as a research fellow University at France and strong reliance in support of such submission is placed upon the judgment of learned Single Judge of Andhra Pradesh High Court in ***G. Atchaiah vs. Registrar, Kakatiya University 2000 (3) ALD 403 : 2000 (3) ALT 192.***

4. I have minutely gone through the judgment relied upon by the petitioner and find that the petitioner therein was appointed as Lecturer in Pharmacy on 16.04.1991 and while he was on probation, he applied for the post doctoral research work in Germany, which was of minimum period of 16 months extendable by one more year as per the prospectus. As per the guidelines of the University Grants Commission (for short 'UGC'), a person selected to do this post doctoral research work, is entitled to be paid full salary during the research work and if any substitute is posted by the concerned University, 50% of the emoluments are to be met by the UGC. The respondent-University in that case rejected the request of the petitioner to do post doctoral research work on the ground that he was only a probationer, but, ultimately on the directions of the UGC, the respondent therein sponsored the candidature of the petitioner only for a period of one year as per proceedings dated 07.11.1992. While relieving the petitioner to go abroad, the respondent-University got a bond executed from the petitioner and as per the condition of the bond, an amount of Rs.10,000/- was to be forfeited in case:

(i) if he fails to report after completion of the course;

(ii) if he returns to India without completing the course ; and

(iii) if he fails to serve the respondent-University for a period of three years.

5. The petitioner therein left for Germany on 25.11.1993 and as the post doctoral research work was to be undertaken in German language, he underwent foundation course in German language for over five months and thereafter took the post doctoral research work. The University extended the petitioner stay upto 01.04.1994, but his further request to the University to complete the course was rejected and the petitioner was threatened that his services with the University would stand terminated in case he fails to join back. Later on, the University terminated the services of the petitioner vide letter dated 13.06.1994 with retrospective effect i.e. 01.04.1994.

6. Questioning the said order, the writ petition came to be filed by the petitioner and the same was allowed on the ground that when once the permission had been granted by the University, it could not raise a dispute that the petitioner had applied for the course without the knowledge of the University.

7. Thus, it would be evidently clear from the above discussion that the facts in ***G. Atchaiah's*** case (supra) are entirely different from the instant case and it was in the given facts and circumstances that the Court granted relief to the petitioner therein. Even otherwise, once the competent authority i.e. University had granted the permission to the petitioner, they could not feign ignorance regarding the application having been submitted to the UGC without the knowledge of the University.

8. Whereas, in the instant case, it was the petitioner who of his own, had sought to improve his career prospectus and accepted 12 months contract with the University at France. This contract was not undertaken with the consent whether express or implied of the respondent. It was therefore for the petitioner to opt for research work at France or to join the University, even if, it entailed certain other consequences. The petitioner at this stage cannot be heard to complain that because his family had been staying at France or that he had an accommodation with electricity, water, internet, medical insurances and permit contracts, which were valid for one year, he should have been granted extension as a matter of right.

9. As observed above, it was for the petitioner to have opted to serve either at France or report to the respondents, he cannot be heard to complain, more particularly, when it has specifically come on record that the services of the petitioner were essentially required before January, 2010 to start the academic session particularly once it has come on record that the respondents in view of non-joining of the petitioner had to make alternate arrangements by recruiting the faculty on contract for this purpose to accomplish the start of new academic session as per schedule. The petitioner has only made grievance about his individual prospects, but has kept mum and silent on the question of larger interest of the students, who obviously would have or rather had suffered on account of his non-joining within the stipulated period. It is more than settled that individual interest, aspiration and ambition has to yield the larger public interest.

10. That apart, it would be noticed that the respondent- Institute is a State within the meaning of Article 12 of the Constitution of India and cannot, therefore, act 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 or its instrumentalities have to strictly fall within the four corners of the law and all its activities are governed by the Rules, Regulations, Instructions etc.

11. In the present case also, the instructions contained in GOI OM 9/23/71-Estt.(D) dated 6th June, 1978 cited in the Establishment and Administrative Manual (Annexure R-1), only provide for extension of six months in cases like that of the petitioner

and obviously therefore the respondents being bound by such instructions could not have flouted or violated the same.

12. The petitioner has not been able to show any instruction to the contrary and, therefore, cannot be heard to complain that the action of the respondent(s) is illegal only because they choose to follow the law.

13. As noticed above, the petitioner apart from other reliefs has sought a writ of mandamus, which can only be enforced in case the petitioner can prove his legal right and corresponding performance of a legal duty by the respondent(s).

14. It is the basic principle of jurisprudence that every 'Right' has a co-relative 'Duty' and every 'Duty' has a co-relative 'Right'. But the rule is not absolute. It is subject to certain exceptions in the sense that a person may have a 'Right' but there may not be co-relative 'Duty'. 'Right' is an interest recognized and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for such interest would be a legal duty. That is how *Salmond* has defined the "Right". Therefore, in order, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also legal recognition. The elements of a 'Legal Right' are that the 'right' is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting in a manner so as to prevent the violation of the right, if, therefore, there is a legal right vested in a person, the latter can seek its protection against a person who is bound by a corresponding duty not to violate that right.

15. In ***Zonal Manager, Central Bank of India vs. Devi Ispat Limited and others (2010) 11 SCC 186,*** the Hon'ble Supreme Court held that mandamus can be issued by the High Court under Article 226 of the Constitution, if a legal right must exist and/or corresponding legal duty is available to be performed by the State or its instrumentality.

16. A writ of or in the nature of mandamus, it is trite, is ordinarily issued where the petitioner establishes a legal right in himself and a corresponding legal duty in the public authorities.

17. Thus, on the basis of the aforesaid discussion, the petitioner having failed to establish his right and having failed to point out any corresponding legal duty in the public authority i.e. respondent(s), is, therefore, not entitled to any relief whatsoever. Accordingly, there is no merit in this petition and the same is dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

Lekh Ram & another ....Appellants/defendants.

Versus

Smt. Kamla Devi & others ....Respondents/Plaintiffs.

RSA No. 386 of 2006.
Reserved on : 22nd August, 2017.
Decided on : 30th August, 2017.

Specific Relief Act, 1963- Section 34 and 38- Plaintiff pleaded that he is joint owner in possession with proforma defendant No. 3 – plaintiff was aged 95 years and was residing with his wife- plaintiff had executed a Will in favour of R but he was compelled by defendant No. 1 who had greedy eyes on the property of the plaintiff – plaintiff was taken to the office of sub registrar

for the cancellation of earlier will – subsequently, plaintiff came to know that the gift deed was got executed by defendant No. 1 – the defendants pleaded that the gift deed was executed in sound disposing state of mind – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that dismissal of the application to file the suit as indigent person does not bar the institution of a fresh suit – previous suit does not constitute res judicata as the validity of the gift deed was not challenged in the same – the Courts had rightly appreciated the evidence- appeal dismissed. (Para-8 to 11)

For the Appellants: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

For the Respondents: Mr. Ashwani Kaundal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs instituted a suit against the defendants, claiming therein a decree for declaration, possession, permanent prohibitory injunction as well as for mandatory injunction. The suit of the plaintiffs stood decreed by the learned trial Court. In an appeal carried therefrom by the defendants before the learned First Appellate Court, the latter Court dismissed the appeal, whereupon, it concurred with the verdict recorded by the learned trial Court. In sequel thereto, the defendants/appellants herein are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that original plaintiff Sasaru filed a suit against the defendant seeking declaration to the effect that the plaintiff is joint owner in possession alongwith proforma defendant No.3 of the suit land along with the houses the description of which has been given in the plaint and defendant No.1 was a licensee with consequential relief of permanent injunction restraining the defendant from interfering in the right, title or interest of the plaintiff and in the alternative for mandatory injunction to vacate the land and the houses or for possession. It was averred that the plaintiff was 95 years old and she is of weak mind living with his old wife and has no male issue except two daughters, one from first wife Smt. Lakshmi and the other daughter never came to see him and she is residing with defendant No.1. The plaintiff was unable to perform the manual work and whenever the plaintiff and his wife arranged the services of any one for doing the agriculture work, defendant No.1 having eye on the property of the plaintiff threatened those persons. Defendant No.1 also advised the plaintiff not to bring any body from outside and had been telling that the Will which the plaintiff has executed in favour of Ram Singh be got revoked. The plaintiff had actually executed a Will in favour of Ram Singh but the said Ram Singh was compelled by defendant No.1 to leave his house. Defendant No.1 had greedy eyes on the property of the plaintiff and arranged for all work claiming that it is his duty to look after old person and similarly after some time he also assured the plaintiff that he will arrange for harvesting the crop and the same will be stored at the house of the plaintiff to which the plaintiff agreed. It was further averred by the plaintiff that defendant No.1 being the Pradhan of the adjoining Panchayat and dominated the Will of the plaintiff and took him under his influence. Defendant No.1 on the pretext of revoking the earlier Will brought the plaintiff to Bilaspur on 5.3.1982 to cancel the Will executed by the plaintiff in favour of Ram Singh to which the plaintiff agreed and signed the document for cancellation as he was told that it was a deed of cancellation of earlier Will and the same was registered with Sub Registrar, Bilaspur. At the time of sowing the Kharif crop, defendant No.1 assured the plaintiff that he may be allowed to cultivate the land and defendant No.2 was allowed to do the household work. The plaintiff and his wife believed them and allowed them to serve, cultivate the land in lieu of the services promised to be rendered and for providing them all the necessity of life. It was further averred that the defendant cultivated suit land as licencee without any right, title or interest and continued doing so far a year. In the meantime, the defendants threatened to oust him from the

house on the plea that defendant No.1 got gift deed of the property of the plaintiff. As such, the plaintiff filed an application under Order 33, Rule 1 CPC, for permitting the plaintiff to sue as an indigent person. The defendants contested the application and appared through his counsel and filed the reply. The defendants did not allow him to appear in the Court and as such, the application was dismissed for want of presence. Defendant No.1 for another one year worked as licencee but when proforma defendant No.3 filed a suit before the Court of learned Senior Sub Judge, Bilaspur, in which the plaintiff also filed the reply and admitted the claim preferred by her and defendant No.1 upon which become angry. However, proforma defendant No.3 withdrew the suit with permission to file afresh. The plaintiff had to admit certain facts during the pendency of the suit and the learned Senior Sub Judge decreed the suit and declared the gift null and void. Both the parties have gone in appeal against that order before the learned District Judge. Defendant No.1 thereafter did not perform his promise and left the plaintiff and his wife in distress. Defendant No.1 has also filed written statement in civil suit in a case titled Hardei Vs. Lekh Ram on 7.9.1989 and started claiming his title on the basis of the gift which he has abandoned long before. However, the defendant took him to his house saying that he had no claim for the alleged gift and upon his assurance the plaintiff allowed him to cultivate his land in lieu of the services to be rendered and maintained him and his wife decently from the agriculture income of the land of the plaintiff.

3. The defendants contested the suit and filed written statement. In their written statement, they have pleaded that the plaintiff has executed a registered gift deed in favour of defendant No.1 on 5.3.1982 and the possession thereof was delivered to him and after the executing of the gift deed defendant No.1 is owner in possession of the suit land. The plaintiff is hale and hearty but is a chronic litigant and as such this false and frivolous suit has been filed simply to harass the defendant and to get the gift deed set aside. It is further averred by the defendant that the plaintiff was properly maintained by defendant No.1. It is denied that the plaintiff was brought to Bilaspur for revoking the Will. Defendant No.1 is maintaining the plaintiff and paying all expenses. It is also denied that the plaintiff is in a possession of the suit land. The defendant never worked as licencee, but he is owner in possession of the suit land and the plaintiff has no right, title or interest and even the previous suit was filed by Hardai in connivance with the plaintiff. Certain preliminary objections as to limitation, resjudicata, cause of action and maintainability were further raised on behalf of the defendants.

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

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

1. Whether the plaintiff and proforma defendant are joint owner in possession of the suit land and residential house situate over it as alleged?OPP

2. Whether the plaintiff is entitled for relief of permanent prohibitory injunction as agreed?OPP.

3. Whether the plaintiff is entitled for decree of mandatory injunction as prayed? opp

4. Whether the suit is barred under Section 11 CPC? OPD

5. Whether the suit is time barred? OPD.

6. Whether the suit is not maintainable as the parties have entered into alleged compromise? OPD.

7. Whether the suit is not maintainable as the first suit filed by the plaintiff on the same cause of action which was dismissed? OPD.

8. Whether the suit of the plaintiff is not maintainable as alleged in para 5 of the written statement, as alleged? OPD

9. Whether the plaintiff is estopped to file the present suit by his act and conduct? OPD.

10. Whether the plaintiff has executed a valid gift deed and handed over the possession of the suit land in favour of defendant No.1. If so its effect? OPD.

11. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom by the defendants/appellants before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein he assails the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission, on 28.02.2007, this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the suit, out of which this appeal has arisen, was barred by time, especially when at least in the year 1984 deceased Sansaru, the donor, knew about the gift deed, as per recitals of the application to sue as an indigent person, which he filed in that year?

b) Whether the suit was barred by the principle of res-judicata?

Substantial questions of Law No.1 and 2:

8. The learned senior counsel appearing for the defendants/appellants herein has with vigour contended before this Court, that with the donor instituting a previous suit/application seeking therein leave to sue as an indigent person, whereas, with the apposite application/suit comprised in Ex. D-5, standing dismissed in default, thereupon, the embargo of estoppel embodied in Order 9, Rule 9 of the Code of Civil Procedure against the institution of a fresh suit in respect of therewith analogous suit property hereat, stood attracted vis-a-vis the extant suit of the plaintiff, rather the only remedy available to the plaintiffs/respondents herein was to seek restoration of the application seeking leave of the Court concerned to sue as an indigent person besides to seek restoration of the suit, remedies whereof remaining unavailed by the donor, thereupon, the extant suit of the plaintiff/donor being reinforcingly barred by the principle of constructive res judicata. Also he alludes to the conclusive and binding judgment(s) and decree(s) borne in Ex. D-6, recorded by the Civil Court in Civil Suit No.39/1 of 1988, decrees whereof stood affirmed in Civil Appeal No. 27 of 1990, wherein declaratory relief(s) stood pronounced in respect of validity of the relevant gift deed impugned hereat, besides with the plaintiffs/respondents herein being also arrayed as co-defendants therein, to, espouse therefrom qua the principle of res judicata being rendered fortifylingly attracted in respect of the extant suit, whereupon, the plaintiff is barred to re-agitate the controversy in respect of validity of gift deed borne in Ex.DW2/B by hers/theirs reinstituting the instant suit. He has also proceeded to contend that with Ex.DW6/A holding revelations in respect of the donor accepting the validity of the gift deed also hence ousting her to, through the instant suit, re-agitate its valid execution. The crucible for determining the strength of the aforesaid submission rests upon the recitals borne in the registered deed of conveyance comprised in Ex.DW2/B, wherefrom it is to be fathomed qua its vesting absolute title or rights upon the donor in respect of the property borne therein or its vesting contingent right or imposing condition(s) subsequent upon the donee besides its enclosing therein any defeasance clause(s), on infractions whereof occurring at any moment, inference(s) would stand garnered that on each moments of infraction(s) of condition(s) subsequent or of evident transgression(s) of defeasance clause(s) incorporated therein, thereupon, legally permissible causes of actions accruing vis-a-vis the plaintiffs/respondents, dehors Ex.D-5, exhibit whereof comprises an application/suit seeking leave to sue as an indigent person, standing under Ex. D-4, hence, dismissed for default. In making the aforesaid fathoming(s), it is

imperative to allude to the recitals borne in the gift deed borne on Ex.DW2/B, an allusion thereto, unfolds that thereunder the donor had made bestowment of the suit property upon the donee in lieu of services or in lieu of hers being maintained by the defendants/appellants herein. Occurrence of the aforesaid echoings in the gift deed, begets an inference that it did not make any absolute conveyance of the property borne therein vis-a-vis the donee rather it made contingent bestowment(s) thereof upon him besides hence it embodied therein defeasance clause(s) or imposed condition(s) subsequent upon him. Evident infraction(s) thereof, if any, at any moment arousing legally permissible causes of action vis-a-vis the plaintiffs/respondents. However, before proceedings to allude to the testification made by the defendant in respect of his not adhering to the condition(s) subsequent or qua his transgressing the defeasance clause(s) embodied in gift deed comprised in Ex. DW2/B, it is significant to allude to the mandate of Order 33, Rule 15 of the CPC, provisions whereof stand extracted hereinafter:-

> **"15. Refusal to allow applicant to sue as an indigent person to bar subsequent application of like nature.-** An order refusing to allow the applicant to sue as an indigent person shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that the plaint shall be rejected if he does not pay, either at the time of the institution of the suit or within such time thereafter as the court may allow, the costs (if any) incurred by the State Government and by the opposite party in opposing his application for leave to sue as an indigent person."

for therefrom garnering qua the tenacity held by the espousal made before this Court by the counsel, for the appellants, that the dismissal in default of the application/suit of the plaintiffs/respondents herein wherein he sought leave to sue as an indigent person, whereafter, his/hers yet not seeking its apt restoration, thereupon the suit of the plaintiff being barred by the principle of constructive res judicata. A closest reading of the mandate of Order 33, Rule 15 of the CPC, discloses that the mere dismissal of the apposite application, wherein she had sought leave of the Civil Court for suing as an indigent person per se, thereupon, not constituting any rigid statutory bar against the donor instituting a fresh suit in respect of analogous therewith subject matter borne herein. Consequently, even if under Ex.D-4, the application of the donor, wherein, he/she sought leave to sue as an indigent person hence stood dismissed in default, whereafter, he/she did not seek its restoration, yet thereupon his/her right to institute a fresh suit in respect of the subject matter borne in the previous suit, cannot, be forestalled nor hence the bar of the constructive res-judicata, is, attractable vis-a-vis the instant suit, preeminently when the extant suit has been valued for the purpose of court fee and jurisdiction and court fee of Rs.13/- stands affixed on the plaint.

9. Nowat the impact of the judgment(s) rendered in Civil Suit No. 39/1 of 1988, verdict whereof is borne in Ex. D-6 and of the verdict concurrent therewith rendered in Civil Appeal No.27 of 2010, wherein pronouncements occur with respect to the validity of the gift deed borne in Ex. DW2/B also the impact of Ex. DW2/A, wherein she/he has admitted the validity of execution of gift deed, qua thereupon the extant suit of the plaintiff being barred, warrants is apt fathoming. However, as aforestated with the recitals borne in the gift deed making graphic disclosure(s) in respect of, it, not creating any absolute indefeasible title in respect of the property borne therein vis-a-vis the donee, the defendants/appellants herein, rather it constituting therein a defeasance clause(s) also its imposing apposite condition(s) subsequent, comprised, in the defendants/appellants rendering services vis-a-vis the donor, recitals whereof when stand coagulated with the defendant in his testification, accepting his breaching conditions subsequent embodied in Ex.DW2/B, besides obviously his accepting his transgressing defeasance clause(s) occurring therein, thereupon, an inference is bolstered that at all moment(s) of each of breach(es) or transgression(s) of the defeasance clause(s) embodied in Ex.DW2/B, thereupon, fresh legally permissible causes of action being vested vis-a-vis the donor, whereupon, the subsequently instituted extant suit, is not barred, dehors, the previous rendition(s) borne in Ex. D-6, wherein a declaration occurs with respect to the validity of Ex. DW2/B, predominantly, when in the earlier

renditions of the Civil Courts borne in Ex.D-6, there is no evidence qua the courts concerned pronouncing upon the trite relevant fact of gift deed, holding therein condition(s) subsequent or holding articulation(s) qua defeasance clause(s) nor obviously also the aforestated exhibits pronounced upon the impact of infraction of condition(s) subsequent or of infraction of defeasance clause(s) or theirs diluting the efficacy of Ex.DW2/B. In aftermath, too hence the registered instrument of gift yet remaining intact for a challenge being thrown vis-a-vis its validity nor when the donor is not shown to depose therein in respect of apt breaches, of, condition(s) subsequent comprised therein, thereupon, this Court is constrained to conclude that none of the aforesaid exhibits operate as resjudicata for hence the plaintiffs/respondents herein being forestalled to institute the instant suit, preeminently, when evident breaches of condition(s) subsequent stand displayed.

10. Cumulatively with this Court concluding hereinabove that as and when breaches of condition(s) subsequent besides of defeasance clause(s) embodied in Ex.DW2/B, standing proven, thereupon legally permissible fresh causes of action accruing vis-a-vis the plaintiffs/respondent herein, whereupon, with the plaint making disclosures of the defendants/appellants herein making breaches of condition(s) subsequent, occurring in the gift deed comprised in Ex.DW2/B, whereafter with the donor promptly filing the extant suit, renders its reinstitution to fall within limitation, predominantly thereupon also disabling effects, if any, of all previous verdicts upon alike herewith suit property stand subsumed.

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

12. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Puran Dutt & others .....Appellants/plaintiffs.

Versus

State of H.P. .....Respondent/Defendant.

RSA No. 220 of 2005.
Reserved on : 22.08.2017.
Decided on : 30th August, 2017.

Specific Relief Act, 1963- Section 34 and 38- The predecessor-in-interest of the plaintiff was inducted as mortgagee and the mutation was attested to this effect – the land was vested in the State but by that time plaintiffs and their predecessor had become the owners after the lapse of 30 years – the entry showing the plaintiffs to be mortgagee and the State to be owner are wrong – the defendant pleaded that the land vested in the State under H.P. Ceiling of Land Holdings Act, 1972 - the plaintiffs were mortgagee and are only entitled to receive the mortgage amount – the suit was decreed by the Trial Court – an appeal was filed, which was allowed and the judgment of Trial Court set aside- held that it is not disputed that the mortgage was executed in favour of the predecessor-in-interest of the plaintiff and the land had vested in the State- the vestment was not challenged – usufructuary mortgage can be redeemed any time – the Appellate Court had rightly reversed the judgment of the Trial Court- appeal dismissed. (Para-7 to 12)

Case referred:
Singh Ram (dead) through legal representatives versus Sheo Ram and others, (2014)9 SCC 185

For the Appellants: Mr. Sanjay Sharma, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs instituted a suit against the defendants, claiming therein a declaratory decree by way of foreclosure besides a decree for permanent prohibitory injunction being rendered with respect to the suit property. The suit of the plaintiffs stood decreed by the learned trial Court. In an appeal carried therefrom by the defendant/respondent herein before the learned First Appellate Court, the latter Court allowed the appeal, whereupon, it disconcurred with the verdict recorded by the learned trial Court. In sequel thereto, the plaintiffs/appellants herein are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the predecessor-in-interest of the plaintiffs was inducted as mortgagee by the predecessor-in-interest of the defendant, i.e. one Shri Bala Ram, son of Shri Nankoo, on the land comprised in Khasra No.4,18 and 19, kitas 3, measuring 4-15 bighas, situated in mauja Shalau, Pargana Bagri Khurd, Tehsil Kandaghat, District Solan, H.P. for consideration and mutation No.49 was sanctioned accordingly in Samvat 1964, Baisakh 8. Since then, the predecessor-in-interest of plaintiffs and thereafter the plaintiffs have been coming in possession of the aforesaid land. The aforesaid land was vested in the State of Himachal Pradesh, in the year 1974-75. By that time, the plaintiffs and their predecessors-in-interest had already become owners in possession of the above said land by lapse of 30 years time since the date of mortgage as the predecessor-in-interest of the defendant had failed to get the said land redeemed within the prescribed period but the plaintiffs are shown as mortgagees under the State of Himachal Pradesh. Hence, vestment of the aforesaid land in the State of Himachal Pradesh/defendant itself is wrong, illegal and void. The revenue entires contrary to it and not showing the plaintiffs and their predecessors-in-interest as owners, after 30 years of the mortgage are wrong and illegal. As stated above, the plaintiffs have already become in owners in possession of the suit land by lapse of 30 years' time since the date of mortgage as to no moment of time, mortgage money was paid to the plaintiffs for their predecessors-in-interest. Hence, the defendant is duty bond under the law to get the revenue entries changed and corrected in favour of the plaintiffs and thereby showing the plaintiffs to be owners in possession of the suit land referred to above.

3. The defendant contested the suit and filed written statement, wherein, it has taken preliminary objection qua locus standi, estoppel, no cause of action, suit being bad for non joinder of necessary parties and jurisdiction. On merits, the defendant has not disputed that the suit land was in possession of the plaintiffs as mortgagee and Smt. Nazo wife of Shri Ram Saran, was the mortgagor of the suit land. But it is contended by the defendant that on promulgation of H.P. Ceiling of Land Holding Act, 1972, the land held by Smt. Nazo, show in the Ceiling return as surplus and the Collector, Sub Division, Kandaghat, declared the surplus other land as also the suit land and vested it to the State of H.P. vide order dated 13.01.1975. Mutation No.220 of 22.7.1975 was also attested in favour of the State of H.P., the status of the mortgagees remained as it was. The present plaintiffs have failed to file their objections before the Collector, Sub Division, Kandaghat at the time of hearing of the ceiling case and therefore, the suit land has rightly been vested to the State of H.P. The defendant has further pleaded that the plaintiffs are only entitled to receive the mortgaged amount as they are mortgagees under the H.P. Government.

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

1. Whether the plaintiffs have become owners-in-possession of the suit land by efflux of time, as alleged? OPP.

2. Whether the plaintiffs have no locus standi to file and maintain the present suit?OPD

3. Whether the plaintiffs are estopped from filing the suit due to their acts and conduct etc., as alleged?OPD.

4. Whether the plaintiffs have no cause of action to file the present suit? OPD

5. Whether this court has no jurisdiction to entertain and try the present suit, as alleged in para 2 of the preliminary objection?

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

7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the defendant/respondent herein before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission, on 18.05.2005, this Court, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the ld. District Judge was competent to decide the appeal on the basis of facts which were never pleaded by both the parties, if so, to what effect?

2. Whether the appellants/plaintiffs had become owners of the suit land by afflux of time in view of Section 63 of the Indian Limitation Act?

3. Whether the defendant was competent to mutate the land in favour of the State Govt. in view of Himachal Pradesh Ceiling and Land Holding Act, if so to what effect?

4. Whether the previous land owners could surrender the land in the suit to the State Govt. in view of Section 8 of the Ceiling and Land Holding Act, although they were not the owners of the suit land on the date of the Act having become applicable tin 1972, if so to what effect?

5. Whether the defendant/respondent was competent to mutate the land in favour of the State Govt. in view of the specific bar placed by the H.P. Ceiling land Holding Act, 1972, if so what effect?

6. Whether the defendant/respondent can redeem the mortgage after exercising the right of fore closure in view of Section 63 of the Indian Limitation Act, if so, what effect?

7. Whether the order of vesting of the land with the State under the Ceiling Act is without jurisdiction and nonest and if so what effect?

8. Whether the defendant/respondent is bound by the admission contained in the written state, if so what is its effect on the suit?

9. Whether this Hon'ble Court could set aside the judgment and decree of the Ld. Addl. District Judge without there being any appeal or revision filed

against the dismissal of the appeal of the defendant/respondent, if so what is its effect?

Substantial questions of Law No.1 and 9:

7. Uncontrovertedly, the hitherto owner of the suit property, one, Bala Ram created a mortgage in respect of the suit property upon the predecessor-in-interest of the plaintiffs. Mutation No.49 borne in Ex.PW1/A stood in consonance therewith, hence sanctioned in Samvat 1964, Baishakh 8. However, on coming into force of the Himachal Pradesh Ceiling on Land Holdings Act, 1972 (hereinafter referred to as the Act), the land held by Smt. Nazo, the successor-in-interest of aforesaid Bala Ram, was, thereunder declared to be surplus by the authority(ies) constituted under the aforesaid Act, sequelling, its, under an order recorded on 13.01.1975 statutory vestment in the State of Himachal Pradesh, whereafter, mutation bearing No.220 of 22.07.1975 was attested vis-a-vis the defendant, yet the status of the predecessor-in-interest of the plaintiffs, as a mortgagee therein remained intact.

8. The vires of the apposite proviso of the Act, holding contemplation(s) therein of land holdings, on, evidently falling in excess of theirs statutorily enjoined limits, thereupon, warranting their statutory vestment in the State of Himachal Pradesh, has, neither been subjected to any challenge nor obviously its mandate has been shown to be declared as ultra vires vis-a-vis the mandate of the Constitution of India. Consequently, the relevant provision(s) engrafted in the aforesaid legislative enactment, provisions whereof are comprised in Section 11 thereof, provisions whereof stand extracted hereinafter :-

> "11. Vesting of surplus area in the State Government;- The surplus area of the person shall on the date on which possession thereof is taken by or on behalf of the State Government, be deemed to have been acquired by the State Government for a public purpose on payment of amount hereafter provided and all rights, title and interests (including the contingent interest if any, recognized by any law), custom or usage for the time being in force, of all persons in such area shall stand extinguished and such rights, title and interests shall vest in the State Government free from any encumbrance;
>
> Provided that where any land within the permissible area of the mortgagor is mortgaged with possession and falls within the surplus area of the mortgagee, only the mortgagee rights shall be deemed to have been acquired by the State Government and the same shall vest in it."

Wherein stands encapsulated, the apposite statutory vestment of tracts of lands of landowner(s) falling in excess of their statutorily permissible land holding limits, does, oust the play of the mandate borne in Section 63 of the Limitation Act, whereunder a suit for foreclosure, is maintainable, at the instance of the mortgagee(s) arising from the mortgagor(s) concerned failing to within the statutorily prescribed time hence redeem the mortgage money vis-a-vis the mortgagee, dehors overriding therewith mandate of the Hon'ble Apex Court comprised in a case reported in ***(2014)9 SCC 185 titled as Singh Ram (dead) through legal representatives versus Sheo Ram and others***, wherein it stands expostulated qua usufructuary mortgage(s), the mortgagor(s) being entitled to, within conditions in respect thereof enshrined therein, hence, at any time, beget redemption of the mortgaged land(s). The relevant paragraphs No. 21 and 22 of the aforesaid judgment stand extracted hereinafter:-

> "21. We need not multiply reference to the other judgment. Reference to the above judgments clearly spell out the reasons for conflicting views. In cases where distinction is usufructuary mortgagor's right under Section 62 of the TP Act has been noted, right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of the right of redemption after 30 years.

> 22. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the TP 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 or deposit by the mortgagor. Until then, limitation does not start for the 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."

9. The crucial controversy warranting its being rested, is, whether the suit of the plaintiffs, is hence bad for non joinder(s) of the mortgagor or his successors-in-interest. The bestowal of right(s) of redemption, in the afore referred judgment rendered by the Hon'ble Apex Court, upon a mortgagor, when vests in him an indefeasible right, to, within a reasonable time or at any time hence redeem the mortgage, thereupon, the joining of the mortgagor or his successors-in-interest in the array of parties, was, rendered both imperative as well as peremptory, as her/theirs joining in the array of parties in the extant civil suit, would enable them to bringforth evidence in portrayal of the original mortgagor or his successors-in-interest, redeeming the mortgage money vis-a-vis the initial mortgagee. For want of joining of the initial mortgagor or his successors-in-interest in the array of the parties in the extant civil suit, has, precluded adduction of best evidence in respect of mortgage money being redeemed, thereupon, the suit for foreclosure is rendered defective. The effect of non joinder of the initial mortgagor or his successors-in-interest, in the array of parties in the extant civil suit, does hence constrain this Court, to, not impute absolute sanctity to the averment/contention, raised by the defendants in their written statement, of, the plaintiffs being mortgagees under the defendant vis-a-vis the suit land, conspicuously when the aforesaid emanations would sprout only upon joining of the initial mortgagor or his successors-in-interest, in the memo of parties, in the extant suit, in sequel whereof, upon the relevant issues being put to trial, best evidence would stand adduced in respect of the mortgaged sum(s) being redeemed, whereas, the non-joining of the mortgagor or of his successors-in-interest, has precluded adduction of the aforesaid best evidence, thereupon, the suit for foreclosure hence warrants dismissal. Consequently, this Court is reluctant to impute sanctity to the contention(s) raised by the defendants in their written statements, of, the plaintiffs being vis-a-vis the suit land, mortgagee(s) under the mortgagor(s), especially when it would engender an ensuing impermissible inference of the mortgage vis-a-vis the suit property remaining yet unredeemed, despite, best evidence in respect thereof not surging forth besides when the aforesaid inference would prejudice the rights or subsisting rights, if any, of, the mortgagors in respect of the suit property.

10. Be that as it may, thereupon the statutory vesting, of, the suit property upon the defendant, on anvil of powers exercised under Section 11 of the Act, by the competent authority, provisions, whereof stand extracted hereinabove , is to be concluded to be absolute and free from any encumbrances.

11. As aforestated, the statutory provisions engrafted in Section 11 of the Act do not, purvey any leverage to the plaintiffs/appellants herein to contend, that yet their suit for foreclosure arising from the mortgage money, being, vis-a-vis the initial mortgagee or his successors-in-interest yet unredeemed by the mortgagor or by his successors-in-interest, hence warranting an inference of the relevant mortgage being construable to be yet in force, whereupon the suit for foreclosure is rendered maintainable, rather the aforestated provisions comprised in the aforestated legislative enactment, contrarily, forbid the mortgagee to stake any right, for, a declaratory decree being pronounced by the Civil Court(s) concerned for foreclosure of the suit property, thereupon any affirmative findings vis-a-vis the aforesaid espousal would beget conflict with the mandate of the apposite provisions appertaining to the vestment, of, surplus land(s) of landowners in the State of H.P. The successors-in-interest of initial mortgagor Bala Ram, had filed return(s) in respect of the surplus area(s) or qua tracts of land falling in excess of their statutory permissible land holding limits, returns whereof stood accepted by the competent authorities, whereupon, an order qua their statutory vestment stood pronounced on 13.1.1975 by

the competent authority, in pursuance whereof mutation(s) No. 220 comprised in Ex. Dx, stood attested by the revenue officer concerned, declaratory order whereof recorded by the competent authority (ies) remained unassailed by the mortgagor or his successors-in-interest, whereupon, the aforesaid order acquires conclusive binding force.

12. The defendants in their written statement raise a contention that at the stage preceding the recording of the apposite order by the competent statutory authority, whereunder surplus land, of, one Smt. Nazo was ordered to be free from all encumbrances hence stood vested in the State of Himachal Pradesh, the predecessors-in-interest of the plaintiff(s), were/was summoned for theirs joining in the apposite proceedings, which culminated in the recording of the apposite impugned order, yet the aforesaid contention raised by the defendant in the written statement in respect of participation of the predecessor-in-interest of the plaintiffs, in the proceedings occurring prior to the recording of the impugned orders, remained uncontroverted, especially when no replication in rebuttal thereof, stood, furnished by the plaintiffs nor also any evidence comprised in the record contemporaneous to the making of the impugned order, stood adduced by the plaintiff, with a display therein of no summons standing issued to the them or qua their predecessor-in-interest, whereunder their respective participation(s) stood elicited in the apposite proceedings which culminated in the recording of the impugned order. Conjunctively, therefrom, it is befitting to conclude that the predecessor-in-interest of the plaintiff, despite service as unrefutedly unveiled in the written statement, neither, participated in the apposite proceedings nor filed any objection(s) qua the vestment of the suit property in the State of H.P. The effect of the predecessor-in-interest of the plaintiffs failing to file objection(s) in the proceedings drawn prior to the recording of the impugned order, fosters an inference that thereat the mortgaged property stood redeemed also it fosters an inference that in case, it, assumingly thereat remained unredeemed, yet, with the litigant(s) concerned failing to within the ambit of the proviso to Section 11 of the Act, lead cogent evidence that even if the suit land fell beyond the permissible statutory limits of his validly holding it, yet his rights as a mortgagee therein warranting preservation. In aftermath, absence on the part of the predecessor-in-interest of the mortgagee or on part of the latter, to, in consonance with the apt provisions of Section 11 of the Act hence project objection(s), besides his failing to satiate the ingredients encapsulated therein, fillips an inference that he had abandoned his right(s), in respect of preservation or keeping intact his interest(s), as a mortgagee, in the suit land. The apt ensuing sequel therefrom is that it is to be concluded that thereupon also the predecessor-in-interest of the mortgagee besides the latter waived and abandoned his/their right(s) in the suit property also he/they acquiesced to the mortgaged property being redeemed by the predecessor-in-interest of the mortgagor or the latter, wherefrom, it is to be concluded that the suit for foreclosure instituted by the successors-in-interest of the mortgagee, warrants dismissal.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, all the substantial questions are answered in favour of the respondent/defendant and against the appellants.

14. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the impugned judgment and decree rendered by the learned Additional District Judge (Presiding Officer Fast Track Court), Solan in Case No. 20FT/13 of 2004/2002 on 1.9.2004 are maintained and affirmed. However, it is made clear that the plaintiffs/appellants shall not be evicted from the suit land except in due course of law. All pending applications also stand disposed of. No order as to costs.

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

R.S. Thakur ....Petitioner.

Versus

H. P. Housing & Urban Development Authority and others

....Respondents.

CWP No. 302 of 2006.
Reserved on :20.07.2017.
Decided on : 30th August, 2017.

Constitution of India, 1950- Article 226- The writ petitioner claimed that the Housing Board was bound to provide double motorable road to his plot - his earlier writ petition was disposed of with a direction that any encroachment on the path would be removed and no allotment shall be made affecting the rights of the petitioner – personal hearing was given and additional land was allotted in favour of respondent No. 3 – held that the report of local commissioner shows that plot allotted to respondent No. 3 is located on the approach road and at the dead end of lane- 3 – the sale deed mentions the access from lane-3 – the claim that the petitioner has access from lane-2 and lane-3 is not correct and would constitute the violation of the lease deed – the authority had granted hearing to the petitioner and had passed a reasoned order – petition dismissed.

(Para- 2 to 6)

For the Petitioner:	Mr. Vinay Kuthiala, Senior Advocate with Mr. Diwan Singh Negi, Advocate.
For Respondent No.1:	Mr. C.N. Singh, Advocate.
For Respondent No.2:	Mr. Vivek Singh Attri, Addl. A.G.
For Respondent No.3:	Mr. R.L. Sood, Senior Advocate with Mr. Sanjeev Sharma, Advocate.
For Respondent No.4:	Mr. Hamender Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The writ petitioner had previously instituted CWP No. 100 of 2005 before this Court, petition whereof was disposed off on 21.06.2005 with the hereinafter extracted directions rendered thereon, by the Principal Division Bench of this Court:-

> "After hearing the learned counsel for the parties, we dispose of this petition by directing respondent No.1 to ensure that if either the petitioners or respondent No.2 has encroached upon any part of any public property or any part of public land in any manner, such encroachment(s) shall be removed and such public property or such public land shall be totally cleared of such encroachment within four weeks from today. We also direct respondent No.1 to ensure that if it contemplates considering any application of respondent No.2 for allotment of any land, no such allotment in favour of respondent No.2 shall be made by respondent No.1 if any such allotment adversely affects public interest or the right of any member of the public for user of any such land. If any such proposed allotment in any manner has the potential of adversely affecting the right of petitioner No.1 no such allotment in favour of respondent No.2 shall be made by respondent No.1, unless petitioner No.1 is afforded an opportunity of hearing. The allotment in favour of respondent No.2, if proposed to be made despite the aforesaid observations, shall be made only by passing reasoned and speaking order."

2. In pursuance thereto, the competent authority upon hearing all objections instituted therebefore, by the petitioner herein, also after its giving an opportunity of personal hearing to the petitioner, proceeded to order for allotment of additional land measuring 38.85 sq. meters vis-a-vis respondent No.3 herein. The relevant objections reared before the competent authority, by the writ petitioner, stood anvilled upon the (a) factum of plot bearing No. 7A, Lane-3, Sector -1, New Shimla holding access thereto also from Lane-2. He hence contended qua his holding access to the aforesaid plot from lane-2 and from lane-3. (b) The factum of the apposite allotment occurring at the dead end of lane No.2, stood assayed to be assailed by the writ petitioner, through, correspondence(s) made by him with the authorities concerned, wherein he sought its being metalled, whereas his apposite efforts bearing no fruition; (c) the sequel of the authorities concerned, not, metalling the dead end of lane-2, resulting in infraction being begotten of the relevant salient features of the apposite scheme comprised in sub-paragraph No.vi, with a display therein of "all buildings, flats and independent houses in the complex will be accessible by double lane motorable road". (d) The aforesaid unmetalled dead end of lane-2 comprising a public utility hence being unallotable vis-a-vis any resident/allottee in the area concerned. The authority concerned under Annexure P-32, by, assigning reasons, dismissed the aforesaid objections, in sequel, whereto, it , in consonance with the afore extracted directions, proceeded to make allotment of the contentious parcel of land vis-a-vis respondent No.3. The reason(s) assigned by the competent authority, for, making the allotment of the contentious parcel of land, is/are, comprised in the factum of the allottee proposing to develop it as a green land, whereas, no request emanating from him for raising any construction thereon, except, erection of boundary wall also is embedded in misutilization, of the dead end of lane-3 by the residents of the area, comprised in theirs throwing garbage thereon, whereupon, unhygienic condition(s) arising vis-a-vis respondent No.3, standing hence obviated. Though, New Shimla Residents Welfare Society under a communication borne at page 696, of, the writ petition, addressed a communication to the competent authority, ventilating therein, its, objection(s) qua the allotment of the contentious parcel of land vis-a-vis respondent No.3, objections whereof stood anvilled upon its, as per the master plan being reserved for public utilities, yet no cogent material in substantiation thereto stood adduced before the competent authority, which pronounced Annexure P-32. Consequently, the objection(s), if any, raised by New Shimla Residents Society's vis-a-vis the allotment of the contentious parcel of land, cannot, be construed to be holding any sustenance rather it is to be concluded that the allotment of the contentious parcel of land vis-a-vis respondent No.3, is hence, not, with respect to any tract(s) of land preserved for user by the public at large. Consequently, the subsisting dominant lis appertaining to the allotment of the contentious parcel of land, is inter se the petitioner and respondent No.3.

3. Before proceeding to dwell upon the respective contentions reared by the learned counsel appearing for the petitioner as also by the learned counsel appearing for respondent No.3, it is imperative to allude, to the report of the Local Commissioner concerned, who, stood appointed by this Court on 18.04.2006. The report of the local commissioner occur at page 147 of the paper book. The relevant portion of the report of the local commissioner unfolds, the factum of (a) Plot No. D-16 allotted vis-a-vis respondent No.3 standing located in lane-2, approach road whereof is about 10 meters wide; (b) plot No.D-16 belonging to respondent No.3 occurring at the dead end of lane-2, on the hill side; (c) Plot No. A-7 allotted to the writ petitioner occurring at the end of lane-3 also its being the last plot in lane-3; (d) access to plot No. 7-A being from lane-3, whereas, the petitioner with user of bridge/stairs resting on lane-2 hence also using lane-2, as a back entry to his house and for his entering onto his second floor. The report of the Local Commissioner, adds vigour to the pronouncement made by the competent authority concerned, especially when no objection(s) in respect to the aforesaid displays occurring therein, stand projected by the writ petitioner.

4. With conclusivity being imputed to the report of the Local Commissioner and to the reasons in commensuration thereof assigned by the competent authority, in the latter making the apposite allotment, thereafter the emanations borne in (a) Annexure P-2/B, comprising the

final plan prepared by respondent No.1, wherein a display occurs in respect of the approach, to the plot of the petitioner being singularly from lane-3. (b) Annexure P-3 comprising the registered lease deed executed by the competent authority vis-a-vis the writ petitioner in respect of plot No.7-A, standing appended, with a layout plan, with a display therein of plot No.7-A occurring in lane-3, Sector-1, "also", beget a sequel of the petitioner hence contractually acquiescing to the factum of his plot occurring in lane-3, wherefrom, it is apt to conclude of his, as, concurrently borne in the report of the local commissioner besides in the order recorded by the competent authority, hence holding an entitlement to make access onto his plot bearing plot No.7A, singularly from lane-3. The registered lease deed borne in Annexure P-3, embodies the contractual terms and conditions in respect of the aforesaid plot, thereupon, all the terms and conditions borne therein acquire conclusivity, importantly with no display(s) occurring therein, of the petitioner besides holding access to plot No. 7A from lane-3, his being also entitled to access his plot from lane-2. Corollary whereof, is that the petitioner is estopped, to beyond the covenanted disclosures occurring in Annexure P-3 besides beyond the one(s) occurring in the layout plan appended therewith, claim access to his plot No.7A from lane-2. Also he could oust the play of the aforesaid recitals borne in Annexure P-3 besides in the layout plan appended therewith, for leveraging a tenable claim, for, hence his legitimately competing with respondent No.3 vis-a-vis allotment, of, the contentious parcel of land, only, when in compatibility with respondent No.3, he had claimed of his also requiring it for developing it, as a green area, without, his making any claim(s) for raising construction thereon, except, for constructing a retaining wall thereon, yet claims aforesaid in respect of allotment vis-a-vis him of the contentious tract of the land, remain unespoused by the writ petitioner, thereupon, he cannot strip the apposite allotment of its validity.

5. The writ petitioner has also, on anvil, of the salient features of the apposite scheme, as exist in sub paragraph No. iv thereof, claimed that the Housing Board was enjoined to through double motorable roads hence provide dual/two approaches to his plot. The aforesaid contention is manifestly erroneous, especially when the relevant deed of conveyance embodying the contractual binding obligation(s) created therein vis-a-vis the Housing Board and the writ petitioner, does not, apparently sustain the aforesaid contention, rather contrarily enunciations occur therein in respect of the writ petitioner holding an access to his plot singularly from lane-3. Moreover, the factum of the Housing Board being enjoined, to, provide approaches to the plot of the petitioner, through, double motorable road(s), is bereft of any veracity, in the face of the petitioner in his previous writ petition bearing No. CWP No. 100 of 2005, making, in consonance with the relevant mandate occurring in the salient features of the scheme borne in the brochure, hence, correct display(s) thereof qua all the buildings, flats, plots and independent houses existing in the complex, being accessible by double lane motorable road, implication whereof is of the Housing Board being contractually bound to hence, through, singular/single motorable road holding two lanes provide access to the relevant buildings, plots and flats, "than", as erroneously contended by the petitioner, of, the Housing Board being obliged to provide double motorable roads, with an inherent fallacious implication of the petitioner, being entitled to access his plot both from lane-2 and from lane-3, validation(s) whereof would also sequel this Court beyond the terms and conditions of the relevant lease deed, pronouncing qua the petitioner, holding a right to access his plot both from lane-2 and from lane-3. It appears that the aforesaid averment ensues from the petitioner withholding the first three pages of the scheme, significantly, the one appertaining to the salient features thereof, trite feature No. vi whereof rather enunciates with vividity qua all buildings, flats, plots and independent houses existing in the complex being accessible by double lane motorable road, implying hence single road(s), with, two lanes being enjoined to be constructed by the Housing Board, for hence the allottees accessing their respective abodes. The writ petitioner had also made an effort to bely the consensual echoings occurring in the order of the competent authority and in the report of the Local Commissioner, in respect of the contentious parcel, of, land being the dead end of the road also concerted to repulse the factum of its being used as a place for dumping garbage by the residents of the locality. However, the aforesaid contention is bereft of succor, in the face of the petitioner in the

earlier instituted writ petition bearing CWP No.100 of 2005 borne in Annexure R-3/P, making the hereinafter extracted prayers:-

> "(i) That the respondent No.1 may kindly be directed not to allot to respondent No.2 dead end of lane No.2 in between house No. D-16 and House No.7-A shown in Annexure P-3.
>
> (ii) That the respondent No.1 may kindly be directed to proceed against respondent No.2 in accordance with law for clearing Dhara constructed by respondent No.2 at the dead end of lane No.2 in between House No. D-16 and House NO.7-A shown in Annexure P-3
>
> (iii) That the respondent No.1 may kindly be directed to perform its statutory duties by repairing the retaining wall of lane No.2 near dead end metalling the road at the dead end of lane No.2, provide proper drainage and make available parking place at the dead end of the said lane, as shown in Annexure P-3, meant for common purposes."

Wherefrom, hence, he obviously accepts that the contentious parcel of land comprising the dead end of lane-2. Also in corroboration thereto echoings occur in Annexure P-25 qua the contentious parcel of land being mis-utilized by the residents of the area concerned, for dumping of garbage. Dehors the aforesaid conclusion, the writ petitioner had vehementally espoused before this Court, his claim, for his accessing, his house/plot through lane-2, claim whereof is rested on anvil of its user by him being imperative, especially for his accessing the 4th storey of his house, significantly, given his being also granted, a, purportedly valid permission under Annexure R-3/D, to construct a bridge with a width of 2.5 meter, bridge whereof connects the 4th storey of his building. Though, the learned counsel appearing for respondent No.3, has contested validity(ies) thereof in the face of sanction(s) in respect thereto, as borne in Annexure R-3/D, being applied for on 05.11.1993, whereas, it standing prior thereto approved on 1.7.1991, as displayed in the plan in respect thereto submitted by the petitioner. Consequently, the learned Senior Counsel appearing for respondent No.3 contends that Annexure R-3/D, rather being a sanction in respect of approval(s) granted by the competent authority in respect of the proposed building constructed by the petitioner upon plot No.7-A, contrarily, it not being with respect to the bridge, bridge whereof purveys access to his plot/building from lane No.2 besides, concomitant user thereof also enabling his accessing therefrom onto his 4th storey. However, the mere occurrence in the sanction order recorded vis-a-vis the petitioner in respect of his constructing a bridge, order whereof is borne in Annexure R-3/D and occurs at page 279, of, the paper book, qua it being in respect of an application made on 5.11.1993 by the petitioner, would not hence erode its efficacy unless evidence comprised in all records prepared in contemporaneity therewith, "predominantly" the apposite register(s) in respect thereof maintained by the authority concerned, with likewise therewith reflections, stood adduced, especially when only on adduction(s) thereof, thereupon alone an inference would arise qua it standing not engendered by inadvertence or it being not hence a typographical mistake, contrarily, absence(s) thereof, hence, sequel an inference that the aforesaid incompatibilities arising from sheer inadvertence or may be standing engendered by a typographical error nor hence detracting from the validation(s) of apposite sanction(s). However, the legitimacy of the right of user of the bridge by the petitioner, for his accessing his fourth storey and for his therefrom holding a concomitant right to also access it from lane-2, is, also to be tested, from, the approval accorded under Annexure R-3/F vis-a-vis the petitioner, for hence his raising construction upon the plot in respect whereof a lease deed was executed inter se him and the competent authority. A perusal of Annexure R-3/F discloses that he was initially accorded approval, to raise three floors. However, as evident from Annexure R-3/K, exhibit whereof comprises a notice of 26.6.2004 issued upon the petitioner for his raising illegal construction(s) upon validly approved stories beneath it, also given the petitioner evidently, as, disclosed in Annexure R-3/N, making an attempt for regularising illegal construction(s) occurring "above" the approved construction(s) beneath thereto, constrains this court to record (a) sanction accorded vis-a-vis the petitioner to raise a bridge for his accessing the

4th storey of his building, not purveying any tenacity to him, for his hence staking a claim qua his therefrom by user of lane-2 accessing his 4th storey, yet only and always subject to the settled rights of respondent No.3 upon the contentious parcel of land occurring at lane-2, standing not infringed; (b) that the petitioner being not entitled to access the unauthorised portion of the building occurring above the road level and adjoining lane-2, or to make user of lane -2 along with his user of lane-3, for his accessing his 4th storey, significantly with hence validations meted vis-a-vis the attempts of the petitioner to make a dual access to his house, would beget infraction, of, the terms and conditions of the contract entered/executed inter se the petitioner and the competent authority,besides would infract the terms and conditions of the brochure, in pursuance(s) whereof, the apposite lease deed stood executed. The effect, if any, of Annexure P-7 with a display therein qua unallotability, of, the contentious parcel of land vis-a-vis respondent No.3 is also subsumed by all the aforestated subsequent thereto developments also by valid reasons assigned by the competent authority in making the allotment besides by valid reasons assigned by it in rejecting the petitioner's objections.

6. Be that as it may, the writ petitioner has challenged the orders recorded in respect of the impugned allotment made vis-a-vis respondent No.3. However, initially though there was no challenge thrown to the lease deed executed in pursuance thereto, yet, an amendment in respect thereto stood strived through CMP No.1354 of 2008, however, the aforesaid CMP was subsequently dismissed as withdrawn, whereupon the writ petitioner is estopped to challenge the apposite lease deed executed in respect of the contentious parcel of land. Sequel whereof, is that with the petitioner challenging the decision making process in respect of the allotment of the contentious parcel of the land, vis-a-vis respondent No.3, whereas, his not casting any challenge to consummation(s) thereto also constrains this Court, to, not grant the apposite relief to the writ petitioner.

7. The learned counsel appearing for respondent No.3 has relied upon decisions recorded by this Court in CWP No.364 of 2016, CWP No.2196 of 2011, Review Petition No. 85 of 2016, CWP No. 356 of 2016 and CWP No. 163 of 2004,wherein this Court proceeded, to, for evident re-litigation or frivolous litigation hence impose heavy exemplary deterrent costs upon chronic litigants, for espousing that in consonance therewith, the instant petition be dismissed with exemplary deterrent costs. However, this Court is constrained to not accept the aforesaid submission, given this Court in its order recorded upon CWP No. 100 of 2005 directing the competent authority, to consider the making of the allotment of the contentious parcel of land vis-a-vis respondent No.3, after apposite objections in respect of its allotment being received and adjudicated upon, in complaint pursuance(s) thereof, the contentious orders stood recorded. The writ petitioner had appeared before the competent authority and also argued in respect of the validity(ies) of his objections reared therebefore. It appears that he is aggrieved by the reasons assigned by the competent authority in its rejecting his objections. Consequently, when he has a right to challenge, the frailty or tenacity of the reasons assigned by the competent authority in its rejecting his objections, in respect of allotment of the contentious parcel of land vis-a-vis respondent No.3, in sequel, he cannot be said to be frivolously litigating. However, illegal constructions, if any, be subjected to process(s) of law.

8. For the foregoing reasons, there is no merit in the instant petition which is accordingly dismissed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Ram Singh & another .....Appellants/Plaintiffs.
Versus
Kamla Devi & another .....Respondents/Defendants.

RSA No. 572 of 2006.
Reserved on : 11.08.2017.
Decided on : 30th August, 2017.

Specific Relief Act, 1963- Section 5- Plaintiff pleaded that he had executed a gift deed in favour of defendant No. 1 – an agreement was executed in which it was agreed that defendants will look after the plaintiff till his life time and will pay a sum of Rs. 150/- per month to the plaintiff – the defendants failed to fulfill the conditions – hence, the suit was filed for setting aside the gift deed and to recover the possession- the defendants pleaded that gift was absolute and there was no right of revocation- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that the parties are governed by customary law and the same permits the revocation of conditional gift on failure to fulfill the condition- however, it has not been proved that gift was conditional- the Courts had properly appreciated the evidence- appeal dismissed. (Para-8 to 11)

For the Appellants: Mr. Adarsh K. Vashishta Advocate.
For the Respondents: Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree for possession of the suit land upon the defendants, suffered dismissal, under, concurrently recorded judgments and decrees rendered by both the learned Courts below. In sequel thereto, the plaintiffs/appellants herein are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the original plaintiff Harnam Singh had filed a suit against the defendants for possession with respect to the suit land as detailed in the plaint. It is pleaded that plaintiff Harnam Singh executed a gift deed of 21.4.1992 in favour of defendant No.1 and transferred possession of the suit land in her favour. The gift deed was in the form of a Gift Bakhshish and not for services. It is pleaded that the words "past services" written in the recital of the gift, have been wrongly mentioned since defendant No.1 or her husband defendant No.2 were not related to the plaintiff nor they rendered any services to him. It was further averred that on the same date i.e. on 21.04.1992, an agreement was also executed between the plaintiff and the defendants, whereby, it was agreed that the defendants shall look after the plaintiff till his life time and fulfill his all genuine demands. It was also agreed that the defendants would pay a sum of Rs.150/- per month to the plaintiff, apart from looking after him till his life. It was also condition in the agreement that in case the defendants failed to pay the aforesaid amount regularly, the entire arrears of the amount would be payable by the defendants with interest at the rate of 15%. Hence, it was averred that both these documents should be read as part of the same transaction. It was further averred that the parties being Rajput, are the dominant agricultural tribes and as such, governed by agricultural customs of Kangra District. It was further averred that as per the aforesaid custom, when the gift is made for services as in the present case, the gift could be revoked, if the conditions of the gift were not fulfilled. It was alleged that the defendants, who agreed to look after the plaintiff and to pay Rs.150/- per month to him regularly, failed to look after and server the plaintiff after 12.5.1992, and refused to fulfill the conditions as agreed upon. Hence, it was submitted that under the aforesaid circumstances,

the plaintiff was entitled to the possession of the suit property gifted to the defendants. The plaintiff requested the defendants to handover the possession of the suit land to the plaintiff, but they refused to do so and as such, the cause of action arose to the plaintiff on 12.5.1992.

3. The defendants contested the suit and filed written statement, wherein, they have pleaded that the suit was not legally maintainable since the gift was absolute and right of revocation had not been reserved. It was also submitted that after the death of plaintiff Harnam Singh, the right to sue did not survive since plaintiff Harnam Singh had sued for revocation of the gift in favour of defendant No.1 under custom and it being a personal right, therefore, question of the continuity of suit did not arise. On merits, it was submitted that the defendants were owners in possession of the suit land after the aforesaid gift deed. It was further submitted that the gift was executed and the possession was also transferred in favour of the defendants. It was denied that plaintiff Harnam Singh was not looked after by the defendants. It was asserted that aforesaid Harnam Singh was looked after by the defendants. It was further submitted that the only condition of the agreement was that in case the defendants failed to pay the amount, the aforesaid Harnam Singh was entitled to recover the same. It was further submitted that the parties were not governed by the customs. Moreover under the customs, power to revoke the gift was only to the donor, but when the gift is conditional and personal, the said right cannot be survived after his death and therefore, the present plaintiffs i.e. successors-in-interest of Shri Harnam Singh, could not maintain the suit. It was further submitted that there was no such condition and the gift was irrevocable. It was further submitted that the plaintiff Shri Harnam Singh was being paid a sum of Rs.150/- per month by the defendants, hence, no question of violating the terms of conditions of the gift or agreement arose.

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

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

1. Whether the plaintiff is entitled to the relief of possession as prayed for? OPP.
2. Whether the parties are governed by custom in the matter of gift? If so, what that custom is? OPP
3. Whether the suit land is ancestral as alleged? OPD
4. Whether the gift in question is gift “Bakhshish”? If so, its effect?OPD.
5. Whether agreement dated 21.4.1992 was executed, as alleged? OPD.
6. Whether the suit is not maintainable, as alleged? OPD.
7. Whether the plaintiffs are estopped to file the suit by their act and conduct? OPD
8. Whether the right to sue does not survive, as alleged? OPD.
9. Whether the suit is liable to be stayed? OPD.
10. Whether the gift in question is liable to be revoked? OPP
11. Relief.

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

7. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 7.8.2008, this Court, admitted the appeal instituted by the plaintiffs/appellants against the

judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the judgments and decree passed by the learned Courts below is result of misreading, misconstruing and mis-interpretation of the gift deed, exhibit DW1/A as well as agreement Ext. D-1 dated 21.04.1992?

b) Whether the learned Courts below are right in not holding the gift deed to be liable to be revoked in view of the violation of the terms and conditions of the agreement dated 21.04.1992, Ex. D-01?

c) Whether the impugned judgment and decree is the result of complete misreading as well as mis-interpretation of question No.94 of the Kangra Customary Law?

d) Whether the learned Lower Appellate Court below is right in not considering the judgment of this Hon'ble Court passed in RSA No.23/2005 decided on 29.03.2005, Ex. Px in which the wills executed by late Sh. Harnam Singh in favour of the present appellants/plaintiffs were upheld?

Substantial questions of Law No.1 to 4.

8. Under a registered deed of conveyance borne in Ex.DW1/A, donor Harnam Singh made a gift of the suit property upon defendant No.1. No contest has emanated before this Court in respect of validity of execution of gift deed borne in Ex.DW1/A. Its rescission besides its validity is concerted to be impugned, on anvil of its embodying therewithin a condition subsequent comprised in the donor casting an injunction upon the donee(s) in respect of him/hers maintaining him, breach whereof entailing the sequel of its ipso facto visiting Ex.DW1/A with a rescinding effect. In case, the aforesaid condition subsequent is in fact embodied in Ex.DW1/A or in case Ex.DW1/A is a contingent gift, thereupon, evidence, if any, in succor thereof warrants allusion. However, a closest reading of Ex.DW1/A does not unveil of its therewithin holding any condition subsequent or it being a contingent gift, comprised in the factum of the donor in thereunder making the apposite bestowment(s) of the suit property vis-a-vis defendant No.1, his casting any obligation upon them/him to render services vis-a-vis him. The omission of the aforesaid condition subsequent in Ex.DW1/A, renders it to be not construable to be a contingent instrument of bestowal of the suit property borne therein, thereupon, omission(s), if any, of the defendants/respondents to not serve or maintain the donor, would concomitantly not entail the consequence of thereupon Ex.DW1/A being visited with a vice of invalidation or ipso facto rescission. Even a perusal of Ex.DW1/A does not unfold that any obligation stood therein cast upon the defendants for theirs maintaining or serving the donor, whereupon, also it is befitting to conclude that dis-service or ill-service, if any, of the donees vis-a-vis the donor would not result in Ex.DW1/A suffering the ill-fate of its ipso facto rescission.

9. Be that as it may, it is not disputed inter se the parties at contest that in respect of matters of alienation of the extant suit property, theirs standing governed by Kangra Customary Law, Customary Laws whereof hold prevalence in the area whereat the suit property is located. Even though, question No. 94 of the Kangra Customary Law which stands extracted hereinafter:-

> "State in what circumstances a gift is revocable and in what circumstances irrevocable? Specify particularly the effects of (I) possession on the part of the donee, (ii) relationship between the donee and the donor.
>
> Answer: Conditional gifts, e.g., in return for services are revocable if the conditions are not fulfilled, otherwise gifts are not revocable.
>
> Possession and relationship do not affect this."

does reveal that a conditional or a contingent gift is revocable, upon the condition(s) subsequent, for hence its taking full binding effect being evidently not fulfilled, yet for attracting the aforesaid Kangra Customary law(s) vis-a-vis the gift deed, it was imperative for both Ex. D-1 and Ex.DW1/A, to therein hold absolute or categorical recital(s) in respect of it being a contingent

instrument of gift besides rendition of service by the donee(s) vis-a-vis the donor being an imperative condition subsequent, for it, to take full binding force or evident breach(es) thereof warranting its revocation. However, as aforestated, a closest reading of both Ex.D-1 and Ex. DW1/A does not reveal of any condition(s) subsequent, being comprised therein in respect of the donee(s) being imperatively enjoined to serve the donor nor obviously any purported breach(es) thereof warrant rescission of Ex.DW1/A. In aftermath, no reliance can be placed upon the aforestated Kangra customary law.

10. The learned counsel appearing for the plaintiffs/appellant has alluded to the conclusive and binding judgments recorded by Courts of law, in Civil Suit No. 560/1998/95 in respect of validity therein being imputed to Wills borne therein, Wills whereof stand respectively exhibited therein as Ex.PW5/A and as Ex.PW6/A, wherefrom, he contends that thereupon the validity of Ex.DW1/A standing ipso facto scored off. However, even though conclusive binding judgments in respect of validity standing imputed to execution of Ex. DW5/A and of Ex.DW6/A, by Harnam Singh, stood pronounced in the aforesaid Civil Suit(s), nonetheless, imputation of validity to Ex.DW5/A and to Ex.DW6/A would not per se invalidate the execution of the extantly litigated registered deed of conveyance, through, a gift borne in Ex.DW1/A, conveyance deed whereof stands evidently validly executed prior thereto. Any execution(s) thereafter of testamentary disposition(s) by Harnam Singh vis-a-vis the plaintiffs, would also not belittle the legality of Ex.DW1/A, dehors ascription of validity to testamentary disposition(s) aforestated subsequently executed by Harnam Singh vis-a-vis the plaintiffs, preeminently also when courts of law concerned remained not seized with Ex.DW1/A executed prior thereto, whereupon, they could have tested the in ter se compatibility of validity of Ex. DW1/A vis-a-vis Ex.DW5/A and Ex.PW6/A, whereas, with the Civil Courts concerned not standing seized with Ex.DW1/A renders any ascription of validity to the subsequent thereto executed testamentary dispositions by Harnam Singh, to not, prevail upon prior thereto executed Ex.DW1/A, rather the subsequent thereto executed testamentary dispositions by Harnam Singh were unexecutable by him, given the deceased testator prior thereto under Ex.DW1/A divesting himself from any right, title or interest vis-a-vis the suit property.

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

12. In view of the above discussion, there is no merit in the instant appeal, which is accordingly dismissed. The impugned judgments and decrees are maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Sardar Inder Mohan Singh Batra and others. .....Appellants

Versus

Sh. Ram Dev .....Respondent.

RSA No. 460 of 2004
Decided on: 30th August, 2017

Limitation Act, 1963- Article 40- A cheque was issued by the defendant which was presented by the plaintiff for encashment before his bank- the bank sent the cheque for collection to the bank of the defendant – however, the cheque was returned with the endorsement that alteration in the

date required drawer's full signatures – the suit was decreed by the Trial Court - an appeal was filed, which was dismissed- held in second appeal that the period of limitation for filing a suit on the basis of dishonoured cheque will arise on the date when cheque is dishonoured and not prior to that – the Courts had correctly held that Article 40 is applicable. (Para-6 & 7)

Case referred:
Chanana Steel Tubes Pvt. Ltd. v. M/s Jaitu Steel Tubes Pvt. Ltd. and another, 1999(2) SLC 508

For the appellants: Mr. B.B. Vaid, Advocate.
For the respondent: Mr. Rajiv Jiwan, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Defendants are in second appeal before this Court. They are aggrieved by the judgment and decree dated 2.7.2004 passed by learned District Judge, Kinnaur Civil Division at Rampur Bushahr in Civil Appeal No. 49 of 2003, whereby learned lower appellate court has affirmed the judgment and decree dated 4.11.2003 passed by learned Civil Judge (Senior Division), Kinnaur at Reckong Peo in Civil Suit No. 23-1 of 2001.

2. It is thus the concurrent findings recorded by both Courts below on appraisal of the evidence and pleadings on record have been assailed before this Court on the grounds inter-alia that both Courts below have erred in applying the provisions contained under Article 40 of the Indian Limitation Act to conclude that the suit was filed within the period of limitation. Article 40 of the Act was stated to be not applicable in the given facts and circumstances, but the suit for the purpose of limitation was governed by the provisions contained under Article 35 thereof.

3. The legality and validity of the impugned judgment and decree though has also been assailed on the grounds that the facts of the case and evidence available on record has not been appreciated in its right perspective nor all the issues arisen out of the pleadings of the parties framed properly and also that the goats and sheep taken by the defendants from the plaintiff were agreed to be retuned whereas the cheque he had issued to be not presented for encashment, however, irrespective of the former having returned the sheep and goats, later presented the cheques which according to the defendant was rightly dishonoured. The other grounds raised in the memorandum of appeal, however, looses significance as the same has been admitted on the following substantial question of law alone:-

> 1. Whether the period of limitation for a suit based upon a cheque would start from the date of the cheque or the date of knowledge of the cheque having been dishonoured on being presented?

4. Mr. B.B. Vaid, learned counsel representing the appellants-defendants has canvassed that in the matter of limitation, the provisions contained under Article 40 of the Indian Limitation Act were not attracted to the case in hand, however, keeping in view that the suit was filed on the ground of cheques having been dishonoured, it is the provisions contained under Article 35 of the Act were attracted and as per the same, the period of three years started running from the date of cheques and not from the date when it was dishonoured.

5. On the other hand, Mr. Rajiv Jiwan, learned counsel while repelling the arguments addressed on behalf of the appellants-defendants has strenuously contended that it is Article 40 of the Limitation Act applicable to the case in hand and as such, the limitation started running from the date when the cheque was returned by the bankers of the plaintiff after having been dishonoured.

6. On analyzing the rival submissions, it would not be improper to conclude that the cause of action to file the suit could have only been accrued in favour of the plaintiff on refusal of the bankers of the defendants to clear the same. The cheque was to be submitted for clearance by the plaintiff to the bankers of the defendants through his bankers at Reckong Peo. Therefore, the cheque Ext. P-2 when presented by the plaintiff for encashment in Punjab National Bank, Reckong Peo, the same was sent to Oriental Bank of Commerce, Ambala Cantt, the bankers of the defendants for clearance. The same, however, was returned to the bankers of plaintiff i.e. Punjab National Bank, Reckong Peo with the endorsement that 'alteration in date requires drawers full signature'. The cheque, as such, was returned by the bankers of the defendants without its clearance. The Limitation in a situation when the bankers of the drawer refused to clear the cheque for any reasons whatsoever is govered by Article 40 of the Limitation Act and not by Article 35 of the Act. The plaintiff's case that deceased defendant Surjit Singh had purchased 68 sheep and goats in a sum of Rs. 81,600/- and made the payment through cheque No. 842996 dated 20.07.1998 is held to be duly proved by both Courts below. Therefore, when the cheque dated 20.7.1998 when presented for clearance by the plaintiff returned to him by his banker being not honoured by the bankers of deceased defendant vide letter dated 11.9.1998, Ext. P-3, the limitation for filing the suit for the recovery of amount in question started running from that day and not from 20.7.1998, the date of issuance of cheque. The suit having been filed on 4.9.2001 is, therefore, well within the period of limitation. Similar view of the matter has been taken by a Co-ordinate Bench of this Court in ***Chanana Steel Tubes Pvt. Ltd.*** v. ***M/s Jaitu Steel Tubes Pvt. Ltd. and another, 1999(2) SLC 508***. This judgment is relied upon by learned lower appellate Court also.

7. In view of what has been said supra, the point of limitation raised on behalf of the defendants has rightly been considered and decided by both Courts below. The findings so recorded being legally sustainable cannot be termed to be perverse or vitiate the judgment and decree under challenge. The appeal, as such, deserves dismissal. Consequently, the impugned judgment and decree though deserves to be affirmed, however, with modification to the extent that interest on the decretal amount shall be @ 9% per annum and not 18% per annum awarded by both Courts below. It is pertinent to note that future interest in terms of Section 35 of the Code of Civil Procedure should be 6% per annum, however, in a case of commercial transaction, the rate of interest should be the one as the Court ceased of the matter deems fit and proper. Deceased defendant, a supplier of sheep and goat to the Indian Army was not a big businessman and rather may be earning his livelihood by way of little profit and earnings by supplying the sheep and goats to the Army after purchasing the same from others like the plaintiff. Therefore, having regard to the given facts and circumstances of this case, future interest awarded @ 9% per annum on the decretal amount would serve the ends of justice. Therefore, the suit is decreed against the defendants for the recovery of Rs. 81,600/-, however, together with interest @ 9% per annum. The impugned judgment and decree will stand modified only to this extent.

8. In view of the above, the impugned judgment though is affirmed, however, subject to modification as aforesaid with no orders so as to costs. The appeal stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.

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

State of Himachal Pradesh .....Appellant.

Vs.

Besaria Ram .....Respondent.

Cr. A. No.: 141 of 2009
Date of Decision: 30.08.2017

Indian Penal Code, 1860- Section 279 and 304-A- Two trucks came with high speed - one truck crushed a child aged 6 ½ years- driver did not stop the truck and fled away- it was found on investigation that accused was driving the truck- he was tried and acquitted by the Trial Court- held in appeal that PW-1 admitted that he had arrived at the spot after five minutes of the incident- PW-2 stated that she could not note the number of truck- PW-3 admitted that accident had not taken place in his presence- PW-4 stated that he had not noticed the number of the truck- PW-7 admitted that he is illiterate and could not note the number of the truck- in these circumstances, prosecution had failed to prove that truck being driven by the accused had caused the accident- I.O. had also failed to collect the material evidence- Trial Court had taken a reasonable view while acquitting the accused-appeal dismissed. (Para-7 to 19)

For the appellant: Mr. Vikram Thakur, Deputy Advocate General.
For the respondent: Mr. Abhishek Sood, Advocate.

The following judgment of the Court was delivered:

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

By way of this appeal, the State has challenged the judgment passed by the Court of learned Chief Judicial Magistrate, Mandi in Criminal Case No. 205-II/2004, dated 17.10.2008, vide which, learned trial Court has acquitted the present respondent for commission of offences punishable under Sections 279 and 304-A of the Indian Penal Code.

2. In brief, the case of the prosecution was that on 07.06.2004 at around 12:30 noon, complainant Tara Chand was outside his Dhabha, which was being run in the name and style of M/s. Lucky Bhojnalaya at Basta in Tehsil Sadar, District Mandi and at that very time, children were returning from Government Primary School Shambal towards Basta, who were walking on the side of the road, when suddenly two trucks came in a very high speed and crossed the road in front of the Dhabha of the complainant towards Mandi. After the trucks had moved ahead, the children started crying. The registration number of the trucks were HP-11-2207 and HP-11-2100. Though truck No. HP-11-2207 was driven ahead of truck bearing registration No. HP-11-2100, however, immediately driver of truck bearing registration No. HP-11-2100 over took the truck ahead of him and fled away towards Mandi side. On hearing the cries of kids, complainant Tara Chand and his brother Gopal as well as one Keshav Ram rushed to the spot and they found Parwati, a six and half years old child having been crushed by the first truck. On the basis of the statement of Tara Chand so recorded under Section 154 of the Code of Criminal Procedure, an FIR was lodged at Police Station Sadar, District Mandi. Pursuant thereof, investigation was conducted by SI Mast Ram, who prepared inquest as well as site plan. Statements of the witnesses were recorded and truck bearing registration number HP-11-2207 was impounded, which was being driven by the accused at the relevant time. Autopsy report of the deceased was obtained.

3. After completion of the investigation, chargesheet was filed in the Court and as a prima facie case was found against the accused for commission of offences punishable under Sections 279 and 304-A of the Indian Penal Code, accordingly Notice of Accusation was put to him, to which he pleaded not guilty and claimed trial.

4. Learned trial Court vide its judgment under challenge, acquitted the accused for commission of offences punishable under Sections 279 and 304-A of the Indian Penal Code by holding that there was no material placed by the prosecution on record to demonstrate that it was vehicle bearing registration number HP-11-2207 involved in the accident at Basta, which led to the death of Kumari Parwati. While coming to the said conclusion, after discussing the testimonies of prosecution witnesses, it was held by the learned trial Court that testimony of PW-1 Tara Chand demonstrated that he was not an eye witness, as he had not actually seen the occurrence of the accident, which was evident from his statement, as he had in his cross-examination deposed that he rushed to the spot after about five minutes after hearing the cries

and when he reached the spot, he came to know that the accident had occurred. Learned trial Court also took note of the fact that in his cross-examination, this witness had stated that the persons at the spot were shocked and perplexed and no one told him the number of the vehicle which had hit the child. Learned trial Court also took note of the fact that this witness had deposed that children who were with the deceased child had stated that she had been hit by a truck, which thereafter had moved towards Mandi side. Learned trial Court also held that the testimony of PW-2 Poonam Devi, sister of the deceased, demonstrated that she was a tutored witness. It was further held by the learned trial Court that statement of PW-4 Gopal to the effect that he had actually seen the occurrence of the accident was unbelievable, because in his cross-examination, this witness had stated that he rushed to the spot, which was at a distance of two hundred yards away on hearing the cries and when he reached the spot, PW-2 Poonam told him that the first truck which had gone ahead, had crushed her sister, though she had not disclosed the truck number and further, it was Naganu Ram who told him that he suspected that the child was crushed by truck bearing registration number HP-11-2207. A perusal of the judgment passed by the learned trial Court further demonstrates that it disbelieved the version of PW-7 Naganu Ram by holding that the description of the accident as well as trucks involved in the accident, including their registration numbers given by the said witness could not be believed as it stood proved on record that this witness was totally illiterate, who barely managed to put his signatures and he could neither write or read Hindi or English or could count beyond 50. Learned trial Court also held that in these circumstances, it was difficult to believe that this witness would have read the registration numbers of the trucks going towards Mandi side. Learned trial Court also took note of the fact that this witness had produced a slip Ex. D-3 at the time of his examination, on which registration number of the vehicle, i.e., HP-11-2207 was written and he had deposed that this number on the slip Ex. D-3 was written by complainant Tara Chand, who had told him that it was the first truck which was going towards Mandi. On these bases, learned trial Court disbelieved the version of this witness. It was also held by the learned trial Court that as the case in issue was a hit and run case, therefore, the Investigating Officer was required to be more vigilant and careful in conducting the investigation. Learned trial Court held that as child was run over by a truck and was totally crushed and mutilated under the tyre(s) of the vehicle, it was possible that pieces of flesh, hair, clothes and stains of blood must have stuck on the tyre(s) of the offending vehicle, but the prosecution had failed to place any such material on record as, though the offending vehicle was impounded shortly, but seizure memo Ex. PW7/A of the vehicle in issue did not contain anything in this regard nor was there any observation of the Investigating Officer to this effect. On these bases, it was held by the learned trial Court that the prosecution had not produced any material on record to demonstrate that the vehicle which was being driven by the accused was driven at Basta on the fateful day, which led to the death of Kumari Parwati.

5. Feeling aggrieved, the State has filed this appeal.

6. I have heard the learned Deputy Advocate General and learned counsel for the accused. I havealso carefully gone through the records of the case as well as the judgment passed by the learned trial Court.

7. It is indeed an unfortunate accident in which a six and half years old girl lost her life on account of road rage. Records demonstrate that in order to prove its case, the prosecution, in all, examined 10 witnesses. Two witnesses were examined by the defence.

8. Complainant Tara Chand entered the witness box as PW-1 and he deposed that on the fateful date, he was standing at his Dhabha, when two trucks came in high speed from Pandoh side and crushed a girl and drove away. He further deposed in the Court that the registration number of the truck which was in front was HP-11-2207**.** He further stated that the deceased was accompanied by two three small girls, who when he reached at the spot, informed him that the deceased was crushed by the truck which was in front. In his cross-examination, he admitted that he reached the spot on hearing the noise and when he reached the place, the accident had already taken place. He further stated that it was only after he had given his statement that he came to know that the registration number of the vehicle which was in front

was HP-11-2207. He also admitted it to be correct that the body of the deceased was lying in the middle of the road. In his cross-examination, he further deposed that he in fact reached the spot after about five minutes after hearing the noise.

9. PW-2 Poonam Devi, sister of the deceased, who was aged about 9 years, in her examination-in-chief stated that on the fateful date, she and deceased were going together when two trucks, which were racing with each other crushed the deceased and fled away. She further stated that number of the offending vehicle was HP-11-2207. In her cross-examination, this witness though admitted it to be correct that at the time of the accident, because of the speed of the offending vehicle, she could not note down the number of the truck, however, she further stated that number of the truck was disclosed to her by Tara Chand (PW-1). She also stated that on the day when she was deposing in the Court, the number of the truck was told to her by PW-1.

10. PW-3 Atma Ram deposed in the Court that on 07.06.2004, he was working in his house and when he heard noise, he came out and found that people were bringing his daughter Poonam to his house and on his asking, he was informed that his other daughter had been crushed to death by a truck. In his cross-examination, he stated that the accident had not occurred in his presence.

11. PW-4 Gopal stated that he used to run a hotel and on the fateful day, at around 12:30 noon, he was standing outside his hotel, when he saw a truck coming in high speed from Kullu side and in front of his Dhabha, the driver of the truck crushed a young girl, who died at the spot. He further deposed that the number of the vehicle was HP-11-2207, which was being driven by the accused. In his cross-examination, he stated that the spot where the accident took place was 200 yards away from his house. He further stated that he did not remember the number of the offending vehicle, but the same was disclosed to him by Nagnu Ram. He also stated that when he reached the spot, Poonam told him that the truck which was in front had crushed the deceased. He also admitted it to be correct that when he reached the spot, Poonam had not disclosed to him the number of the offending vehicle.

12. Dr. K.S. Malhotra entered the witness box as PW-6 and he had proved on record the post mortem report of the deceased.

13. Nagnu Ram, who entered the witness box as PW-7, deposed that on the fateful day, at around 12:30 noon, truck bearing registration number HP-11-2207 came in high speed towards Mandi side and behind the said truck, there was one more truck. One small girl, who was a student of Class-1, was pressed under truck bearing registration number HP-11-2207, which crushed her. There was one more girl with the deceased, who disclosed nothing. The accident took place on account of rash and negligent driving of the driver of the truck bearing registration number HP-11-2207. He also stated that he had seen the truck driver and he identified him as the accused. In his cross-examination, he stated that before him Tara Chand had reached the spot of accident. He further stated that truck bearing registration number HP-11-2207 was behind, i.e., about one curve behind. He also stated that he reached the spot five minutes after Tara Chand reached the spot. In his cross-examination, he also deposed that he was not aware that Tara Chand was running a Dhabha in the name and style of *Lucky Dhabha*. He also stated that he had himself noted down the number of the truck in his diary. He thereafter in his cross-examination stated that the number of the truck was disclosed to him by Tara Chand, who had reached the spot before him. He also stated that he was illiterate and it was with difficulty the he appended his signatures. He also stated that he has not written anything in his diary in his own handwriting, either in English or in Hindi. He also stated that he can count only up to 50. He also stated that on Ex.D-3, number of the truck was written by Tara Chand.

14. Investigating Officer entered the witness box as PW-10 and he deposed that on 07.06.2004, he was serving as Additional SHO in Police Station Sadar, Mandi, when at around 12:30 noon, a telephonic information was received about the occurrence of accident on National Highway 21, whereafter he alongwith Constable Param Dev, left for the spot. He further stated that at the spot, statement of Tara Chand was recorded under Section 154 of the Code of

Criminal Procedure, on the basis of which, the FIR was lodged. He also stated that he took photographs of the spot and also sent the body of the deceased for post mortem. He also stated that thereafter, he impounded the truck in issue and the accused was taken into custody.

15. In his defence, accused examined DW-1 Roshan Lal and DW-2 Kuldeep Singh.

16. A perusal of the statements of the prosecution witnesses demonstrates that the prosecution has not placed on record any cogent evidence, from which it can be inferred that the deceased child was actually crushed under the tyre(s) of the truck, which was being driven by the accused on account of his rash and negligent driving. Statements of the prosecution witnesses, including the minor sister of the deceased are not trustworthy. The complainant through his deposition wants the Court to believe that he had witnessed the occurrence of the accident, but in the same breath, he has stated in the Court that he reached the spot after five minutes of the occurrence of the accident. This witness has also stated that it was only after he reached the spot that he came to know that the truck involved in the accident was HP-11-2207. Now, who informed him at the spot that it was truck bearing registration number HP-11-2207, which had crushed the child, has not been explained by him. PW-2 Poonam Devi, the sister of the deceased, in her cross-examination has stated that she did not take note of the number which crushed her young sister and further that the number of the truck was told to her by PW-1.

17. As far as the testimony of PW-4 Gopal is concerned, the same is also neither cogent nor trustworthy, because on one hand he has deposed in his examination-in-chief that he was an eye witness to the accident, whereas in his cross-examination, he has stated that the spot where the accident took place was about 200 yards away from his house and there was a 45°curve in between and he did not remember the number of the truck and the number of the same was told to him by Nagnu Ram. Now, Nagnu Ram incidentally in his cross-examination has stated that PW-1 Tara Chand had reached the spot before him and he had reached five minutes after Tara Chand had reached there. Tara Chand himself has stated in the Court that he reached the spot after five minutes of the occurrence of the accident. In other words, this means that Nagnu Ram reached the spot after about 10 minutes of the occurrence of the accident. Now if Nagnu Ram reached the spot after about 10 minutes of the occurrence of the accident, then it is but obvious that PW-4 Gopal reached the spot thereafter only, because as per this witness because the number of the truck was disclosed to him by Nagnu Ram, therefore, obviously Nagnu Ram had reached the spot before him.

18. Now, if we peruse the statement of Nagnu Ram, who has entered the witness box as PW-7, his testimony is also not worth relying upon, because it has come in his statement that he is totally illiterate, who cannot count above 50 and who is neither conversant with Hindi language nor English language. His testimony in the Court that he had himself noted down the number of the vehicle in his diary is belied from the fact that further he has deposed in the Court that all the entries made in the diary were in the hand of his son and none of the entries were in his own handwriting. Not only this, he has stated in the Court that in Ex. D-3, number of the truck was written by Tara Chand.

19. As I have already mentioned above, this is a case where a young life was lost on account of rash and negligent driving on a National Highway, yet the Investigating Officer after impounding the truck, took no steps to collect evidence from the offending vehicle to connect the accused with the offence. Learned trial Court has also taken note of the fact that as the child who died in the accident was crushed under the tyre(s) of the truck and her body was badly mutilated, Investigating Officer could have had easily collected evidence from the tyre(s) of the vehicle concerned to link the accused with the commission of the offence, which unfortunately was not done. Findings so recorded by the learned trial Court are borne out from the records of the case. This Court fails to understand as to why no cogent effort in this regard was taken by the Investigating Officer after the truck was impounded. Result of the same is that material evidence, which could have linked the accused with the commission of offence, has not been placed on record by the prosecution. Therefore, in this background, when neither the statements of the prosecution witnesses prove beyond reasonable doubt that the unfortunate accident took place

on account of rash and negligent driving of the accused nor there is any material on record placed by the prosecution from which it can be inferred that the young child lost her life on account of rash and negligent driving of the accused, no infirmity can be found with the judgment so passed by the learned trial Court which has acquitted the accused for commission of offences punishable under Sections 279 and 304-A of the Indian Penal Code.

In view of the above, as there is no merit in this appeal, the same is accordingly dismissed.

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

RSA No. 116 of 2007 along
with RSA No. 117 of 2007.
Reserved on : 6th July, 2017.
Decided on : 30th August, 2017.

1. RSA No. 116 of 2007.

Smt. Susheela .....Appellant/Plaintiff.

Versus

Inder Singh & another .....Respondents/defendants.

2. RSA No. 117 of 2007

Smt. Susheela .....Appellant/Plaintiff.

Versus

Inder Singh & another .....Respondents/defendants.

Specific Relief Act, 1963- Section 38 and 39- Plaintiff pleaded that she is owner in possession of the suit land- she had constructed a four-storeyed house prior to January, 2016 – defendant No. 1 purchased land adjacent to the land of the plaintiff – the defendants raised construction without leaving setbacks and making arrangement for drainage of water- the projection was extended towards the property of the plaintiff which has caused danger to the building – the defendants pleaded that house was raised in accordance with the permission granted by the competent authority – no encroachment was made – the suit was partly decreed by the Trial Court- separate appeals were filed and the Appellate Court dismissed the suit of the plaintiff- held in the second appeal that no evidence was led to prove that construction was being raised without any permission – encroachment was also not proved – Appellate Court had rightly dismissed the suit- appeal dismissed. (Para-9 to 14)

For the Appellant(s): Mr. R.K. Bawa, Senior Advocate with Mr. M.S. Thakur, Advocate.

For the Respondent(s): Mr. B.S. Chauhan, Senior Advocate with Mr. Munish Dhatwalia, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, both these appeals arise out of a common verdict pronounced by the learned Additional District Judge, Fast Track Court, Shimla, H.P. in Civil Appeal No. 30-S/13 of 2004/2002 and in Civil Appeal No. 31-S/13 of 2004/2002, hence, both are liable to be disposed off by a common verdict.

2. RSA No. 116 of 2007 stands directed against the judgment and decree recorded by the learned First Appellate Court upon Civil Appeal No. 30-S/13 of 2004/2002, whereby, the aforesaid appeal preferred before it by the defendants/respondents herein against the judgment

and decree of the learned trial Court "stood allowed", whereas, RSA No. 117 of 2007 stands directed against the judgment and decree recorded by the learned First Appellate Court upon Civil Appeal No. 31-S/13 of 2004/2002, whereby, the learned First Appellate Court dismissed the appeal preferred before it by the appellant herein "against" the judgment and decree pronounced by the learned trial Court, appeal whereof stood directed against the declining of the relief of mandatory injunction to the plaintiff by the trial Court.

3. The brief facts of the case are that plaintiff Smt. Susheela laid a civil suit for permanent prohibitory injunction and also for mandatory injunction against the defendants on the ground that she is owner in possession of land comprised in Khasra No. 1661/1, measuring 4 biswas, situated in Mauza Shangti, Sanjauli, Tehsil and District Shimla, H.P. She had purchased 4 biswas of land aforesaid out of khasra No.166, measuring 5.1 bighas from its owner through a registered sale deed and after purchase she was put in exclusive possession in a specific portion through a tatima. Smt. Susheela constructed a four storeyed house before January, 1996. Inder Singh also purchased land adjoining to the suit property and raised two lintels. On 8.11.1999, defendants started projection of their construction without leaving set backs and making any arrangement for drainage of water. During the pendency of the suit, it was also pleaded that despite injunction orders defendants continued uanuthorsied construction, raised 3 lintels without prior permission of Town and Country Planning Department and Municipal Corporation Shimla and after January, 2000 extended the projection towards the suit property and put unbearable load on the foundation of the building. This caused danger to the building. The cause of action accrued on 8.11.1999 and still continuing and hence this suit for permanent prohibitory injunction and mandatory injunction.

4. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections inter alia non joinder of parties, estoppel and want of cause of action. The right, title and interest of the plaintiff was denied. The house was raised by the defendants in the year 1993 and it was raised in accordance with plan and permission granted by the competent authority. No encroachment was ever made. No cause of action accrued to the plaintiff on 8.11.1999. No construction was ever raised after January, 2000.

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

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

1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for? OPP.

2. Whether the plaintiff is entitled for mandatory injunction, as prayed for?OPP

3. Whether the suit is bad for non joinder of necessary parties, as alleged? OPD

4. Whether the plaintiff is estopped from filing the suit, as alleged? OPD.

5. Whether the plaintiff has no cause of action, as alleged? OPD.

6. Whether the plaintiff has concealed the material fact, if so, what is its effect? OPD

7. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the latter Court under its verdict proceeded to partly decree the suit of the plaintiff vis-a-vis relief for permanent prohibitory injunction wherein it declined vis-a-vis the plaintiff the relief of mandatory injunction. In appeals, preferred therefrom by the aggrieved plaintiff as well as by the defendants before the learned First Appellate Court, the latter Court dismissed the appeal carried therebefore

by the plaintiff/appellant herein, whereas, it allowed the appeal preferred therebefore by the defendants, whereby, it dismissed the suit of the plaintiff.

8. Now the plaintiff/appellant, has instituted the instant Regular Second Appeals before this Court, wherein she assails the findings recorded in the impugned common judgment(s) and decree(s) rendered by the learned first Appellate Court. When RSA No. 116 of 2007 and RSA No. 117 of 2007 came up for admission, respectively on 30.11.2007, this Court, admitted the aforesaid appeals instituted by the plaintiff/appellant against the common judgment(s) and decree(s), rendered by the learned first Appellate Court, on the hereinafter extracted common substantial questions of law:-

a) Whether there has been misreading of of oral as well as documentary evidence by the courts below?

b) Whether the courts below have erred by not resorting to the provisions of the Order 26, Rule 9 CPC suo motu in order to ascertain the factum and extent of encroachments/overhanging projections on the land/property of the plaintiff by the defendants and such exercise was necessary in order to finally and effectively adjudicate upon the real matter in controversy?

Substantial questions of law No.1 and 2

9. Since, the substantial questions of law "as stand" formulated in both appeals are common besides interlinked and interconnected with each other, hence, they all are taken together for discussion and determination.

10. Under a registered deed of conveyance executed by the relevant owner, thereupon plaintiff Susheela acquired title vis-a-vis khasra No.166/1, thereon, she completed construction before January, 1996. Upto the stage of the defendant raising two lintel(s) on the land adjoining khasra No.166/1, the plaintiff did not raise any protest in respect of the defendant(s), in theirs raising construction thereon, theirs infracting the mandate of the duly sanctioned building approvals accorded vis-a-vis them by the authorities concerned nor she raised any protest in respect of the defendants hence encroaching upon the suit property nor she raised any remonstrance in respect of the defendants not making any arrangements for disposal/drainage of water therefrom, whereafter, it percolated onto the land of the plaintiff, sequelling concomitant damage to the adjoining building of the plaintiff borne on khasra No. 166/1. However, on 8.11.1999 when the defendants commenced construction of 3rd storey/lintel, the plaintiff on all facets aforesaid raised objections in respect of the defendants in raising construction thereon, theirs infracting the mandate of the building approvals accorded by the competent authorities vis-a-vis them, also raised objections qua the overhanging projection(s) cast upon the 3rd lintel standing constructed without any provision for drainage of water therefrom onto the appropriate source, rather water emanating from the overhanging projections raised on the 3rd lintel constructed by the defendants hence percolating onto the land of the plaintiff whereupon the building of the plaintiff raised on adjoining thereto, hence khasra No.166/1 suffering damage. The plaintiff did not adduce any evidence in respect of the defendants in raising construction upon adjoining khasra No.166/1, theirs not prior thereto receiving any apt approval(s) from the competent authority concerned nor she adduced any evidence in respect of the construction raised by the defendant upon land adjoining khasra No.166/1, sequeling theirs encroaching upon land borne on khasra No.166/1. Also, no best documentary evidence comprised in a tatima, denoting, the factum of the extent or dimensions of overhanging projection(s) purportedly raised by the defendants upon the 3rd lintel, stood adduced in evidence. Want of the aforesaid evidence, precludes this Court, to, pronounce any binding effective decree with precise or accurate delineations therein in respect of the extent or area of overhanging projection(s) purportedly raised by the defendants on the 3rd lintel of their building, hence, warranting dismantling. Concomitantly, this Court is constrained, to, not pronounce a decree of mandatory injunction in respect of the dismantling of the overhanging projections, if any, raised by the defendants on the 3rd lintel of their building situated on land adjoining khasra No.166/1.

11. Be that as it may, dehors any pleadings standing erected by the plaintiff in respect of drawing of any compromise inter se her and the defendants, compromise whereof is borne in Ex.PW1/B, the plaintiff yet relies upon the recitals borne therein, in respect of the defendants bending all the steel bars existing on the 3rd lintel, of, the relevant building also upon the articulations borne therein qua acquiescences of the defendants, to, not thereafter extend them for raising any overhanging projections thereupon, for hers canvassing that thereupon she was not enjoined to adduce any evidence in respect of overhanging projections, cast, by the defendants upon the 3rd lintel of their building, hence, infringing her right in respect of the building raised by her upon khasra No.166/1. Even though, no pleadings in respect thereof stand constituted in the plaint, yet with Ex.PW1/B sanding executed inter se the parties at contest, during the pendency of the civil suit before the learned trial Court also with the counsel for the defendant while subjecting the plaintiff to cross-examination, his putting affirmative suggestion(s) with echoings therein in respect of validity of execution Ex.PW1/B inter se the parties at contest, does, dehors no leave being sought or granted by the learned trial Court for its adduction into evidence, render it to be yet appraisable. However, the evidentiary worth thereof is belittled by the factum, of, at the time contemporaneous to its execution, no, supplemental auxiliary evidence standing adduced, comprised in any valid demarcation of contentious adjoining estates of the litigating parties being conducted, whereafter, tatima with exact depictions therein of the area of the overhanging projections erected by the defendants on the 3rd lintel, also its holding reflections in consonance with the recitals borne in Ex.PW1/B, thereupon, EX.PW1/B is rendered unbereft of any conclusive evidentiary solemnity, for hence firmly resting the controversy, qua thereupon rights, if any, of the plaintiffs in respect of the building raised by her, hence standing infracted. Moreover, the plaintiff was also enjoined to prove by adducing potent expert evidence that the defendant(s) in raising overhanging projection(s) on the 3rd lintel, theirs leaving, no provisions for drainage of rain water therefrom onto its appropriate source, rather water flowing therefrom entering onto the land of the plaintiff, in sequel whereof, imminent danger besides thereat arising to the building erected by her upon khasra No.166/1. However, the aforesaid evidence is also amiss. Consequently, the plaintiff as concluded by the learned first appellate court, abysmally, failed to prove that the overhanging projection raised by the defendant upon the 3rd lintel, being, beyond the building approvals granted by the competent authority to the defendants also her failure to adduce into evidence the relevant records from the office(s) of the sanctioning authorities concerned, results in hers also failing to prove that the defendants in raising construction upon land adjoining khasra No.166/1, theirs not prior thereto obtaining any valid sanction in respect thereof, also has failed to prove that the defendants in digression besides in deviation therefrom, hence proceeding to raise construction in a manner, whereby, rights, if any, of the plaintiff in respect of the building raised by her upon khasra No.166/1 being infringed. Contrarily, with the plaintiff in her cross-examination conducted by the learned counsel for the defendants, acquiescing to the suggestion put thereat to her qua hers not leaving intact any set backs in the apt portion(s) of her building adjoining the building of the defendants, thereupon, she rather tacitly probalizes the suggestion put to her by the learned counsel for the defendant with echoings therein of the defendants in raising construction on the land adjoining khasra No.166/1, theirs not digressing or deviating from the sanctioned plan, thereupon an inference is bolstered qua the plaintiff without leveraging her claims in the suit upon firm conclusive evidence, has yet therein sought frivolous reliefs against the defendants.

12. The learned counsel appearing for the plaintiff/appellant has contended with vigour that dehors want of conclusive firm evidence aforesaid, for thereupon the controversy engaging parties at lis being clinchingly rested, yet the learned courts below were enjoined with an obligation to suo moto order, for, the appointment of a local commissioner, whereupon, alone, the lis in suit would stand firmly clinched, whereas, the learned First Appellate Court omitting to suo moto order for the appointment of a local commissioner, its abandoning, its duty to elicit firm and clinching evidence for settling findings on the apposite issue(s), whereupon, he contends that the decree impugned hereat warrants interference. The aforesaid submission is highly illusory besides fanciful, unbereft, of sound grooving(s) in the apposite material existing hereat, comprised in the plaintiff initially making concerted efforts, to, adduce all the aforesaid firm

documentary pieces of evidence, for thereupon succoring her claim in the suit, whereafter, in case any noticeable infirmity standing detected therein or ambiguity existing therein, would hence for begetting removal(s) thereof constrain the learned First Appellate Court, to suo moto order for the appointment of a local commissioner. However, when the plaintiff has not initially made her endeavours to adduce the relevant best documentary evidence, for securing formidable findings being pronounced upon the relevant issue(s), she, cannot at this stage contend that the learned first Appellate Court was enjoined, to, suo moto order for the appointment of a local commissioner, for, the controversy engaging the parties being thereupon firmly rested, especially when any countenancing of the aforesaid espousal would sequel the ill fate, of, the effect of all the aforesaid failures/omissions of the plaintiff being scuttled besides it would scuttle the effect of all the aforesaid acquiescence(s) of the plaintiff, whereupon, she probalises the factum of the defendants in raising construction upon land adjoining Khasra No.166/1, theirs not making any encroachment upon the land borne on khasra No.166/1 also when she probalises the factum of theirs not deviating besides digressing from the appropriate sanction(s) meted to them. Moreover, any approbation of the aforesaid espousal would sequel the ill fate of this court untenably ordering for a denovo trial of the civil suit, especially when the plaintiff has failed to adduce any cogent evidence in portrayal of the defendants in theirs raising construction on their land, theirs hence violating the mandate of sanctioned or approved building plans. Importantly also the plaintiff was under a solemn obligation to discharge the onus(es) of proving the relevant issues whereas, it being not the duty of courts concerned, to collect evidence for her for hence facilitating her in discharging the onus of proving the relevant issues.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Both the substantial questions of law are answered in favour of the respondents and against the appellant.

14. In view of the above discussion, there is no merit in the instant appeals, which are accordingly dismissed. The impugned judgment(s) and decree(s) rendered by the learned First Appellate Court in Civil Appeal Nos. 30-S/13 of 2004/2002 and Civil Appeal No. 31-S/13 of 2004/2002 are maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

****

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

The Dev Mahapna Co-operative Housing Building Society & others
.....Petitioners/Defendants.

Versus

Smt. Reshmu & another .....Respondents/Plaintiff.

CMPMO No. 350 of 2015
Reserved on : 25.07.2017.
Date of Decision: 30th August, 2017.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- An application for ad interim injunction was filed in which the Trial Court granted the order of status quo – an appeal was filed, which was dismissed- held in revision that suit land is abadi deh and all the owners of the land in the mohal own proportionate share in it – no person has a right to raise construction on the same- plaintiff had relinquished her share in favour of her brother and the suit at the instance of plaintiff is prima facie not maintainable- the defendants are not the owners and have no right to raise construction – the petition dismissed. (Para-3 to 10)

Case referred:
Ajmer Singh (deceased by L.R's) versus Shamsher Singh & others, AIR 1984 P&H, 58

For the Petitioners: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For Respondent No. 1 : Mr. K.D. Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.
For Respondent No.2: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

During the pendency of the plaintiff's suit for permanent prohibitory injunction for restraining the defendants from begetting any change in the nature of the suit khasra numbers delineated in the plaint, she instituted an application cast under the provisions of Order 39, Rules 1 and 2, CPC, seeking therein relief(s) qua till the disposal of the apposite suit, the defendants being restrained from changing the nature and possession of the suit khasra numbers. Upon the aforesaid application, the trial Judge recorded an order, whereby, the parties to the lis were directed, to, till the apposite suit receives adjudication hence maintain status quo qua nature and possession of the suit khasra numbers.

2. The defendants being aggrieved therefrom instituted an appeal before the learned learned Additional District Judge-II, Solan, the latter proceeded to dismiss the appeal of the defendants, in sequel, whereto, the defendants/petitioners are aggrieved, hence, concert to beget reversal thereof, by instituting the instant petition before this Court.

3. Uncontrovertedly, the suit property is entered in the relevant records as "abadideh". The parlance borne by coinage "abadideh", is, of its being the occupied site of village, whereon exist the houses of villagers, who, in the mohal concerned, whereat lands evidently reflected in the revenue records as "abadideh", hence, hold shares therein in proportion to their recorded land holdings in the apposite mohal, also hold concomitant compatible rights to raise their respective abodes thereon. With this Court ascribing the aforesaid connotation, to the coinage "abadideh" besides its also proceeding to make conclusions in respect of apposite entitlement(s) of the recorded co-khatedars in the mohal concerned, whereat, abadideh lands are located, to hence raise their abodes thereon, it is of crucial importance, to, dwell upon the factum of each of the parties to the lis in consonance therewith also holding a right of user of suit khasra numbers, numbers whereof stand uncontrovertedly borne in the revenue records as "abadideh", right(s) whereof would ensue vis-a-vis each of the contesting parties, only, on surfacing of prima facie evidence in respect of each of the litigant(s), possessing, shares therein on account of theirs holding lands in the mohal whereat the suit khasra numbers occur.

4. Initially bearing in the mind the aforesaid inferences, therefrom the locus standi of the plaintiff to institute the instant suit is also to be gauged. The plaintiff prima facie holds no locus standi to institute the instant suit against the defendants nor hence she holds any leverage to validate the verdicts pronounced by both the learned Courts, below, significantly, in face of reflections occurring in the relinquishment deed of 19.01.1993, hence making a display of the plaintiff thereunder relinquishing her share in respect of abadideh land(s) vis-a-vis her brothers. However, even if, the plaintiff hence under the aforesaid relinquishment deed has thereunder relinquished her share in the abadideh land(s) existing in the mohal concerned, whereat the suit khasra numbers are located, thereupon, she is prima facie per se, not, entitled to rear the instant suit against the defendants nor she is entitled to institute, during its pendency an application, for claiming therein relief of ad interim injunction being pronounced vis-a-vis the defendants, nonetheless, given the defendants in their written statement acquiescing to the factum of hers holding a residential house comprised in an area of four biswas upon abadideh land(s), land(s) whereof are located in the mohal concerned. In aftermath, the effect borne by the aforesaid acquiescence is thereupon an inference being erected, of hence, the plaintiff being a co-

sharer in the abadideh land(s) located in the mohal concerned, whereat, the suit khasra numbers are located, corollary whereof, is of hers holding the apposite entitlement to institute the extant suit against the defendants.

5. However, yet the learned counsel appearing for the defendants/petitioners herein contends that in the absence of impleadment in the extant suit, of, other co-owners vis-a-vis the relevant abadideh lands, thereupon, the plaintiff's suit being not maintainable. However, the aforesaid submission gets scuttled by a judgment recorded by the Hon'ble Full Bench of the Punjab and Haryana High Court, reported in ***Ajmer Singh (deceased by L.R's) versus Shamsher Singh & others, AIR 1984 P&H, 58***, relevant paragraph 9 whereof is extracted hereinafter:-

> "9. To conclude, the answer to the question posed at the outset is rendered in the affirmative and it is held that a co-sharer can institute and maintain a suit for possession against a trespasser in respect of the entire property without impleading the other co-sharers and secure a decree for the same irrespective of his own share therein." ....(p.61)

wherein, a right is preserved in a co-owner, dehors his/her omitting to associate in the memo of parties or his/her omitting to implead along with him/her other co-owners, to, yet proceed to maintain a suit for possession vis-a-vis trespassers. Even, though, the aforesaid extracted relevant portion of the judgment recorded by the Hon'ble Full Bench of the Punjab and Haryana High Court in Ajmer Singh's case (supra), is a verdict pronounced with respect to the entitlement of a co-sharer, to, maintain a suit for possession, dehors hers/his not associating along with her/him in the array of co-plaintiffs other recorded co-owners concerned, especially when the relevant relief is constituted against trespasser(s) upon the suit property concerned. Also when in distinction thereto, the instant suit is a simplicitor suit for permanent prohibitory injunction, without, any relief being ventilated therein in respect of vacant possession of the suit property, nonetheless, the ratio decidendi borne in the afore extracted relevant portion of the judgment recorded by the Hon'ble Full Bench of the Punjab and Haryana High Court in Ajmer Singh's case (supra), is, of the plaintiff's suit, even, with a ventilation therein of a simplicitor relief for permanent prohibitory injunction being, yet, maintainable against a trespasser, despite, the sole plaintiff, not, associating along with him/her in the array of co-plaintiffs, other recorded co-owners in the suit land(s) concerned.

6. Nowat, the effect of admission(s) of the defendants/petitioner of the plaintiff, holding, a residential house, comprised in an area of 4 biswas upon abadideh land(s) located in the mohal concerned, when is construed in entwinement with hers under an relinquishment deed of 19.01.1993 also relinquishing her share in abadideh lands vis-a-vis her brothers, thereupon, prima facie, the plaintiff when may have by raising construction to the extent of 4 biswas upon abadideh land, may also hence in proportion to her legitimate share therein, hence, taken to occupy abadideh land, in sequel whereto, she may not hold any locus standi, to, institute the instant suit or thereupon the association by her in the array of co-plaintiffs of other recorded co-owners being a dire necessity. However, the defendants were enjoined to adduce prima facie material qua, on, hers relinquishing her purported entire share in the abadideh land in favour of her brothers, besides given hers taking to occupy only 4 biswas of abadideh land, thereupon, hers holding, no, entitlement to stake any claim for any share in the abadideh land(s) nor obviously her rights as a co-owner in the abadideh land(s) remaining intact, whereupon, alone she would be concluded to have no locus standi to institute the suit, rather association by her of other recorded co-owners in the array of co-plaintiffs, being an absolute necessity. Whereas, at this stage, with the defendants failing to place on record, any, clear or categorical material with displays therein, of, the plaintiff despite making relinquishment of her share in abadideh land(s) or despite hers occupying only 4 biswas thereof, hers not being entitled to stake a claim qua any portion of abadideh land(s). Consequently, the suit of the plaintiff, claiming relief of injunction against the defendants, the purported trespassers upon the suit property is maintainable, dehors hers not associating in the array of co-plaintiffs other recorded co-owners in the abadideh land(s).

7. Be that as it may, it is to be now analysed besides guaged from the relevant material existing on record, qua whether any echoing occurs therein in respect of the defendants/appellants being not entitled to any share in the abadideh land(s), given theirs evidently not holding as owners any tract(s) of land in the mohal concerned, whereat the suit khasra numbers exist, besides depiction(s) ought to emanate from the relevant records, with graphic enunciations therein in respect of the defendants/petitioners herein being trespassers upon the suit khasra numbers. Though, the aforesaid echoings stand tacitly borne in the pleadings of defendants No. 4 to 15 wherein they articulate qua theirs through their ancestors hence acquiring title to the abadideh land, who stood recorded in the apposite revenue record to hold possession of suit khasra numbers, wherein dilapidated structures exist, hence, theirs holding a derived legitimate right(s) therefrom, for, subjecting the suit khasra numbers to construction. The innate nuance of the pleadings reared by the defendants/petitioners No.4 to 15, is qua their apposite striving to establish the trite factum of their endeavour to complete construction upon the suit khasra numbers, being grooved upon the relevant tract(s) of land whereon it is strived to be completed, falling to their shares therein. However, for theirs prima facie succeeding in their endeavours, they were enjoined to place on record the relevant "naksha bartandaran" holdings reflections therein, of, defendants/petitioners No.4 to 15 holding in entirety in respect of the entire tract(s) of suit khasra number(s), an indefeasible entitlement thereof. However, the defendants/petitioners, for, prima facie establishing their entitlement to raise or complete construction upon the entire tracts of land, borne in the suit khasra numbers, given the relevant lands in their entirety falling within the share of defendants No.4 to 15, did not adduce, "naksha bartandaran". Non existence besides non adduction of the aforesaid best documentary evidence, for hence leveraging strength to their espousal, contrarily, begets an inference qua theirs neither establishing the factum of their endeavour to commence or complete construction thereon, emanating, from theirs being recorded co-owners in the abadideh land(s), befitting sequel wherefrom, is, that the bald pleadings of defendants No.4 to 15 cannot, prima facie at this stage nail any conclusion that the construction, if any, endeavoured to be completed upon suit khasra number(s) being not in excess of their share therein or the construction, if any, if permitted to be completed thereon, its adversely prejudicing the rights of other co-owners in the abadideh land inclusive of the plaintiff.

8. Both, written statement(s) to the plaint as well as the reply(ies) to the apposite application, stood furnished by co-defendant No.8, on behalf of all co-defendants, inclusive of defendants No.1 to 3. The effect of all the co-defendants jointly instituting written statement(s) to the plaint besides jointly instituting reply(ies) to the apposite application, begets an inference of construction activities, if any, carried upon the suit khasra number(s), being strived to be completed, for, the benefit of all co-defendants, inclusive of defendants No.1, 2 and 3, the latter defendant(s) whereof bear the nomenclature of "The Dev Mahapna, Co-operative Housing Building Society, Dhiarighat, Tehsil Kandaghat, District Solan, H.P.. The further concomitant effect, thereof, is that dehors assumingly defendants No.4 to 15, holding share(s) in abadideh land(s) also assumingly theirs holding right(s) to subject the suit khasra number(s) to construction, is of, the members of the aforesaid co-operative society being prima facie evidently alike the aforesaid defendants construable to be also holding a share in the abadideh land(s), whereupon, the benefits, if any, of the completed construction upon the suit khasra numbers, may untenably accrue vis-a-vis all the members of the afore-referred co-operative society, bestowals whereof may for reasons alluded to hereainafter also infract the mandate of the Himachal Pradesh Co-operative Societies Act (hereafter referred to as the Cooperative Societies Act) also may transgress the provisions engrafted in Section 118 of the Himachal Pradesh Tenancy and Land Reorms Act, infraction(s) whereof are to be obviated.

9. For determining whether all the members of the aforesaid co-operative society, hold, purportedly alike defendants No.4 to 15, shares in the abadideh land, an allusion to the enlisted members thereof borne in the annexure appended to the certificate issued, in, respect of the registration of the Society concerned, by the competent authority concerned, is extremely important. An allusion thereto, copy whereof stands placed on record, is reflective of some of the

enlisted members of the “society”, not, standing arrayed as co-defendants in the array of defendants. Consequence of apposite non arraying(s) of all the enlisted members of the co-operative society concerned, is, of the defendants/petitioners herein camouflaging the relevant status(es) of all the enlisted members of the co-operative society concerned, pertinently in respect of the suit land. It appears that the aforesaid camouflaging sprouts from all the enlisted members of the co-operative society concerned, not, along with defendants No.4 to 15 purportedly holding any share in the suit khasra numbers, thereupon, if qua co-defendants No.1 to 3, the benefits of the relevant completed construction, are permitted to ensue, thereupon, despite theirs not holding any entitlement, to, any share(s) in the abadideh land, they would stand benefited therefrom. The aforesaid bestowal of benefits upon certain members of the co-operative society, not holding any share in the abadideh land(s) would detract from the subtle nuance borne by the connotation “abadideh lands”, lands whereof are meant only for user by evidently proven co-owners therein or are meant for user by natural inhabitants of the mohal concerned or by natural beings, than by, artificial beings or corporate entities, whereas contrarily, with co-defendants No.1 to 3 being artificial beings besides not finding their apposite reflection(s) in the relevant records, thereupon, it appears that there is a possibility of certain, enlisted members of the society concerned, hence through a clever stratagem of creating a cooperative Society striving, for bestowal of impermissible benefits vis-a-vis them, despite, theirs not being agriculturists within Himachal Pradesh, whereupon, they stand debarred by the provisions of Section 118 of the H.P. Land Tenancy and Reforms Act, provisions, whereof stand extracted hereinafter, to derive any pecuniary leverage from construction raised vis-a-vis lands borne upon the suit khasra number, also stand debarred to claim any right, title or interest upon “abadideh lands”.

> "118. (1) Notwithstanding 'anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, no transfer of land (including sales in execution of a decree of a civil court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease, mortgage 'with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.
>
> (2) Nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of-
>
> (a) a landless labourer; or
>
> (b) a landless person belonging to a scheduled caste or a scheduled tribe; or
>
> (c) a village artisan; or
>
> (d) a landless person carrying on an allied pursuit; or
>
> (e) the State Government; or
>
> (f) a co-operative society or a bank; or
>
> (g) a person who has' become non-agriculturist on account of the acquisition of his land for any public purpose under the Land Acquisition Act, 1894; or
>
> (h) a non-agriculturist who purchases or intends to purchase land for the construction of a house or shop, or purchases a built up house or shop, from the Himachal Pradesh State Housing Board, established under live Himachal Pradesh Housing Board Act, 1972, or from the Development Authority constituted under the Himachal Pradesh Town and Country Planning Act, 1977, or from any other statutory corporation set-up under any State or Central/enactment; or
>
> (i) a non-agriculturist with the permission of State Government for the purpose that may be prescribed

9. Having, for the aforesaid reasons, hence concluded that proactive camouflaging(s) by the defendants/petitioners herein vis-a-vis the apposite status(es), as, agriculturists of all the enlisted members of the cooperative society concerned, begetting an inference, of, in infraction of the mandate of Section 118 of the H.P. Tenancy and Lands Reforms Act, illegitimate benefits,

hence standing bestowed upon them vis-a-vis abadideh land, thereafter, it is imperative to allude to the relevant provisions engrafted in Section 17 of the Societies Act, provisions whereof stand extracted hereinafter:-

> "17. Persons who may become members:- No person shall be admitted to membership of co-operative society except the following, namely:-
>
> (a) an individual competent to contract under Section 11 of the Indian Contract Act, 1872 (9 of 1872);
>
> (b) any other registered society (except a society under liquidation proceedings);
>
> (c) State Government; and
>
> (d) such class or classes of persons or associations or persons as may be notified by the State Government in this behalf."

Amongst the afore-extracted relevant provisions, the provisions occurring in clause (a) thereof is significant, wherein a mandate is cast in respect of persons, not, competent to contract, being thereupon disentitled to obtain enlistment as member(s) of the co-operative society concerned, mandate whereof also, does, attract hereat the afore-extracted mandate borne in Section 118 of the H.P. Tenancy and Land Reforms Act, wherein non agriculturists are barred to execute or enter into any contract in respect of sale gift, exchange, lease, mortgage 'with possession or creation of tenancy in respect of land(s) occurring within Himachal Pradesh. Since, the defendants/petitioners herein omitted, to, by adducing cogent evidence hence display that all the enlisted members of the co-operative societies concerned hold within the State of H.P., the status(es) of agriculturist(s), also when it has not been proven that all the enlisted members hold share(s) in the abadideh land(s), thereupon, all the enlisted members of the society concerned, not, holding the aforestated status/capacity(ies) in the suit land, were hence rendered incapacitated to erect any construction vis-a-vis the suit land, also, where hence concomitantly disentitled to obtain enlistment, as members thereof nor any tenable benefits in respect thereof, were bestowable upon them, significantly when they reiteratedly , prima facie, for lack of cogent evidence in respect(s) aforesaid, were not competent to execute any deeds qua tracts of relevant lands evidently occurring within Himachal Pradesh nor were entitled to derive any benefits therefrom. Contrarily, it appears that in the garb of constitution or registration of defendants No.1 to 3, as a, cooperative society, all the enlisted members thereof, are, prima facie concerting to circumvent the provisions of both Section 11 of the Cooperative Societies Act, as also, the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, whereas, the aforesaid endeavours are enjoined to be thwarted besides scuttled. In aftermath, it is to be concluded that all the co-defendants are trespassers upon the suit land and prima facie they are not entitled to raise any construction upon the abadideh land(s), rather thereupon they have no prima facie case in their favour nor the balance of convenience is loaded in their favour nor they would be entailed with any irreparable loss, arising from theirs expending exorbitant sums of money for raising construction upon the suit khasra number, predominantly when prima facie they are trespassers upon the suit khasra number(s).

10. The learned counsel appearing for the defendants/petitioners, on, anvil of judgments recorded by this Court respectively in ***CMPMO No. 283 of 2010***, titled as Sita Ram versus Ram Lal, decided on 3.6.2011 and in ***CMPMO 35 of 2011***, titled as Sardar Singh versus Smt. Salam Pati & others, decided on 6.4.2011, the relevant paragraph where of are extracted hereinafter:

Relevant paragraphs No. 5 & 6 of the judgement reported by this Court in CMPMO No.283 of 2010 read as under:

> "5. From the material on record, it is also apparent that the construction had reached upto the lintel level at the stage when the suit was filed. The plaintiff did not come to the Court immediately when the construction was started and the defendant has already spent a huge amount of money. In case he is not permitted to

complete the construction irreparable harm and injury shall be caused to him which cannot be compensated in terms of costs.

6. On the other hand in case the defendant is allowed to complete the construction, the rights of the plaintiff can be protected by ordering that in case any land on which construction is raised by the defendant falls to the share of plaintiff, the defendant shall not claim any equity or compensation during partition on the basis of such construction. He shall raise the construction at his own risk and cost. In case during partition proceedings the said area falls to the share of the plaintiff then the defendant shall not object to the same and shall handover the constructed portion without claim any compensation from the plaintiff"

Relevant paragraph No. 6 of the judgement reported by this Court in CMPMO No.35 of 2011 reads as under

"6. From the material on record, it is also apparent that the construction had already reached the lentil level and at this stage to restrain the defendants from completing the construction would cause irreparable harm and damage to them which cannot be compensated in terms of costs in case the suit is finally dismissed. On the other hand in case the defendants are allowed to construct and suit is decreed and it is held that the land and old house was joint of the petitioner would be entitled to claim a share in the newly constructed house which would not cause any loss to them. It is clarified that any construction raised shall be subject to the result of the suit and the defendants shall not claim any right or equity on the basis that they have spent time and money on the construction of the house."

has contended that the defendants being co-sharer(s) upon the suit land, they be permitted to complete their construction upon the suit khasra number, especially when huge sum of money stand expended thereon, besides, if construction is not permitted to be completed, irreparable loss, him and injury unrecompensable in terms of money being hence visited upon the defendants/petitioners herein, rather also with the aggrieved co-owner belatedly seeking relief of ad interim injunction, hers being hence disentitled for the apposite relief. The learned counsel appearing for the defendants proceeds to contend that with the plaintiff in paragraph No.11 of the plaint, pleading that construction activity upon the suit land, commencing 8-9 months prior to the institution of the plaint also when the Local Commissioner in his report makes disclosure therein, of, large part of construction activity being completed upon suit khasra number(s) also with concomitant exorbitant sums of money being expended thereon besides with the plaintiff belatedly rearing a suit with relief(s) of injunction therein, she is not entitled to relief(s) of ad interim injunction being granted vis-a-vis her, reliefs whereof if granted would nullify the triplicate tests of (a) prima facie case existing in her favour; (b) balance of convenience being loaded vis-a-vis the plaintiff and (c) irreparable loss not re-compensable in terms of money, being visited upon the plaintiff. However, all the aforesaid submissions, for all the reasons aforestated, impinge upon the disentitlment or entitlement of the defendants/petitioners herein to raise construction upon the suit khasra number, whereas, given theirs being prima facie concluded to be trespassers thereon, hence, the instant petition warrants dismissal. Also dehors the above, even the aforestated submission is rudderless, in the face of the plaintiff averring that, on, the relevant excavation activities commencing 8 to 9 months prior to the institution of the suit, thereupon sequeling the defendants to commence construction thereon, whereafter hers promptly instituting the extant suit also constrains this Court to dismiss the instant petition.

11. For the foregoing reasons, the instant petition is dismissed and the impugned orders are maintained and affirmed. However, it is made clear that the the observations made hereinabove shall not be construed as any expression on the merit(s) of the case. No order as to costs. All pending applications also stand disposed of.

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

Tilak Raj & others .....Petitioners/Plaintiffs.

Versus

Ivy International School & others .....Respondents/Defendants.

CMPMO No. 381 of 2015
Reserved on : 22.08.2017.
Date of Decision: 30th August, 2017.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- A deed was executed by proforma defendant No. 4 in favour of the defendants No. 1 to 3- defendant No. 4 swore his affidavit reserving his right to use three meters wide passage over khasra No. 901- portion of this khasra number was transferred by proforma defendant No. 4 in favor of the plaintiff – defendants No. 1 to 3 starting constructing a path in khasra No. 901 – plaintiffs filed a suit for seeking injunction- an application for interim injunction was filed, which was allowed – an appeal was filed, which was allowed and the order of Trial Court was set aside- held that there is no mention in the sale deed that any portion of khasra No. 901 would be used as a passage by the defendants No. 1 to 3 - in case the defendants are allowed to raise construction, rights of plaintiffs and proforma defendant No. 4 would be defeated – the Appellate Court had erred in reversing the order of the Trial Court- petition allowed – order of Appellate Court set aside and that of the Trial Court restored. (Para- 2 to 5)

For the Petitioners: Mr. Rakesh Kumar, Advocate.

For Respondents No. 1 to 3: Mr. Bhupender Gupta, Senior Advocate with Ms. Poonam Gehlot, Advocate.

For Respondent No.3: Mr. Adarsh Vashishta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The contesting defendants No.1 to 3, under a registered deed of conveyance executed vis-a-vis them by proforma defendant No.4, acquired title to land borne on khasra No. 902. The relevant deed of conveyance in respect of the aforesaid suit khasra number stood executed on 9.4.2013. At the time of its execution, proforma defendant No.4 swore an affidavit, attested by an Executive Magistrate, wherein, he reserved a right qua user of land measuring 3 meters wide path upon khasra No. 901 vis-a-vis the contesting defendants No.1 to 3. The averments appertaining to the aforesaid creation of right of path upon defendants No.1 to 3, stand elucidated in paragraph No.2 of the apposite affidavit, affidavit whereof stands appended as Annexure P-14 with the instant petition. However, subsequent thereto under a registered deed of conveyance, proforma defendant No.4 alienated vis-a-vis the co-plaintiffs a portion of land borne on khasra No.901. Since, defendants No.1 to 3, in consonance with Annexure P-14, purportedly proceeded to excavate a portion of khasra No.901, for hence constructing a path thereon, thereupon the co-plaintiffs were constrained to institute a suit against defendants No.1 to 3 claiming therein qua a relief for permanent prohibitory injunction being pronounced upon the contesting defendants, for hence restraining them from digging and encroaching upon any portion of land borne in khasra No.901. During the pendency of the suit, an application cast under the provisions of Order 39, Rules 1 and 2 of the CPC, stood, instituted by co-plaintiffs before the learned trial Court, wherein they claimed an ad interim relief that till the conclusion of the trial of the suit, the contesting defendants No.1 to 3 be restrained from excavating any portion of khasra No. 901 for theirs thereon raising a path. The application was, on anvil of Annexure P-14, contested by defendants No.1 to 3. However, the learned trial Judge, allowed the application, thereupon with hence contesting defendants No.1 to 3 being aggrieved therefrom, they proceeded

to institute an appeal before the learned District Judge, Shimla, who, however, reversed the verdict pronounced upon the apposite application by the learned trial Judge, rather he proceeded to permit the contesting defendants No.1 to 3, to, on anvil of Annexure P-14 and in consonance therewith construct a path upon a portion of khasra No.901. The co-plaintiffs standing aggrieved therefrom are constrained to institute the instant petition herebefore.

2. Apparently, a perusal of the written statement instituted to the plaint by the contesting defendants also a perusal of the counter claim instituted by the contesting defendants, make graphic underscorings in respect of theirs placing reliance upon Annexure P-14, Annexure whereof is an affidavit sworn by proforma defendant No.4 before the Executive Magistrate at the time contemporaneous to his executing vis-a-vis them, a registered deed of conveyance in respect of khasra No. 902, thereupon, all the aforesaid disclosure(s) borne therein, tantamount to the contesting defendants acquiescing to the factum of theirs both attempting besides purportedly completing the apt activity of theirs constructing a path upon a portion of khasra No. 901, in portion whereof the co-plaintiffs also hold title as co-owners.

3. The learned District Judge has taken to assign credence to Annexure P-14. However, in his assigning credence to Annexure P-14, whereupon, he validated the relevant construction activity purportedly carried thereon by the contesting defendants No.1 to 3, he has mis-appraised the effect of proforma defendant No.4, in his written statement furnished to the counter-claim instituted by contesting defendants No.1 to 3, hence denying the voluntariness of his executing Annexure P-14. The aforesaid denial by proforma defendant No.4 in respect of his voluntarily executing Annexure P-14, remained efficaciously unrebutted by contesting defendants no.1 to 3. Furthermore, there is no recital occurring in the apposite sale deed in respect of user as a path of any portion of khasra No. 901 by the contesting defendants. Consequently, it was grossly inappropriate for the learned District Judge concerned to assign credence thereto rather prima facie any rights on anvil thereof in respect of any portion of khasra No.901, could not, prima facie have been legitimately agitated by contesting defendants No.1 to 3. Consequently, when at this stage the suit has, not, arrived at a stage of evidence being adduced in respect of voluntary or involuntary execution of Annexure P-14, by proforma defendant No.4 nor obviously when evidence in respect thereof has not erupted, corollary of the aforesaid is that with no prima facie rights, title or interest in respect of any portion of khasra No.901 hence ensuing vis-a-vis the contesting defendants No.1 to 3, whereupon, the recording of the impugned verdict by the learned District Judge suffers from a vice of thorough non application of mind.

4. Be that as it may, till any pronouncement emanates from the Civil Court concerned upon the issue appertaining to voluntary or involuntary execution of Annexure P-14, by, proforma defendant No.4, any ascription of validation thereto by this Court or concomitant validation vis-a-vis the holding of construction activity upon any portion of khasra No.901, would, result in contesting defendants No.1 to 3 being untenably permitted to usurp the right(s) of proforma defendant No.4 and of co-plaintiffs upon any portion(s) thereof, besides validating the impugned verdict would tantamount to causing irreparable loss or injury to the co-plaintiffs and to proforma defendant No.4 besides hence balance of convenience rests vis-a-vis the co-plaintiffs and proforma defendant No.4, than vis-a-vis contesting defendants No.1 to 3.

5. In aftermath, with the co-plaintiffs having (a) prima facie case in their favour, (b) balance of convenience being loaded in their favour, (c) irreparable loss or injury demonstrably accruing to them, in case relief of injunction is refused, thereupon, with evident satiation of the aforesaid trite triplicate tests, constrains this Court to reverse the verdict recorded by the learned District Judge. Consequently, the instant petition is allowed and the impugned order/judgment rendered by the learned District Judge, Shimla in CMA No.19-S/14 of 2015 is set aside, whereas, the order rendered by the learned Civil Judge (junior Division), Court No.5, Shimla in CMA No. 51-6 of 2014 on 8.06.2015 is affirmed and maintained. However, it is made clear that the observations made hereinabove shall not be construed as any expression on the merit(s) of the case. All pending applications also stand disposed off.

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

Vikas Goel .....Appellant.
Versus
Deepti Chanana .....Respondent.

FAO No. 478 of 2015.
Reserved on : 14.07.2015
Decided on : 30th August, 2017.

Hindu Marriage Act, 1955- Section 13- Wife filed a petition for divorce pleading that a fraud was practiced upon her and she was told that her husband is MBA, which is not correct – her husband and his family members treated her with cruelty and demanded Rs. 2 lacs from the wife- report was lodged in the police station- she was turned out of the house after snatching the jewellery – the petition was allowed and decree of divorce was granted- held that the version of the petitioner was corroborated by PW-2- the fact that petition under Section 125 Cr.P.C was dismissed on the ground that wife was able to maintain herself is not sufficient to dismiss the petition for divorce- the Court had properly appreciated the evidence - appeal dismissed.

(Para-9 to 13)

For the Appellant: Mr. Sarvdaman Rathore, Advocate.
For the Respondent : Mr. K.D. Sood, Senior Advocate with Mr. Ankit Aggarwal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal arises from the impugned judgment rendered by the learned Addl. District Judge, Sirmaur District at Nahan, on 27.11.2015 in H.M.A. Petition No. 40-n/3 OF 2013/11, whereby he allowed the petition preferred thereat under Section(s) 12/13 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act), by the petitioner/respondent herein and on the proven ground of cruelty passed a decree for dissolution of marriage inter se the parties at lis.

2. The appellant herein standing aggrieved by the rendition of the learned Addl. District Judge hence concerts to reverse it, by preferring an appeal therefrom before this Court.

3. The brief facts of the case are that marriage inter se the parties was solemnized on 14.10.2009 at place Bhatia Palace, Paonta Sahib, District Sirmaur, H.P. according to Hindu rites and customs. After the marriage, the parties lived together. It is pleaded that before marriage, the respondent/appellant herein has told that he has passed MBA, but after marriage it came to the knowledge of the petitioner/respondent herein that his parents played fraud with her regarding his qualification. The petitioner/respondent herein stayed for few days in the house of the appellant herein after the marriage. At that time, her husband and his family members treated her with cruelty. They also demanded Rs. 2 lacs from the petitioner/respondent herein. Thereafter, the petitioner informed about the cruel act and conduct of the respondent to her parents telephonically on 15.11.2009. Then, her father came to their house and requested her her in-laws to behave with her properly. Thereafter, the respondent remained cordial with her for some time upto 20.11.2009, but again started misbehaving with her. She did not lodge the report in the police station, because the relations will become strained. It is further averred that during the stay in the house of the respondent/appellant herein, the marriage of the parties was never accumulated as there was no physical relation and co-habitation between them and when the matter was referred to the Mediator on 21.6.2012, the respondent threatened the petitioner that he was having nude photos and videography of the petitioner and threatened her to withdraw the present petition, otherwise he will make it public due to which she is in mental shock. It is pleaded that these photos were taken by the respondent/appellant herein during the stay of the

petitioner/respondent herein in their house after the marriage, but on her objection, he had assured that he will delete the photos and videos. On 17.12.2009, the respondent/appellant herein and his family members beaten the petitioner/respondent herein mercilessly and shunted out her from their house after snatching her jewelery and thereafter, they never came to look after her. As per the petitioner/respondent herein, she has been treated with cruelty by the respondent and marriage deserves to be dissolved by a decree of divorce.

4. The respondent/appellant herein contested the petition and filed reply. The marriage is admitted, but cruelty on the part of the respondent/appellant herein is denied. It is specifically denied that Rs.2 lacs were demanded by the respondent from the petitioner and it is stated that the petitioner has concocted a false story. It is also denied that any nude photos or videos were clicked by the respondent and it is also denied that he had blackmailed her. It is pleaded that this new story is made only after the filing of the petition with a view to fill up the lacuna by levelling false allegations. It is further pleaded that the petitioner remained with the respondent till 10.04.2010 and on 11.4.2010, she went with her parents with the consent of the respondent/appellant herein and between this period, there were cordial relations between both the parties as husband and wife and she was kept as his wife in their house with all dignity. The respondent/appellant herein visited the house of parents of the petitioner/respondent herein, but her parents refused to send the petitioner with him and threatened him to involve in a false criminal case. It is also denied that any jewellary of the petitioner was kept by the respondent/appellant herein. The appellant herein/respondent had went to the house of the parents of the petitioner, but they did not allow the petitioner to accompany him and even, the petitioner along with respondent went to Gurudwara, Paonta Sahib on 8.5.2011 and the respondent is ready to live with her and prayed for the dismissal of the petition.

5. The petitioner/respondent herein filed rejoinder to the reply of the respondent/appellant herein, wherein, she denied the contents of the reply besides re-affirmed and re-asserted the averments, made in the petition.

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

1. Whether the respondent has treated the petitioner to cruelty, as alleged? OPP
2. Relief.

7. On an appraisal of evidence, adduced before the learned Addl. District Judge, he allowed the petition of the petitioner/respondent herein.

8. Now the respondent/appellant herein has instituted the instant appeal before this Court wherein he assails the findings recorded in its impugned judgment and decree by the learned District Judge.

9. Under the impugned rendition, the learned Addl. District Judge concerned, had decreed the apposite petition instituted therebefore by the petitioner/respondent herein, wherein she sought dissolution of her marital ties with the appellant herein. In affording the aforesaid decree, it imputed credence to the apposite averments cast in the apposite petition qua the appellant herein at the time of solemnizing marriage, his, playing fraud with the petitioner/respondent herein, comprised in his disclosing his qualification as MBA, whereas, he was evidently only plus two besides vis-a-vis the averment of the respondent/appellant herein demanding Rs.2 lacs from her, for establishing his business and to the further averment of the appellant herein, on, 15.11.2009 and on 20.11.2009 maltreating the petitioner/respondent herein, as also, to of on 17.12.2009, the appellant herein, in an inebriated condition, mercilessly beating the respondent herein/petitioner. The learned trial Court also imputed credence to the averments cast in the petition qua the appellant herein taking nude photos and videos of the petitioner/respondent herein and also to the averments of his threatening to post them on the Internet, whereupon she was entailed with a severe mental trauma, “credence(s) whereof” stood anchored upon testimonies in tandem therewith deposed by PW-1, succor whereto stood lent by PW-2. The appellant herein had in his reply projected that he did not at any point of time treated

the petitioner/respondent herein with cruelty also he denied all the allegations of cruelty levelled against him by the petitioner.

10. The evidence germane to the aforesaid averments cast in the apposite petition stand(s) constituted in the testifications of the petitioner besides in the testimony of PW-2. The matrimonial strife inter se the parties at contest survived for more than six months. Immensity of the period whereupto their internecine marital warfare has lasted, is per se magnificatory of the marital relations inter se them standing irretrievably broken down, whereupon, given the marital relations inter se the parties at contest standing irretrievably broken down, both prudence and justice coax an inference from this Court of the petitioner/respondent herein, rearing an indefeasible ground for ousting the appellant herein from his baulking any rendition of a decree of dissolution of their marital ties. Contrarily, it is the demand of justice qua thereupon the decree as rendered by the learned Additional District Judge warranting vindication.

11. Be that as it may, the ground of cruelty whereupon any party to matrimony seeks dissolution of his/her marital status with the errant spouse, has, both physical as well as mental facets. The cruelty which the petitioner/respondent herein alleges in her petition stands harboured upon the respondent besetting her with mental trauma also with mental turmoil, constituted in the respondent/appellant herein playing fraud with her qua his qualification as also his after solemnizing marriage, his pressurizing the petitioner for bringing money from her parents for his establishing his business, averments whereof stand efficaciously proven. Furthermore, a suggestion was put to the petitioner in her cross-examination conducted by the learned counsel appearing for the respondent/appellant, of hers not taking to wear Saree(s) on the eve of festivals, suggestion(s) whereof, is communicative of the fact that she was being pressurized by the respondent/appellant herein and his family members to live her life at their behest, factum whereof also constitute(s) cruelty. Moreover, the petitioner/respondent herein in her testification has also levelled serious allegations against the respondent/appellant qua his taking her nude photographs and videos, testification whereof stands corroborated by PW-2 her mother, absence of adduction of any rebuttal evidence thereto hence renders it to acquire conclusivity. The conjunctive effect of the respondent/appellant herein evidently playing fraud with the petitioner/respondent herein qua his qualification; his evidently demanding money from her; his evidently maltreating the petitioner/respondent herein with cruelty as also his evidently taking nude photographs and videos of the petitioner, begets the sequel of the petitioner/respondent herein standing beset with mental trauma also her psyche standing beset with excruciating mental turmoil besides agony, wherefrom the apt inference is of the petitioner/respondent herein evidently holding a tenable ground for seeking dissolution of her marital ties with the respondent/appellant herein.

12. Furthermore, the espousal of the learned counsel appearing for the appellant herein that with the petition constituted under Section 125 of the Cr.P.C., as stood, preferred before the learned trial Magistrate by the petitioner/respondent herein for grant of maintenance standing dismissed, thereupon, the appellant herein proving of his not treating the petitioner/respondent herein with cruelty, is also not sustainable, given the aforesaid petition for grant of maintenance standing dismissed by the learned trial Magistrate, on the ground of the petitioner/respondent herein holding sufficient means to maintain herself, hers being a teacher by profession besides when issues also the evidence adduced thereat being dissimilar vis-a-vis the issue(s) also the evidence existing hereat, thereupon the verdict if any pronounced thereon does not operate as *res judicata* for hence the instant petition being rendered not maintainable.

13. The above discussion unfolds the fact that the conclusion as arrived by the learned Additional District Judge is based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned trial Court has not excluded germane and apposite material from consideration. Consequently, there is no merit in the instant appeal and it is dismissed. In sequel, the impugned judgment and decree is affirmed and maintained. All pending applications, if any, also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Dr. Parveen Singh Bhatia .....Petitioner.
Versus
Smt. Anita Bhatia .....Respondent.

CMPMO No. 23 of 2017.
Decided on: 31.8.2017.

Hindu Marriage Act, 1955- Section 24- Husband filed a petition for divorce – the wife filed an application seeking maintenance pendente lite @ Rs. 31,000/-p.m. and litigation expenses of Rs. 40,000/- - the trial Judge granted the maintenance @ Rs. 25,0000/- per month and litigation expenses of Rs. 15,000/- - aggrieved from the order, the present petition has been filed pleading that carry home salary of the husband is Rs. 43,575/- out of which an amount of Rs. 6,000/- is being paid to the wife and Rs. 2,000/- is being paid to each of the children in compliance with the direction passed by Judicial Magistrate Class, Court No. 4- held that the gross salary of the husband is Rs. 97,152/- and the carry home salary is Rs. 42,159/- after various deductions – a sum of Rs. 10,000/- is being paid to the wife and the children- mother is dependent upon the husband and he has to maintain himself as well- hence, maintenance reduced to Rs. 12,000/- per month with liberty to the wife to seek enhancement, if legally permissible. (Para- 3 to 5)

For the petitioner: Mr. Ramesh Sharma, Advocate.
For the respondent: Mr. S.C.sharma, Advocate.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

The order under challenge in this petition is Annexure P-6 passed by learned Addl. District Judge, Shimla (I) in an application filed under Section 24 of the Hindu Marriage Act, 1955 whereby the respondent-wife has been granted a sum of Rs. 25,000/- as maintenance pendente lite and Rs. 15,000/- towards litigation expenses.

2. The petitioner-husband has filed petition Annexure P-1 with a prayer to dissolve his marriage with respondent by way of decree of divorce on the ground of cruelty. The respondent-wife on entering appearance in the Court below has filed an application under Section 24 of the Hindu Marriage Act, 1955 for grant of maintenance pendente lite @ Rs. 31,000/- per month and litigation expenses Rs. 40,000/-. Learned trial Judge, on having taken on record the version of the petitioner-husband and taking into consideration the records has, however, granted the maintenance pendente lite @ Rs. 25,000/- per month and the litigation expenses to the tune of Rs. 15,000/-.

3. The complaint is that the amount so granted by the Court below is on higher side as the carry home salary of the petitioner-husband is only Rs. 43,575/-. Out of that also, a sum of Rs. 10,000/- i.e. Rs. 6,000/- to respondent-wife and Rs. 2,000/- each to the children is being paid by him to the respondent consequent upon the order Annexure P-3 passed by learned Judicial Magistrate Ist Class, Court No. 4, Shimla in the proceedings instituted against him under the provisions of the Domestic Violence Act, 2005.

4. On hearing learned counsel on both sides and on perusal of the record, it would not be improper to conclude that Rs. 25,000/- per month granted as maintenance pendente lite is on higher side. True it is that as per the salary slip annexed to the reply fled on behalf of respondent-wife, the gross salary of the petitioner-husband is Rs. 97,152/- The deductions on account of GPF subscription, payment of LIC installment and income tax etc. is Rs. 54,993/-. However, the fact remains that the carry home salary of the petitioner, as such, is Rs. 42,159/- .

5. As pointed out hereinabove, a sum of Rs. 10,000/- per month for her maintenance and that of the children is being paid to her by the petitioner. There is no bar in awarding maintenance under the provisions of the Domestic Violence Act, 2005, under Section 24 of the Hindu Marriage Act, 1955 and for that matter even under the provisions of Section 125 Cr.P.C. simultaneously, however, it depends upon the paying capacity of the petitioner-husband. Therefore, the respondent-wife has rightly sought the maintenance pendente lite and litigation expenses against her husband. However, the maintenance granted is certainly on higher side. At the same time, the present is also not a case where the respondent-wife in view of the maintenance granted to her under the provisions of the Domestic Violence Act, 2005 is not entitled to seek maintenance pendente lite under Section 24 of the Hindu Marriage Act, 1955. In view of the income of the petitioner-husband coupled with his own liabilities i.e. his own maintenance as well as his mother dependent upon him and also the monthly income, the maintenance pendente lite @ Rs. 12,000/- should have been granted in addition to Rs. 6,000/- which the respondent wife is already getting under the Domestic Violence Act, 2005. Therefore, the order under challenge, to the extent of granting maintenance pendente lite @ Rs. 25,000/- per month, is modified and besides litigation expenses as granted, the petitioner-husband is also directed to pay the maintenance pendente lite to the respondent-wife @ Rs. 12,000/- per month instead of Rs. 25,000/-. The respondent-wife, however, shall be at liberty to seek further maintenance if legally admissible and enhancement of the maintenance already granted, if so advised. The 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.

Head Post Master of Post Office, Kullu ....Appellant.

Versus

Tulsi Devi alias Tulji ....Respondents.

FAO No. : 101 of 2010.
Decided on : 31.08.2017.

Workmen Compensation Act, 1923- Section 4- Workman was serving as Gramin Dak Sevak Mail Carrier- he died in harness – an application for compensation was filed, which was allowed and compensation of Rs. 2,62,835/- was awarded along with interest @ 12% per annum- aggrieved from the order, the present appeal has been filed- held that claimant claims to be daughter of the deceased- she stated that she was divorced and was dependent upon the deceased for her livelihood- claimant had completed 24 years of age on the date of incident- a major daughter does not fall within the definition of dependent- she has to satisfy that she was wholly or in part dependent upon the earnings of the workman at the time of his death- claimant had not led any evidence to prove this fact- even the divorce was not granted by a court of law- Commissioner had wrongly held that claimant was dependent on the deceased - appeal allowed and order of the Commissioner set aside. (Para-11 to 16)

For the appellant : Mr. Ashok Sharma, ASGI.
For the respondent : Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (*Oral*)

By way of this appeal, appellant has challenged the order passed by the learned Commissioner under the Workmen's Compensation Act, 1923 (hereinafter referred to as 'Act'), in

case No. 15 of 2006, dated 07.09.2009, vide which learned Commissioner has granted the following relief to the respondent/claimant.

> *"Accordingly the petition is allowed and an amount of Rs. 1,79,956/- (Rs. One lac seventy nine thousand nine hundred and fifty six only) is hereby awarded as compensation to the petitioner. Simple interest @ 12% from the date of filing the petition till to date is also allowed which works out to Rs. 82880/-. The respondent is hereby directed to deposit the amount of compensation and interest amounting to Rs. 2,62,835/- (Rs. Two lac sixty two thousand eight hundred and thirty five only) with this court within a period of 30 days from the date of the order failing which the respondent shall also be liable to pay simple interest @ 12% p.a. on the basic amount of compensation from the date of the order till the actual date of deposit in this Court."*

2. The issue involved in this appeal is in a very narrow compass. It is not in dispute that workman Shri Gehru Ram who was serving as a Gramin Dak Sewak Mail Carrier since 27.09.1974, died in harness on 25.11.2003. It is also not in dispute that all the emoluments which otherwise were payable to the said workman in his capacity as a Gramin Dak Sewak were duly paid by the department. Present respondent filed an application under the Workmen's Compensation Act for grant of compensation under the provisions of the said Act on the ground that the deceased was a workman as contemplated under the Act supra and the claimant was dependent on the deceased as defined in the Act supra.

3. The application so filed by the claimant was resisted by the department who *inter alia* took the stand before the learned Commissioner that the claimant did not fall within the definition of 'dependent' and also that the deceased was not workman.

4. On the basis of pleadings of the parties, following issues were framed by the Court below.

> *"1. Whether the deceased Gehru alias Gehru Ram was a workman within the meaning of the Workmen's Compensation Act, 1923? OPP*
>
> *2. Whether the accident arose out of and in the course of deceased's employment under the respondent? OPP*
>
> *3. Whether the petitioner was dependent upon the deceased and was his legal heirs? OPP*
>
> *4. Whether the petitioner is entitled to compensation as claimed? If Yes; how much and from whom?*
>
> *5. Relief."*

5. On the basis of evidence led by the parties, issues so framed were answered in the following manner.

"Issue No. 1	*:Yes*
Issue No. 2	*:Yes*
Issue No. 3.	*:Partly yes, partly No.*
Issue No. 4.	*:Not maintainable.*
Issue No. 5	*:No relief granted."*

6. Accordingly, the claim so preferred by the petitioner was allowed by learned Commissioner in terms of relief which already stands quoted above.

7. Feeling aggrieved, the employer has preferred the present appeal.

8. This appeal was admitted on 04.08.2010 on the following substantial question of law.

"Whether the deceased Gehru @ Gehru Ram was a workman within the meaning of Section sub clause (xiii) of Schedule-II of Section 2(1)(n)(ii) of the Workmen's Compensation Act, 1923 especially in view of the fact that the service conditions of the deceased were regulated by GDS (Conduct & Employment)Rules, 2001 which do not contain any provision for compensation."

9. During the course of arguments, as the following substantial question of law was also involved in the case, the same was accordingly framed and learned Counsel for the parties were also heard on the said substantial question of law.

"Whether the learned Commissioner erred in coming to the conclusion that the claimant was a dependent of the deceased as defined in Section 2(i) (d) of The Workmen's Compensation Act."

10. I have heard learned Assistant Solicitor General of India, as well as learned Counsel for the respondent and also gone through the records of the case as well as the order passed by the learned Commissioner.

11. Claimant who claims to be the daughter of the deceased has put forth her claim as being a dependent, as defined in the Act on the ground that she was a divorcee and was dependent upon the deceased for her livelihood when he died. Issue No. 3 as was framed by learned Commissioner was decided by him by holding that the claimant was legal heir of the deceased-workman and dependency under Section 2(d) of the Act means "dependents at the time of death of the time of death of the deceased/workman." Learned Commissioner further held that claimant had completed 24 years of age as on the date of death of the workman and therefore, she was a major. Actual findings returned in this regard are reproduced herein below.

" I have perused the record of the case and have reconsidered the arguments put forth by the ld. Counsels for the parties in the case in view of the observations made by the Hon'ble High Court in appeal filed by the applicant. There is no denying the fact that the petitioner is the legal heir of the deceased workman and this has not been disputed even by the respondent. Dependency under Section 2(d) of the act means 'dependents at the time of death of the deceased workman'. The petitioner had completed 24 years' of age as on the date of death of the petitioner and was therefore a major. Without going into the validity of the divorce deed which, of course, is a civil matter, this tribunal had earlier held that a divorcee was a married woman and was a major at the time of death of the workman and as such was not covered within the definition of dependent as given in Section 2(d)(iii)(c) of the Act as only "minor married daughter" and "minor widowed daughter" where dependents under the Act. It was also opined that the words 'married and a minor' given in the definition were to be read conjunctively which would only make a married daughter who was a minor dependent.

The Hon'ble High Court has not accepted this interpretation holding that this meaning cannot be ascribed to the provisions of the Act and was contrary even to the plain reading of what has been stated in the Section. The interpretation placed by this court that it is only minor married daughter and minor widowed daughter can be treated as dependent has been found absurd by the Hon'ble High Court, making this court aware of the view that married daughter cannot be a minor and therefore the works 'married' and 'a minor' can not be read conjunctively. Implicitly, a married daughter would be covered within the meaning of a dependent under section 2(d)(iii)(c) of the Act.

Accordingly, I am inclined to hold that the petitioner falls in the definition of the dependent as given in section 2(d)(iii)(c) of the Act. The respondent could adduce no evidence which could suggest that the divorcee was not dependent on the earnings of the deceased workman at the time of his death. As per the evidence on record the petitioner was the only legal heir dependent of the deceased and was

living separately from her husband with her father at the time of the death of the workman. As such this issue is decided in affirmative."

12. On these bases, learned Commissioner held that claimant was a 'dependent', as defined in Section 2(d)(iii) (c) of the Act and was entitled for the compensation in view of death of the workman in harness.

13. In my considered view, as is also submitted by learned Assistant Solicitor General of India, learned Commissioner has gravely erred in holding that the claimant was a 'dependent' within the meaning of Section 2(d) (iii) (c) of the Act. As per Clause (d) of Sub-section (i) of Section 2 of the Act, a dependent has been defined as under.

"[(d) 'dependent' means any of the following relatives of a deceased workman, namely:-

(i) A widow, a minor (legitimate or adopted) son, an unmarried (legitimate or adopted) daughter, or a widowed mother; and

(ii) If wholly dependent on the earnings of the workman at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm;

(iii) if wholly or in part dependent on the earnings of the workman at the time of his death,-

(a) a widower,

(b) a parent other than a widowed mother,

(c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter [legitimate or illegitimate or adopted] if married and a minor or if widowed and a minor,

(d) a minor brother or an unmarried sister or a widowed sister if a minor,

(e) a widowed daughter-in-law,

(f) a minor child of a pre-deceased daughter where no parent of the child is alive, or

(h) a paternal grandparent if no parent of the workman is alive.]

[Explanation.-For the purposes of sub-clause (ii) and items (f) and (g) of sub-clause (iii), reference to a son, daughter or child include an adopted son, daughter or child respectively;]"

14. A perusal of the above statutory provisions demonstrates that 'dependent' means following relatives of the deceased-workman.

I. A widow, a minor (legitimate or adopted) son, an unmarried (legitimate or adopted) daughter, or a widowed mother; and

II. A son or a daughter who has attained the age of 18 years and who is infirm, if wholly dependent on the earnings of the workman at the time of his death;

If wholly or in part dependent on the earnings of the workman at the time of his death, then (a) widower, (b) a parent other than a widowed mother, (c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter (legitimate or illegitimate or adopted) if married and a minor or if widowed and a minor, (d) a minor brother or an unmarried sister or a widowed sister if a minor, (e) a widowed daughter-in-law, (f) a minor child of a pre-deceased son, (g) a minor child of a pre-deceased daughter where no parent of the child is alive, or (h) a paternal grandparent if no parent of the workman is alive.

15. Now it is not the case of the claimant that she is covered under the definition of 'dependent', as given in Section 2((d) (i), 2(d) (ii) supra. As per learned Counsel for the claimant, she falls within the definition of 'dependent' as is envisaged in Section 2(d)(iii) (c). I am afraid that

the said contention of learned Counsel for the claimant is totally unsustainable in law. This is for the reasons that any person who falls within the ambit of the categories, as are defined in points (a) to (h) in Section 2(d) (iii) of the Act, has to first satisfy the test that they were wholly or in part dependent on the earnings of the workman at the time of his death. Learned Commissioner has erred in not appreciating that the claimant has miserably failed to prove before said authority that she was wholly or in part dependent on the earnings of the workman at the time of his death. I have minutely gone through the records of the case and a perusal of the same demonstrates that save and except the bald assertions of the claimant, there is nothing on record from which it can be gathered that the claimant in fact was either in part or wholly dependent on the workman at the time of his death. It is not in dispute that the claimant was a married lady. Though in order to substantiate that she was dependent upon the workman, a so called divorce deed has been placed on record, however, this divorce deed, in my considered view, has no significance in the eyes of law. Claimant is a Hindu by religion which fact has not been disputed during the course of arguments and it had not been disputed that her husband is also a Hindu. Therefore, as divorce amongst the Hindus is governed by the Hindu Marriage Act, until and unless husband and wife are divorced in accordance with law as per provisions of The Hindu Marriage Act, it cannot be said that a marriage has been dissolved by way of a divorce on the basis of a divorce deed so produced by the parties. In fact this possibility cannot be ruled out that this so-called divorce deed was manipulated by the claimant just to substantiate her claim that she being a destitute lady and having been divorced was wholly dependent upon her father at the time of death of her father. There is no witness of the locality produced by the claimant before the learned Commissioner to substantiate that either at the time of death of her father, she was residing with him and or that she was dependent upon the workman wholly or in part at the time of his death. The alleged talak nama is on record as Ext. PW5/E. The same is dated 05.05.2003. Now PW4 Devender Sharma, who was the former Pradhan of Gram Panchayat concerned in his examination in chief though has stated that Tulsi Devi was the legal heir of deceased Gehru Ram and was a divorcee, however, he nowhere stated in his examination in chief that at the time of death of Gehru Ram, Tulsi Devi was either residing with Gehru Ram or was dependent upon him (deceased-workman). Incidentally in his cross examination, he admitted the suggestion that Tulsi Devi had not shown any divorce deed to him and he was deposing that Tulsi Devi was a divorcee, simply on the information so given to him by Tulsi Devi. As I have already mentioned above, none of the witnesses produced by Tulsi Devi have deposed that at the time of death of Gehru Ram, Tulsi Devi was dependent upon Gehru Ram. This Court is not oblivious of the fact that provisions of the Workmen's Compensation Act are benevolent in nature, however, at the same time, one cannot be permitted to misuse the provisions of a benevolent Act as are contained in The Workmen's Compensation Act.

16. It is settled principle of law that he who alleges has to prove. It was the case of the respondent/claimant that she was dependent of deceased-workman, however, this, in my considered view, she has miserably failed to prove. This important aspect of the matter has been totally ignored by the learned Commissioner. The earlier decision of this Court has been totally mis-read and mis-appreciated by the learned Commissioner while holding that claimant was dependent. While holding that present respondent was dependent of deceased Gehru Ram, learned Commissioner has totally mis-read and misconstrued the plain statutory provisions and ignored the fact that no evidence was led on record by the claimant to substantiate her claim. In this view of the matter, the impugned order is not sustainable in the eyes of law as the same is perverse and the findings returned by the learned Commissioner are not borne out from the records of the case. Though, in my considered view, respondent Tulsi Devi cannot be said to be dependent of deceased Gehru, however, Gehru Ram was a workman as defined under The Workmen's Compensation Act. The substantial questions of law are answered accordingly.

17. In view of above discussion, as the order passed by learned Commissioner is not sustainable in the eyes of law, the same is accordingly quashed and set aside and the appeal is allowed. No orders as to costs.

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

Parvati Devi and others .....Appellants.

Vs.

Smt. Sabratu and others .....Respondents.

RSA No.: 403 of 2003
Reserved on: 28.06.2017
Date of Decision: 31.08.2017

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that their predecessor was non-occupancy tenant over the suit land – he had neither abandoned nor relinquished his tenancy rights- he was not ejected from the suit land – he had become the owner by way of operation of law –plaintiffs also claimed that they had become owners by adverse possession in the alternative- the Trial Court dismissed the suit- an appeal was filed, which was also dismissed- held in second appeal that the plaintiff could not connect the documents to the suit land – plaintiff cannot seek any declaration on the basis of adverse possession as the adverse possession can be used as a shield and not as a sword – the Courts had correctly appreciated the evidence.

(Para-11 to 15)

Case referred:

Gurdwara Sahib versus Gram Panchayat Village Sirthala and another, (2014) 1 Supreme Court Cases 669

For the appellants: Mr. G.R. Palsra, Advocate.

For the respondents: Mr. Kapil Dev Sood, Senior Advocate, with Mr. Dhananjay, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this appeal, appellants have assailed the judgment and decree passed by the Court of learned District Judge, Mandi in Civil Appeal No. 62 of 2001, dated 17.07.2003, vide which, learned appellate Court while dismissing the appeal so filed by the present appellants, upheld the judgment and decree passed by the Court of learned Senior Sub Judge, Mandi in Civil Suit No. 53/98, dated 04.07.2001, whereby the learned trial Court had dismissed the suit so filed before it by the plaintiffs for declaration and injunction as a consequential relief.

2. Brief facts necessary for the adjudication of this case are that the appellants/plaintiffs (hereinafter referred to as "the plaintiffs") filed a suit on the ground that the suit land comprised in Khata/Khatauni No. 226 min/214 min, Khasra Nos. 859 and 869, Kitta 2, measuring 2-8-6 bighas, situated in Mauja Kehar, Hadbast No. 290, Illaqa Rajgarh, Tehsil Sadar, District Mandi (hereinafter referred to as "the suit land") was recorded in the ownership and possession of defendant, which entry was wrong and illegal, as Khasra No. 869 and ½ share of Khasra No. 859, Kittas 2, measuring 1-14-12 bighas was actually in possession of the plaintiffs in their capacity as its owners. As per the plaintiffs, their predecessor-in-interest, late Sh. Dilu was a non-occupancy tenant over the suit land and he was paying rent to the land owner. Said Dilu had neither abandoned nor relinquished his tenancy rights, nor he was ever ejected from the suit land. As per the plaintiffs, their father had thus become owner of the suit land by operation of law in the year 1992. It was further their case that predecessor-in-interest of defendant had neither paid any rent of the suit

land to the land owner nor he was in possession of the same. In the alternative, it was prayed by the plaintiffs that in case it was found that defendant or his predecessor-in-interest had any right, title or interest in the suit land, then the plaintiffs may be declared as owners in possession of the suit land by way of adverse possession. Plaintiffs in fact had prayed for the following reliefs:

> *"(A) That the plaintiffs may kindly be declared to be the owners in possession of the suit land by passing a decree of declaration and the defendant may kindly be restrained to cause any sort of interference over the suit land as a consequential relief.*
>
> *(B) It is further prayed that in case if the defendant is found in possession of the suit land during the pendency of the suit or prior to the institution of the suit a decree for possession of the suit land may also be passed in favour of the plaintiffs and against the defendant and in the alternative the plaintiffs may kindly be declared owners in possession of the suit land by way of adverse possession. And/or any other relief to which the plaintiffs are found to be entitled to in the circumstances of the case under consideration be passed in favour of the plaintiffs, against the defendant and costs of the suit may also be awarded to be plaintiffs and justice be done."*

3. Case of the plaintiffs was resisted by the defendant, who took the stand that the suit land was owned and possessed by the defendant and that neither the predecessor-in-interest of the plaintiffs nor the plaintiffs ever possessed the suit land as a non-occupancy tenant. As per the defendant, the suit land first remained in possession of Sh. Balu and after his death, the same was in possession of Sh. Chinhu, who was father of defendant and after the death of Chinhu, the possession of the suit land was with the defendant, who was exclusive owner in possession of the same. It was further mentioned in the written statement that Chinhu filed a suit for permanent prohibitory injunction against the plaintiffs and their father in the Court of learned Sub Judge Court No. III, Mandi and plaintiffs and their father in the said case had stated on oath that they will not interfere with the ownership and possession of Chinhu, i.e., father of the defendant. As per the defendant, plaintiffs and their father had admitted the ownership and possession of the defendant over the suit land in Civil Suit No. 99 of 1991, which was decreed in favour of the defendant vide judgment and decree dated 29.03.1992. It was further mentioned that during consolidation proceedings, Khasra No. 626, measuring 1-0-19 bighas was converted into Khasra No. 869 and hence, the suit was barred by the principles of *res judicata*. It was also denied in the written statement that the plaintiffs had otherwise become owners of the suit land by way of adverse possession.

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

> *"1. Whether the plaintiffs are in possession of the suit land as tenant? OPP*
>
> *2. If issue No. 1 is not proved whether the plaintiffs are owners in possession of the suit land by adverse possession? OPP*
>
> *3. Whether the plaintiffs in the alternative are entitled for possession of the suit land? OPP*
>
> *4. Whether the suit is barred by principle of res-judicata? OPD*
>
> *5. Whether the plaintiffs are estopped to file this suit by their act and conducts? OPD*

6. Whether the suit is barred under Section 57 of the H.P. Land Consolidation Act and Section 104 of the H.P. Tenancy and Land Reforms Act? OPD

7. Relief.

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

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*No.*
Issue No. 6:	*No.*
Relief:	*Suit dismissed as per operative portion of judgment.*

6. Learned trial Court while dismissing the suit so filed by the plaintiffs held that the claim of the plaintiffs was based on entries as were contained in Jamabandi for the 1949-50 as well as Ex. PC and Ex. PI. It further held that plaintiffs had failed to produce any document to link khasra numbers mentioned in Ex. PB, PC and PI with the suit land and also that the measurement of the land contained in the said Exhibits was not same as the suit land. It was further held by the learned trial Court that besides this, there was admission of the plaintiffs in order dated 29.03.1992 passed by the learned Sub Judge 1st Class, Court No. III, Mandi (Ex. DE), wherein plaintiffs had admitted the suit of the defendant regarding Khasra No. 626(old) and Khasra No. 869 (new). It also held that there was a *rapat* roznamcha Ex. DD, dated 27.10.1997, in which it was clearly mentioned that defendants were in possession of half share of the suit land and the possession of remaining half was delivered to them on the basis of warrant of possession No. 52/95. On these bases, it was held by the learned trial Court that plea of the plaintiffs that they were owners in possession of the suit land was not maintainable. Learned trial Court also held that plaintiffs had failed to prove that they had become owners of the suit land by way of adverse possession, as they had not led any evidence in this regard.

7. In appeal, learned appellate Court while upholding the judgment and decree so passed by the learned trial Court, held that it was evident from the documents on record that the possession of the suit land was with defendants and not the plaintiffs. Learned appellate Court also held that the plea taken by the defendants of a previous judgment not only stood proved but though the plaint was amended by the plaintiffs, no amendment was carried out to the effect that the earlier decree which was being relied upon by the defendants was not a valid decree and not binding upon them. On these bases, it was held by the learned appellate Court that the plaintiffs had failed prove their possession over the suit land and also failed to prove that revenue entries were incorrect.

8. Feeling aggrieved, the appellants/plaintiffs filed this appeal.

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

10. This appeal was admitted on 16.04.2004 on the following substantial questions of law:

"Whether the learned Courts below have misread, misinterpreted, misconstrued the oral as well as documentary evidence of the parties, especially documents Ex. DD and Ex. PB, PC and PI respectively?"

11. Perusal of the records demonstrates that Ex.DD is a copy of *rapat* No. 72. Ex. P1 pertains to land comprised in Khatauni No. 136/119, Khasra Nos. 331/296 and 333/297, Kita 2 measuring 7-14-19 bighas. Ex. PC is also to this effect and Ex. PB is also copy of Jamabandi for the year 1949-50 of the same land in Urdu.

Suit land as is described in the plaint is as under:

"Khata Khatauni No. 226 min/214 min, bearing Khasra No. 859, 869, Kitas 2, measuring 2-8-6 bighas, situated in Mauja Kehar, Hadbast No. 290, Illaqa Rajgarh, Tehsil Sadar, District Mandi, Himachal Pradesh"

During the course of arguments, learned counsel for the appellants could not link the land mentioned in above Exhibits with the suit land. In other words, learned counsel for the appellants could not demonstrate that Exhibits PB, PC and PI pertained to the land, subject matter of the suit filed by them. Therefore, it cannot be said that the said documents have either been mis-read or mis-appreciated by both the learned Courts below. In my considered view, the finding returned by both the learned Courts below to the effect that the plaintiffs were not able to link the suit land with the said Exhibits is correct finding, which is duly borne out from the records of the case. Now, Ex. DD also does not further the case of the plaintiffs to the effect that their predecessor-in-interest was a non-occupancy tenant over the suit land and that he had become owner of the same by operation of law. Besides this, there is concurrent finding returned by both the learned Courts below against the plaintiffs to the effect that they were not in possession of the suit land and in fact the possession of the suit land was with the defendant. During the course of arguments, learned counsel for the appellants could not point out from the records that the findings so returned by the learned Courts below were either perverse or not borne out from the records of the case. Besides this, one more important fact which has to be mentioned at this stage is that a perusal of the plaint demonstrates that an alternative prayer was made by the plaintiffs to the effect that in case the suit land was found to be owned by the defendants, then the plaintiffs be declared to have had become owners of the same by way of adverse possession.

12. The Hon'ble Supreme Court in ***Gurdwara Sahib*** versus ***Gram Panchayat Village Sirthala and another***, (2014) 1 Supreme Court Cases 669 has held as under:

"There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

13. As per law declared by Hon'ble Supreme Court in abovementioned judgment, a plaintiff even if found to be in adverse possession cannot seek a declaration that such adverse possession of his has matured into ownership.

14. Relying upon the said judgment of the Hon'ble Apex Court, this Court in *Roop Lal and others* versus *Bhup Singh and others*, RSA No. 91 of 2004, decided on 16th March, 2016, has held that plea of adverse possession can only be used as a shield and not as a sword. Similarly, in *Roshan Lal* versus *Briji,* RSA No. 42 of 2006, decided on 10.03.2016, this Court again relying on judgment of Hon'ble Supreme Court in *Gurdwara Sahib* versus *Gram Panchayat Village Sirthala and Another*, (*supra*) has held that plaintiff cannot claim title in suit land by way of adverse possession.

15. In fact, in view of the law so declared by the Hon'ble Supreme Court, the suit so filed by the plaintiffs was not maintainable. Be that as it may, even otherwise, in my considered view, the judgments and decrees passed by both the learned Courts below do not suffer from any infirmity, as there is no mis-reading or mis-appreciation of Exhibits referred to above by both the learned Courts below. Substantial question of law is answered accordingly.

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

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

State of Himachal Pradesh and others .....Appellants

Versus

Shri Surender Kumar Parmar .....Respondent

LPA No. 110 of 2011
Reserved on: June 29, 2017
Decided on August 31, 2017

Constitution of India, 1950- Article 226- Respondent was initially appointed in the year 1981 as Computer Operator in the Health Department of Himachal Pradesh – he superannuated on 31.1.2010 after attaining the age of 58 years – he claimed that he was deployed in various offices to render the services of clerk but was not granted promotion as Assistant- the respondent claimed that different channel of promotion is available to the category of computer operator – the petitioner was never assigned the duties of clerk – writ court concluded that no promotional avenues are available for the post of computer operator – the work of clerk was taken from the petitioner – the petitioner was held entitled to two higher scales in the hierarchy of pay scales, one on the completion of 12 years and another on the completion of 24 years – held in appeal that Recruitment and Promotion Rules show that the computer operator is a feeder category for the post of Junior Statistical Assistant and Statistical Assistant- the rules for the post of statistical assistants were notified in the year 2011 and amended in 2013 – it was not explained as to why the petitioner was not promoted during his service- the petitioner worked on one post from 1981 to 2010, which amounts to stagnation – the writ court had rightly allowed the petition- appeal dismissed. (Para-10 to 19)

Cases referred:

State of Tripura and others versus K.K. Roy, (2004) 9 SCC 65

Food Corporation of India v. Parashotam Das Bansal, (2008) 5 SCC 100

For the appellants	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.
For the respondent	Mr.Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

By way of instant Letters Patent Appeal, challenge has been laid to judgment dated 4.1.2011 rendered by the learned Single Judge in CWP No. 5104 of 2010, whereby learned Single Judge, while allowing writ petition having been preferred by the respondent-petitioner (hereinafter, 'respondent), directed the appellant-respondent (hereinafter, 'appellant') to grant two higher scales to the respondent, in the hierarchy of pay scales, one on completion of 12 years of service and other on completion of 24 years of service with consequential monetary benefits alongwith arrears.

2. Facts as emerges from the record are that the respondent was initially appointed in the year 1981 as Computer Operator in the Health Department of Himachal Pradesh. It is also not in dispute that respondent in the aforesaid capacity worked with the appellant till 31.1.2010, when he was superannuated, after having attained age of 58 years. In nutshell, the case of the respondent before the learned Court below was that after having been appointed as Computer Operator in the year 1981, he continued to be deployed by the appellant in various offices to render services of a Clerk. Since other Clerks working in the Department were granted promotions as Assistants, Senior Assistants, Deputy Superintendents etc., respondent also claimed that he be also granted promotion in the line of Clerk and thereafter at par with the similarly situate employees, who had joined with him, alongwith consequential benefits of pay scales granted from time to time. Respondent, by way of writ petition, which is subject matter of this appeal, also sought quashing of order dated 6.7.2010, annexure P-15, whereby representation made by him in terms of order dated 9.3.2010, passed in CWP No. 4210 of 2009, came to be dismissed by the appellants.

3. Appellants, while refuting aforesaid claim of the respondent, claimed that respondent was appointed as Computer Operator, which is altogether a different post from that included in the Clerical cadre. Appellants, further contended before the learned Court below that there is different channel of promotion available to the category of Computer Operator, to which the respondent belonged. Appellants, while claiming that the appointment of the petitioner with the appellants was, for all intents and purposes, as Computer Operator, categorically contended that the respondent was never assigned duties of clerical cadre by the competent authority, hence, no benefit, as claimed by the respondent as per Annexures P1 to P-5, can be granted to him, especially, when he belonged to the category of Computer Operator, which is/was a separate and distinct category, from that of Clerks, having separate seniority, R&P Rules etc. Appellants, while refuting the claim of the respondent, with regard to absorption of another incumbent namely Padam Chand, Computer Operator, to clerical cadre, contended that though Padam Chand had claimed absorption in clerical cadre, but he was only allowed post of Senior Statistical Assistant, that too in his own cadre of Computer Operator, that too, for a limited period, while he worked as Cashier in the Project by the orders of competent authority.

4. Learned Single Judge, taking note of the aforesaid pleadings adduced on record by the respective parties, came to the conclusion that there are no promotional avenues for the post of Computer Operators in the Department, wherein respondent was an employee.

5. Perusal of judgment passed by learned Single Judge, suggests that it had come to the conclusion that though work of Clerk was taken from the respondent as claimed, but that does not make him a member of the Clerical cadre, since he was appointed as a Computer Operator. Learned Single Judge, taking note of the fact that there are no promotional avenues for the post of Computer Operator, held the respondent entitled to two higher scales in the hierarchy of pay scales, as has been taken note above, after completion of 12 and 24 years of service. Learned Single Judge, taking note of the law laid down by the Hon'ble Apex Court in **State of Tripura and others** versus **K.K. Roy**, (2004) 9 SCC 65, wherein it was held that, where there are no promotional avenues, concerned Department should formulate a policy, based on recommendations of Pay Commissions, granting at least two higher scales to an employee, held

the respondent entitled to grant of two higher scales in the hierarchy of pay scales, one on completion of 12 years and other on completion of 24 years.

6. In the aforesaid background, appellants have come before this Court, in the present proceedings, praying therein for quashing of the judgment passed by learned Single Judge.

7. Mr. Shrawan Dogra, learned Advocate General duly assisted by Mr. Anup Rattan, learned Additional Advocate General, strenuously argued that impugned judgment passed by learned Single Judge is not sustainable, as the same is not based upon factual matrix of case and is not in consonance with the law and facts pleaded, as such, same deserves to be set aside. Learned Advocate General further contended that there was no occasion for the learned Single Judge to direct the appellant-department to grant two higher scales to the respondent, on completion of 12 and 24 years of service, especially, when it was specifically pleaded before the learned Single Judge that separate promotional avenues and channel to the category of Computer Operators, are available and promotion, if any, to the respondent can be granted only in that channel only. While inviting attention of this Court to the judgment passed by Hon'ble Apex Court, in **K.K. Roy's** case (Supra), learned Advocate General contended that the same is not applicable in the present case, because, promotional avenues are/were available to the category of Computer Operators. Mr. Dogra, learned Advocate General, further contended that learned Court below failed to appreciate that for the category of employees, where there are no promotional avenues, State introduced Assured Career Progression Scheme (ACPS), to avoid any kind of stagnation, whereby financial benefits are/were allowed to all regular employees, on completion of 8, 16 and 24 years of service in the same post including grant of next higher scale besides additional increments as per admissibility. Learned Advocate General further contended that recommendations of Pay Commission stand already implemented by the Government of Himachal Pradesh, in the form of Assured Career Progression Scheme, as such, no benefits as have been ordered to be granted to the respondent by the Court, are admissible to any such employee benefited under Assured Career Progression Scheme. Lastly, the learned Advocate General contended that in case, respondent is allowed benefit in terms of judgment dated 4.1.2011, over and above the scheme of Government, it would be contrary to Rules and policies of the government, as such, impugned judgment having been passed by the learned Single Judge, deserves to be set aside.

8. Mr. Sanjeev Bhushan, learned Senior Advocate duly assisted by Ms. Abhilasha Kaundal, Advocate, while refuting submission having been made on behalf of the appellant, contended that the respondent, who had performed same and dissimilar duties since his initial appointment in the year 1981, without there being any change, was not provided with any promotion, as such, there is no illegality or infirmity in the judgment passed by learned Single Judge. Learned Senior Advocate, further contended that it stands duly proved on record that appellant, after having appointed respondent, as Computer Operator, compelled/ forced him to perform duties of a Clerk, as such, he rightly claimed to be promoted in the line of Clerical cadre. Learned Senior Advocate, while inviting attention of this Court to the averments contained in para-16 of the petition, contended that one Shri Padam Chand, who had filed OA No. 2434 of 1999, was also posted as a Computer Operator, and Himachal Pradesh Administrative Tribunal in the aforesaid Original Application, directed appellant to release pay scale of post of Senior Statistical Assistant in the Project till the time, he worked as Cashier or till the time, Project is complete, as such, respondent, who though was posted as Computer Operator, but rendered services of Clerk, was also entitled to be promoted to the post of Senior Statistical Assistant. While placing reliance upon judgment in **K.K. Roy's** case (Supra), learned Senior Advocate contended that the appellant is bound to promote the respondent atleast after completion of 12 years of service and thereafter on completion of 24 years of service and also to give increments under Assured Career Progression Scheme, as such, there is no illegality or infirmity in the judgment passed by learned Single Judge.

9. We have heard the learned counsel for the parties and gone through the record carefully.

10. After having carefully perused the pleadings adduced on record by the respective parties, this Court finds substantial force in the arguments of learned Advocate General that promotional avenues are/were available to the respondent as well as other similarly situate persons. At this stage, it may be noticed that during the pendency of the instant appeal, a supplementary affidavit came to be filed on 23.2.2016, by Dr. D.S. Gurung, Director, Health Services. It would be profitable to take note of following paras of the aforesaid affidavit:

> "2. That it is submitted that there is a definite channel of promotion available to the category of Computer to which the present respondent belonged. The category of Computer was/is a feeding category to the post of Junior Statistical Assistant and the Statistical Assistant as well, which promotion is otherwise subject to the seniority and fulfilling the other eligibility criteria as per the Recruitment and Promotion Rules to the category of Junior Statistical Assistant and the Statistical Assistant, are collectively placed on record as **Annexure-I** for kind perusal of the Hon'ble Court.
>
> 3. That it is further submitted that the present respondent was initially appointed in the Appellant Department in the year 1981 and stood retired from Government service on 31-1-2010 on attaining the age of his superannuation. The present respondent during the course of his employment with the Appellant State and the Department stood already granted the additional financial benefit on account of the completion of 8 years, 16 years and 24 years of service on 10-8-198, 11-8-1987 and 11-8-2005 respectively under the Assured Career Progression Scheme framed and notified by the Government from time to time. The attested photocopies of the letter dated 03.02.2016 alongwith the relevant pages of service book containing such entries of having been granted benefits of proficiency increment/ under Assured Career Progression Scheme, to the present respondent, are collectively placed on record as **Annexure-II** for kind perusal of the Hon'ble Court."

11. Perusal of aforesaid affidavit though suggests that separate channel of promotion is/was available to the category of Computer Operators, to which respondent belonged. Even, as per Recruitment and Promotion Rules annexed to the affidavit as Annexure I, clearly suggest that category of Computer Operators is a feeder category to the post of Junior Statistical Assistant and Statistical Assistant as well. Perusal of Recruitment and Promotion Rules, referred to above, suggest that promotion to the post of Junior Statistical Assistant and Statistical Assistant is subject to seniority and fulfilling other eligibility criteria. It would be profitable to take note of following portion of Recruitment and Promotion Rules of the post of Junior Statistical Assistant as under:

> "RECRUITMENT AND PROMOTION RULES FOR THE POSTS OF JUNIOR STATISTICAL ASSISTANT (NON GAZETTED) CLASS-III IN THE DEPARTMENT OF HEALTH & FAMILY WELFARE, HIMACHAL PRADESH

1.	Name of the post	Junior Statistical Assistant
2.	Number of posts	14 (Fourteen)
3.	Classification	Class-III (Non-Gazetted) (Ministerial Services)
4.	Scale of pay	Rs.4020-120-4260-140-4400-150-5000-160-5300-200-6800
5.	Whether Selection	
	post or Non Selection Post	: Non Selection

6.	Age for direct Recruitment	:Between 18 to 38 years.
7.	xx	
8.	xx	
9.	xx	
10.	xx	
11.	In case of recruitment by promotion deputation, transfer, grade from which promotion/deputation/transfer is to be made	By promotion from amongst computers who possess three years regular services or regular combined with continuous adhoc (rendered upto 31.03.1991) services, if any, in the grade.

12. It is clear from the Recruitment and Promotion Rules reproduced herein above that Computer Operators having three years regular service or regular combined with continuous ad hoc services rendered upto 31.3.1991, if any, is entitled to be promoted to the post of Junior Statistical Assistant. Appellants have also annexed Notification No. Per(AP)-C-A(3)-4/2012 dated 11.2.2013, thereby amending Recruitment and Promotion Rules for the post of Statistical Assistant, notified vide Notification No. Per(A)-C-A(3)-1/2010-II dated 20.8.2011, perusal of which shows that column No. 11 of the earlier Rules, stood amended as under:

> "By promotion from amongst the Investigators, Junior Statistical Assistants/Computer-cum-Typists/ Computers and Enumerators of the concerned Departments subject to possessing of essential qualification prescribed for direct recruitment against Column No. 7(a) above with ten years regular service or regular combined with continuous adhoc service rendered, if any, in the grade, failing which from amongst the incumbents of Common Clerical cadre (which include Clerks/ Junior Assistants) of the concerned Departments subject to possession of essential qualification prescribed for direct recruitment against Column No. 7(a) above with ten years combined regular service or regular combined with continuous adhoc service rendered, if any, in the cadre.
>
> Provided that for the purpose of promotion a combined seniority list of eligible Investigators, Junior Statistical Assistants, Computer-cum-typists, Computers, Enumerators and Clerks/ Junior Assistants on the basis of their lengthy of service without disturbing their cadre wise inter-se-seniority, shall be prepared....."

13. Record further reveals that the financial benefits under Assured Career Progression Scheme were granted to the respondent on 10.8.1989, 11.8.1997 and 11.8.2005, on completion of 8, 16 and 24 years of service.

14. Though the above facts brought on record by the appellant by way of affidavit suggest that post of Computer Operator is a feeder post for promotion to the post of Junior Statistical Assistant, on completion of 3 years of regular or regular combined with ad hoc service but there is nothing on record brought by the appellant, why respondent was not promoted to the post of Junior Statistical Assistant, especially when he was appointed in 1981 on the post in question or to the post of Statistical Assistant. There is also nothing on record suggestive of the fact that promotion was offered to the respondent but same was foregone by him; or that he was not found fit for promotion thus rejected, or that due to some disciplinary proceedings, he was not promoted to the post of Junior Statistical Assistant or Statistical Assistant. It is strange that no averments to this effect have come forth on behalf of either of parties, that in case promotional posts were available, why respondent was not promoted to such post(s). It is also not clear that

when were initially Recruitment and Promotion Rules for the post of Junior Statistical Assistant framed, whether it was prior to his superannuation or later, though perusal of Recruitment and Promotion Rules for the post of Statistical Assistant definitely suggest that same were notified initially in 2011 and thereafter amended in 2013.

15. This Court also finds that though financial benefits under Assured Career Progression Scheme were made available to the respondent, but same can not be compensated for the benefits to be conferred on account of promotion. In this backdrop, findings returned by the learned Single Judge to the effect that there were no promotional avenues available to the respondent, seem correct and based upon correct appraisal of the record.

16. Hon'ble Apex Court in **K.K. Roy's** case (supra) has also held as under:

> "6. It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the promotional policy. The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue of appointment, he cannot resile therefrom. It is not a case where the principles of estoppel or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other States in India Union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel appearing on behalf of the appellant, even could not point out that the State of Tripura has introduced such a scheme. We wonder as to why such a scheme was not introduced by the Appellant like the other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this Court in the decisions referred to hereinbefore, it was expected that the Appellant should have followed the said principle..
>
> 7. We are, thus, of the opinion that the respondent herein is at least entitled to grant of two higher grades, one upon expiry of the period of 12 years from the date of his joining of the service and the other upon expiry of 24 years thereof."

17. Mr. Sanjeev Bhushan, learned Senior Advocate, while placing reliance upon judgment of the Hon'ble Apex Court in **Food Corporation of India** v. **Parashotam Das Bansal**, (2008) 5 SCC 100, vehemently argued that so far as introduction of grant of selection grade is concerned, the same does not provide for a promotional scheme. It is available to a limited number of employees. The Hon'ble Apex Court has held as under:

> "11. The question also came up for consideration in M/s. Ujagar Prints etc. etc. v. Union of India & Ors. [AIR 1989 SC 972] and Council of Scientific and Industrial Research & Anr. v. K.G.S. Bhatt & Anr. [(1989) 4 SCC 635]. In the latter decision, this Court held :
>
> > "It is often said and indeed, adroitly, an organisation public or private does not 'hire a hand' but engages or employees a whole man. The person is recruited by an organisation not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any

organisation. It is an incentive for personnel development as well. (See : Principles of Personnel Management by Flipo Edwin B. 4th Ed. p. 246). Every management must provide realistic opportunities for promising employees to move upward. "The organisation that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale, and ineffectual performance, among both non-managerial employees and their supervisors". (See : Personnel Management by Dr. Udai Pareek p.277). There cannot be any modern management much less any career planning, man-power development, management development etc. which is not related to a system of promotions."

23. So far as introduction of grant of selection grade is concerned, the same does not provide for a promotional scheme. It is available to a limited number of employees. By reason thereof a promotional scheme cannot be said to have been framed. The scheme of Accelerated Career Progression is distinct and different from grant of selection grade. We have noticed hereinbefore that although such a provision has been made for the unionized employees but even then they are also entitled to grant of selection grade as well."

18. In the case at hand, admittedly the respondent worked on one post only i.e. Computer Operator from 1981 to 2010, till his superannuation, and no reason has come forth why he was no promoted even once in his whole service career, if there were promotional posts available, as canvassed by the appellants. There are also no averments whether respondent was ever offered promotion, which was either denied by him or for which he was found not eligible. Thus, the fact remains that the respondent has remained on one post for around 28 years, which definitely amounts to stagnation. The learned Single Judge has rightly allowed the petition and held the respondent entitled to two higher scales in the hierarchy of pay scales.

19. In view of the detailed discussion made herein above, this Court finds no reason or justification to interfere with the well reasoned judgment of learned Single Judge.

20. Accordingly, there is no merit in the present appeal, and the same is accordingly dismissed. Judgment passed by learned Single Judge is upheld. Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Devinder Singh ...Petitioner
Versus
Mehar Chand ...Respondent

Criminal Revision No. 155 of 2016
Date of decision: 01.09.2017

Code of Criminal Procedure, 1973- Section 319- An application for impleadment was filed on the ground that G had sworn an affidavit that he had issued the disputed dishonoured cheque-hence, he be impleaded as a party- the application was rejected by the Trial Court – held that G had admitted that the cheque was issued as a security for the sum of money borrowed by him from the complainant- in these circumstances, the application was rightly rejected by the Trial Court- petition dismissed. (Para-2 to 4)

For the petitioner: Mr. H.S.Rangra, Advocate.
For the respondent: Mr. Rajiv Rai, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

During the pendency of the apposite complaint instituted before the learned Judicial Magistrate, Gohar, Mandi, District Mandi, an affidavit borne in Ext.DW-1/A was tendered in evidence by the defendant-accused also one, Ghanshyam Singh who swore it, testified in consonance with the recitals borne therein. With recitals occurring therein, of one Ghanshyam Singh who swore Ext.DW-1/A, holding possession, of, the dishonoured negotiable instrument(s), thereupon through an application cast under the provisions of Section 319 Cr.P.C., provision(s) whereof stand extracted hereinafter, it was canvassed, that, hence with the author of Ext.DW-1/A admitting his guilt in issuing the disputed dishonoured negotiable instrument(s), thereupon the purported incriminatory, role, of the respondent-accused being exculpated, whereas the impleadment of Ghanshayam Singh in the array of accused being imperative.

> 319. Power to proceed against other persons appearing to be guilty of offence.
>
> (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> (2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
>
> (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
>
> (4) Where the Court proceeds against any person under sub- section (1), then-
>
> (a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;
>
> (b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

2. However, a closest reading of the recitals borne in Ext.DW-1/A make a visible disclosure of its author being delivered, the disputed dishonoured negotiable instrument(s), by one Devender Singh the petitioner-accused herein, merely, as a security in respect of sums of money borrowed by him from the author of Ext.DW-1/A, whereafter the author of Ext.DW-1/A narrates therein qua his further handing over the disputed dishonoured negotiable instrument(s), to, the complainant, merely as a security for sums of money borrowed by him from the complainant. Significantly thereupon the counsel for the petitioner accused, submits that hence with its evidently displaying qua non occurrence of any financial transaction(s) inter se the respondent and the complainant, there was obviously, no occasion, for the accused transmitting the disputed dishonoured negotiable instruments vis-à-vis the complainant, rather he contends that the author of Ext.DW-1/A warrants his being added as an accused in the instant complaint. The aforesaid submission warrants rejection, for the reason(s) (a) with a disclosure occurring in Ext.DW-1/A that its author receiving absolutely blank cheques, effect(s) whereof is that the dishonoured negotiable instrument(s), never during the period they purportedly remained in possession of the author of Ext.DW-1/A, hence holding the signatures of the respondent-accused. The further consequence thereof is that the scribing(s) therein of the signatures of the respondent-accused hence occurring only upon the accused obviously holding its possession besides effect thereof, is, of the accused also preceding therewith scribing thereon the details of amounts borne therein, especially, when there is no best evidence comprised in the report of the handwriting expert qua the signatures borne therein and scribing(s) of details of sums of money borne therein, being not authored by the respondent-accused. Prima facie hence the respondent

accused is to be concluded to author all writings occurring therein. In aftermath, prima facie the recitals borne in Ext.DW-1/A stand falsified rendering the adding of Ghanshyam Singh in the array of accused, to be unnecessary.

3. Furthermore, the prayer made in the application cast under the provisions of Section 319 Cr.P.C, stood, aptly rejected by the learned trial Magistrate, given the special procedural mechanism contemplated in Section 138 of the Negotiable Instrument Act, (hereinafter referred to as the Act), in respect of trial of a complaint instituted under the "Act" before the Magistrate concerned, provisions whereof stand extracted hereinafter:-

> "138 (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee, or as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

4. Therein exists a mandate in respect of upon evident satiation(s) occurring qua the contemplated statutory pre condition or qua the condition(s) precedent, thereupon alone the Magistrate concerned being empowered to take cognizance upon the complaint. The trite imperative besides peremptory condition warranting absolute compliance, for the Magistrate standing hence empowered to take cognizance upon a complaint lodged under the "Act" in respect of dishonour of negotiable instruments, is, comprised in the factum of the drawer or presenter of the dishonoured negotiable instrument, prior to his, instituting the apposite complaint against the person issuing the dishonoured negotiable instrument, his being mandatorily enjoined to serve a notice upon the errant accused, whereupon the errant accused is called upon to make liquidation(s) of sums of money borne therein, evident failure(s) of liquidation(s) whereof within 15 days of the apposite notice being evidently served upon the accused, alone, fastening the learned trial Magistrate with a jurisdictional empowerment to take cognizance upon the complaint. Evidence in respect of statutory satiations aforesaid occurring hereat, is abysmally amiss, wherefrom an inference is earned of the Magistrate concerned being statutorily barred to take any cognizance vis-à-vis Ghanshyam Singh, by adding him as an accused in the extant complaint. However, in the instant case, even if there is merit in the application, given any purported truthful occurrences in Ext.DW-1/A also with Section 319 Cr.P.C holding a mandate with respect to adding of or arraying of any person/persons as accused in the apposite complaint, even when the complainant has arrived at the stage of adduction of respective evidence(s) thereon, upon, surging forth of clinching evidence qua his/their incriminatory role. Nonetheless any order allowing the apposite application would result in the Magistrate, hence breaching the mandatory statutory conditions aforesaid, whereas compliances therewith are statutorily mandated, theirs' being peremptory conditions precedent, for empowering the Magistrate to take cognizance upon a complaint or the imperative condition(s) precedent(s) occurring in clause (c) of Section 138 of the Act enjoin strict compliance therewith. The special procedural mechanism embodied in the aforesaid statutory provisions, warrant no transgression, dehors provisions existing in Section 319 Cr.P.C., predominantly, when infraction(s) thereof would render vitiated any cognizance taken vis-à-vis the proposed accused also would result in the accused added in the complaint, being tried de novo, without any legally tenacious cognizance being taken vis-à-vis him, whereas cause(s) of action in respect of incriminatory role(s) vis-à-vis the proposed co-accused, enjoin institution qua him of a fresh validly constituted complaint. In sequel, the provisions of Section 319 of Cr.P.C. are overridden by the special procedural precursory mechanism(s) envisaged under Section 138 of the Act in respect of a validly constituted complaint besides for a valid cognizance being taken thereon, yet the aforesaid exception(s) therewith, in respect of cognizance(s) vis-a-vis a complaint instituted under Section 138 of the Act, are, confined to natural being(s) or non juristic non corporate entity(s), whereas, subject to just statutory exceptions besides apt statutory provisions, they, may not be applicable vis-à-vis juristic corporate entity(s) or artificial beings/persons. In view of the above, the instant petition is dismissed, so also all pending application(s), if any. Impugned order is maintained and affirmed. No order as to the costs.

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

State of Himachal Pradesh ...Appellant.
Versus
Ashwani Kumar & others ...Respondents.

Cr. Appeal No. 407 of 2012
Reserved on: 18.08.2017
Decided on: 01.09.2017

Indian Penal Code, 1860- Section 498-A, 306 and 404 read with Section 34- Deceased was married to A – the accused started maltreating the deceased for not bringing dowry- the deceased used to complain about the ill- treatment – she was ousted from her matrimonial home 3-4 times but every time she was sent back and the accused were asked to mend their behaviour – the deceased consumed poison and died in the hospital – the accused were tried and acquitted by the Trial Court- held in appeal that instigation or abetment by the accused persons to the deceased has not been proved- there is no evidence of any conspiracy – the Trial Court had rightly acquitted the accused- appeal dismissed. (Para- 9 to 32)

Cases referred:
V.K. Mishra & another versus State of Uttrakhand & another, 2015 (9) SCC 588
Rajinder Singh versus State of Punjab, 2015 (6) SCC 477
Pinakin Mahipatray Rawal vs. State of Gujarat, (2013) 10 Supreme Court Cases 48
K.R.J. Sarma vs. R.V. Surya Rao and another, (2013) 4 SCC 118
Devender and others vs. state of Haryana, 1994 Criminal Law Journal 1679
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

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

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal has been preferred by the appellant/State (hereinafter referred to as "the appellant") laying challenge to judgment, dated 28.05.2012, passed by learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, H.P., in Sessions Case No. 22-J/VII/2011 (Sessions Trial No. 10/12), whereby the accused persons/respondents (hereinafter referred to as "the accused persons") were acquitted for the offence punishable under Sections 498-A, 306 and 404 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. Succinctly, the facts giving rise to the present appeal, as per the prosecution, are that on 16.06.2011 complainant, Smt. Nirmala Devi, mother of Anita Devi (deceased) lodged a complaint with the police, alleging that in February, 2009, her daughter, Anita Devi, was married with accused Ashwani Kumar, after three months of marriage accused persons, being husband, father-in-law, mother-in-law and *devar* (brother-in-law) of the deceased started maltreating the deceased for not bringing dowry. The deceased, on her visits to the house of the complainant, used to tell about the conduct of the accused persons. As per the complainant, the deceased was ousted from her matrimonial home 3-4 times, however, every time she was sent back and the accused persons were asked to mend their behavior towards the deceased. Despite repeated

requests, the behavior of the accused persons further deteriorated towards the deceased. On 16.06.2011, at about 08:30 a.m., the complainant came to know from accused Brahmi Devi (mother-in-law of the deceased) that the deceased has consumed some medicine. When the complainant reached at Shahpur/Rait, she came to know that her daughter has expired in Tanda Hospital, so she alighted en route and subsequently went to Tanda Hospital with other villagers. The deceased was having four months' infant and she committed suicide yielding to mental and physical torture meted out by the accused persons for not bringing dowry. As per the prosecution, the deceased was initially taken to CHC Shahpur, where she was not found fit to give statement and therefrom she was referred to Rajendra Prasad Government Medical College, Tanda. In CHC, Shahpur, gastric levage and other necessary material was preserved for chemical analysis. The deceased expired in Tanda Hospital and her inquest papers were prepared. Post mortem report of the deceased was obtained and necessary samples were preserved by the Medical Officer, which were sent for chemical analysis. As per the medical opinion, the deceased died due to *"phosphine gas poisoning"*. Police thoroughly investigated the matter and recorded the statements of the witnesses. The spot map was prepared. The corpse was photographed, marriage certificate, copy of *pariwar* register and call record were taken into possession. As per the prosecution, the accused persons also dishonestly misappropriated the ornaments of the deceased. The police, after exhaustively investigating the matter, found that the accused persons used to torture the deceased physically and mentally and so they abetted her to commit suicide. After completion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as twenty two witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they denied the prosecution case and claimed innocence, however, the accused persons did not examine any defence witness.

4. The learned Trial Court, vide impugned judgment dated 28.05.2012, acquitted all the accused persons for the offence punishable under Sections 498-A, 306 and 404 IPC read with Section 34 IPC, hence the present appeal.

5. Learned Additional Advocate General has argued that the proof required under Section 498-A is not strict proof, but only preponderance of probabilities are required to be established. He has further argued that the statements of the witnesses *i.e.* PW1 and PW3 clearly establish the guilt of the accused persons beyond the shadow of reasonable doubt. To support his arguments, he has relied upon the law as laid down by Hon'ble Supreme Court in **V.K. Mishra & another versus State of Uttrakhand & another, 2015 (9) SCC 588.** Learned Additional Advocate General has further argued that in case the evidence as a whole is taken into consideration, the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. He has further relied upon the decision of Hon'ble Supreme Court rendered in **Rajinder Singh versus State of Punjab, 2015 (6) SCC 477.**

6. On the other hand, learned Counsel appearing for the respondents has argued that Smt. Nirmala Devi (PW-1), mother of the deceased, in her cross-examination, has admitted that the accused persons never raised any demand of dowry and so the judgments as cited by the learned Additional Advocate General are not applicable to the facts of the present case. He has further argued that Shri Amar Singh, Up-Pradhan (PW-3), though deposed with regard to some oral complaint earlier made to him, however, his statement is not at all reliable simply for the reason that he was not Up-Pradhan of the concerned Panchayat and he has failed to show any written record with regard to the complaint made by the prosecutrix or her father. He has further argued that the material witness Sunita was not examined and the statements of the witnesses, if read as a whole, go to show that no case is made out against the accused persons and the judgment passed by the learned Court below is just, reasoned and no interference is called for.

7. In rebuttal, the learned Additional Advocate General has argued that the written complaint was not made by the father of the prosecutrix to Up-Pradhan and this fact stands duly explained by the Up-Pradhan that the family of the prosecutrix has to marry their other two daughters.

8. In order to appreciate the rival contentions of the parties, we have gone through the record carefully and in detail.

9. The complainant, Smt. Nirmala Devi (PW-1), who is mother of the deceased, while appearing in the witness-box deposed that the deceased was married with accused Ashwani Kumar in February 2009, however, only after three months accused persons started torturing her for not bringing any dowry. PW-1 twice/thrice asked the deceased to go to her matrimonial home. She has further deposed that she alongwith Smt. Jogindera Devi (PW-2) went to the house of the accused persons asking them to mend their behavior, on which the accused persons assured the complainant that they will not repeat such acts in future, but accused Shashi Kant (*devar* of the deceased) objected for giving assurance and he asked his parents (accused Brahmi Devi and Satpal) to oust the deceased. PW-1 has further deposed that 17-18 days prior to occurrence, the deceased came to their house and she was looking depressed. The deceased divulged that accused persons used to torture her for not bringing dowry and ornaments. She has further deposed that on 16.06.2011, at about 08:30 a.m., police asked her to talk to accused Brahmi Devi, mother-in-law of the deceased, who asked her to see the deceased, as she had consumed some medicine. She rushed to Shahpur and en route near place Rait she came to know from some relative, who telephoned her, that the deceased had been shifted to Tanda Hospital, therefore, she returned to Daraman and took her relatives with her to Tanda Hospital. In Tanda Hospital, she saw the dead body of the deceased and there were no ornaments on her body. She has further deposed that on 15.06.2011 the deceased informed her that accused persons are quarrelling with her and exerting pressure on her to leave the matrimonial home, but she asked the deceased to remain there and gave her assurance that she would come tomorrow. As per this witness, due to the harassment and torture meted out by the accused persons on the deceased, she was compelled to end her life. This witness, in her cross-examination, has deposed that accused Ashwani (husband of the deceased) came on leave and on 16.06.2011 he was supposed to return on duty. She feigned her ignorance that the deceased was asking accused Ashwani to take her to Pathankot and he told her that firstly he will make arrangements for accommodation. She denied the suggestion that the deceased was of obstinate nature.

10. PW-2, Smt. Jogindra Devi, deposed that PW-1 is her *samdhan* and deceased's sister has been married to her son. When she came to know qua the death of the deceased, she sent her daughter-in-law to the home of the deceased. She alongwith her son went to Tanda Hospital. This witness has further deposed that the deceased, after her marriage, visited her twice and complained that accused persons used to beat her for not bringing dowry. As per this witness, the deceased also told her that accused persons wanted her to bring dowry or leave their house. She alongwith PW-1 went to the house of the accused persons for pacifying the matter, but the accused persons said that they did not do anything to the deceased. She has further deposed that father-in-law of the deceased admitted the guilt, but *devar* of the deceased was saying that oust the deceased from the home. As per this witness, the deceased committed suicide, as she was subjected to harassment for want of dowry. This witness, in her cross-examination, has feigned ignorance that the deceased wanted to reside with accused Ashwani at Pathankot. She has deposed that when she had got the deceased engaged with accused Ashwani, at that time no dowry was demanded. At the time of marriage also no demand for dowry was raised.

11. PW-3, Shri Amar Singh, Up-Pradhan of Gram Panchayat Hanerra, deposed that the deceased came to him with one Sunita and complained that her mother-in-law and *devar* used to harass and beat her for not bringing dowry. As per this witness, the deceased was having injury on her forehead. He advised her to call for Panchayat from both the sides for resolving the matter. On subsequent day Nirmala (PW-1) alongwith her *jethani* came to him and told that she has to marry other two daughters, so she averted from the Panchayat. The deceased was not happy in her in-law's house due to harassment and torture meted out by her in-laws. This witness, in his cross-examination, has deposed that no case was registered with the Panchayat against the accused persons and he did not get the deceased medically examined.

12. PW-4, Dr. Mohan Singh, Medical Officer, deposed that on 16.06.201, around 08:00 a.m., the deceased was brought before him with alleged history of consuming some poisonous substance. On application, Ex. PW-4/A, moved by the police, he conducted medical examination of the deceased and observed as under:

> ***"Patient was drowsy, not responding to command, cold clammy skin, BP and Pulse not recorded, foul smelling from her breath was present. History of vomiting at home was given by the attendant.***
>
> ***"Gastric levage was done and first sample preserved for chemical analysis. After giving emergency treatment, patient was referred to RPGMC, Tanda for further management."***

He handed over to police a sealed bottle having a seal containing gastric levage of the deceased and an envelop having four seals containing facsimile seal, medical report of the deceased, forwarding letter to Director, FSL and Police request letter for conducting the medical examination of the deceased. He also issued medico legal certificate of the deceased, which is Ex. PW-4/B. He has further deposed that when the deceased was admitted in the hospital, she was not found fit to give her statement and to this effect he has issued certificate on the application, Ex. PW-4/A, which is encircled in red.

13. PW-5, Shri Chander Shekhar Premi, deposed that in July, 2011, he was posted as JTO, Nurpur. On his directions Office Clerk, Shri Rajesh Sanga, issued record qua telephone No. 230258, which was in the name of Satpal son of Gorkha Ram and the same telephone number was disconnected on 05.08.2010. He issued certificate, Ex. PW-5/A. PW-6, Harbans Lal, Secretary, Gram Panchayat, Bhali, deposed that on 01.07.2011 police, vide application Ex. PW-6/A, requested him for copy of *pariwar* register. He issued copy of *pariwar* register, which is Ex. PW-6/B, relating to the family of Satpal son of Gorkha Ram. He also issued marriage certificate, Ex. PW-6/C, qua the marriage of the deceased with accused Ashwani Kumar.

14. PW-7, Shri Raj Kumar, maternal uncle (*mama)* of the deceased, has deposed that after three-four months of marriage of the deceased she met him and started weeping. She divulged to him that her husband, mother-in-law and *devar* used to beat her for want of dowry. He has further deposed that after seven-eight months, the deceased again met him and told him that her mother-in-law, husband and *devar* used to beat and torture her for want of dowry. He requested accused Ashwani Kumar in the house of the parents of the deceased not to harass and torture the deceased, as she belongs to poor family and her father has already expired and they had given what they could afford. Likewise, he made request to accused Satpal on telephone and he assured him not to repeat such activities in future, but despite that the accused persons did not mend their behavior. On 16.06.2011 her sister (PW-1) informed him that the deceased has committed suicide and he alongwith his sister and villagers went to Tanda Hospital. He found no ornaments on the dead body of the deceased and it appeared that the ornaments had been removed. As per this witness, the deceased committed suicide owing to harassment and torture administered by the accused persons. Inquest papers, prepared by the police for post mortem, Ex. PW-7/A and Ex. PW-7/B, bear his signatures, which are encircled in red. This witness, in his cross-examination, has deposed that accused Ashwani was doing a private job at Pathankot and the deceased wanted to reside with him at Pathankot. He feigned his ignorance that the deceased had ever asked accused Ahswani to take her to Pathankot.

15. PW-8, Shri Subhash Chand, deposed that on 17.06.2011 he received a phone call from accused Ashwani and he had informed that the deceased has consumed poison. He alongwith his mother, mother-in-law and other relatives reached Shahpur bus stand, but by that time the deceased had been taken to Tanda Hospital by the accused persons. Subsequently they went to Tanda Hospital and saw the dead body of the deceased. The dead body had no ornaments and the same appeared to have been removed. As per this witness, deceased, after her marriage, met him twice and she used to tell that her *devar* and mother-in-law beat her for not bringing dowry. He has further deposed that his mother and mother-in-law sent the deceased back to her matrimonial house and asked the accused persons not to harass her. The

matter was brought to the notice of Pradhan, Gram Panchayat, Harnera, and the Pradhan assured them that he will talk with the in-laws of the deceased, however, in the meantime the deceased consumed poison. This witness, in his cross-examination, has deposed that his statement was not recorded in Tanda Hospital and the same was recorded later on. As per this witness, the statement of his mother-in-law was recorded in Tanda Hospital. He admitted that his statement was recorded after the post mortem and the police were asking them to reach at Tanda Hospital at the earliest. He has admitted that accused Ashwani Kumar was doing a private job at Pathankot. He feigned his ignorance that the deceased intended to live with accused Ashwani Kumar at Pathankot.

16. PW-9, HHC Tilak Gautam, deposed that on 16.06.2011 he alongwith SI Lekh Raj, was present at Tanda Hospital and SI Lekh Raj handed him *rukka,* Ex. PW-1/A, which he gave to MHC Police Station, Jawali, on 17.06.2011. He has further deposed that MHC Police Station, Jawali, handed him the case file, which he gave to Lekh Raj. PW-10, HC Rachhpal Singh, deposed that on 16.06.2011, around 10:10 a.m. MHC Police Station, Shahpur telephonically informed Police Post, Kotla, qua poisoning case pertaining to their area. He alongwith Constable Ranjit reached CH Shahpur, where HC Ranjit Singh was also present. HC Ranjit Singh handed over to him medico legal certificate and vomitings of the deceased and informed him that the deceased had been taken to Tanda Hospital. He has further deposed that he went to Tanda Hospital, where the deceased was declared dead and her dead body was handed over to him. He informed this fact at Police Station, Jawali, wherefrom SI Lekh Ram came and proceeded accordingly. PW-11, HC Ranjit Singh, deposed that on 16.06.2011, around 09:15 a.m., on receipt of telephonic information from CHC, Shahpur, qua some poisoning case, he alongwith police officials, Ravinder and Suneh Lata, reached CHC, Shahpur. He wrote application, Ex. PW-4/A, to Medical Officer for obtaining medico legal certificate and opinion whether the deceased is fit to give her statement. The Medical Officer opined that the deceased is not fit to give her statement. The medico legal certificate and vomitings of the deceased, which were given to him by the Medical Officer, were handed over by him to Rachhpal and he informed about the case at Police Station, Shahpur, Police Post, Kotla, and to the parents of the deceased. This witness, in his cross-examination, has deposed that the deceased was brought to Shahpur Hospital by accused Ashwani and Brahmi Devi. PW-12, HHC Parmodh Chand, deposed that on 22.06.2011 MHC Gurdeep Singh, vide RC No. 99/21, handed over him a *dibba* viscera with docket, which he deposited on the same day in Regional Forensic Science Laboratory, Dharamshala. As per this witness, the case property remained intact under his custody.

17. PW-13, HC Gurdeep Singh, deposed that on 17.06.2011 SI Lekh Ram deposited with him two parcels, which were sealed with seal CH, Shahpur, and on 19.06.2011 three more parcel sealed were handed over to him. He entered the same in Register No. 19, attested copy whereof is Ex. PW-13/A. On 22.06.2011, vide RC No. 99/21, attested copy of which is Ex. PW-13/B, he sent four parcels through Parmodh to Regional Forensic Science Laboratory, Dharamshala for chemical analysis. PW-14, SI Parkash Chand Verma, deposed that on 16.06.2011 he searched the house of Sat Pal and the nearby area, however, he found neither suicide note nor any objectionable article. As per this witness, he prepared memo, Ex. PW-14/A, in presence of the witnesses Netar Ram and Ashok Kumar. PW-15, ASI Ishwari Prasad, deposed that on 17.06.2011 HHC Tilak Gautam handed over to him *rukka,* Ex. PW-1/A, which was sent by SI Lekh Ram, whereupon FIR, Ex. PW-15/A, was registered by him. He made endorsement, Ex. PW-15/B, and returned the case file. PW-16, Inspector Hari Pal, deposed that on 01.08.2011 SI Lekh Ram, after completion of investigation, gave him the case file. He prepared the *challan,* which bears his signatures. PW-17, Dheeaj Kumar, deposed that on 16.06.2011 on the asking of police, he took photographs of the dead body, which are Ex. PW-17/A to Ex. PW-17/C. PW-18, HC Pardeep Kumar, deposed that on 12.11.2011 he received the case file from SHO, P.S. Jawali. He recorded the statements of two witnesses and also obtained the photographs of the dead body. He handed over the case file to SHO, Ramesh Chand. This witness, in his cross-examination, has deposed that when he received the case file, *challan* was already filed in the Court.

18. PW-19, Dr. Atul Gupta, Medical Officer, Dr. RPGMC Kangra at Tanda, deposed that he conducted the post mortem examination of the deceased. As per this witness, in his final opinion, the cause of death of the deceased was phosphine gas poisoning. He gave his final opinion, vide Ex. PW-19/C, which is on the back side of PMR, Ex. PW-19/B, which bears his signatures.

19. PW-20, Smt. Kunta Devi (aunt of the deceased), deposed that the deceased was married to accused Ashwani Kumar about two and half years back. The deceased, during her visits to her parental house, used to weep and tell them that her husband, father-in-law, mother-in-law and brother-in-law used to torture her for want of dowry and they used to call her the daughter of beggars. As per this witness, prior to the incident, she alongwith PW-1 and one other lady went to the house of the accused persons for inquiring about the matter. On their asking, the father-in-law of the deceased sought an excuse and assured them to desist from their activities in future. However, the brother-in-law of the deceased asked his father why he was seeking excuses and quarreled with them. She saw the dead body of the deceased and noticed that no ornaments were present on it. She has further deposed that the deceased committed suicide due to the harassment and maltreatment administered to her by the accused persons. This witness, in her cross-examination, has deposed that the police did not record her statement on the day when the deceased died and till 12.11.2011 she did not give her statement to the police. The deceased was not her real niece.

20. PW-21, SI Lekh Ram (Investigating Officer), deposed that on 16.06.2011, around 2:30 p.m., HC Rachhpal (PW-10), Investigating Officer, Police Post, Kotla, telephonically informed at Police Station, Jawali, qua consuming of poison by the deceased. He had also informed that the deceased was taken to Tanda Hospital and he asked to send some NGO to look into the matter. On the basis of the above information, *rapat,* Ex.PW-21/A, was lodged and he alongwith other police personnel went to Tanda Hospital. The dead body of the deceased was taken into possession and the relatives of the deceased were informed. He recorded the statement of Smt. Nirmala Devi, Ex. PW-1/A, after making endorsement, Ex. PW-21/B, and sent the same to Police Station for registration of the case. He also prepared the inquest papers, which are Ex. PW-7/A and Ex. PW-7/B. Vide application, Ex. PW-19/A, the dead body was sent for conducting post mortem examination. The dead body was photographed and thereafter the same was handed over to accused Ashwani Kumar (husband of the deceased). Statements of the witnesses were recorded and the accused persons were arrested. Record, qua call details, was obtained, which is Ex. PW-21/C. It was unearthed that the deceased was not allowed by the accused persons to use the landline phone to talk with her mother. Marriage certificate, Ex. PW-6/C, and copy of *pariwar* register, Ex. PW-6/B, were obtained. Viscera and vomiting were sent for chemical analysis vide docket, Ex. PW-21/G. FSL report, Ex. PW-19/B, was also obtained. Case file, after completion of investigation, was handed over to SHO Hari Pal Saini. As per this witness, no ornaments were found on the dead body of the deceased and it appeared that the same have been removed, so Section 404 read with Section 34 IPC was added. This witness, in his cross-examination, has denied the suggestion that firstly he prepared the inquest papers and subsequently recorded the statement of the complainant (PW-1). He admitted that on the inquest papers there were no allegations against the accused persons. He denied the suggestion that statements under Sections 154 and 161 Cr.P.C. were recorded after due deliberations. He admitted that no recovery of ornaments was effected from the accused persons. He further admitted that on 16.06.2011 accused Ashwani Kumar had to go to Pathankot, the place of his working.

21. PW-22, SI Ramesh Singh, deposed that on 15.11.2011 HC Pardeep handed over to him the case file and he prepared the supplementary *challan,* which bears his signatures.

22. The evidence, which has come on record, demonstrates that the deceased after her marriage visited her parental house twice and complained that accused persons used to beat her for not bringing dowry and when the complainant came to know about the death of the deceased, she went to Tanda Hospital. The complainant has further deposed that the deceased told her that the accused persons wanted her to bring dowry otherwise she would be ousted.

This statement of the complainant is fortified by PW-3, Shri Amar Singh, Up-Pradhan of Gram Panchayat, Harnera. On close scrutiny of the statements witnesses, i.e., P W-1, Smt. Nirmala Devi, PW-2, Smt. Jogindra Devi, and PW-3, Shri Amar Singh, it is found that no written complaint had been made to said Up-Pradhan (PW-3). There is also no occasion to make the complaint to Up-Pradhan, that too of a different village, especially when there is Pradhan of the Panchayat. In fact, the fact qua making of the complaint by the deceased to her mother (PW-1) and further complaining the matter to PW-3, Shri Amar Singh, Up-Pradhan, has not been substantiated. The statement of PW-3, Shri Amar Singh, is not at all confidence inspiring, as he is Up-Pradhan of a different village and there is nothing on record that he at any point of time advised the complainant to make a written complaint to the Panchayat to which she belongs. In these circumstances, the prosecution has failed to prove that the deceased was given a cruel treatment by the accused persons for not bringing dowry or they wanted dowry from the deceased or her family. Therefore, the judgment as cited by the learned counsel for the appellant, i.e., ***V.K. Mishra & another vs. State of Uttrakhand & another, 2015 (9) SCC 588,*** wherein vide paras 7 and 39 it has been held as under:

> **"7. In order to attract application of Section 304-B IPC, the essential ingredients are as follows:-**
>
> ***1. The death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance.***
>
> ***2. Such a death should have occurred within seven years of her marriage.***
>
> ***3. She must have been subjected to cruelty or harassment by her husband or any relative of her husband.***
>
> ***4. Such cruelty or harassment should be for or in connection with demand of dowry.***
>
> ***5. Such cruelty or harassment is shown to have been meted out to the woman soon before her death.***
>
> ***On proof of the essential ingredients mentioned above, it become obligatory on the court to raise a presumption that the accused caused the dowry death. A conjoint reading of Section 113B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. "Soon before" is a relative term and it would depend upon circumstance of each case and no straitjacket formula can be laid down as to what would constitute a period "soon before the occurrence." There must be in existence proximate live link between the facts of cruelty in connection with the demand of dowry and the death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.***
>
> ***... ... ...***
>
> **39.** ***In Sher Singh v. State of Haryana, it had been held there in that the use of word "shown" instead of "proved" in Section 304-B IPC indicates that the onus cast on the prosecution would stand satisfied on the anvil of a mere preponderance of probability. In other words "shown" will have to be read up to mean "proved" but only to the extent of preponderance of probability. Thereafter, the word "deemed" used in that Section is to be read down to require an accused to prove his innocence but beyond reasonable doubt. The "deemed" culpability of the accused leaving no room for the***

accused to prove innocence was, accordingly, read down to a strong "presumption" of his culpability. The accused is required to rebut this presumption by proving his innocence. The same view was reiterated in Ramakant Mishra v. State of U.P".

The judgment (supra) is not applicable to the facts of the present case.

23. Likewise, the learned Additional Advocate General has placed reliance on another judgment of Hon'ble Supreme Court, i.e., **Rajinder Singh versus State of Punjab, 2015 (6) SCC 477,** apposite para of the judgment is extracted hereunder for ready reference:

> ***"20. Given that the statute with which we are dealing must be given a fair, pragmatic and common sense interpretation so as to fulfill the object sought to be achieved by Parliament, we feel that the judgment in Appasaheb case followed by the judgment of Vipin Jaswal do not state the law correctly. We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of the married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly an unequivocally point otherwise."***

This judgment is also not applicable to the facts of the present case, as no demand of dowry or demand for any other article stands proved on record.

24. Conversely, the learned counsel for the respondents has placed reliance on the judgment of Hon'ble Supreme Court rendered in ***Pinakin Mahipatray Rawal vs. State of Gujarat, (2013) 10 Supreme Court Cases 48,*** wherein it has been held as under:

> ***"15. We are, however, of the view that for a successful prosecution of such an action for alienation of affection, the loss of marital relationship, companionship, assistance, loss of consortium, etc. as such may not be sufficient, but there must be clear evidence to show active participation, initiation or encouragement on the part of a third party that he/she must have played a substantial part in inducing or causing one spouse's loss of other spouse's affection. Mere acts, association, liking as such do not become tortious. Few countries and several States in the united States of America have passed legislation against bringing in an action for alienation of affection, due to various reasons, including the difficulties experienced in assessing the monetary damages and a few States have also abolished "criminal conversation" action as well.***
>
> ***... ... ...***
>
> ***21. This Court in Girdhar Shankar Tawade Vs. State of Maharashtra, 2002 5 SCC 177, examined the scope of the explanation and held as follows:-***
>
> > ***"3. The basic purport of the statutory provision is to avoid "cruelty" which stands defined by attributing a specific statutory meaning attached thereto as noticed hereinbefore. Two specific instances have been taken note of in order to ascribe a meaning to the word "cruelty" as is expressed by the legislatures: whereas Explanation (a) involves three specific situations viz. (i) to drive the woman to commit suicide or (ii) to cause grave injury or (iii) danger to life, limb or health, both mental and - physical, and thus involving a physical torture or atrocity, in Explanation (b) there is absence of physical injury but the legislature thought it fit to include only***

coercive harassment which obviously as the legislative intent expressed is equally heinous to match the physical injury: whereas one is patent, the other one is latent but equally serious in terms of the provisions of the statute since the same would also embrace the attributes of "cruelty" in terms of Section 498A."

... ...

26. Section 113A only deals with a presumption which the Court may draw in a particular fact situation which may arise when necessary ingredients in order to attract that provision are established. Criminal law amendment and the rule of procedure was necessitated so as to meet the social challenge of saving the married woman from being ill-treated or forcing to commit suicide by the husband or his relatives, demanding dowry. Legislative mandate of the Section is that when a woman commits suicide within seven years of her marriage and it is shown that her husband or any relative of her husband had subjected her to cruelty as per the terms defined in Section 498A IPC, the Court may presume having regard to all other circumstances of the case that such suicide has been abetted by the husband or such person. Though a presumption could be drawn, the burden of proof of showing that such an offence has been committed by the accused under Section 498A IPC is on the prosecution. On facts, we have already found that the prosecution has not discharged the burden that A-1 had instigated, conspired or intentionally aided so as to drive the wife to commit suicide or that the alleged extra marital affair was of such a degree which was likely to drive the wife to commit suicide."

25. The learned counsel for the respondents has also placed reliance on another judgment of the Hon'ble Supreme Court in another case titled ***K.R.J. Sarma vs. R.V. Surya Rao and another, (2013) 4 SCC 118,*** wherein it has been held as under:

"7. Also from the evidence of PW 1 we do not find any act of cruelty or harassment as such committed by the respondent within the meaning of Clauses (a) and (b) of the Explanation to Section 498A, IPC. Clause (a) of the Explanation to Section 498A, IPC states that any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical of the woman amounts to 'cruelty'. We have noticed from the evidence of PW 1 that on the day the deceased committed suicide, the respondent was not in any way guilty of any willful conduct which was likely to drive the deceased to commit suicide, nor did the respondent cause any grave injury to the deceased. Clause (b) of the Explanation to Section 498A, IPC states that harassment of a woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand amounts to 'cruelty'. Though PW 1 has stated that the respondent used to take away the salary of the deceased, he has very fairly conceded in cross examination that he had not stated before the police that the respondent used to take away the salary of the deceased. Considering this evidence of PW 1, we are of the view that the concurrent findings of the Trial Court and the High Court that the respondent was not guilty of the offences under Sections 498A and 306, IPC should not be interfered with by us in exercise of our powers under Article 136 of the Constitution."

The above judgments relied upon by the learned counsel for the respondents are fully applicable to the facts of the present case.

26. Lastly, the learned counsel for the respondents has placed reliance on the judgment of Hon'ble High Court of Punjab and Haryana rendered in ***Devender and others vs. state of Haryana, 1994 Criminal Law Journal 1679,*** wherein it has been held that the fact of deceased's being immediately taken to hospital by the accused immediately on consuming pills proved the good conduct of the accused persons. Apposite paras of the judgment (supra) are reproduced hereunder:

> ***"12. It is also significant to note that after the appellants came to knew that the deceased was unwell, she was immediately removed by Suraj Bhan brother of Kapoor Singh, appellant and Smt. Murti, mother-in-law of the deceased, to the Medical College and Hospital at Rohtak, at 7.35 a.m. on 24-4-1985 where she was examined by Dr. Kitab Singh, P.W.3. According to the said doctor, the patient had consumed some tablets used for preservation of wheat mistaking it for some tablets used for headache, as stated by the mother-in-law accompanying the patient whereas patient herself refused to give any details. Obviously the deceased was removed to the hospital for treatment much before the arrival of the complainant party. These circumstances rather indicate that the conduct of the appellant was not consistent with the guilty conscience. The reports of the Chemical Examiner also indicates that visceras taken from stomach, small intestines, liver, spleen and kidney contained aluminium phosphide. Post mortem report further shows that the deceased also had four injuries on her body including injuries on her right thigh. The said injuries, however, were not sufficient in the ordinary course of nature to cause death and death of Mahle in all probability was due to intake of phosphide poisoning. In the absence of other material evidence, this circumstances alone would not be sufficient to prove the guilt against the appellants beyond reasonable doubt.***
>
> ***13. There is no reliable material on the record to prove that the appellants within reasonable time before the death of Smt. Mahle had abetted the commission of suicide by her or that Devinder appellant husband and Kapoor Singh and Mst. Murti appellants, parents-in-law of Mahle deceased subjected her to cruelty by willful conduct which drove Smt. Mahle to commit suicide or caused her harassment with a view to coerce her and her father to meet their unlawful demand for dowry or valuable security, on account of their failure to meet such demand. Rather the defence plea that the deceased was frustrated and greatly perturbed or agitated because she could not bear any child even after more than seven years of her marriage and committed suicide by intake of aluminium phosphide on that account seems probable, in view of the peculiar facts and circumstances of the present case."***

The judgment (supra) is fully applicable to the case in hand, as it cannot at all be overlooked that the accused persons shifted the deceased to nearby hospital, when they noticed that she has consumed some medicines.

27. The Hon'ble High Court of Himachal Pradesh in **Criminal Appeal No. 361 of 2011, decided on 3.9.2012, titled as Vishal v. State of Himachal Pradesh,** has held as under:

> **"13.** ***In Vithal Eknath Adlinge v. State of Maharashtra, AIR 2009 Supreme Court 2067, while reiterating the above principles, annunciated in Sharad Birdhichand Sarda (supra), the Hon'ble Apex Court has further held as under, vide paras 6 to 16 of the report:-***
>
> > ***"6. 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. (See Hukam Singh v. State of Rajasthan (AIR 1977 SC 1063), Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316), Earabhadrappa v. State of Karnataka (AIR 1983 SC 446), State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224), Balwinder Singh v. State of Punjab (AIR 1987 SC 350), Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). 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. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

7. We may also make a reference to a decision of this Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus:

> *"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....".*

8. In Padala Veera Reddy v. State of A.P. and Ors. (AIR 1990 SC 79), it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

> *"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
>
> *(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
>
> *(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and*
>
> *(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.*

9. In State of U.P. v. Ashok Kumar Srivastava, (1992 Crl.LJ 1104), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and thecumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

10. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:

(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt,

(5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

11. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.

12. In Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh, (AIR 1952 SC 343), wherein it was observed thus:

"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 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."

13. A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' 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 guilty;

(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.

14. These aspects were highlighted in State of Rajasthan v. Raja Ram (2003 (8) SCC 180), State of Haryana v. Jagbir Singh and Anr. (2003 (11) SCC 261) and Kusuma Ankama Rao v State of A.P. (Criminal Appeal No.185/2005 disposed of on 7.7.2008).

15. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this court. In State of U.P. v. Satish [2005 (3) SCC 114] it was noted as follows:

> *"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."*

16. In Ramreddy Rajesh khanna Reddy v. State of A.P. [2006 (10)SCC 172] it was noted as follows:

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration". (See also Bodh Raj v. State of J&K (2002(8) SCC 45).)"

14. In the present case, the following circumstances were pressed into service by the prosecution to prove its case and the same have been held to be duly proved by the learned trial Court:-

1. The illicit relation of deceased with the accused Neelam.

2. The presence of both accused Neelam and her husband co-accused Vishal together in the intervening night of 29th and 30th June, 2009.

3. The injury of incised wound on the hands of accused Vishal.

4. Blood stains on the floor, wall of the room, in which deceased was lastly seen to have entered by PW5 Naresh Kumar.

5. Blood stains on the curtains, T.V., floor, sofa cover, bed sheet etc. of the aforesaid room.

6. The blood stains on the scooter of accused Vishal as well as its engine cover.

7. The blood stains on the clothes of both the accused, the recovery of which had been effected by the police at the instance of the accused.

8. Both the accused dis-appeared from their residence they remained absconded up till 3rd and 4th July, 2009.

9. The presence of blood on the weapon of offence i.e. Kirpan.

10. The extra judicial confession made by accused Neelam to PW15 Kallash Chand that she alongwith the accused Vishal had killed the deceased.

15. *The case is required to be judged in the light of the above legal position, laid down by the Hon'ble Supreme Court, with regard to appreciation of circumstantial evidence and we proceed to undertake the exercise, by taking up the circumstances individually/ collectively, keeping in view the nature thereof.*

Circumstances No. 1 and 2.

16. Both the circumstances, being inter-connected, requiring common appreciation of evidence and law, are taken up together for discussion and decision. Whereas the first circumstance relates to the alleged illicit relations between C-2 Neelam Sharmaand the deceased, the second circumstance is in the nature of the deceased having been last seen together, in the company of C-2 Neelam Sharma, at the relevant time, that is, during the night intervening 29/30.6.2009, at her parental house.

17. PW-5 Naresh Kumar is a co-villager and friend of the deceased. He has deposed that in June, 2009 he was working in a Mobile shop at Nangal Bhoor. He knew the deceased, who was of his village. He used to remain in touch with him. According to him, about two years prior to the death of the deceased, he had told him that he was having relations with C-2 Neelam Sharma and both of them had been meeting each other. The witness further goes on to depose that once he had brought the deceased to the house of C-2 Neelam Sharma at Kandrori on his motor-cycle. On 29.6.2009, at about8/8.30 p.m., the deceased informed him telephonically that he intended to go to C-2 Neelam Sharma's place. Thereafter, again at 10.30 p.m. the deceased telephoned him and asked him to come. It was at about11 p.m. that the witness took the deceased to Kandrori railway station on his motor-cycle. He remained at the railway station and saw C-2 Neelam Sharma roaming in her courtyard, then the deceased switched on the light of his mobile, upon which C-2 Neelam Sharma came to the gate and took him (deceased) inside.Then the lights of the verandah were switched off. Thereafter, the witness came back. He received a telephone call, when he wanted to talk, the call got disconnected. Then he made a telephone call to the deceased, but he did not pick up the phone. On the next day, at about 1.15 p.m., he received telephonic information that the dead body of the deceased was lying under Bain Attarian bridge. Accordingly, he went there and saw the dead body of the deceased. The witness identified C-2 Neelam Sharma in the Court.

28. After exhaustively discussing the evidence and the law, it is clear that the prosecution has failed to prove that cruel treatment was given to the deceased and under these circumstances the presumption that it was a dowry death within seven years of marriage does not at all arise.

29. Section 113-A of the Evidence Act deals with presumption as to abetment of suicide by a married woman. It mandates that if a married woman commits suicide within seven years of her marriage due to the reasons that she was subjected to cruelty by her husband or relatives then the Court raise the presumption of the fact that the husband or such relative abetted the suicide. Primarily for proving the said presumption it has to be established that the wife was subjected to cruelty, as ingrained in Section 498-A IPC. Certainly, the said presumption is rebuttable. Section 107 of IPC defines ingredients of abetment as under:

(i) instigation to commit an offence;

(ii) engaging in a conspiracy to commit an offence; and

(iii) aiding the commission of offence.

However, in essence, none of the above ingredients is attracted in the case in hand, as no evidence qua instigation or abetment by the accused persons to the deceased has come on record. Likewise, there is also nothing on record to demonstrate that the accused persons hatched a conspiracy for commission of an offence. Lastly, nothing is emanating from the record that the accused persons were instrumental in aiding the deceased in committing the suicide. Thus, the prosecution has failed to prove the guilt of the accused persons beyond the shadow of reasonable doubt. Further the prosecution has also failed to prove that the accused persons had taken away the ornaments of the deceased. The net result of the above discussion is that the prosecution has not been able to prove the guilt of the accused persons.

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

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

32. Keeping in view what has been discussed hereinabove, in a nut shell it is more than safe to hold that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. Thus, there is no occasion to interfere with the well reasoned judgment of the learned Trial Court, as such the appeal, which sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, stand(s) disposed of accordingly.

****

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

State of Himachal Pradesh ...Petitioner.

Versus

Ayub Mohammad ...Respondent.

Cr. Appeal No. 368 of 2008
Decided on: 1st September, 2017.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 700 grams charas – he was tried and acquitted by the Trial Court- held in appeal that the accused was told to exercise his option of being searched before a Magistrate, Gazetted Officer or the police – the accused has to be apprised of his right that he could get himself searched in the presence of Magistrate or the Gazetted Officer- the prosecution has not complied with the mandatory requirement of Section 50- the accused was rightly acquitted in these circumstances- appeal dismissed. (Para-9 to 20)

Cases referred:

State of H.P. vs. Pawan Kumar, 2005 (4) SCC 350
State of Punjab vs. Baldev Singh (1999) 6 SCC 172
Vijaysinh Chandubha Jadeja vs. State of Gujarat (2011) 1 SCC 609
Ashok Kumar vs. State of H.P. 2009 (2) SLC, 162
State of H.P. vs. Harish Thakur, 2010 (2) Latest HLJ 1472
State of H.P. vs. Viney Kumar alias Binu (2013) 1 SLC, 515
State of H.P. vs. Vijay Singh alias Rinku (2014) 3 SLC 1248
State of H.P. vs. Vijay Kumar (2015) 3 SLC 1700

State of H.P. vs. Virender Singh (2016) 4 ILR (HP) 381

For the Appellant : Mr. V. S. Chauhan, Addl. A.G. with Mr. J. S. Guleria, Asstt. A.G.
For the Respondent : Mr. Devender K. Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

This appeal under Section 378 of the Code of Criminal Procedure (for short 'Code') by the State assailing the acquittal order passed by learned Special Judge, Chamba Division, Chamba, H.P.in Sessions Trial No.34 of 2009 held under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (for short NDPS Act).

2. The prosecution story which emerges from the record is that on 10.7.2009 H.C. Kartar Singh (PW-8) alongwith H.C. Subhash Chand, HC Roop Singh, Constable Anuj Kumar (PW-1), Constable Sanjay Kumar 9PW-3) and LHC Uttam Chand were present at Bonkhri Morh at about 12.05 PM and Sadhu Ram (PW-2) and one Pawan Kumar met them at that place. The respondent came there on foot and on seeing the police party, tried to run back but was nabbed on suspicion. The option was given to the respondent vide memo Ext.PW-1/A and the respondent opted to give his search to the police and thereafter all the police officials and two independent witnesses gave their personal search to the respondent vide memo Ext.PW-1/B, but nothing incriminating was found.

3. The further case of the prosecution is that the personal search of the respondent was conducted and one Polythene envelope of black colour was recovered which was concealed by the respondent under his belt and was tied around his waist and on checking it was found to be containing Charas which on weighing turned to be 700 grams. Two samples each weighing 25 grams were separated from the Charas so recovered, which were put in two separate parcels and each of the parcel was sealed with three seals of impression 'A', whereas the residue charas was put in the same envelope and thereafter sealed in a separate parcel with five seals of the same impression and all the parcels were taken into possession vide memo Ext.PW-1/D. The specimen of the seal was taken separately which is Ext.PW-1/C.

4. The NCB form Ext.PW-8/A was filled in and seal impression was also affixed on the NCB form and the seal after use was handed over to Sadhu Ram (PW-2). Rukka Ext.PW-8/B was prepared which was sent to Police Station, Dalhousie through Constable Sanjay Kumar (PW-3) and its copy Ext.PW-7/A was sent to S.P., Chamba for information through LHC Uttam Chand. On receipt of Rukka, FIR Ext.PW-4/A came to be recorded at Police Station, Dalhousie by HC Bhajan Singh (PW-4) who also made an endorsement Ext.PW-4/B on the rukka. The site plan Ext.PW-8/C was prepared by HC Kartar Singh and the respondent was arrested vide memo Ext.PW-1/F.

5. It is also the case of the prosecution that on reaching the Police Station, HC Kartar Singh, produced the case property alongwith sample seal and NCB forms before HC Bhajan Singh (PW-4) who was officiating as SHO in the presence of Constable Rajesh Kumar (PW-6) and HC Bhajan Singh released all the three sealed parcels by affixing 3 seals of impression 'J' on each parcel and specimen of the seal used Ext.PW-4/C was taken separately and seal impression was also affixed on the NCB form regarding which reseal memo Ext.PW-4/D was prepared. The case property was deposited in the Malkhana alongwith sample seals and NCB forms regarding which entry was made in the Malkhana register, the extract of which is Ext.PW-4/E. On 12.7.2009 vide RC No. 106/2009 copy of which is Ext.PW-4/F, all the parcels alongwith NCB forms and specimen seal impressions were forwarded to FSL, Junga through HHC Kamal Kishore (PW-10) for chemical analysis and as per the report of the Chemical Examiner Ext. PX, the entire mass of the three parcels was found to be extract of cannabis and samples of Charas.

Special report Ext.PW-7/B was prepared and was sent to S.P., Chamba. The statements of the witnesses were recorded by HC Kartar Singh as per their versions.

6. After the completion of investigation, the challan was presented in the Court of learned Special Judge, Chamba, who framed the charge under Section 20 of the Act, to which the appellant pleaded not guilty and claimed trial.

7. The prosecution examined as many as ten witnesses in support of its case and closed its evidence. The statement of respondent under Section 313 Cr.P.C. was recorded in which he denied the case of the prosecution and claimed that he is innocent and has been falsely implicated in this case and no evidence in defence was adduced by the respondent.

8. The learned Special Judge, after recording the evidence and evaluating the same, acquitted the respondent particularly on the ground that non-compliance of Section 50 of the NDPS Act.

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

9. It is not in dispute that the personal search of the respondent was conducted by the Investigating Agency and the respondent was also informed that he could have informed that his search conducted before the Magistrate, a Gazetted Officer or the Police, upon which the respondent expressed his opinion to be searched by the police party. This would clearly be evident from the consent form (fard Sehmati), which reads thus:

> "थाना डलहौज़ी जिला चंबा.
>
> फर्द सहमति U/S 50 NND&PS Act.
>
> निमंलिखित गवाहों के सामने आज दिनांक 10.7.09 को मय HC करतार सिंह No. I/O SIU, चंबा आप अयूब मुहम्मद S/o सफी मुहम्मद जात मुस्लमान R/o इछलोई थाना कीहर तहसील सलूनी जिला चंबा को सूचित करता हु की आप के पास मादक द्रव्य होने का शक हे . आपकी जमा तलाशी ली जानी हैं . आप लिखित तौर पर बतलाएं की आप अपनी जामा तलाशी किसी मजिस्ट्रेट , राजपत्रित अधिकारी या पुलिस के पास देना चाहते हैं . जिस पर अयूब मुहम्मद उपरोक्त ने ज़ाहिर किया की यह अपनी जामा तलाशी मौका पर मोजूद पुलिस को देना चाहता हैं इसने ज़ाहिर किया की यह लिखना पढना नहीं जानता हे , जिसे पढ़ कर सुनाया गया. जिसने गवाहों के सामने सहमति प्रकट करते हुए अपना बाया अंगूठा शपथ किया हे."

10. It is more than settled that in case of personal search, the provisions of Section 50 are duly attracted. (***State of H.P. vs. Pawan Kumar, 2005 (4) SCC 350***). Therefore, the moot question that arises for further consideration is as to whether the requirement of Section 50 have been complied with by the prosecution in the instant case.

11. Since the only question pertains to compliance of Section 50 of the NDPA Act, it is useful to refer to the same and reads as under:

> *"**50. Conditions under which search of persons shall be conducted**.— (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.*
>
> *(2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in sub-section (1).*
>
> *(3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.*
>
> *(4) No female shall be searched by anyone excepting a female.*

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest gazetted officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest gazetted officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

12. Notably, there was a divergence of opinion between different Benches of the Hon'ble Supreme Court with regard to the ambit and scope of the aforesaid Section and, in particular with regard to the admissibility of the evidence collected by an Investigating Officer during search and seizure conducted in violation of the provisions of Section 50. The legal position initially came to be cleared by the Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***State of Punjab vs. Baldev Singh (1999) 6 SCC 172***. After considering the mandate of law as provided under Section 50 of the NDPS Act and various earlier decisions on the point it was concluded as under:

"57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be

permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

(9) xxx xxxx (10) xxx xxxx"

13. Thus, in view of the aforesaid exposition of law there is no room for any doubt that what the officer concerned is required to do in compliance to the mandate of Section 50 is to convey about the choice of the accused. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word 'right' at relevant places in the decision of Baldev Singh case (supra) seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the suspect/accused at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.

14. However, it appears that even after the Constitution Bench decision in ***Baldev Singh's*** case (supra), the legal position again became hazy as some of the Hon'ble Benches used the expression of "substantial compliance" vis-à-vis the requirement of Section 50 and ultimately the matter once again reached the Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja vs. State of Gujarat (2011) 1 SCC 609*** wherein the question that was posed before it was whether Section 50 of the NDPS Act casts a duty on the empowered officer to 'inform' the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazetted officer can be said to be due compliance within the mandate of the Section 50?

15. After taking into consideration all the earlier decisions, the later Constitution Bench arrived at the following conclusions:

> *"28. We shall now deal with the two decisions, referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In Prabha Shankar Dubey vs. State of M.P. (2004) 2 SCC 56, a two Judge Bench of this Court culled out the ratio of Baldev Singh case on the issue before us, as follows: (Prabha Shankar Dubey case, SCC p. 64, para 11)*
>
> > *'11. … What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word 'right' at relevant places in the decision of Baldev Singh case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the 'suspect' at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.'*
>
> *However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and Joseph Fernandez, the Court chose to follow the views echoed in the latter case, wherein it was held that the searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words: (Prabha Shankar Dubey case, SCC p. 64, para 12)*
>
> > *'12. The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case4. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.'*
>
> *It is manifest from the afore-extracted paragraph that Joseph Fernandez does not notice the ratio of Baldev Singh and in Prabha Shankar Dubey, Joseph Fernandez is followed ignoring the dictum laid down in Baldev Singh case.*
>
> *29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.*
>
> *30. As observed in Presidential Poll, In re (1974) 2 SCC 33: (SCC p. 49, para 13)*
>
> > *'13. … It is the duty of the courts to get at the real intention of the legislature by carefully attending [to] the whole scope of the provision to be*

construed. 'The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole.'

31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

16. From the observations made by the Hon'ble Supreme Court as extracted above, it is abundantly clear that the Hon'ble Constitution Bench has not approved the concept of "substantial compliance".

17. The law laid down by the Hon'ble Supreme Court has been consistently followed by this Court in ***Ashok Kumar vs. State of H.P. 2009 (2) SLC, 162, State of H.P. vs. Harish Thakur, 2010 (2) Latest HLJ 1472, State of H.P. vs. Viney Kumar alias Binu (2013) 1 SLC, 515, State of H.P. vs. Vijay Singh alias Rinku (2014) 3 SLC 1248, State of H.P. vs. Vijay Kumar (2015) 3 SLC 1700 and State of H.P. vs. Virender Singh (2016) 4 ILR (HP) 381.***

18. Therefore, once the provision of Section 50 of the Act has been proved to have been not complied with, then no fault can be found with the judgment and acquittal passed by learned Special Judge, Chamba. It is well settled that acquittal leads to presumption of innocence in favour of the accused and to dislodge the same, the onus heavily relied upon the prosecution. Having considered the entire material on record, more particularly Ex.PW-1/A, we are of the considered view that the prosecution has failed to establish the essential ingredients so required to constitute the charged offence.

19. The findings recorded by the learned trial court are based on correct appreciation of the facts and the law and do not warrant any interference. There are no compelling circumstances which may call for interference as the reasons given by the learned court below are cogent and convincing; and based on records of the case.

20. For the forging reasons, the appeal is sans merit and is accordingly dismissed. Pending application(s), if any also stands dismissed. Bail bonds are discharged.

****

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

State of Himachal Pradesh ...Petitioner.
Versus
Ayub Mohammad ...Respondent.

Cr. Appeal No. 368 of 2010
Decided on: 1st September, 2017.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 700 grams charas, which was concealed under his belt and was tied around his waist – he was tried and acquitted by the Trial Court- held in appeal that the accused was told to exercise his option of being searched before a Magistrate, Gazetted Officer or the police – the accused has to be apprised of his right that he could get himself searched in the presence of Magistrate or the Gazetted Officer- the

prosecution has not complied with the mandatory provision of Section 50- the accused was rightly acquitted in these circumstances- appeal dismissed. (Para-9 to 20)

Cases referred:
State of H.P. vs. Pawan Kumar, 2005 (4) SCC 350
State of Punjab vs. Baldev Singh (1999) 6 SCC 172
Vijaysinh Chandubha Jadeja vs. State of Gujarat (2011) 1 SCC 609
Ashok Kumar vs. State of H.P. 2009 (2) SLC, 162
State of H.P. vs. Harish Thakur, 2010 (2) Latest HLJ 1472
State of H.P. vs. Viney Kumar alias Binu (2013) 1 SLC, 515
State of H.P. vs. Vijay Singh alias Rinku (2014) 3 SLC 1248
State of H.P. vs. Vijay Kumar (2015) 3 SLC 1700
State of H.P. vs. Virender Singh (2016) 4 ILR (HP) 381.

For the Appellant : Mr. V. S. Chauhan, Addl. A.G. with Mr. J. S. Guleria, Asstt. A.G.
For the Respondent : Mr. Devender K. Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

This appeal under Section 378 of the Code of Criminal Procedure (for short 'Code') by the State assailing the acquittal order passed by learned Special Judge, Chamba Division, Chamba, H.P.in Sessions Trial No.34 of 2009 held under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (for short NDPS Act).

2. The prosecution story which emerges from the record is that on 10.7.2009 H.C. Kartar Singh (PW-8) alongwith H.C. Subhash Chand, HC Roop Singh, Constable Anuj Kumar (PW-1), Constable Sanjay Kumar 9PW-3) and LHC Uttam Chand were present at Bonkhri Morh at about 12.05 PM and Sadhu Ram (PW-2) and one Pawan Kumar met them at that place. The respondent came there on foot and on seeing the police party, tried to run back but was nabbed on suspicion. The option was given to the respondent vide memo Ext.PW-1/A and the respondent opted to give his search to the police and thereafter all the police officials and two independent witnesses gave their personal search to the respondent vide memo Ext.PW-1/B, but nothing incriminating was found.

3. The further case of the prosecution is that the personal search of the respondent was conducted and one Polythene envelope of black colour was recovered which was concealed by the respondent under his belt and was tied around his waist and on checking it was found to be containing Charas which on weighing turned to be 700 grams. Two samples each weighing 25 grams were separated from the Charas so recovered, which were put in two separate parcels and each of the parcel was sealed with three seals of impression 'A', whereas the residue charas was put in the same envelope and thereafter sealed in a separate parcel with five seals of the same impression and all the parcels were taken into possession vide memo Ext.PW-1/D. The specimen of the seal was taken separately which is Ext.PW-1/C.

4. The NCB form Ext.PW-8/A was filled in and seal impression was also affixed on the NCB form and the seal after use was handed over to Sadhu Ram (PW-2). Rukka Ext.PW-8/B was prepared which was sent to Police Station, Dalhousie through Constable Sanjay Kumar (PW-3) and its copy Ext.PW-7/A was sent to S.P., Chamba for information through LHC Uttam Chand. On receipt of Rukka, FIR Ext.PW-4/A came to be recorded at Police Station, Dalhousie by HC Bhajan Singh (PW-4) who also made an endorsement Ext.PW-4/B on the rukka. The site plan Ext.PW-8/C was prepared by HC Kartar Singh and the respondent was arrested vide memo Ext.PW-1/F.

5. It is also the case of the prosecution that on reaching the Police Station, HC Kartar Singh, produced the case property alongwith sample seal and NCB forms before HC Bhajan Singh (PW-4) who was officiating as SHO in the presence of Constable Rajesh Kumar (PW-6) and HC Bhajan Singh released all the three sealed parcels by affixing 3 seals of impression 'J' on each parcel and specimen of the seal used Ext.PW-4/C was taken separately and seal impression was also affixed on the NCB form regarding which reseal memo Ext.PW-4/D was prepared. The case property was deposited in the Malkhana alongwith sample seals and NCB forms regarding which entry was made in the Malkhana register, the extract of which is Ext.PW-4/E. On 12.7.2009 vide RC No. 106/2009 copy of which is Ext.PW-4/F, all the parcels alongwith NCB forms and specimen seal impressions were forwarded to FSL, Junga through HHC Kamal Kishore (PW-10) for chemical analysis and as per the report of the Chemical Examiner Ext. PX, the entire mass of the three parcels was found to be extract of cannabis and samples of Charas. Special report Ext.PW-7/B was prepared and was sent to S.P., Chamba. The statements of the witnesses were recorded by HC Kartar Singh as per their versions.

6. After the completion of investigation, the challan was presented in the Court of learned Special Judge, Chamba, who framed the charge under Section 20 of the Act, to which the appellant pleaded not guilty and claimed trial.

7. The prosecution examined as many as ten witnesses in support of its case and closed its evidence. The statement of respondent under Section 313 Cr.P.C. was recorded in which he denied the case of the prosecution and claimed that he is innocent and has been falsely implicated in this case and no evidence in defence was adduced by the respondent.

8. The learned Special Judge, after recording the evidence and evaluating the same, acquitted the respondent particularly on the ground that non-compliance of Section 50 of the NDPS Act.

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

9. It is not in dispute that the personal search of the respondent was conducted by the Investigating Agency and the respondent was also informed that he could have informed that his search conducted before the Magistrate, a Gazetted Officer or the Police, upon which the respondent expressed his opinion to be searched by the police party. This would clearly be evident from the consent form (fard Sehmati), which reads thus:

"थाना डलहौज़ी जिला चंबा.

फ़र्द सहमति U/S 50 NND&PS Act.

निमंलिखित गवाहों के सामने आज दिनांक 10.7.09 को मय HC करतार सिंह No. I/O SIU, चंबा आप अयूब मुहम्मद S/o सफी मुहम्मद जात मुस्लमान R/o इछलोई थाना कीहर तहसील सलूनी जिला चंबा को सूचित करता हु की आप के पास मादक द्रव्य होने का शक हे . आपकी जमा तलाशी ली जानी हैं . आप लिखित तौर पर बतलाएं की आप अपनी जामा तलाशी किसी मजिस्ट्रेट , राजपत्रित अधिकारी या पुलिस के पास देना चाहते हैं . जिस पर अयूब मुहम्मद उपरोक्त ने ज़ाहिर किया की यह अपनी जामा तलाशी मौका पर मोजूद पुलिस को देना चाहता हैं इसने ज़ाहिर किया की यह लिखना पढना नहीं जानता हे , जिसे पढ़ कर सुनाया गया. जिसने गवाहों के सामने सहमति प्रकट करते हुए अपना बाया अंगूठा शपथ किया हे."

10. It is more than settled that in case of personal search, the provisions of Section 50 are duly attracted. (***State of H.P. vs. Pawan Kumar, 2005 (4) SCC 350***). Therefore, the moot question that arises for further consideration is as to whether the requirement of Section 50 have been complied with by the prosecution in the instant case.

11. Since the only question pertains to compliance of Section 50 of the NDPA Act, it is useful to refer to the same and reads as under:

> ***"50. Conditions under which search of persons shall be conducted****.— (1) When any officer duly authorised under Section 42 is about to search any person*

under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in sub-section (1).

(3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest gazetted officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest gazetted officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

12. Notably, there was a divergence of opinion between different Benches of the Hon'ble Supreme Court with regard to the ambit and scope of the aforesaid Section and, in particular with regard to the admissibility of the evidence collected by an Investigating Officer during search and seizure conducted in violation of the provisions of Section 50. The legal position initially came to be cleared by the Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***State of Punjab vs. Baldev Singh (1999) 6 SCC 172***. After considering the mandate of law as provided under Section 50 of the NDPS Act and various earlier decisions on the point it was concluded as under:

"57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The

answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

(9) xxx xxxx (10) xxx xxxx"

13. Thus, in view of the aforesaid exposition of law there is no room for any doubt that what the officer concerned is required to do in compliance to the mandate of Section 50 is to convey about the choice of the accused. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word 'right' at relevant places in the decision of Baldev Singh case (supra) seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the suspect/accused at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.

14. However, it appears that even after the Constitution Bench decision in ***Baldev Singh's*** case (supra), the legal position again became hazy as some of the Hon'ble Benches used the expression of "substantial compliance" vis-à-vis the requirement of Section 50 and ultimately the matter once again reached the Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja vs. State of Gujarat (2011) 1 SCC 609*** wherein the question that was posed before it was whether Section 50 of the NDPS Act casts a duty on the empowered officer to 'inform' the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazetted officer can be said to be due compliance within the mandate of the Section 50?

15. After taking into consideration all the earlier decisions, the later Constitution Bench arrived at the following conclusions:

> *"28. We shall now deal with the two decisions, referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In Prabha Shankar Dubey vs. State of M.P. (2004) 2 SCC 56, a two Judge Bench of this Court culled out the ratio of Baldev Singh case on the issue before us, as follows: (Prabha Shankar Dubey case, SCC p. 64, para 11)*
>
> > *'11. … What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word 'right' at relevant places in the decision of Baldev Singh case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the 'suspect' at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.'*
>
> *However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and Joseph Fernandez, the Court chose to follow the views echoed in the latter case, wherein it was held that the searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words: (Prabha Shankar Dubey case, SCC p. 64, para 12)*
>
> > *'12. The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case4. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.'*
>
> *It is manifest from the afore-extracted paragraph that Joseph Fernandez does not notice the ratio of Baldev Singh and in Prabha Shankar Dubey, Joseph Fernandez is followed ignoring the dictum laid down in Baldev Singh case.*
>
> *29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be*

searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

30. As observed in Presidential Poll, In re (1974) 2 SCC 33: (SCC p. 49, para 13)

> *'13. … It is the duty of the courts to get at the real intention of the legislature by carefully attending [to] the whole scope of the provision to be construed. 'The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole.'*

31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

16. From the observations made by the Hon'ble Supreme Court as extracted above, it is abundantly clear that the Hon'ble Constitution Bench has not approved the concept of "substantial compliance".

17. The law laid down by the Hon'ble Supreme Court has been consistently followed by this Court in ***Ashok Kumar vs. State of H.P. 2009 (2) SLC, 162, State of H.P. vs. Harish Thakur, 2010 (2) Latest HLJ 1472, State of H.P. vs. Viney Kumar alias Binu (2013) 1 SLC, 515, State of H.P. vs. Vijay Singh alias Rinku (2014) 3 SLC 1248, State of H.P. vs. Vijay Kumar (2015) 3 SLC 1700 and State of H.P. vs. Virender Singh (2016) 4 ILR (HP) 381.***

18. Therefore, once the provision of Section 50 of the Act has been proved to have been not complied with, then no fault can be found with the judgment and acquittal passed by learned Special Judge, Chamba. It is well settled that acquittal leads to presumption of innocence in favour of the accused and to dislodge the same, the onus heavily relied upon the prosecution. Having considered the entire material on record, more particularly Ex.PW-1/A, we are of the considered view that the prosecution has failed to establish the essential ingredients so required to constitute the charged offence.

19. The findings recorded by the learned trial court are based on correct appreciation of the facts and the law and do not warrant any interference. There are no compelling circumstances which may call for interference as the reasons given by the learned court below are cogent and convincing; and based on records of the case.

20. For the forging reasons, the appeal is sans merit and is accordingly dismissed. Pending application(s), if any also stands dismissed. Bail bonds are discharged.

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

Ashwani Kumar ...Petitioner.
Versus
Sunita Kumari ...Respondent.

Cr.MMO No.53 of 2017.
Reserved on : 28.8.2017.
Decided on: 4th September, 2017.

Code of Criminal Procedure, 1973- Section 482- A petition for maintenance was filed pleading that marriage between the parties was solemnized in accordance with Hindu rites and custom- one child was born – the husband started treating the wife with cruelty – the petition was allowed and maintenance @ Rs. 5,000/- per month was awarded to the wife – aggrieved from the order, the present petition has been filed pleading that maintenance of Rs. 15,000/- per month had already been awarded by Additional District Judge in exercise of matrimonial jurisdiction – this amount was not taken into consideration by the Court below – hence, it has been pleaded that order be set aside – held that the marriage is not disputed – it is also not disputed that parties are residing separately – husband is a contractor having good business and wife is totally dependent upon him- considering the status of the parties and their standard of living, the maintenance is not excessive- petition dismissed. (Para-7 to 9)

For the petitioner : Mr. Subhash Mohan Snehi, Advocate.
For the respondent : Mr. Ramakant Sharma, Sr. Advocate with Mr. P.S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition under Section 482 of the Code of Criminal Procedure (*for short 'Code'*) has been preferred by the petitioner for quashing and setting aside the impugned orders dated 10.6.2015/15.7.2015, passed by the learned Additional District Judge-II, Solan, District Solan, (H.P) in Case No.14-ADJ-II/3 of 2015, as well as order dated 7.10.2016, passed by the learned Judicial Magistrate 1st Class, Court No.4, Shimla, District Shimla, in Case No.450-3 of 2015.

2. Brief facts giving rise to the present petition are that petitioner and the respondent herein, are husband and wife. The marriage between the petitioner and respondent was solemnized on 7.10.2003, in accordance with the Hindu rites and local customs at Ram Mandir, Shimla. As per the petitioner, after the marriage, both the parties resided together and cohabited at village Bhag, Post Office Summer Hill, Boileauganj, District Shimla, as husband and wife. Out of the said wedlock, one male child, namely, Yatish was born, who is under the care and custody of the respondent. The respondent is having always cruel nature against the petitioner. The respondent with the support of her mother, namely, Munni Devi, step-mother as well as their relatives has created problem after the child was born. On 15.4.2008, the mother and step-mother of the respondent came to the house of the petitioner and resided there. The mother of the respondent has also advised the respondent to live with the respondent happily by stating that it is your house. The petitioner is not able to enjoy his life with the respondent due to her cruel nature, she quarrel and misbehave and started abusing the petitioner in the presence of friends and relatives. The respondent has never joined the company of the petitioner and the petitioner is providing maintenance to the respondent and his son, namely, Yatish, who is studying in Dayanand Public School near Kali Bari Temple, Shimla. All the expenses on account of caring of the child and also maintaining the respondent is paid by the petitioner and he is

paying approximately Rs.10,000/- to Rs.15,000/- per month. The respondent is living with her mother, namely, Munni Devi at village Khalogra, Post Office Kumarhatti, Tehsil and District Solan and enjoying her life in her parental house. The petitioner is not able to enjoy his married life since 2008 with the respondent due to the cruelty and unreasonable quarrel. Due to ill-behaviour of the respondent, the petitioner is not able to adjust with the respondent, since the respondent has deserted the petitioner and also subjected him to cruelty and adultery, therefore, compelled with the circumstances created by the respondent, the petitioner has left with no other option, but to file an application under Section 13 (a) (i-a) (i-b) of the Hindu Marriage Act, for dissolution of marriage. The said application was listed before the learned Additional District Judge-II, Solan and vide order, dated 10.6.2015/15.7.2015, directed the petitioner to pay maintenance amount of Rs.15,000/- per month in favour of the respondent. After the impugned order passed by the learned Court, the respondent in order to unnecessary harass the petitioner filed an application under the Domestic Violence Act, against the petitioner. The said application was listed before the learned Court below and granted maintenance amount of Rs.5000/- per month in favour of the respondent from the date of filing of the application. Hence, the petition against the order of learned Court below under the provisions of Domestic Violence Act.

3. Learned counsel appearing on behalf of the petitioner has argued that the maintenance amount awarded by the learned Court below is too much on the higher side, as the learned Court below has not taken into consideration the fact that the earlier maintenance amount of Rs.15,000/- is being paid, as per the orders of learned Additional District Judge-II, Solan, in the petition for dissolution of marriage, as maintenance *pendente lite* and Rs.25,000/- as litigation expenses.

4. On the other hand, Mr. Ramakant Sharma, learned Senior Counsel appearing on behalf of the respondent has strenuously argued that the present petition under Section 482 of the Code of Criminal Procedure, is not maintainable, as the petitioner has a remedy to maintain the revision petition before the learned lower Appellate Court, if he is aggrieved by the order of learned Court below. He has further argued that in case, tomorrow, the petitioner withdraws his petition under Hindu Marriage Act, then the maintenance *pendente lite* awarded by way of mutual consent of the petitioner-husband will go. He has further argued that the maintenance amount of Rs.5000/- awarded by the learned Magistrate under the Domestic Violence Act, is otherwise cannot be said to be excessive.

5. In rebuttal, learned counsel appearing on behalf of the petitioner has argued that the powers of this Court under Section 482 of the Code of Criminal Procedure, is extra ordinary powers and grievance of the petitioner can be redressed and the amount of maintenance, as awarded by the learned Magistrate below may be reduced.

6. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

7. From the perusal of record, it is clear that the parties are married and the respondent, who was petitioner in the learned Court below, was legally wedded wife of the petitioner-husband herein. The marriage *inter se* is admitted. It has come in the evidence before the learned lower Appellate Court that the parties were married in the year 2003. It has also come on record that the parties are now not living together, but the respondent is living in the house of petitioner's mother at Shimla and the petitioner-husband is living at Solan. It has also come on record that the petitioner is a Contractor and having good business and the respondent-wife is totally dependent upon him and she is residing at Shimla, looking after her son also born after the marriage from the petitioner, who is studying in Dayanand Public School, near Kali Bari Temple, Shimla, which is a good Public School in Shimla.

8. After taking into consideration the status of the parties and the manner in which they are living, this Court finds that the interim maintenance awarded by the learned Court below is not excessive at all and the same is reasonable, as the respondent has to maintain herself and her son and so, the maintenance awarded is just and reasoned. Further, the maintenance

awarded by the learned Additional District Judge-II, Solan, in the petition under the Hindu Marriage Act, on the consent of the parties, thus, the order needs no interference. Accordingly, the present petition is not maintainable, as when the revision petition is maintainable, the extra ordinary powers under Section 482 of the Code of Criminal Procedure, is not required to be exercised in favour of the petitioner in the facts and circumstances of the present case.

9. In view of what has been discussed hereinabove, the present petition, which sans merits, deserves dismissal and is accordingly dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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

Manoj Kumar Tandan .....Appellant.
Versus
Smt. Kamla Devi .....Respondent.

FAO No.128 of 2010
Date of Decision: 4.9.2017

Employees Compensation Act, 1923- Section 4- Deceased had sustained burn injuries by coming into contact with the transmission line above the site of construction- Commissioner awarded compensation of Rs. 9,15,222/-- aggrieved from the order, present appeal has been filed- held that post-mortem report proves that deceased had suffered burn injuries- employer had not taken any steps to get the transmission line removed- deceased was carrying out the construction at that time of accident- there was delay in filing the petition but the reasons for the same were given which were duly supported by the evidence- deceased was earning Rs. 200/- per day- compensation was correctly assessed by the Commissioner- appeal dismissed. (Para-3 to 7)

For the Appellant: Mr. B.C. Verma, Advocate.
For the Respondent: Mr. Lalit Kumar Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant appeal is directed against the verdict rendered on 22.3.2010 by the learned Commissioner, for Employee's Compensation, Chachyot at Gohar, District Mandi, H.P., while his exercising jurisdiction under the Employee's Compensation Act, whereby the learned Commissioner assessed compensation comprised in a sum of Rs. 9,15,222/- vis-à-vis the respondent herein. Being aggrieved therefrom, the employer has instituted the instant appeal before this Court.

2. During the course of arguments before this Court, this Court deemed it fit to formulate the hereinafter extracted substantial questions of law, for hence an adjudication being pronounced thereon:-

1. Whether the delay in filing the claim petition has not been sought to be condoned on the basis of satisfactory, valid and legal grounds and whether in the absence of any evidence in support of application for condonation of delay, the delay could not be condoned?

2. Whether the respondent has failed to prove that the minimum wages of the deceased Roop Lal were Rs. 6,000/- per month and burden of proof of this issue was upon the respondent?

3. Whether the adverse inference could not be drawn against the appellant on the ground that he failed to produce his record in spite of the fact that the appellant has denied the relationship of workman between him and the deceased Sh. Roop Lal?

4. Whether the relevant factor has wrongly been applied by the learned Commissioner and since the respondent claimed that the deceased was working for 10 to 12 years therefore, the deceased could not be less than 30 years of age at the time of his death?

3. The learned counsel for the appellant has contended with vigor, that with no cogent proof being adduced in respect of the deceased holding employment under the appellant, thereupon, it was not just for the learned Commissioner to make a conclusion that the demise of the deceased workman occurred during the course of his performing employment under the appellant.

4. Post mortem certificates embodied in Ext. PW8/A to E, ascribe the cause of demise of the deceased to electric burn shock(s), arising from his contacting transmission line(s), occurring above the site of construction, whereat the appellant herein along with other co-workers, had, purportedly employed the deceased. The purported employer of the deceased was hence enjoined to be fastened with the apposite liability of his indemnifying the successor(s)-in-interest of the deceased, especially when he proceeded to hold construction activity at the relevant site, despite existence thereat of transmission line(s), also when for removal(s) thereof, he evidently failed to make any apposite endeavour(s) with the State Electricity Board.

5. The co-workers along with deceased in their respective depositions make, a concurrent pronouncement, of, theirs and the deceased rendering employment under the appellant. The aforesaid testifications' rendered by the co-workers with the deceased, at the relevant site, tritely in respect of theirs along with the deceased rendering employment under the appellant, remained unshred of their efficacy, importantly, for want of the appellant adducing any cogent rebuttal evidence thereto, comprised in his adducing the relevant register of employment, with non depiction(s) therein of the name(s) of deceased or of the latter's co-worker(s). The omission of adduction of the aforesaid best evidence, validates the apt inference derived therefrom, by the learned Commissioner, of, the deceased workman along with other co-workers standing engaged by the appellant herein, for carrying of construction activity at the relevant site, nor its tenacity is eroded. Consequently, it is to be concluded, moreso, when the employer appellant herein, has also not proceeded to make a complaint with the authorities concerned in respect of the deceased workman trespassing upon the relevant premises, that hence a subsisting contract of employment existed inter-se the deceased and the appellant, whereupon the fastening of the indemnificatory liability of compensation amount vis-à-vis the appellant, is not wanting in any legal vigor.

6. The learned counsel for the appellant has contended with vigor that the statutory provisions embodied in Section 10, sub-section (1) of the Employee's Compensation Act, provisions whereof stand(s) extracted hereinafter,

> "10. **Notice and claim.-** (1) 10. Notice and claim.- (1)
>
> 1*[No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within 2*[two years] of the occurrence of the accident or, in case of death, within 2*[two years] from the date of death:]
>
> Provided that where the accident is the contracting of a disease in respect of which the provisions of sub-section (2) of section 3 are applicable, the

accident shall be deemed to have occurred on the first of the days during which the [employee] was continuously absent from work in consequence of the disablement caused by the disease:

Provided further that if [an employee] who, having been employed in an employment for a continuous period, specified under sub-section (2) of section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:]

[Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the {entertainment of a claim]-

(a) If the claim is [preferred] in respect of the death of a [an employee] resulting from an accident which occurred on the premises of the employer, or at any place where the [employee] at the time of the accident was working under the control of the employer or of any person employed by him, and the [employee] died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or

(b) If the employer [or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured [employee] was employed] had knowledge of the accident from any other source at or about the time when it occurred:]

Provided further that the Commissioner may [entertain] and decide any claim to compensation in any case notwithstanding that the notice has not been given or the claim has not been [preferred] , in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or [prefer] the claim, as the case may be, was due to sufficient cause."

engraft therewithin, an embargo against preferment of a petition beyond two years since the occurrence, whereas significantly with the ill-fated occurrence occurring on 2.5.2001 and the apposite claim petition being preferred beyond three years thereafter, hence thereupon the award is rendered vitiated, with a stain of its infracting the mandate of the hereabove extracted statutory provisions. Further the learned counsel for the appellant, has contended that though the learned Commissioner, is empowered to upon evidence displaying existence of sufficient cause precluding the disabled workman or the successor(s)-in-interest of the deceased workman, to, within time prefer a claim petition, to thereupon proceed to condone the apposite delay, yet non existence hereat of the aforesaid apposite material, precluded the learned Commissioner to inaptly adjudge qua existence of sufficient ground(s), for, hence the delay in the belated institution of the apposite petition, hence warranting its being condoned. The apposite application filed before the learned Commissioner states therein the reasons which constrained the applicant to institute it before the learned Commissioner. It is specifically averred therein that the claimant is a rustic simpleton lady, who, stood repeatedly assured by the employer of her deceased son, qua his readiness to indemnify her in respect of the relevant mishap, yet all verbal assurance(s) remained unadhered to, also hers failingly making an apposite last endeavour in the first week of November, 2003. In proof of the aforesaid averments, the claimant stepped into the witness box. Her deposition embodied in her examination-in-chief remained unscathed of its tenacity, during, the ordeal of an inexorable cross-examination she stood subjected to. Also the trite factum of the respondent herein being a rustic villager remained unshred of its veracity. In sequel, it appears that the appellant did adduce tangible evidence qua hers being a rustic simpleton lady also qua the appellant making false verbal assurance(s) to her

qua his readiness to indemnify her, for occurrence of demise of her son, in an accident which befell him, during the course of his rendering employment under the appellant. In sequel, it is befitting to conclude that the learned Commissioner was sagacarious, to thereupon infer that hence sufficient cause(s) aforesaid precluding her, to, earlier within the statutory period hence prefer the claim petition. The substantial questions of law(s) are answered accordingly.

6. As borne in the Pariwar Register, the age of the deceased at the time of his demise was 23 years. The learned Commissioner had for want of documentary evidence, in respect of the actual sum(s) of wages drawn by the deceased, from, his employment under the appellant, had imputed sanctity to the testimony of the claimant qua her deceased son, drawing a sum of Rs. 200/- per diem from his employer, explicitly also for want of effect(s) thereof remaining unscathed, for absence of adduction by the appellant, of best documentary evidence, comprised in the apposite receipt(s) being adduced in evidence. Further, want of adduction of the aforesaid best evidence befittingly constrained the learned Commissioner, to impute sanctity to the oral testimony rendered by the claimant in respect of the aforesaid fact. The learned counsel for the appellant submits that in absence of the aforesaid best documentary evidence, rather it was incumbent upon the learned Commissioner to compute the relevant wages derived by the deceased workman from his employment, in a figure/amount bearing consonance with the Minimum Wages Act. However, the aforesaid submission, does not appeal to this Court, as any reliance upon the apposite provisions borne in the Minimum Wages Act, for this Court thereupon computing the minimum wages vis-a-vis the deceased workman, would occur, only upon the appellant being proceeded against ex-parte, whereupon he stood obviously precluded to adduce the apposite best evidence. Contrarily with the appellant contesting the claim petition besides his failing to adduce best evidence in respect thereto, thereupon any attraction hereat, of, the apposite provision borne in the Minimum Wages Act, is wholly un-called for, significantly when reiteratedly the appellant contested the petition and also led evidence upon all contentious issues, whereas, he failed to adduce the best documentary evidence in respect of the wages drawn by the deceased from his employment under him. With the appellant failing to scuttle the vigor of oral evidence adduced in respect(s) thereof, thereupon he cannot under the garb of the provisions of the Minimum Wages Act, espouse that in consonance therewith this court compute wages vis-à-vis the deceased workman, especially when the relevant provisions of the aforesaid Act, make pronouncements, qua defrayment of minimum wages by the employer vis-à-vis his employee, whereas they do bar the claimant(s) concerned to claim wages in excess thereof, specifically the contractual wages settled inter-se the employer and the employee, also concomitantly defrayment(s) thereof also are not barred. Substantial questions of law are accordingly answered.

7. In view of the above, there is no merit in this appeal, the same is accordingly dismissed. Impugned verdict is maintained and affirmed. All pending applications stand disposed of accordingly.

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

Shubham Verma ...Appellant

Versus

State of HP ...Respondent

Cr. Appeal No. 58 of 2017

Decided on: 4th September, 2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 450 grams charas- he was tried and convicted by the Trial Court- held in appeal that DW-1 proved that the ticket was issued on 24.4.2014- DW-2, Conductor of the bus proved that accused was taken out of the bus- he was

not possessing anything at that time- independent witness was not associated - the testimonies of the police officials are not trustworthy – defence version is equally probable- Trial Court had wrongly convicted the accused- appeal allowed and judgment of the Trial Court set aside- accused acquitted of the commission of offence punishable under Section 20 of N.D.P.S. Act.

(Para-9 to 19)

Cases referred:

State of UP versus Ghambhir Singh & others, AIR 2005 (92) Supreme Court 2439
Harbeer Singh v. Sheeshpal and Ors., (2016) 16 SCC 418
Pawan Kumar and Kamal Bhardwaj versus State of H.P., latest HLJ 2008 (HP) 1150

For the Appellant: Mr. Daleep Singh Kaith, Advocate.
For the Respondent: Mr. P.M.Negi & Mr. M.L.Chauhan, Additional Advocate Generals.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

The instant appeal filed under Section 374(2) of the Code of Criminal Procedure, is directed against the judgment of conviction and sentence dated 19.12.2016/20.12.2016, passed by learned Special Judge, Bilaspur, District Bilaspur, Himachal Pradesh in Sessions Trial No.4/3 of 2014, whereby learned trial court while holding appellant-accused(hereinafter referred to as 'accused') guilty of having committed the offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act'), convicted and sentenced him to undergo rigorous imprisonment for a period of four years and to pay fine of Rs. 50,000/- and in default of payment of fine, to further undergo imprisonment for six months.

2. In nutshell, case of the prosecution is that on 25.04.2014, at about 4:30 AM, police party comprising of HHC Dev Raj, LHC Mangal Singh, headed by SI/SHO Lakhvir Singh of police Station, Swarghat was on patrolling in official vehicle No.HP-69-A-0130. As per story put forth by prosecution when the aforesaid police party reached near BDO Office, Swarghat, a boy i.e. appellant-accused was spotted on NH-205 carrying one 'pithu' on his back. Police party stopped its jeep near the said boy, whereupon said boy (accused) became perplexed. Accused on inquiry disclosed his name to be Shubham Verma son of Sh. Ramesh Chand. Police party checked the bag ('pithu'), which was of black and grey colour Ex.P.5, wherein one plastic envelope containing one transparent polythene was recovered. On opening of aforesaid transparent polythene, police recovered black substance in the form of stick and ball, which lateron was found to be charas. As per investigating Agency, contraband allegedly recovered from the appellant-accused was found to be 450 grams. The charas was taken into possession by the police vide recovery memo Ex.PW3/A in the presence of HHC Dev Raj and Constable Rajinder Singh. Thereafter, investigating Officer sent ruqua Ex.PW4/A through LHC Mangal Singh, on the basis of which, formal FIR No.21/2014 Ex.PW6/A came to be registered against appellant-accused at Police Station, Swarghat. After completion of the investigation, police presented the challan in the competent Court of law.

3. The learned court below being satisfied that a prima facie case exist against the accused, framed charge against the accused under Section 20 of the Act, to which he pleaded not guilty and claimed trial.

4. Learned trial court on the basis of the evidence adduced on record, held appellant-accused guilty of having committed offence punishable under Section 20 of the Act, and accordingly convicted and sentenced him, as per the description already given hereinabove.

5. Feeling aggrieved and dissatisfied with the impugned judgment dated 19.12.2016, passed by the learned trial Court, accused has approached this Court by way of instant proceedings seeking therein his acquittal after setting aside the judgment of conviction recorded by the learned court below.

6. Mr. D.S.Kaith, learned counsel representing the appellant-accused, vehemently contended that impugned judgment of conviction recorded by the learned court below is not sustainable in the eye of law as the same is not based upon the correct appreciation of the evidence and as such, same deserve to be quashed and set-aside. Mr. Kaith, while inviting attention of this Court to the challan put up by the police in the competent court of law, contended that case of the prosecution is that accused was found carrying charas at 4:30 AM while he was coming from Swarghat on NH-205, whereas appellant/accused by examining DW-2, Anil Kumar, who happened to be conductor of HRTC, Nahan Depot, has successfully proved on record that on 24.04.2014 accused was going from Kullu to Chandigarh in HRTC bus and as such, there was no occasion for the court below to hold appellant-accused guilty of having committed the offence punishable under Section 20 of the Act that too on the basis of the story put forth by the prosecution, which is not trustworthy at all in light of the candid statement given by DW-2, who is a government employee. Mr. Kaith, further contended that bare perusal of impugned judgment passed by the learned trial Court, clearly suggest that statement having been made by DW-2 has not been dealt with in its right perspective by the court below, as a result of which, erroneous findings have come on record to the detriment of the appellant-accused, who is an innocent person. Mr. Kaith, while specifically referring to para-25 of the impugned judgment of conviction recorded by the learned court below, contended that findings recorded by the court below that "DW-2, nowhere stated that accused present in the court is the same boy who was alighted by the police", is totally contrary to the actual statement made by DW-2 in the Court. While inviting attention of this court to the statement of DW-2, Mr. Kaith, contended that DW-2 specifically stated in his statement before the court below that at about 1/1:30 AM(night hours), appellant- accused was got alighted by the police from the bus. Learned counsel while referring to the evidence led on record by the prosecution categorically contended that no reliance, if any, could be placed by the learned court below on the version put forth by the official witnesses, especially in view of the fact that as per story of prosecution, appellant/accused was nabbed by the police at Swarghat that too at about 4:30 AM, meaning thereby independent witnesses could be easily associated by the police party to prove its case against the appellant- accused. With the aforesaid submissions, learned counsel representing the appellant/accused prayed that appellant/accused, who is an innocent person may be acquitted of charge framed against him after setting aside the impugned judgment of conviction recorded by the learned court below.

7. Mr. M.L.Chauhan, learned Additional Advocate General representing the respondent-State, while refuting the aforesaid submissions having been made by learned counsel for the appellant-accused, strenuously argued that there is no illegality and infirmity in the judgment of conviction recorded by the court below and as such same deserve to be upheld. While inviting attention of this court towards the impugned judgment, Mr. Chauhan, contended that bare perusal of the same suggest that learned court below before holding appellant-accused guilty of having committed the offence punishable under Section 20 of the Act, carefully dealt with each and every aspect of the matter and as such there is no scope of interference and as such present appeal deserve to be dismissed. With a view to substantiate his aforesaid argument, Mr. Chauhan, learned Additional Advocate General, made this Court to travel through the entire evidence adduced on record by the prosecution to demonstrate that prosecution successfully proved it beyond reasonable doubt that on 25.04.2014 at about 4:30 AM police party nabbed the appellant/accused carrying 450 grams of charas on NH-205. Mr. Chauhan further contended that since appellant/accused was apprehended by the police party during the night time, it was not possible to associate independent witness. Mr. Chauhan, also contended that otherwise also version put forth by official witnesses cannot be brushed aside/ ignored solely on account of non examination of independent witnesses, rather version put forth by officials witnesses is required to be dealt with in the same manner as of the independent witnesses. Mr. Chauhan, while referring to the statement of DW-2, Sh. Anil Kumar, Conductor of HRTC, argued that no much reliance could be placed upon the version put forth by this witness, especially when all the prosecution witnesses unequivocally supported the case of the prosecution that appellant-accused was found carrying charas weighing 450 grams at 4:30 AM at Swarghat. At this stage, it may be noticed that Mr. Chauhan, learned Additional Advocate General, while making

submissions before this Court fairly conceded that there is nothing on record suggestive of the fact that DW-2, conductor of HRTC bus was related to appellant-accused in any manner.

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

9. After having carefully perused the evidence adduced on record by the prosecution viz-a-viz impugned judgment of conviction recorded by the court below, this Court finds substantial force in the argument of learned counsel representing the appellant-accused that learned court below miserably failed to appreciate the evidence adduced on record by the appellant-accused in defence while holding him guilty of having committed the offence punishable under Section 20 of the Act.

10. In the case at hand, as clearly emerge from the record, prosecution with a view to prove its case examined as many as seven witnesses. But story put forth by the prosecution that appellant/accused was nabbed/apprehended by the police party on NH-205 appears to be concocted and untrustworthy especially in the light of the categorical statement made by DW-2, Sh. Anil Kumar, who happened to be conductor in HRTC bus, which on the relevant date was enroute from Manali to Dehradoon. Before adverting to the statement having been made by DW-2, this Court deems it fit to take note of defence taken by the appellant-accused in his statement recorded under Section 313 Cr.P.C. Appellant-accused in his statement recorded under section 313 Cr.P.C specifically stated that he was got alighted by the policy party from the bus when he was on his way to Chandigarh from Kullu. DW-2, who was conductor in HRTC Bus bearing No. HP-18-4717 deposed before the Court below that on 24.4.2014 he was on the way from Manali to Dehradoon and his bus was checked at Swarghat by the police party at about 1:30 AM (night hours). He also deposed before the Court below that one boy was got alighted by the police and thereafter they were directed by the police party to take the bus. Most importantly, it has come in the statement of this defence witness that there was no luggage with the boy when he was got down/ alighted from the bus. Similarly aforesaid witness unequivocally stated before the court below that said boy is present in the court today. As per this witness neither any vehicles nor other passengers were checked in the bus at that relevant time. DW-2, further stated before the court below that said boy had purchased ticket from Kullu to Chandigarh and he was sitting on seat No.31. It has also come in his statement that he had checked the ticket of the appellant/accused. Cross-examination, conducted on this witness clearly suggest that prosecution was not able to shatter his testimony with regard to his stand that appellant/accused was got down/alighted from the bus which was enroute from Manali to Dehradoon, rather careful perusal of cross-examination conducted on this witness suggest that he stuck to his stand taken by him in his examination-in-chief.

11. DW-1, Sh. Pardeep Kumar, Sub-Inspector, HRTC, Kullu, stated before the court below that as per waybill report, the ticket Ex.D-1 was issued on 24.04.2014. Interestingly, no suggestion worth the name was put to this witness with regard to plying of HRTC bus bearing No. HP-18-4717 on Manali – Dehradoon route on that day. Similarly, prosecution failed to put suggestion to these witnesses that on that relevant date DW-2, Anil Kumar was not conductor in the bus which was going from Manali to Dehradoon. If the aforesaid statements having been made by defence witnesses i.e. DW-1 and DW-2 are read juxtaposing each other, it certainly persuade this court to agree with the contention of learned counsel for the appellant/accused that court below has failed to appreciate evidence led on record by the accused in defence in its right perspective, especially in the light of the defence taken by the appellant/accused in his statement recorded under Section 313 Cr.P.C, wherein he stated that he was got alighted from the bus when he was on his way to Chandigarh from Kullu. There is nothing on record from where it can be inferred that aforesaid defence witnesses were related in any manner to the appellant/accused, rather it is admitted case of the parties that both DW-1 and DW-2 are the government employees and they had no motive or reason to depose falsely in favour of the appellant/accused.

12. Leaving everything aside, as has been taken note above, both the material defence witnesses have been not cross-examined on the material points by the prosecution and as such version put forth by these witnesses could not be brushed aside easily by the courts below while placing reliance upon the statements made by the prosecution witnesses. As has been taken note above, all the material prosecution witnesses are the police officials and there appears to be no attempt, if any, on the part of the police party to associate independent witness at the time of alleged apprehending/nabbing of appellant/accused that too at Swarghat. At this stage, this court may take judicial note of the fact that at Swarghat there are number of Hotels and Dhabas and all the night buses usually/normally take halt there for dinner and tea etc.

13. Undisputedly, it is well settled by now that version put forth by the official witnesses cannot be brushed aside solely on the ground that independent witnesses are/were not associated but in the case at hand, where entire prosecution story is doubtful in the light of the statements having been made by DW-1 and DW-2, courts below ought to have examined/analyzed statements of prosecution witnesses with utmost care and caution. But in the case at hand learned court below proceeded to hold appellant/accused guilty of having committed the offence punishable under Section 20 of the Act, ignoring material evidence adduced on record by the appellant/accused. Had the learned court below taken pain to carefully examine the statement of defence witnesses, especially in the light of stand taken by the appellant/accused in his statement recorded under Section 313 Cr.P.C, it would have reached/arrived at some other conclusion.

14. This Court further finds from the reading of impugned judgment that learned trial Court in its judgment, especially in para-25, came to the conclusion that whole statement of DW-2 nowhere reflects that accused present in the Court was the same boy, who was alighted from the bus by the police, but aforesaid finding/observation made by the learned court below is totally contrary to the actual statement given by DW-2, Sh. Anil Kumar, who in uncertain terms stated before the court below that appellant/accused was got alighted by the police party at Swarghat at 1:30 AM. It is not understood how the learned court below arrived at a conclusion that nothing could be inferred from the statement of DW-2 that accused present in the court is not the same boy, who was got alighted by the police party on that relevant date. Similarly, it is not understood that how omission, if any, on the part of DW-2 to furnish information to the Regional Manager about detaining and checking of bus by the police is/was relevant while ascertaining implication of the accused/appellant in the case registered against him. This Court after having carefully perused the evidence adduced on record by the respective parties has no hesitation to conclude that the learned court below has failed to appreciate the evidence in its right perspective, as a result of which, great prejudice has been caused to the accused, whose presence on the alleged site of occurrence is doubtful.

15. After having bestowed its thoughtful consideration to the material available on record, this court is inclined to agree with the submissions made by Mr. D.S.Kaith, learned counsel for the appellant/accused that story put forth by the prosecution is not at all trustworthy and no conviction could be recorded by the court below on the basis of statements of prosecution witnesses. Rather, this court after having carefully examined the statements of defence witnesses is compelled to conclude that police party falsely implicated the appellant/accused in the case at hand, who at the relevant time was travelling in the bus. Otherwise also, if the statements made by the prosecution witnesses are read in conjunction, there appears to be material contradictions in their version put forth before the court below and there is no explanation, worth the name, on record that why independent witnesses were not associated when they could be easily associated at Swarghat. Similarly, there is nothing on record to prove that appellant/accused, who was allegedly carrying 450 grams charas was ever informed about his right to be searched in front of Gazetted officer or not.

16. After perusing the statements of the prosecution/defence witnesses as well exhibits placed on record, two views are possible in the present case and as such, the petitioner-accused is entitled to the benefit of doubt. The learned counsel for the appellant-accused has

placed reliance on the judgment passed by Hon'ble Apex Court reported in ***State of UP*** *versus* ***Ghambhir Singh & others***, *AIR 2005 (92) Supreme Court 2439*, wherein the Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

> ***"6. So far as Hori Lal, PW-1 is concerned, he had been sent to fetch a basket from the village and it was only a matter of coincidence that while he was returning he witnessed the entire incident. The High Court did not consider it safe to rely on his testimony because he evidence clearly shows that he had an animus against the appellants. Moreover, his evidence was not corroborated by objective circumstances. Though it was his categorical case that all of them fired, no injury caused by rifle was found, and, only two wounds were found on the person of the deceased. Apart from this PW-3 did not mention the presence of either PW-1 or PW-2 at the time of occurrence. All these circumstances do create doubt about the truthfulness of the prosecution case. The presence of these three witnesses becomes doubtful if their evidence is critically scrutinized. May be it is also possible to take a view in favour of the prosecution, but since the High Court, on an appreciation of the evidence on record, has recorded a finding in favour of the accused, we do not feel persuaded to interfere with the order of the High Court in an appeal against acquittal. It is well settled that if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred."***

17. Reliance is also placed on judgment rendered by the Hon'ble Apex Court in "**Harbeer Singh v. Sheeshpal and Ors.**, (2016) 16 SCC 418, relevant para whereof is being reproduced herein below:-

> ***"11. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. [Vide Kali Ram Vs. State of Himachal Pradesh, (1973) 2 SCC 808; State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415; Upendra Pradhan Vs. State of Orissa, (2015) 11 SCC 124 and Golbar Hussain & Ors. Vs. State of Assam and Anr., (2015) 11 SCC 242]."***

18. The Hon'ble Division Bench of this Court vide judgment reported in ***Pawan Kumar*** *and* ***Kamal Bhardwaj*** *versus* ***State of H.P.***, *latest* HLJ 2008 (HP) 1150 has also concluded here-in-below:-

> ***"25. Moreover, when the occurrence is admitted but there are two different versions of the incident, one put forth by the prosecution and the other by the defence and one of the two version is proved to be false, the second can safely be believed, unless the same is unnatural or inherently untrue.***
>
> ***26. In the present case, as noticed hereinabove, the manner of occurrence, as pleaded by the defence, is not true. The manner of the occurrence testified by PW-11 Sandeep Rana is not unnatural nor is it intrinsically untrue, therefore, it has to be believed.***
>
> ***27.Sandeep Rana could not be said to have been established, even if the prosecution version were taken on its face value. It was pleaded that no serious injury had been caused to PW-11 Sandeep Rana and that all the***

injuries, according to the testimony of PW-21 Dr. Raj Kumar, which he noticed on the person of Sandeep Rana, at the time of his medical examination, were simple in nature.

19. Consequently, in view of the detailed discussion made hereinabove, the present appeal is allowed. Judgment dated 19.12.2016 rendered by the learned Special Judge, Bilaspur, District Bilaspur, Himachal Pradesh in Sessions trial No.4/3/2014 is set-aside and quashed. Accused is acquitted of the offence punishable under Section 20 of the Act. He is ordered to be released, if not required by the police in any other case. Fine amount, if any, paid by the accused, be refunded to him. The Registry is directed to prepare and send the release warrant of the accused to the Superintendent of Jail concerned forthwith.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Court on its own motion ...Petitioner.
Versus
State of H.P & others ...Respondents.

CWPIL No.97 of 2017
Date of Decision: September 5, 2017

Constitution of India, 1950- Article 226- A news item was published regarding the rape and murder of 8 year girl- status report shows that the accused has been apprehended and sent to judicial custody- the investigation is nearing completion and the report of FSL is awaited – the State has taken appropriate action in the matter – proceedings closed with a direction to the Investigating Officer to complete the investigation and to present the challan in the Court at the earliest. (Para-2 to 14)

For the Petitioner : Mr. Rajnish Maniktala, Amicus Curiae.
For the Respondents : Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocates General, and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

On the basis of news reports, dated 1.5.2017, 15.7.2017 and 16.7.2017, all published in Punjab Kesari, to the effect that a girl child, aged 8 years, was raped and then murdered in District Kullu, Himachal Pradesh, this Court took suo moto cognizance and issued notice to the State. Also, an Amicus was appointed to assist the Court.

2. Since 25.7.2017, this Court has been monitoring the status of investigation. Learned Amicus points out that the investigation carried out, thus far, is fair, in accordance with law and in the right direction.

3. Status report filed on 27.7.2017 reveals that on 30.4.2017, at about 8.24 a.m., a telephonic call was received at Police Station, Bhuntar, that one girl is lying in an unconscious condition on the banks of river Beas near Trehan Chowk, Bhuntar. Immediately, HC Mukesh Kumar and lady Constable Lata Devi rushed to the spot. The girl was shifted to Regional Hospital, Kullu. She was identified by her father Prakash Chand, from whose statement, so

recorded under the provisions of Section 154 of the Code of Criminal Procedure, it was revealed that the family originally hailed from village Mohabhoj, P.O. Kathoura, Tehsil Musafirkhana, District Amethi, U.P., and was temporarily residing in a slum near Bhootnath Temple, Bhuntar, District Kullu. Girl was a minor, aged between 8 and 10 years. According to the father, on 29.4.2017, at about 4 p.m., she had left the place where they were residing and when she did not return till 7 p.m., they started searching for her. On 30.4.2017, he learnt from a boy about the girl being shifted to the Regional Hospital, Kullu.

4. According to the father, his minor daughter had been kidnapped, raped and murdered. Accordingly, FIR No.50/17, dated 30.4.2017, for offences under Sections 363, 366A, 376, 302 of the Indian Penal Code and Sections 4 & 6 of the POCSO Act, was registered at Police Station, Bhuntar.

5. Postmortem of the dead body of the victim was conducted on 30.4.2017 itself. As per the opinion of the Experts, the girl, who was subjected to sexual assault, had died on account of ante-mortem traumatic brain injuries secondary to chop wound inflicted to scalp and face region by a moderately heavy sharp pointed weapon.

6. On 1.5.2017, police collected footage from the CCTV Camera, so installed on a private house on the road which led to the spot where the dead body of the victim was found. The same was analyzed and it appeared that the victim was seen with a boy wearing black *Kurta Pyjama* and another girl aged 10-12 years. From the body language, it appeared that they were familiar with each other.

7. On 3.5.2017, family members and relatives of the victim were called to the Police Station for joining investigation. However, there was total non-cooperation and about 100-150 men and women raised slogans against the police.

8. On the basis of suspicion, efforts were made to search the boy. In fact, during the course of investigation, opinion of the experts in Michigan (USA) was also obtained, in order to make the image of the suspected person identifiable.

9. In the very same affidavit, police made a grievance that the family members of the victim were not cooperating.

10. The Court did not allow the matter to rest here and directed the police to file fresh status report.

11. Fresh affidavit, dated 10.8.2017, stands filed by the Superintendent of Police, disclosing formation of two teams for searching the suspects.

12. Today (5.9.2017), Mr. Anoop Rattan, learned Additional Advocate General, submits that in the instant case, the boy, suspected to have committed the crime, stands apprehended and sent to judicial custody. Also, investigation is nearing completion, inasmuch as only report from the Forensic Science Laboratory is awaited, and challan is likely to be presented in the Court.

13. In this view of the matter, we are of the considered view that State has already taken appropriate action. It cannot be said that the investigation is misdirected or that the police has not acted with promptitude. To us, investigation appears to be fair.

14. As such, we close these proceedings with a direction to the Investigating Officer to complete the investigation, as also present the challan in the Court, at the earliest.

15. Needless to add, assistance rendered by Mr. Rajnish Maniktala, learned Amicus, has been immense and is highly appreciable.

In view of the above, present petition stands disposed of. Pending application(s), if any, also stand disposed of.

****

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

Shiv Saran Dass ....Appellant-Plaintiff
Versus
Smt.Rajindera Devi & Others ....Respondents-Defendants

RSA No.555 of 2005 a/w
CMPMO No.166 of 2007.
Judgment Reserved on: 21.07.2017.
Date of decision: 05.09.2017

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking specific performance of the contract and in the alternative for declaration that he has become the owner by way of adverse possession- it was pleaded that predecessor-in-interest of the defendants had agreed to sell the suit property to the plaintiff for a consideration of Rs. 45,000/- - plaintiff had paid part sale consideration of Rs. 10,000/-- plaintiff was already in possession as tenant- further amount was paid by the plaintiff- the suit property was mortgaged and vendor agreed to execute the sale deed after the redemption of the mortgage – plaintiff made repeated requests for executing the sale deed but was told that deed would be executed on redemption – the mortgage has been redeemed but the sale deed was not executed -hence, the suit was filed for seeking specific performance or in the alternative for declaration – the defendants pleaded that agreement was valid for one year and they were required to pay back a sum of Rs.40,000/- to the plaintiff – the limitation for filing the suit has expired – the Trial Court dismissed the suit – an appeal was filed, which was also dismissed- held in second appeal that High Court can interfere with the concurrent findings of fact, if they are perverse, Courts have ignored material evidence or acted on no evidence or they have drawn wrong inferences from the proved facts by applying the law erroneously or have wrongly cast the burden of proof- the sale deed was to be executed within one year of the agreement- it was provided that in case of failure to execute the deed the vender shall be liable to pay double the amount of the sum already paid by the purchaser to the vendor and Rs. 3,000/- as special damages – the Courts concluded that plaintiff was not entitled for the execution of the sale deed but only to the money- however, they had not taken into consideration the receipts extending the time – the period of limitation is mixed question of law and fact and has to be determined on the basis of the evidence – the property was to be got redeemed by the vendor within one year from the date of execution of the agreement – the period of limitation will start running from the date of redemption- the Courts had wrongly held that plaintiff is not entitled for the specific performance of the agreement – the Appeal allowed- judgments passed by Courts set aside and the suit filed by the plaintiff decreed. (Para-17 to 60)

For the Appellant: Mr. Bhupender Gupta, Senior Advocate with Mr. Janesh Gupta, Advocate in RSA No.555 of 2005 and for the petitioner in CMPMO No.166 of 2007.
For the Respondents: Mr. Sumeet Raj Sharma, Advocate in both the cases.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellant-plaintiff against the judgment and decree dated 17.08.2005, passed by the learned District Judge, Shimla, District Shimla, H.P., affirming the judgment and decree dated 06.10.2003, passed by learned Sub Judge, Court No.5, Shimla, whereby the suit filed by the appellant-plaintiff has been dismissed.

2. Briefly stated facts, as emerged from the record, are that the appellant-plaintiff *(hereinafter referred to as the 'plaintiff)*, filed a suit for specific performance of contract and in the

alternative for declaration to the effect that the plaintiff has become owner by way of adverse possession. It is averred in the plaint that Shri Raj Kumar Rajinder Singh, predecessor-in-interest of the defendants, was the owner of the suit property comprised in *'Padam Castle Compound'*, as detailed in the judgment and decree of the learned trial Court. It is further averred by the plaintiff that he was inducted as a tenant by said Shri Raj Kumar Rajinder Singh in respect of residential premises in *'Padam Castle Compound'* in the year 1966. It is the claim of the plaintiff that on 18.12.1973, Shri Raj Kumar Rajinder Singh agreed to sell the suit property to the plaintiff for Rs.45,000/-, for which plaintiff had paid a part sale consideration of Rs.10,000/- to Shri Raj Kumar Rajinder Singh. It is the claim of the plaintiff that he was already in possession of the suit property as tenant and his possession was deemed to have been surrendered in part performance of the agreement. It is further averred that balance sale consideration was agreed to be paid by the plaintiff at the time of registration of the sale deed. Subsequently, another agreement, dated 15.01.1975 was executed between them, when a further part of sale consideration was paid by the plaintiff to the vendor-predecessor-in-interest of the defendants *(hereinafter referred to as the 'vendor')*. Since the suit property was mortgaged by the vendor with the Himachal Pradesh State Co-operative Bank, Shimla, *(for short 'Co-operative Bank')* sale deed was agreed to be executed after redemption of the mortgage by the vendor Shri Raj Kumar Rajinder Singh. It is averred by the plaintiff that thereafter, he had been requesting the predecessor-in-interest of the defendants and then defendants personally as well as through their General Power of Attorney Shri Surat Ram Jhingta, for execution of the sale deed, but they repeatedly informed the plaintiff that the deed shall be executed after redemption of the mortgage. It is claimed by the plaintiff that defendants recently raised a hotel upon the property adjoining to the suit property, causing apprehension in his mind that defendants must have redeemed the property. It is averred that thereafter plaintiff sent a latter, dated 14.9.2001 to the defendants requesting them to execute a sale deed in terms of the agreements, but no response was received from the defendants. Consequently, a legal notice, through lawyer was issued to the defendants, claiming that part of sale consideration has been paid to them and he is ready and willing to perform his part of the contract. It is further averred by the plaintiff that he, throughout after agreement, treated himself to be the owner of the property and liable to be declared as such and defendants were required to perform their part of agreements, dated 18.12.1973 and 15.01.1975 and execute sale deed in favour of the plaintiff. In the alternative, plaintiff sought decree having become owner of the suit property by way of adverse possession.

3. Defendants, by way of filing written statement, raised preliminary objections on the grounds of limitation, maintainability and estoppel etc. On merits, the defendants admitted that sale agreement was entered into by predecessor-in-interest of the defendants with the plaintiff and in total they had received consideration of Rs.18,000/-, but claimed that possession of the suit property, as tenant, was with the plaintiff, therefore, by no stretch of imagination it can be claimed that the plaintiff has become owner by way of adverse possession. It is averred that the agreement was valid for one year and after expiry of period of one year, defendants were required to pay back a sum of Rs.40,000/- to the plaintiff. It is further averred that construction work of the defendants was in progress for five years. So, limitation to sue, on the basis of agreements, dated 18.12.1973 and 15.01.1975, stands expired and they were not bound by the terms and conditions of the agreements.

4. By way of replication, plaintiff re-asserted his case, as set up in the plaint, controverting the stand taken by the defendants in the written statement and claimed that he has already paid Rs.22,500/- in part performance of the agreement and is ready and willing to perform his part of the agreement.

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

> ***"1. Whether the plaintiff is entitled for the relief of specific performance of agreement, as prayed? OPP.***

2. Whether the plaintiff has become owner of suit property by way of adverse possession, as alleged? OPP.

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

4. Whether the suit is barred by limitation? OPD.

5. Whether the suit is not maintainable? OPD.

6. Whether there is never valid transfer of title in favour of the plaintiff? OPD.

7. Whether the plaintiff is estopped from filing the present suit against the defendants, on account of his own acts, deeds and acquiescence? OPD.

8. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.

9. Relief."

6. Learned trial Court vide judgment and decree dated 06.10.2003 dismissed the suit of the plaintiff. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, appellant-plaintiff filed an appeal under Section 96 of the Code of Civil Procedure *(for short 'CPC')* before the learned District Judge, Shimla, who, vide impugned judgment and decree dated 17.08.2005, also dismissed the appeal preferred by the plaintiff by affirming the judgment and decree passed by the learned trial Court. In the aforesaid background, the present appellant-plaintiff filed this Regular Second Appeal before this Court, details whereof have already been given above.

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

"(1) Whether both the Courts below have misconstrued the essential terms of Agreement of Sale Ex.PW-1/A and PW-1/E in concluding that the time was essence of the contract?

2. Whether both the Courts below have returned erroneous and perverse findings in holding that the suit of the plaintiff-appellant was barred by limitation, ignoring the clauses of Ex.PW-1/A and Ex.PW-1/E as well as correspondence Ex.PW-1/L, Ex.PW-1/M and Ex.PW-1/O and the fact of non redeeming the mortgage regarding the property in question?

3. Whether both the Courts below have gravely erred in law in not properly construing the provisions of Article 54 of Limitation Act, whereby it is provided that cause of action to institute the suit for specific performance arises from the date of refusal of the performance of the Agreement?

4. Whether both the Courts below have acted with material illegality and irregularity in concluding that the plaintiff was not ready and willing to perform his part of the contract by ignoring material evidence on the record pointing out that the default was on the part of the defendants who also did not respondent to the notices Ex.PW-1/Q and Ex.PW-1/R?

5. Whether both the Courts below have recorded erroneous and perverse findings in holding that the status of the plaintiff-appellant over the suit property is in the capacity of tenant?

6. Whether the findings of the courts below are illegal, erroneous and perverse in holding that the possession of the plaintiff is not adverse?"

8. Shri Bhupender Gupta, learned Senior Counsel representing the plaintiff-appellant, strenuously argued that the judgment and decree passed by both the Courts below are

highly unjust, illegal, arbitrary, against the facts and law and as such deserve to be quashed and set aside. While inviting the attention of this Court to the judgment and decree passed by both the Courts below, learned Senior Counsel vehemently argued that there is absolute misconstruction of the agreements dated 18.12.1973 & 15.1.1975, Ex.PW-1/A & Ex.PW-1/E respectively, by the Courts below while arriving at the conclusion that since the time limit for execution of the sale deed was specified in the agreements, therefore, the plaintiff ought to have instituted the suit within three years from the expiry of the said period specified in the agreements. Learned Senior Counsel further contended that both the Courts below have erred in concluding that time was essence of the contract by taking into consideration the recital in the agreements that maximum period for execution of the sale deed was specified as one year. Learned Senior Counsel further contended that correspondence allegedly made by the General Power of Attorney *(for short 'GPA')* of the vendor, which was placed on record, clearly suggests that time for performance of agreement was sought to be extended by the seller from time to time and as such there was no occasion for the Courts below to hold that time was essence of contract and as such finding to this effect being contrary to the record deserves to be quashed and set aside being illegal, arbitrary, erroneous and perverse.

9. While inviting the attention of this Court to the communication dated 20.6.1992, Ex.DW-1/A, learned Senior Counsel contended that both the Courts below put undue reliance on the aforesaid document purported to have been sent by the Attorney of vendor intimating therein that the vendor does not intend to sell the property. Mr.Gupta, learned Senior Counsel, contended that document referred hereinabove was not legally proved on record, rather, objection, having been made on behalf of the plaintiff with regard to admissibility of the same, was not decided and as such both the Courts below have fallen into grave error while placing reliance upon the inadmissible document and as such finding returned on the same to the effect that suit is barred by limitation is not sustainable and as such same deserves to be quashed and set aside. Learned Senior Counsel further contended that both the Courts below have failed to appreciate that the bare perusal of Section 54 of the Limitation Act suggests that limitation to file a suit for specific performance of agreement is three years from the date of refusal. Learned Senior Counsel contended that admission, if any, having been made by the plaintiff with regard to commencement of construction of hotel by defendants somewhere in the year 1996 was wholly irrelevant for computing the period of limitation in filing the suit for specific performance of agreement, rather, date of refusal was relevant/important for computing the period of limitation. Learned Senior Counsel contended that notices Ex.PW-1/Q and Ex.PW-1/R were not replied by the defendants and as such findings of both the Courts below that the suit is barred by limitation are erroneous, illegal and perverse because cause of action, if any, accrued to the plaintiff for filing the suit from the expiry of the time specified in notice dated 19.10.2001, Ex.PW-1/R.

10. Learned Senior Counsel further contended that both the Courts below have committed grave error of jurisdiction in not taking into consideration the vital aspect of the matter that the sale deed was to be executed by the defendants in favour of the plaintiff in accordance with the agreements of sale, after getting the suit property redeemed from the bank. Learned Senior Counsel further contended that perusal of correspondence exchanged between the Attorney-cum-Secretary; namely; Shri Surat Ram Jhingta and the plaintiff clearly proves on record that mortgage was not got redeemed for a considerably long period of time, but both the Courts below took erroneous view of law that the plaintiff's suit was barred by limitation, since the plaintiff failed to explain reasons for not taking any action during such a long period. Mr.Gupta, learned Senior Counsel, further contended that sale deed was to be executed after redemption of the mortgage, but in the instant case, there is nothing on record suggestive of the fact that the defendants-respondents were ever able to prove on record that after redemption of mortgage, the plaintiff was intimated and called upon to get the sale deed executed.

11. Lastly, Mr.Gupta contended that limitation to file suit in the instant case was to be construed/inferred from the conduct of parties. In support of his aforesaid submission, learned Senior Counsel placed reliance upon the judgments of Hon'ble Apex Court in ***Panchanan Dhara and Others vs. Monmatha Nath Maity (Dead) Through LRs and Another, (2006)5***

SCC 340 and ***S.Brahmanand and Others vs. K.R. Muthugopal (Dead) and Others, (2005)12 SCC 764.***

12. While concluding his arguments, Mr.Gupta, contended that finding returned by trial Court with regard to readiness and willingness of the plaintiff to perform his part of the contract is also contrary to the evidence adduced on record because there is no iota of evidence adduced on record by the defendants showing un-willingness, if any, on the part of the plaintiff for performance of his part of contract, rather, plaintiff successfully proved on record that he was ever ready and willing to perform his part of the contract by paying the balance amount of sale consideration to get the sale deed executed and registered in his favour. With the aforesaid submissions, learned Senior Counsel contended that the suit of the plaintiff be decreed after setting aside the judgment and decree passed by both the Courts below with the direction to the defendants-respondents to execute sale deed in terms of agreements Ex.PW-1/A & Ex.PW-1/E.

13. Shri Sumeet Raj Sharma, learned counsel representing the respondents-defendants, while refuting the aforesaid submissions having been made by the learned Senior Counsel representing the appellant-plaintiff, contended that there is no illegality and infirmity in the judgments passed by learned Courts below, rather the same are based upon correct appreciation of evidence as well as law. While referring to the impugned judgment and decree passed by both the Courts below, Mr.Sharma contended that there is no scope of interference, especially in view of the concurrent findings of fact recorded by Courts below. With a view to substantiate his aforesaid arguments, learned counsel made this Court to peruse the agreements Ex.PW-1/A and Ex.PW-1/E to demonstrate that time limit for execution of sale deed was specifically specified in the agreements. Learned counsel further contended that vide aforesaid agreements, sale deed was to be executed within a period of one year, during which period vendor was also to get the property redeemed from the bank and in the event of failure on the part of vendor to redeem the property within the aforesaid period and to execute the sale deed consequent thereto, he was liable to pay double the amount to the plaintiff. Learned counsel contended that bare perusal of terms/conditions contained in the agreements, referred herein above, clearly suggests that time was essence of contract *inter se* parties but since, within stipulated and agreed period of one year, neither property was redeemed nor sale deed was executed by the defendants, the plaintiff was well within his right to get his money refunded. While inviting the attention of this Court to Article 54 of the Limitation Act, learned counsel contended that suit for specific performance of agreement, if any, could be filed by the plaintiff within a period of three years from the date of expiry of one year period as stipulated in the agreements, referred hereinabove, and as such, there is no illegality and infirmity in the judgments and decrees passed by both the learned Courts below, which are definitely based upon proper appreciation of evidence adduced on record by the respective parties.

14. Learned counsel, while referring to the correspondence allegedly made on behalf of the vendor, contended that it is of no consequence, especially when there is nothing on record suggestive of the fact that the aforesaid communications made on behalf of the vendor were ever replied to by the plaintiff and as such learned Courts below rightly termed them to be unilateral. While inviting the attention of this Court to the cross-examination conducted on plaintiff Shri Shiv Saran Dass, learned counsel contended that it has specifically come in the cross-examination of the plaintiff that the plaintiff acquired knowledge with regard to construction of hotel by defendants in the year 1996 on the land adjacent to the suit land, but, admittedly suit for specific performance came to be filed in the year 2001. While inviting the attention of this Court to Ex.DW-1/A, learned counsel contended that it was conveyed to the plaintiff in the year 1992 that defendants are not willing to sell their property in terms of agreements Ex.PW-1/A and Ex.PW-1/E, which otherwise had become time barred with the afflux of time. Learned counsel further contended that though limitation is/was required to be computed strictly in terms of the time specified in the agreements, referred hereinabove, but even if, for the sake of arguments, it is presumed that limitation had to start from the date of refusal on the part of the defendants to execute the sale deed in terms of agreements, suit, if any, could be filed within three years from the date of communication Ex.DW-1/A, whereby plaintiff was apprised of the intention of the

defendants to not to sell the property in terms of aforesaid agreements. Learned counsel contended that the judgment, relied upon by the learned Senior Counsel representing the plaintiff in support of his contention that limitation was required to be inferred from overall conduct of the parties, is not applicable in the present case, in view of specific recital of time in agreements i.e. Ex.PW-1/A and Ex.PW-1/E.

15. Learned counsel, while inviting the attention of this Court to the judgment passed by Hon'ble Apex Court in ***Narendra Gopal Vidyarthi vs. Rajat Vidyarthi, (2009)3 SCC 287, (2000)3 SCC 708*** and ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264,** forcibly contended that present appeal is not maintainable, in view of concurrent findings of fact recorded by learned Courts below and as such same deserves to be quashed and set aside.

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

17. Since specific objection with regard to maintainability of present appeal, in view of concurrent findings of fact recorded by Courts below, has been taken by the defendants, this Court deems it necessary to deal with the same at first instance before exploring answer, if any, to the substantial questions of law formulated hereinabove. Though learned counsel representing the defendants has placed reliance upon the judgments, as have been taken note above, this Court deems it proper to take into consideration latest judgment passed by Hon'ble Apex Court in ***Laxmidevamma's*** case *supra*, wherein it has been held as under:-

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

18. Perusal of the aforesaid judgment 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. This Court, after having taken note of observations made by Hon'ble Apex Court in judgment *supra,* sees no reason to differ with the argument having been made by learned counsel representing the defendants that in normal circumstance concurrent findings of fact recorded by Courts below should not be interfered with by the High Courts, rather, High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record. But, aforesaid judgment passed by Hon'ble Apex Court nowhere suggests that there is complete bar for High Courts to upset the concurrent findings of the Courts below, especially when finding recorded by Courts below appears to be perverse.

19. It is well settled by now that a finding of fact itself may give rise to a substantial question of law, *inter alia*, in the event the findings are based on no evidence and/or while arriving at the said findings, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. In this regard, reliance is placed upon the judgment of Hon'ble Supreme Court in ***Chandna Impex Private***

Limited vs. Commissioner of Customs, New Delhi, (2011)7 SCC 289, wherein the Hon'ble Apex Court has held as under:-

> ***"14. In Hero Vinoth Vs. Seshammal, (2006)5 SCC 545, referring to the Constitution Bench decision of this Court in Sir Chunilal V. Mehta & Sons Ltd. Vs. Century Spg. & Mfg. Co.Ltd., AIR 1962 SC 1314, as also a number of other decisions on the point, this Court culled out three principles for determining whether a question of law raised in a case is substantial. One of the principles so summarised, is : (Hero Vinoth case, SCC p.556, para 24)***
>
> > ***"24.(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding". (p.294)***

20. Hon'ble Apex Court in ***D.R. Rathna Murthy vs. Ramappa, (2011)1 SCC 158***, has specifically held that High Court can interfere with the findings of fact even in the second appeal, provided the findings recorded by Courts below are found to be perverse. It has further been held in the case *supra* that there is no absolute bar on the re-appreciation of evidence in those proceedings; however, such a course is permissible in exceptional circumstances. The Hon'ble Apex Court has held as under:-

> ***"9. Undoubtedly, the High Court can interfere with the findings of fact even in the Second Appeal, provided the findings recorded by the courts below are found to be perverse i.e. not being based on the evidence or contrary to the evidence on record or reasoning is based on surmises and misreading of the evidence on record or where the core issue is not decided. There is no absolute bar on the re-appreciation of evidence in those proceedings, however, such a course is permissible in exceptional circumstances. (Vide Rajappa Hanamantha Ranoji v. Mahadev Channabasappa, (2000)6 SCC 120; Hafazat Hussain v. Abdul Majeed, (2001) 7 SCC 189 and Bharatha Matha & Anr. v. R. Vijaya Renganathan, (2010)11 SCC 483.)" (p.162)***

21. Hon'ble Apex Court in ***Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs., (2001)3 SCC 179,*** has held that appellate Court ought not to interfere with the findings of trial Judge on a question of fact unless the latter has overlooked some peculiar feature connected with evidence of a witness or such evidence on balance is sufficiently improbable so as to invite displacement by appellate Court.

22. Careful reading of aforesaid law laid down by Hon'ble Apex Court clearly suggests that there is no blanket bar for High Courts to upset the concurrent findings of Courts below, especially when it emerge from the record that (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. Hon'ble Apex Court in ***Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161,*** has held as under:

> ***"35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)***

"24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same." (pp.174-175)

23. It is quite evident from the aforesaid exposition of law that even concurrent findings of fact recorded by Courts below can be interfered with/upset by the High Courts, while exercising power under Section 100 CPC, if it is convinced that findings recorded by Courts below are not based upon any evidence and same are perverse. At this stage, it may be noticed that during the proceedings of the case, learned counsel representing the appellant-plaintiff was able to point out certain material irregularities/illegalities committed by Courts below, while examining/analyzing the evidence adduced on record by both the parties and as such this Court deems it proper to examine the pleadings/evidence adduced on record by the respective parties in support of their respective claim so that correctness and genuineness of arguments made by learned counsel to the effect that judgments passed by Courts below are wholly perverse, is ascertained.

24. Keeping in view the contents and text of substantial questions of law, reproduced hereinabove, this Court intends to take all substantial questions of law together as they are interconnected.

25. There is no dispute with regard to execution of agreements dated 18.12.1973 and 15.1.1975, Ex.PW-1/A and Ex./PW-1/E, as well as receipt of part consideration to the extent of Rs.18,000/- by the predecessor-in-interest of the defendants from the plaintiff. In nutshell, the case of the plaintiff is that in furtherance of agreements Ex.PW-1/A and Ex.PW-1/E, part sale consideration was paid by the plaintiff and since property was mortgaged by the vendor in favour of Cooperative Bank, sale deed could only be executed after redemption of property in question. Since property came to be redeemed in the year 2001, plaintiff, being ready and willing to perform his part of agreement, claimed that he is entitled to relief of specific performance. Plaintiff further claimed that after redemption of property in the year 2001, he got issued notice Ex.PW-1/Q to the defendants, which was not answered, thereafter another legal notice Ex.PW-1/R was issued to the defendants which proves on the record, his readiness and willingness to execute the aforesaid agreements. Whereas, case of the defendants is that time was essence of the agreements, referred hereinabove, and same was valid for a maximum period of one year only and after the expiry of period mentioned in the agreements, the same stood expired and as such suit for specific performance, having been filed by plaintiff, deserves to be dismissed being barred by limitation.

26. Apart from above, defendants claimed that since there was default clause in both the agreements, the plaintiff could claim amount in terms of agreement in the event of default on the part of defendants to execute the agreement after expiry of one year and as such redemption of property was not a condition precedent in execution of an agreement and as such suit deserves to be quashed and set aside. Learned Courts below, taking note of recital made in the agreements, referred herein above, came to the conclusion that time was essence of the contract and suit for specific performance, having been filed by the plaintiff, after three years from the date stipulated in the agreements is beyond limitation and as such same was dismissed. Learned Courts below also held that perusal of agreements Ex.PW-1/A and Ex.PW-1/E reveals that maximum period set for redemption of suit property from the Cooperative Bank was one year and if it was not redeemed within the period specified in the agreements, plaintiff could claim refund of amount in terms of default clause contained in both the agreements.

27. Issue in the instant case is with regard to interpretation of two agreements admittedly entered *inter se* plaintiff and the vendor. Vide Ex.PW-1/A, vendor being owner of estate known as *'Padam Castle Shimla'* agreed to sell quarters known as *'Padam Castle Quarters'* and the vacant land adjoining the said quarters and two latrines outside the said quarters, in lieu of price settled at Rs.45,000/-. By way of aforesaid agreement, vendor agreed to sell double storeyed building having four rooms, one store, one bath room, one latrine in the ground floor and four rooms, one kitchen, one bath room and one latrine in the first floor. Vide aforesaid agreement, vendor also agreed to sell two latrines towards the *Padam Cottage* and *Rajesh Cottage*, apart from approximately 336 square yards vacant site. It also emerge from the agreement that the plaintiff, who happened to be a purchaser, was already in occupation of three rooms, one bathroom and one latrine in the ground floor of the *'Padam Castle Quarters'* agreed to be sold and the possession of the purchaser was to be considered as having been surrendered in part performance of the agreement. Vendor also agreed to handover vacant possession of one room in ground floor of *'Padam Castle Quarters',* which was being used as office on or before 1st March, 1974 to the plaintiff. In terms of agreement, vendor was required to pay damages to the purchaser at the rate of Rs.10/- per day, in the event of failure on his part to handover the vacant possession as agreed till the vacant possession is handed over to him. It also emerge from aforesaid agreement that vendor received an amount of Rs.10,000/- at the time of execution of agreement i.e. 18.12.1973 with the further rider that purchaser i.e. the plaintiff would pay a further sum of Rs.5,000/- to the vendor on or before 25th February, 1974. The remaining amount of Rs.30,000/- was to be paid by the purchaser to the vendor at the time of registration of document of sale of the aforesaid property. Contents of agreement further suggest that the purchaser i.e. the plaintiff was not liable to pay any rent to the vendor of the premises in his occupation including a room, the possession whereof was to be given on or before 1.3.1974.

28. Most importantly, in the agreement referred above, vendor agreed to get the property redeemed from the Cooperative Bank and thereafter execute the deed of sale in favour of the purchaser and in the event of failure on the part of the vendor to redeem the property within the aforesaid period and thereafter to execute the deed of sale in favour of the purchaser, he was liable to pay the purchaser double the amount i.e. Rs.30,000/-. Similarly, in the event of failure on the part of the purchaser to fulfill his own part of the agreement, the money advanced by him to the vendor was to be forfeited. As per agreement, sale was to be completed within one year from the date of redemption of suit property, thereafter vendor would have no right, title or interest over the property agreed to be sold in favour of the plaintiff. Perusal of Ex.PW-1/B i.e. copy of Jamabandi for the year 1950-51, clearly suggests that property proposed to be sold by vendor was mortgaged with Cooperative Bank. Ex.PW-1/D is the receipt of Rs.10,000/-, issued by the vendor to the plaintiff on account of advance payment made to him by the plaintiff in terms of agreement referred above.

29. Perusal of agreement dated 15.1.1975, Ex.PW-1/E, suggests that since vendor failed to redeem *'Padam Castle Estate',* as was undertaken by him vide agreement to sell dated 18.12.1973, Ex.PW-1/A, the parties agreed to get the sale deed executed within a period of further one year in furtherance of agreement dated 18.12.1973, Ex.PW-1/A. Vide aforesaid agreement, it was also disclosed that vendor had surrendered the possession of one room on the ground floor and had received a sum of Rs.15,000/- in conformity with the terms of agreement dated 18.12.1973. It also emerge from this agreement that apart from Rs.15,000/-, purchaser also paid Rs.3000/- to the vendor through his GPA Shri Surat Ram Jhingta. Vide agreement Ex.PW-1/E, parties agreed that in case vendor fails to execute and register a proper deed of sale after redeeming the entire property mortgaged with the Co-operative Bank, within a maximum period of one year, the vendor shall be liable to pay a sum of Rs.36,000/-, being double the amount of the sum already paid by the purchaser to the vendor, and a further sum of Rs.3,000/- as special damages.

30. In terms of agreements, referred hereinabove, vendor was obliged to execute sale deed on or before 15.1.1976 i.e. within one year from the date of agreement dated 15.1.1975 Ex.PW-1/E. Ex.PW-1/G is receipt of Rs.3000/-, issued by the vendor, having been received by him towards sale consideration in terms of agreement dated 15.1.1975. Similarly, vide Ex.PW-1/H, receipt dated 25.2.1974 issued by the vender, an amount of Rs.5000/- was received by him on account of consideration in terms of agreement dated 18.12.1973. Most importantly, there are two receipts dated 12.4.1977 and 25.2.1978, Ex.PW-1/J & Ex.PW-1/K, issued by GPA of the vendor amounting to Rs.1000/- and Rs.2000/- respectively having been received by vendor on account of advance in terms of agreement to sell *'Padam Castle Quarters'* and land. Vide communication dated 27.12.1975, Ex.PW-1/L, the vendor, while inviting the attention of the plaintiff to the agreement executed *inter se* plaintiff and GPA of the vendor on 15.1.1975, again made a request that period of one year may be given to him so that by that time property is redeemed and sale deed is executed. Vide aforesaid letter, period of agreement was extended for further one year from 16.1.1976. Vide aforesaid communication, the vendor agreed to execute sale deed within one year from 16.1.1976 i.e. on or before 17.1.1976. Subsequently, vide communication dated 25.2.1978, Ex.PW-1/N, GPA of the vendor, while acknowledging that he has received Rs.2000/- towards consideration in terms of agreement, extended time limit of agreement for another six months. Perusal of Ex.PW-1/P i.e. communication dated 18.12.1976, also suggests that the GPA of the vendor, merely by writing letter extended time for execution of sale deed in terms of agreement till June, 1977. It is also pertinent to take note of communication dated 8.6.1973 i.e. Ex.PZ, perusal whereof suggests that the vendor had good relations with plaintiff and on some occasion he had been taking financial help from the plaintiff.

31. Both the Courts below, while coming to the conclusion that time was essence of the contract, only took into consideration Ex.PW-1/A and Ex.PW-1/E i.e. agreements dated 18.12.1973 and 15.1.1975. Both the Courts below, taking note of para-6, as contained in Ex.PW-1/A, came to the conclusion that since property in question was not redeemed within a period of one year, therefore, the plaintiff was only entitled to Rs.30,000/-, i.e. double the amount he had

paid in advance to the vendor. Learned Court further concluded that in terms of agreement Ex.PW-1/E, plaintiff was entitled to Rs.40,000/- and could only claim Rs.40,000/- since property was not redeemed within the maximum period of one year. In nutshell, both the Courts below came to the conclusion that there was a default clause in both the agreements i.e. time was essence of both the agreements. Most interestingly, Courts below did not take into consideration documents Ex.PW-1/C, Ex.PW-1/M and Ex.PW-1/O terming them to be unilateral extensions.

32. This Court, after having carefully perused documents i.e. Ex.PW-1/L, Ex.PW-1/M, Ex.PW-1/N, Ex.PW-1/O and Ex.PW-1/P, has no hesitation to conclude that the vendor repeatedly requested the plaintiff to extend the time for execution of sale deed in terms of agreements Ex.PW-1/A and Ex.PW-1/E. Similarly, perusal of Ex.PW-1/G, PW-1/H, Ex.PW-1/J and Ex.PW-1/K further suggests that the plaintiff had been depositing certain amounts, after expiry of time as specified in agreement Ex.PW-1/A, which were duly acknowledged by the vendor in communications Ex.PW-1/L to Ex.PW-1/O. Hence, finding of the Courts below that extension of time, as referred in documents Ex.PW-1/C, Ex.PW-1/M and Ex.PW-1/O, is unilateral extension, does not appear to be correct, rather, as has been taken note above by this Court after having perused Ex.PZ i.e. communication dated 8.6.1973, it clearly emerge from the record that the plaintiff had good relations with the vendor, who had been taking financial help from the plaintiff from time to time. Learned Courts below, taking note of admission having been made by the plaintiff, while appearing as PW-1, in his cross-examination that he never expressed his acceptance to the defendants qua the letters Ex.PW-1/C, Ex.PW-1/M and Ex.PW-1/O, also came to the conclusion that it cannot be said that term of the agreements, Ex.PW-1/A and Ex.PW-1/E, was extended by the vendor after expiry of period mentioned therein.

33. True, it is that there is no letter/communication either written by vendor himself or through his attorney after 25.2.1978 suggestive of the fact that time was further sought to be extended by him for execution of sale deed in terms of agreements Ex.PW-1/A and Ex.PW-1/E, but, similarly there is no document led on record by the defendants suggestive of the fact that after 1978, communication, if any, was sent to the plaintiff, intimating therein intention of defendants either to execute the sale deed or to terminate the contract in terms of conditions contained in Ex.PW-1/A and Ex.PW-1/E. Defendants placed on the record Ex.DW-1/A, which was allegedly sent on 20.6.1992, perusal whereof suggests that Shri Surat Ram Jhingta, GPA of vendor Raj Kumar Rajinder Singh of Bushahr sent a communication to the plaintiff, intimating therein that Raj Kumar and his family does not intend to sell property in terms of agreement allegedly executed by the vendor. Vide aforesaid communication, plaintiff was further advised to settle the accounts. In the aforesaid communication, defendants again acknowledged receipt of Rs.18,000/- from plaintiff on account of advance having been given by him towards sale consideration qua the property intended to be sold by the vendor in terms of agreements Ex.PW-1/A and Ex.PW-1/E.

34. Interestingly, in the aforesaid communication, defendants admitted that since they had received an amount of Rs.18,000/-, they never demanded rent qua the property occupied by the plaintiff, possession whereof was otherwise surrendered to him by the vendor at the time of execution of agreements Ex.PW-1/A and Ex.PW-1/E. Whether aforesaid communication was received by the plaintiff or not is required to be examined in light of evidence adduced on record by the parties. But, otherwise also, if plea, having been taken by the learned counsel for the defendants, which was otherwise accepted by Courts below, is taken into consideration that intention of the defendants for not selling the property in terms of agreements Ex.PW-1/A and Ex.PW-1/E was conveyed to the plaintiff in the year 1992, limitation, if any, for filing suit for specific performance was required to be computed by the Courts below from the date of delivery of aforesaid letter. As per own case of the defendants, letter dated 20.6.1992 was sent through peon book, but in the instant case neither peon book was produced to prove the factum with regard to issuance of letter by Shri Surat Ram Jhingta nor receipt, if any, by the plaintiff; namely; Shiv Saran Dass. Since it was admitted case of the defendants that letter dated 20.6.1992 Ex.DW-1/A was got served upon the plaintiff through peon book, it was incumbent upon the defendants to produce peon book, especially when factum with regard to delivery of

letter dated 20.6.1992 was specifically denied by the plaintiff. Since aforesaid document was not legally proved on record, the Courts below erred in concluding that suit is barred by limitation. Moreover, letter was issued by GPA of the vendor Shri Raj Kumar Rajinder Singh and since GPA and vendor were not available to prove the contents of letter, statement having been made by DW-1 Rajeshwar Singh was required to be dealt with carefully by the Courts below while ascertaining the factum with regard to issuance of letter dated 20.6.1992. DW-1 in his cross-examination categorically admitted that he does not know whether Ex.DW-1/A stands entered in register or not. He also admitted that there are no signatures of the plaintiff on Ex.DW-1/A.

35. After having carefully perused documents Ex.PW-1/L to Ex.PW-1/P; this Court finds substantial force in the arguments of Shri Bhupender Gupta, learned Senior Counsel representing the plaintiff, that date for performance, which was initially stipulated in Ex.PW-1/A and Ex.PW-1/E, was repeatedly extended by the vendor and as such plaintiff rightly not initiated any steps for filing suit for specific performance after expiry of date as mentioned in Ex.PW-1/A and Ex.PW-1/E. This Court also finds force in the arguments of Shri Gupta that since there is specific mention of amount admittedly paid by the plaintiff in the communications Ex.PW-1/L to Ex.PW-1/P sent by the vendor, while extending time of execution of sale deed in terms of agreements Ex.PW-1/A and Ex.PW-1/E, there was no occasion, as such, for the plaintiff to send specific communication accepting the request/prayer of extension of time having been made by the vendor.

36. At this stage, it would be profitable to take note of judgment passed by Hon'ble the Supreme Court in ***S.Brahmanand and Others vs. K.R. Muthugopal (Dead) and Others, (2005)12 SCC 764,*** wherein Hon'ble Apex Court has held as under:-

"16. It would be useful to set out the provisions of Article 54 before critically appraising the arguments presented to us on both sides.

	"Description of suit	***Period of limitation***	***Time from which period begins to run***
54.	***For specific performance of contract.***	***Three years***	***The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused"***

17. Though, at first blush, it may appear that the use of the expression "date" used in this Article of the Limitation Act, 1963 is suggestive of a specific date in the calendar, we cannot forget the judicial interpretation of this expression over a long period of time. Different High Courts took different views of the matter, which has been a subject matter of controversy. Some interpreted the expression strictly and literally, while others have taken an extended view.

18. In Kashi Prasad v. Chhabi Lal, AIR 1933 All.410(2), the High Court dealing with Article 113 of the Limitation Act, 1908, which was in pari materia with Article 54 of the Schedule to the Limitation Act, 1963, took the view that the force of the word "fixed" implies that the date should be fixed definitely and should not be left to be gathered from surrounding circumstances of the case. It must be a date clearly mentioned in the contract whether the said contract be oral or in writing.

19. In Alopi Parshad v. Court of Wards, AIR 1938 Lah.23, also the court was concerned with Article 113 of the Limitation Act, 1908. A suit for specific performance was brought on an agreement of sale where the time for

performance of the contract was "after passing of a decree". Though no date for performance was fixed for the agreement, the trial Court had opined that time must be held to have begun to run from the date on which the decree was passed in view of the maxim certum est quod certum reddi potest ("That is sufficiently certain which can be made certain"). The Lahore High Court was of the view that statutes of limitation must be strictly construed and that the respondents before it had failed to bring a case specifically within the purview of the first part of Article 113 and that the case did not fall within the first part but fell within the second part of Article 113. The judgment of the Allahabad High Court in Kashi Prasad was approvingly referred to and followed. This judgment was taken in appeal before the Privy Council and approved by the Privy Council in Lala Ram Sarup v. Court of Wards , AIR 1940 PC 19.

20. ***In Kruttiventi Mallikharjuna Rao v. Vemuri Pardhasaradhirao, AIR 1944 Mad.218, a contract was entered into on 18.7.1934, and the vendor promised to execute the sale deed when both his brothers who were studying elsewhere returned to the village for the next vacation, i.e., in May-June 1935. The High Court held (AIR p.218h) that this was "too indefinite to be regarded as fixing a "date" for the performance of the contract and the period of limitation must be computed from the date of refusal to perform".***

21. ***In R. Muniswami Goundarv. B.M. Shamanna Gouda, AIR 1950 Mad.820, interpreting the expression "date fixed" in Article 113 of the Limitation Act, 1908 the doctrine of id certum est quodi certum reddi potest was pressed into service along with its exposition in Broom's Legal Maxims and it was held that it was wide enough to include a date which though at the time when the contract was made was not known, but could be ascertained by an event which subsequently was certain of happening.***

22. ***In Hutchegowda v. H.M. Basaviah, AIR 1954 Mys.29, upholding the view in Muniswami Goundar, it was held that an agreement to execute the sale deed after the 'Saguvali chit' is granted fell within the first part of Article 113 of the Limitation Act, 1908.***

23. ***In Purshottam Sava v. Kunverji Devji, AIR 1954 Sau.104, the judgment of the Madras High Court in R. Muniswami Goundar was followed and it was held that the expression "date fixed" can be interpreted as meaning either the date fixed expressly or a date that can be fixed with reference to a future event which is certain to happen.***

24. ***In Lakshminarayana Reddiar v. Singaravelu Naicker, AIR 1963 Mad.24, it was held that the phrase occurring in the third column of Article 113 of the Limitation Act, 1908 "the date fixed for the performance" must be not only a date which can be identified without any doubt as a particular point of time, but it should also be a date which the parties intended should be the date when the contract could be performed.***

25. ***In Shrikrishna Keshav Kulkarni v. Balaji Ganesh Kulkarni, AIR 1976 Bom.342, the agreement for sale of a property stated that the sale was to be executed after the attachment which the creditors had brought, was raised. Noticing the fact that there was absence of any indication as to when the attachment would be raised, the court treated it as a case in which no date was fixed for performance of the contract and, therefore, falling within the second part of Article 54 of the Limitation Act, 1963.***

26. ***P. Sivan Muthiah v. John Sathiavasagam, (1990)1 MLJ 490, arose from a suit for specific performance with an alternative prayer for recovery of***

advance paid under the agreement of sale. Referring to Article 54 of the Limitation Act, 1963 the court took the view that the expression "date fixed" could mean either the date expressly fixed or the date that can be fixed with reference to a future event, which is certain to happen. If the date is to be ascertained depending upon an event which is not certain to happen, the first part of Article 54 would not be applicable, and in such an eventuality, it is only the latter part of Article 54 that could be invoked by treating it as a case in which no date had been fixed for performance and the limitation would be three years from the date when the plaintiff had notice that performance is refused. This was a case where performance was due after the tenants in the property had been vacated. The court took the view that since eviction of the tenants was an uncertain event, the time must be deemed to have run only from the date when the plaintiffs had notice that the performance had been refused by the defendants.

27. In Ramzan v. Hussaini, (1990)1 SCC 104, a suit was filed for specific performance of a contract of sale in respect of a house. The property was mortgaged and according to the plaintiff, the defendant had agreed to execute a deed of sale on the redemption of the mortgage by the plaintiff herself, which she did in 1970. In spite of her repeated demands, the defendant failed to perform his part, which resulted in a suit being filed. The question that arose before this Court was whether the agreement was one in which the date was "fixed" for the performance of the agreement or was one in which no such date was fixed. This Court answered the question in the affirmative by holding that, although a particular calendar date was not mentioned in the document and although the date was not ascertainable originally, as soon as the plaintiff redeemed the mortgage, it became an ascertained date. This Court also agreed with the view expressed in the Madras High Court in R. Muniswami Goundar and held that the doctrine id certum est quod certum reddi potest is clearly applicable. It also distinguished Kruttiventi Mallikharjuna Rao and Kashi Prasad (supra) as cases that arose out of their peculiar facts.

28. In Tarlok Singh v. Vijay Kumar Sabharwal, (1996)8 SCC 367, the parties by agreement determined the date for performance of the contract, which was extended by a subsequent agreement stipulating that the appellants shall be required to execute a sale deed within 15 days from the date of the order vacating the injunction granted in a suit. The suit was initially dismissed and, thereafter, a review application was also dismissed as withdrawn on 22.3.1986. On 23.12.1987 a suit was filed for perpetual injunction. In that suit, an application came to be made under Order 6 Rule 17 CPC for converting it into a suit for specific performance of an agreement dated 18.8.1984. This amendment was allowed on 25.8.1989. It was held that since the amendment was ordered on 25.8.1989, the crucial date for examining whether the suit was barred by limitation was 25.8.1989. Since the injunction was vacated when the original suit was initially dismissed, and the review application came to be dismissed on 22.3.1986, it was held that it was a situation covered by the first part of Article 54 and, in any event, on 25.8.1989 the suit was barred by limitation." (pp.772-775)

37. Hon'ble Apex Court in ***Panchanan Dhara and Others vs. Monmatha Nath Maity (Dead) Through LRs. and Another, (2006)5 SCC 340,*** has specifically held that "*a plea of limitation is a mixed question of law and fact. The question as to whether a suit for specific performance of contract will be barred by limitation or not would not only depend upon the nature of*

the agreement but also on the conduct of the parties and also as to how they understood the terms and conditions of the agreement." In this judgment, Hon'ble Apex Court has further held that while determining the applicability of the first or the second part of Article 54 of the Limitation Act, 1963, the court will firstly see as to whether any time was fixed for performance of the agreement of sale and if it was so fixed, whether the suit was filed beyond the prescribed period unless any case of extension of time for performance was pleaded and established. When, however, no time is fixed for performance of contract, the court may determine the date on which the plaintiff had notice of refusal on the part of the defendant to perform the contract and in that event the suit is required to be filed within a period of three years therefrom. Most importantly, in the judgment, referred hereinabove, it has been held that in a suit for specific performance of contract in respect of any immovable property, time would ordinarily not be the essence of the contract.

38. In ***Panchanan Dhara's*** case *supra,* the Hon'ble Apex Court has also held as under:

> ***"20. Contention of Mr. Mishra as regard the applicability of the first or the second part of Article 54 of the Limitation Act will have to be judged having regard to the aforementioned findings of fact. A plea of limitation is a mixed question of law and fact. The question as to whether a suit for specific performance of contract will be barred by limitation or not would not only depend upon the nature of the agreement but also the conduct of the parties and also as to how they understood the terms and conditions of the agreement. It is not in dispute that the suit for specific performance of contract would be governed by Article 54 of the Limitation Act, 1963. While determining the applicability of the first or the second part of the said provision, the court will firstly see as to whether any time was fixed for performance of the agreement of sale and if it was so fixed, whether the suit was filed beyond the prescribed period unless any case of extension of time for performance was pleaded and established. When, however, no time is fixed for performance of contract, the court may determine the date on which the plaintiff had notice of refusal on the part of the defendant to perform the contract and in that event the suit is required to be filed within a period of three years therefrom.***
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> ***21. In this case, before the Trial Court, the parties proceeded on the basis that the Second Respondent herein refused to execute and register a deed of sale in terms of the said agreement on 21.8.1985. The courts below have also arrived at a finding of fact that the time for performance of the said agreement for sale had all along been extended and even as on 16.3.1985, a Director of the second respondent assured the first respondent that it would be honored. In a suit for specific performance of contract in respect of any immovable property, time would ordinarily not be the essence of the contract. The appellant herein also did not raise any plea to the said effect.***
>
> ***22. A bare perusal of Article 54 of the Limitation Act would show that the period of limitation begins to run from the date on which the contract was to be specifically performed. In terms of Article 54 of the Limitation Act, the period prescribed therein shall begin from the date fixed for the performance of the contract. The contract is to be performed by both the parties to the agreement. In this case, the first respondent was to offer the balance amount to the Company, which would be subject to its showing that it had a perfect title over the property. We have noticed hereinbefore that the courts below arrived at a finding of fact that the period of performance of the agreement has been extended. Extension of (sic time for performance of a) contract is not necessarily to be inferred from written***

document. It could be implied also. <u>The conduct of the parties in this behalf is relevant. Once a finding of fact has been arrived at, that the time for performance of the said contract had been extended by the parties, the time to file a suit shall be deemed to start running only when the plaintiff had notice that performance had been refused.</u> Performance of the said contract was refused by the Company only on 21.8.1985. The suit was filed soon thereafter. The submission of Mr. Mishra that the time fixed for completion of the transaction was determinable with reference to the event of perfection of title of the Second Respondent cannot be accepted. The said plea had never been raised before the courts below. Had such a plea been raised, an appropriate issue could have been framed. The parties could have adduced evidence thereupon. Such a plea for the first time before this Court cannot be allowed to be raised. Even otherwise on a bare perusal of the agreement for sale dated 18.4.1971, it does not appear that it was intended by the parties that the limitation would begin to run from the date of perfection of title.

31. In view of the aforementioned pronouncements of this Court, we are of the opinion that the plea raised by the learned counsel for the appellant that the suit was barred by limitation cannot be accepted as all the courts have arrived at a finding of fact that the period for execution of the deed of sale had been extended." (pp.347-350)

39. In the case at hand, plaintiff had to pay the balance amount to the vendor at the time of execution of sale deed, which was to be executed by the vendor after redemption of mortgage of the property. As per agreements Ex.PW-1/A and Ex.PW-1/E, it was obligatory on the part of vendor to get the property redeemed from the Co-operative Bank within one year from the date of agreement and thereafter he had to execute the sale deed. Though, perusal of agreements, as have been observed above, suggests that sale deed, after redemption of property in question, was to be executed within specified period as stipulated in agreements Ex.PW-1/A and Ex.PW-1/E, but definitely execution of sale deed was subject to redemption of property from the concerned bank. Admittedly, there is no further extension of time by way of agreement, after execution of agreements Ex.PW-1/A and Ex.PW-1/E, but there are ample documents on record suggestive of the fact that the vendor had been extending time for execution of sale deed in furtherance of original agreement Ex.PW-1/A. It is also not in dispute that in lieu of repeated extensions asked for by the vendor, certain amount was paid by the plaintiff towards sale consideration, as agreed in agreements. Since, the vendor kept on extending period for execution of sale deed in terms of original agreements after expiry of period as mentioned in agreement dated 15.1.1975 Ex.PW-1/E, this Court is inclined to accept the contention having been put forth by learned Senior Counsel representing the plaintiff that question whether suit for specific performance is barred by limitation or not would not only depend upon nature of the agreement but also on the conduct of the parties.

40. In the instant case, this Court, after having carefully perused the communications Ex.PW-1/L to Ex./PW-1/O issued by the vendor, has no hesitation to conclude that the vendor had repeatedly extended time for execution of sale deed and at no point of time he conveyed to the plaintiff with regard to his intention, if any, of not selling the property in terms of original agreement Ex.PW-1/A. Since, after expiry of time period specified in agreements Ex.PW-1/A and Ex.PW-1/E, vendor himself had been requesting for extension of time coupled with the fact that the plaintiff had good relations with the vendor, there was no occasion, as such, for plaintiff to send communication specifically accepting therein the request for extension of time made by the vendor. Rather, it can safely be inferred from the communication sent by the vendor that requests, repeatedly made by him, were accepted and acted upon by the plaintiff.

41. At this juncture, this Court finds it necessary to refer conditions No.5 and 6 of the agreement dated 18.12.1973, Ex.PW-1/A, wherein it has been stipulated that vendor shall

redeem the suit property within a period of one year and thereafter he would execute the deed of sale in favour of the purchaser. Conditions No.5 and 6 are reproduced hereinbelow:-

> ***"5. that the vendor has mortgaged the property agreed to be sold alongwith Padam Castle etc. with the Himachal Pradesh State Cooperative Bank, in the sum of Rs.55,000/- (Rs.Fifty Five thousands). The vendor shall redeem the said property within a period of one year and soon thereafter he would execute the deed of sale in favour of the purchaser. Besides the aforesaid encumberance, the entire estate is free of any other encumberance.***
>
> ***6. That in case the vendor fails to redeem the property within the aforesaid period and consequently does not execute the deed of sale in favour of the purchaser, the vendor shall be liable and the purchaser shall be entitled to receive the double amount i.e. Rs.30,000/- (Rs.Thirty thousands) from the vendor. In case the purchaser fails to fulfill his own part of the agreement as contained above, the money advanced by him to the vendor shall stand forfeited. The sale will be completed within one year from today. After the completion of the sale the vendor shall have no right or title in the property agreed to be sold and the purchaser shall exercise all rights of an owner including easementary and such other rights."***

42. Careful perusal of aforesaid conditions clearly suggests that vendor was under obligation to get the suit property redeemed within a period of one year, where-after he had to execute the deed of sale in favour of purchaser. Time period/limit, if any, stipulated in para-5 of agreement is/was with regard to redemption of property and not for the execution of sale deed. Rather, execution of sale deed is/was purely subject to redemption of property, hence this Court sees valid reasons to differ with the findings returned by both the Courts below that time was essence of the contract. Similarly, condition contained in para-6 of the agreement suggests that in the event of failure on the part of the vendor to get the suit property redeemed within aforesaid period i.e. one year, plaintiff is/was well within its right to receive double the amount given by him in advance. Conjoint reading of conditions contained in paras 5 and 6 nowhere suggests that sale deed in terms of agreement, was to be executed strictly within a period of one year, rather within a period of one year, vendor was bound to get the property redeemed and thereafter he had to execute the sale deed. True, it is that in the event of failure on the part of vendor to redeem the property within the period as prescribed in para-5 of the agreement, purchaser i.e. plaintiff is/was entitled to receive double the amount advanced by him to the vendor. But, by no stretch of imagination, it can be said that sale deed could only be executed within a period of one year from the date of agreement i.e. 18.12.1973, rather execution of sale deed was subject to redemption of the property, which vendor had agreed to get redeemed within a period of one year.

43. Similarly, perusal of agreement, dated 15.1.1975, Ex.PW-1/E, suggests that since vendor failed to get the property redeemed from the Co-operative Bank, it was agreed *inter se* parties in furtherance of agreement to sell executed on 18.12.1973 Ex.PW-1/A that deed of sale would be executed or registered by vendor within a further maximum period of one year and the terms and conditions, as contained in the agreement dated 18.12.1973, would be fully complied with. Most importantly, in the agreement dated 15.1.1975, Ex.PW-1/E, parties agreed that in case the vendor fails to execute and register deed of sale after redeeming the entire property within a maximum period of one year, the vendor shall be liable to pay a sum of Rs.36,000/- being double the amount of sum already paid by the purchaser to the vendor. At this stage, it would be profitable to reproduce relevant part of agreement Ex.PW-1/E:-

> ***".... .... The purchaser has also paid a further sum of Rs.3,000/- (Rs.Three thousand only) to the vendor through Shri Surat Ram Jhingta, General Attorney of the Vendor against a receipt issued by him in this behalf. It is further agreed between the parties that in case the vendor fails to execute and register a proper deed of sale after redeeming the entire property mortgaged with the Himachal Pradesh State Cooperative***

<u>Bank Simla, within a maximum period of one year,</u> the vendor shall be liable to pay a sum of Rs.36,000/- (Rs.Thirty Six thousand only) being double the amount of the sum already paid by the purchaser to the vendor and a further sum of Rs.4,000/- as special damages. As such the vendor shall be liable to pay a sum of Rs.40,000/- (Rs.Forty thousand only) on all on account of damages in terms of the agreement."

44. Careful perusal of aforesaid stipulation, as contained in agreement Ex.PW-1/E on 15.1.1975, clearly suggests that sale deed was required to be executed by the vendor after redemption of the entire property mortgaged with Cooperative Bank within a maximum period of one year. Conjoint reading of contents of aforesaid agreements Ex.PW-1/A and Ex.PW-1/E clearly suggests that execution of sale deed was subject to redemption of suit property.

45. At the cost of repetition, it may be observed that the execution of sale deed was totally dependant upon the redemption of property. This Court, after having carefully perused the aforesaid agreements, is of the view that vendee i.e. plaintiff after completion of one year in the event of non-execution of sale deed in terms of agreement referred above could always claim double the amount of advance paid by him, but, it is/was not open for the vendor, after expiry of one year from the date of agreement, to claim that the party is/was not liable to execute the sale deed in terms of agreement. Hence, this Court has no hesitation to conclude that both the Courts below, while dismissing the suit of the plaintiff, misconstrued, misinterpreted and misread the terms and conditions of agreements to sell Ex.PW-1/A and Ex.PW-1/E, while coming to the conclusion that time was essence of the contract.

46. In the instant case, as clearly emerge from bare reading of agreements, referred hereinabove, limitation for filing suit was required to be computed from the date when factum with regard to redemption of property was either conveyed to the purchaser by vendor or from the date when the plaintiff acquired knowledge of redemption of property by the vendor. Since, in the instant case, sale deed was to be executed within one year from the date of redemption of the property, as has been held above, Courts below ought to have decided issue of limitation, taking into consideration date of redemption of property mortgaged with the Cooperative Bank.

47. At the cost of repetition, it may again be stated that there are numerous documents available on record suggestive of the fact that vendor had been requesting for extension of time to execute the sale deed since property could not be redeemed by him within stipulated period as agreed *inter se* parties by way of affidavits referred hereinabove. As per plaintiff, defendants started raising building/hotel on the land adjoining to the suit property, which gave rise to apprehension in his mind that the defendants had redeemed the mortgage and accordingly vide communication dated 13.9.2001 Ex.PW-1/Q requested the defendants to intimate the date on which sale deed is to be executed on the basis of agreements Ex.PW-1/A and Ex.PW-1/E executed by their predecessor. Since defendants failed to respond to aforesaid communication sent by the plaintiff, plaintiff got a legal notice dated 19.10.2001, Ex.PW-1/R, served upon the defendants calling upon them to execute the sale deed in respect of property detailed in agreements dated 18.12.1973 and 15.1.1975 Ex.PW-1/A and Ex.PW-1/E respectively within a period of 15 days. Vide aforesaid communication dated13.9.2001, plaintiff specifically stated that recently a hotel building has been raised by the defendants on the property adjoining the property agreed to be sold by the vendor and as such he has reason to believe that the property stands redeemed from the mortgage. Vide aforesaid notice dated 19.10.2001, plaintiff reminded the defendants that part of sale consideration stood already paid, whereas remaining was payable by him at the time of registration of the sale deed. Perusal of acknowledgement receipts, Ex.PW-1/W, Ex.PW-1/X, Ex.PW-1/Y and Ex.PW-1/Z, placed on record, clearly suggests that aforesaid communications were duly received by the defendants. Plaintiff, after having come to know the factum with regard to redemption of property, immediately by way of aforesaid communications requested/reminded the defendants to get the sale deed executed in terms of agreement. Vide aforesaid communication, he specifically acknowledged that remaining amount in terms of agreement is to be paid at the time of execution of the sale deed; meaning thereby that

by sending aforesaid communication, he expressed his readiness and willingness to get the sale deed executed. In this regard reliance is placed upon the judgment of Hon'ble Supreme Court in ***Pushparani S.Sundaram and Others vs. Pauline Manomani James (Deceased) and Others, (2002)9 SCC 582,*** wherein the Hon'ble Court has held as under:-

> ***"5. For this, the appellants rely on two circumstances, one that immediately after the exemption was given by the Ceiling Authorities on the 31.3.1982, the present suit was filed in April, 1982, and the other the tendering of further sum of Rs. 5,000/- to the defendant after execution of the agreement of sale. He also reiterates with reference to Para 11 of the plaint which pleads that the appellant was and is ready and willing to perform his part of the contract. So far these are being a plea that they were ready and willing to perform their part of the contract is there in the pleading. We have no hesitation to conclude, that this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same. Now examining first of the two circumstances, how could mere filing of this suit, after exemption was granted could be a circumstance about willingness or readiness of the plaintiff. This at the most could be the desire of the plaintiff to have this property. It may be for such a desire this suit was filed raising such a plea. But Section 16(c) of the said Act makes it clear that mere plea is not sufficient, it has to be proved.***
>
> ***6. Next and the only other circumstance relied is about the tendering of Rs.5,000/, which was made on the 2.3.1982 which was even prior to the grant of the exemption. Such small feeder to the vendor is quite often made to keep a vendor in good spirit. In this case only other payment made by the plaintiff was Rs.5,000/- at the time of execution of the agreement of sale. Thus, total amount paid was insignificantly short of the balance amount for the execution of the sale deed. Thus, in our considered opinion the said two circumstances taken together, is too weak a filament to stand even to build an image of readiness and willingness. Section 16(c) of the Specific Relief Act, requires that not only there be a plea of readiness and willingness but it has to be proved so. It is not in dispute except for a plea there is no other evidence on record to prove the same except the two circumstances. It is true that mere absence of plaintiff coming in the witness box that by itself may not be a factor to conclude that he was not ready and willing in a given a case as erroneously concluded by the High Court. But in the present case, not only the plaintiff has not come in the witness box, but not even sent any communication or notice to the defendant about his willingness, to perform his part of the contract. In fact no evidence is led to prove the same." (p.584)***

48. Hon'ble Apex Court in aforesaid judgment has held that Section 16(c) of the Specific Relief Act requires that not only there be a plea of readiness and willingness but has to be proved so. In the case at hand plaintiff after having come to know the factum with regard to redemption of mortgage, sent two communications Ex.PW-1/Q and Ex.PW-1/R calling upon the defendants to execute sale deed and as such finding of Courts below is not correct that there is no readiness and willingness on the part of the plaintiff.

49. Hon'ble Apex Court in ***Bal Krishan & Anr. vs. Bhagwan Dass (Dead) by L.Rs & Ors, AIR 2008 SC 1786*** has held as under:-

> ***"8. Section 16 of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') corresponds with Section 24 of the old Act of 1877 which lays down***

that the person seeking specific performance of the contract, must file a suit wherein he must allege and prove that he has performed or has been ready and willing to perform the essential terms of the contract, which are to be performed by him. The specific performance of the contract cannot be enforced in favour of the person who fails to aver and prove his readiness and willingness to perform essential terms of the contract. Explanation (ii) to clause (c) of Section 16 further makes it clear that plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The compliance of the requirement of Section 16(c) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void."

(p.1790)

50. Plaintiff specifically pleaded in the plaint that he was always ready and willing to perform his part by paying balance payment. Plaintiff in his statement before Court again reiterated that he had no shortage of money and he was ready and willing to perform his part by paying balance payment and as such there is compliance of Section 16(c) of the Specific Performance Act.

51. It appears that learned Courts below brushed aside the aforesaid communications, taking note of admission, having been made by PW-1 plaintiff Shiv Saran Dass in his cross-examination that the defendants had started constructing hotel since last six years. He also admitted that the defendants started constructing the hotel without giving notice to him. Since statement of plaintiff was recorded on 6.6.2002, Courts below came to the conclusion that construction was commenced somewhere in the year 1996 by the defendants and as such factum, if any, with regard to redemption of property had come to the knowledge of the plaintiff in the year 1996 and as such he could have filed the suit up to year 1999.

52. Aforesaid findings having been returned by the learned first appellate Court appear to be totally erroneous solely for the reasons that construction, if any, raised by the defendants was on the property adjoining to the suit property and not on the property intended to be sold by the vendor by way of agreements Ex.PW-1/A and Ex.PW-1/E. Plaintiff himself in his plaint has stated that since defendants started raising construction over the land adjoining to suit property, he apprehended that suit property stands redeemed, but fact remains that the suit property came to be redeemed only in the year 2001.

53. PW-3, Shri Ramesh Chand, who at that relevant time was Manager, H.P. State Cooperative Bank, Rampur Bushehr, in his statement recorded on 15.1.2003 categorically stated that as per record, the vendor; namely; Raj Kuamr Rajinder Singh, had taken loan on 18.9.1964, which was cleared on 8.9.2001. He also stated that property named as '*Padam Castle, Rajesh Cottage and Padam Cottasge'* stood mortgaged with the bank and it was redeemed on 8.9.2001. Even in his cross-examination, he categorically admitted that loan account of the vendor was closed on 8.9.2001. There is nothing in his cross-examination from where it can be inferred that the defendants were able to extract anything contrary which aforesaid witness stated in his examination-in-chief. Similarly, DW-1, defendant Rajeshwar Singh, in his cross-examination categorically admitted that suit property was redeemed on 8.9.2001.

54. Hon'ble Apex Court in ***Panchanan Dhara's*** case *supra* has specifically held that bare perusal of Article 54 of Limitation Act suggests that period of limitation begins to run from the date on which the contract was to be specifically performed. Hon'ble Apex Court has further held that in terms of Article 54 of the Act, period prescribed therein shall begin from the date fixed for performance of the contract. Most importantly, in the case referred above, Hon'ble Apex Court has held that the extension of contract is not necessarily to be inferred from written document. It could be implied also. Their Lordships in the case referred above held that the conduct of the parties in this behalf is relevant. Once a finding of fact has been arrived at, that the time for performance of the said contract had been extended by the parties, the time to file a suit shall be deemed to start running only when the plaintiff had notice that performance had been refused.

55. In the case at hand, as has been already concluded hereinabove that stipulation of time, if any, in the agreements was to commence after redemption of property by vendor from the bank concerned and sale deed was fully dependant upon the redemption of property which was admittedly redeemed on 8.9.2001. There is no document, as has been discussed hereinabove, suggestive of the fact that communication, if any, was ever sent by the vendor-predecessor-in-interest of the defendants or thereafter by defendants intimating therein factum with regard to redemption of suit property to enable the plaintiff to do his part in terms of agreement in question. Though, defendants by placing on record Ex.DW-1/A, letter dated 2.6.1992, made an attempt to prove on record that intention of defendants in not selling the property in question was conveyed to the plaintiff, but as has been observed above, aforesaid communication dated 2.6.1992 was never proved in accordance with law and thus no reliance, if any, could be placed on the same by the Courts below while determining the period of limitation on the basis of same. This Court could lay its hand to one document which is though not exhibited, but the same has been marked as 'mark-B' dated 28.5.1988 available at page 119 of record, which itself suggests that even till 28.5.1988 defendants had been acknowledging that they have executed agreement to sell with the plaintiff to sell the property in question. Vide aforesaid communication defendants have also acknowledged that they have received Rs.19,000/- in total.

56. Hence, this Court, after having bestowed its thoughtful consideration to the pleadings, evidence vis-à-vis impugned judgments and decrees passed by both the Courts below, is of the view that both the Courts below erred in concluding that suit for specific performance having been filed by the plaintiff is/was barred by limitation. Findings returned by Courts below, after having interpreted conditions contained in Ex.PW-1/A and Ex.PW-1/E as well as correspondence Ex.PW-1/L, Ex.PW-1/M and Ex.PW-1/O, are erroneous and as such being not based upon proper appreciation of evidence deserve to be quashed and set aside. Both the Courts below also erred in concluding that plaintiff was not ready and willing to perform his part of contract because after having perused Ex.PW-1/Q and Ex.PW-1/R it is quite apparent that plaintiff, immediately after having come to know the fact with regard to redemption of property, issued two communications to the defendants requesting them to apprise him the time when sale deed is to be executed in terms of agreements Ex.PW-1/A and Ex.PW-1/E.

57. Since it stands duly proved from the perusal of Ex.PW-1/A and Ex.PW-1/E that possession of purchaser/plaintiff, who at that relevant time was tenant, was to be considered as having been surrendered in the part performance of the agreements, findings returned by both the Courts below that the status of appellant-plaintiff over the suit property is in the capacity of tenant is erroneous and perverse and as such same deserves to be set aside.

58. At this stage, it may be noticed that learned counsel representing the plaintiff had specifically stated that plaintiff is not pressing his claim of having acquired title by way of adverse possession as claimed in plaint in the light of law laid down by Hon'ble Apex Court in ***Gurdwara Sahib vs. Gram Panchayat Village Sirthala, (2014)1 SCC 669,*** wherein it has been held that even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership, and as such this Court sees no reason to deliberate on the same. All the substantial questions of law are answered, accordingly.

59. Since this Court, after having carefully perused the evidence as well as law laid down on the point, has arrived at conclusion that there is total mis-appreciation, misconstruction of evidence, be it ocular or documentary, adduced on record by respective parties and findings returned by the Courts below are erroneous and perverse, it sees valid reason to interfere in the concurrent findings of fact recorded by both the Courts below. At the risk of repetition, it may be stated, at this stage, that Hon'ble Apex Court vide its various pronouncements, which have been taken note above, has held that concurrent findings of fact can be interfered in case of perversity.

60. In view of the detailed discussion made hereinabove, this appeal is allowed. The judgments and decrees passed by both the Courts below are set aside and suit filed by the plaintiff is decreed. A decree for specific performance of contract, as prayed for in the plaint, is granted in favour of the appellant-plaintiff. Decree sheet be prepared, accordingly. There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

CMPMO No.166 of 2017.

61. In view of the detailed discussion made in ***RSA No.555 of 2005***, wherein finding of the Courts below that status of appellant-plaintiff over the suit property is in the capacity of tenant has been set aside, present petition is disposed of with the liberty to the petitioner-plaintiff to approach the Court below for passing appropriate order in the light of judgment rendered by this Court in aforesaid ***RSA No.555 of 2005.***

****

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

Maa Sheetla Associated Cement Company ....Petitioner.
Versus
State of HP and others ...Respondents.

CWP No.: 4271 of 2012
Decided on: 06.09.2017.

Constitution of India, 1950- Article 226- Petitioner claims to be a registered society-its grievance is that the work of transportation of clinker etc. is not being provided to its members despite the fact that they are covered by the scheme for the resettlement and rehabilitation of oustees of ACC Cement Factory, Gaggal, District Bilaspur- held that definition of oustee provided under Clause-2 of the scheme shows that oustee is a member who has been deprived of his house, land or path on account of acquisition proceedings in connection with the construction of ACC Cement Factory, Gaggal- members of the petitioner society are not covered under the definition of oustees and have no right to claim benefits granted to the oustees- scheme is for the

settlement of oustees of ACC Cement Factory, Gaggal, District Bilaspur and cannot be availed by others - ACC is neither State nor authority and no writ can be issued against it - no infringement of right has been established- petition dismissed. (Para-2 to 9)

For the petitioner	Mr. B.S. Thakur, Advocate.
For the respondents	Mr. Vikram Thakur and Ms. Parul Negi, Dy. Advocate General for respondents No.1 and 2. Mr. Vivek Singh Thakur, Advocate for respondent No. 3. Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, the petitioner-Society has prayed for the following reliefs.

"A) Writ of mandamus may kindly be issued thereby direction the respondents to provide employment under the Scheme of Resettlement and Rehabilitation of Oustees of ACC Cement Factor Gaggal, District Bilaspur (HP) and to grant compensation and to deploy/engage the trucks of the families of the Gram Panchayats Baroti, Dehar, Kangu, Dhawal, Jarol, Jambla, Slapad and Salwana which are affected by the establishment of the Associate Cement Companies Ltd. Barmana, District Bilaspur (HP).

(B) Entire original record pertaining to the present case may also be called for.

(C) Cost of the petition may kindly be awarded in favour of the petitioner and against the respondents.

(D) Any other appropriate writ, order or direction in view of the facts and circumstances of the case as this Hon'ble Court may deem fit and proper may also be passed in favour of the petitioner and against the respondents."

2. The petitioner before this Court claims itself to be a registered society under The Himachal Pradesh Society Registration Act, 2006 and primarily its grievance is that the work of transportation of clinker etc. is not being provided to its members by respondent No. 4 despite the fact that they are covered by the scheme for the resettlement and rehabilitation of oustees' of ACC Cement Factory, Gaggal, District Bilaspur. In my considered view, this petition is totally mis-conceived. A perusal of the scheme 'Resettlement and Rehabilitation of Oustees' of ACC Cement Factory, Gaggal, District Bilaspur, which is on record as Annexure P-3 demonstrates that the purpose of the scheme is primarily for the resettlement and rehabilitation of **oustees** of ACC Cement Factory, Gaggal, District Bilaspur. "Oustees" stand defined in Clause (2) of the Scheme, as per which, the definition of the oustees is as under.

*"**Oustees**: For the purpose of this scheme, means a person who has been deprived of his house, land or both on account of acquisition proceedings in connection with the construction of ACC Cement Factory, Gaggal and entitled to compensation in lieu thereof and includes his successors interest."*

3. It is not in dispute that persons whose cause is being espoused by the petitioner-Society are not covered under the definition of 'oustees'. Keeping in view the fact that scheme in issue is primarily for resettlement and rehabilitation of oustees and as members of the petitioner-Society are not covered under the said Scheme, in my considered view, member of the petitioner-Society do not have any right to claim the benefits which otherwise are envisaged under the Scheme to be conferred up on the oustees of the ACC Cement Factory, Gaggal, District Bilaspur.

4. Learned Counsel for the petitioner has submitted that scheme cannot be read myopically and each and every person who is affected by the establishment of the Factory is

covered by the same which is evident from the fact that it is mentioned in the said Scheme that the same should be extended to whole of the area affected or likely to be affected as a result of construction of ACC Cement Factory, Gaggal. I am afraid that the scheme cannot be read in the mode and manner in which learned Counsel for the petitioner wants the scheme to be read. Clause (1) of the Scheme is quoted herein below.

> *"1. short title extent and Commencement:- This Scheme may be called the Resettlement and Rehabilitation of Oustees of ACC Cement Factory, Gaggal, (Grant of Land) Scheme, 1980.*
>
> *(ii) It shall extend to the whole of the area affected or likely to be affected as a result of construction of ACC Cement Factory, Gaggal in Bilaspur District.*
>
> *(iii) It shall come into force at once."*

5. A perusal of the clause as is contained in the Scheme demonstrates that intent of this Clause is that basically the scheme is for resettlement and rehabilitation of **Oustees** of ACC Cement Factory, Gaggal, District Bilaspur and all oustees are covered under the scheme, who may be in any area which is affected or is likely to be affected as a result of construction of ACC Cement Factory, Gaggal, District Bilaspur. Not only this, Sub-Clause (ii) of Clause 1 is not an independent Clause but is a part of Clause (1) i.e. Short title and commencement of the Scheme.

6. The second contention which has been raised by learned Counsel for the petitioner is that ACC Cement Factory is discriminating between similarly situated persons because on the one hand, it is denying employment to the members of the petitioner-Society by not affording the business of transportation of clinker etc. to them by engaging their trucks, on the other hand, it has engaged the trucks of other persons who are also not oustees as is defined in scheme 'Resettlement and Rehabilitation of Oustees' of ACC Cement Factory, Gaggal, District Bilaspur. In my considered view, this issue cannot be gone into in writ jurisdiction as the same is a disputed question of fact. Not only this, this contention is not even otherwise substantiated by any cogent material on record by the petitioner.

7. Besides this, as respondent-ACC Cement Company Limited is neither a 'State' nor 'other authority', as is envisaged under Article 12 of the Constitution, in my considered view, therefore, a writ of mandamus even otherwise cannot be issued in this respect to the said Company. In case the petitioner has any grievance then the petitioner is at liberty to approach the appropriate Court of law to establish and prove the said contention of the petitioner but the same, in my considered view, cannot be done in proceedings under Article 226 of Constitution of India.

8. Further, the contention of learned Counsel for the petitioner that Registrar, Cooperatives Societies, is not performing its statutory duties by not directing respondent No. 4-Company to engage trucks of members of the petitioner-Society is also totally mis-conceived. Respondent No. 4 is a Company incorporated under the Companies Act and it is not a Society registered under The Himachal Pradesh Cooperatives Societies Act, 1968. As such, in my considered view, Registrar Cooperatives Societies, even otherwise cannot issue such like directions to the respondent No. 4-Company in exercise of powers vested in it under The Himachal Pradesh Cooperatives Societies Act, 1968.

9. Learned Counsel for the petitioner has not been able to substantiate that any legal right, leave aside fundamental right of its members has been infringed by respondent No. 4-Company. Who is to be engaged by respondent No. 4-Company for the transportation of its products is neither to be directed nor to be dictated by this Court. Only exception can be if there is an agreement entered into by the said Company with the State Government to the effect that it shall be offering the business of transportation of its products to a particular class of persons and the said agreement is being violated by the Company, then obviously, the affected persons can approach firstly the State Government and then this Court praying for a mandamus that State and respondent No. 4-Company be directed to honour the said agreement. However, this is not the case in the present petition. There is neither any agreement nor any undertaking given by

respondent No. 4 to the State or for that matters to any authority that it shall be offering part of its transportation business to the members of the petitioner-Society and/or for the said purpose, it shall be engaging the trucks of the members of the petitioner-Society.

In this view of the matter, as there is no merit in the present petition, the same is accordingly dismissed, so also pending miscellaneous application(s), if any.

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

Sidhant Malhotra & others ...Petitioners.

Versus

H.P. Technical University, Hamirpur & another ...Respondents.

CWP No. 380 of 2017
Date of Decision: September 6, 2017

Constitution of India, 1950- Article 226- Petitioners were admitted to four year degree course under the respondent No. 2 – they completed their classes for the session 2014-2016 – they desired their transfer to different colleges of the State due to inadequate infrastructure and lack of quality education – the applications were rejected by respondent No. 1 on the ground that petitioner had not cleared the examination for the semesters for which they were imparted education – aggrieved from the order, the petitioners filed the present writ petition – held that petitioners have not cleared their first, second, third and fourth semesters examination – respondent No. 1 had issued various directions for complying with the norms fixed by All India Council for Technical Education (AICTE) – no grievance has been made by other students – a student is expected to pursue his studies diligently and clear the examination – permitting non meritorious students to migrate can bring bad name to the institution and university – there is no illegality in imposing condition of clearing the examination for the academic year for which migration is sought – the clause maintains educational standard and cannot be said to be arbitrary – petition dismissed. (Para-2 to 17)

Cases referred:

Medical Council of India vs. Sarang and others, (2001) 8 SCC 427
Shirish Govind Prabhudesai vs. State of Maharashtra and others, (1993) 1 SCC 211
Medical Council of India vs. Diparani P. Deshmukh and another, (2000) 9 SCC 163
Nitasha Paul vs. Maharishi Dayanand University Rohtak and others, (1996) 2 SCC 103
Sanchit Bansal v. The Joint Admission Board, (2012) 1 SCC 157
All India Council for Technical Education v. Surinder Kumar Dhawan, (2009) 11 SCC 726]

For the Petitioners: Mr. Ajay Sharma, Advocate, for the petitioners.
For the Respondent: Mr. Surinder Sharma, Advocate, for respondent No.1.
Mr.Rajesh Kumar, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice.

Petitioners were admitted to various 4 year degree courses undertaken by MIT College of Engineering and Management (respondent No.2). For the Session 2014-16, they have completed their classes. Finding the infrastructure and the qualitative education to be lacking,

petitioners desired their transfer to different colleges of the State. Their applications for migration came to be rejected by H.P. Technical University, Hamirpur (respondent No.1), for the reason that the petitioners had not cleared their examination for the semesters for which they were imparted education by respondent No.2- Institution. It is in this backdrop the petitioners have laid challenge to the decision rejecting their applications for migration as also challenged the validity of the relevant clauses of the Ordinance, so issued by respondent No.1, laying an embargo of migration, to be violative of Articles 14, 19 and 21 of the Constitution of India.

2. Thus, primary issue which arises for consideration is as to whether the following clauses of Chapter-I, Ordinance No.2 notified by virtue of Section 35 of the Himachal Pradesh Technical University Act, 2014 (hereinafter referred to as the Act), can be said to be unconstitutional or not:-

> "2. Migration of Students
>
> In pursuance of the provisions of Section 35 of the Himachal Pradesh Technical University Act 2014 (9 of 2014), the Board of Governors of the Himachal Pradesh Technical University, hereby makes the revised Ordinance 3 relating to Migration of students.
>
> 1. Migration from University School of Studies to University maintained institutions or affiliated institutions and vice-versa or from one institution to another institution in the same programme/discipline in the second year/third semester will be allowed only after the completion of the 1st year and is applicable only to students who are eligible to register for 3rd semester. Inter college migration within the same city shall be discouraged.
>
> 2. Migration shall be allowed after completion of the second semester but before start of the 3rd semester. The application on the prescribed form should be submitted to the University within one month of start of session along with NOCs from the both the institutions.
>
> 11. In case of inter University migration, the following conditions shall apply:
>
> - The candidate should have passed all the courses of the first year of the University from where he/she wants to migrate.
> - The courses studied by the candidate in first year must be equivalent to the courses offered in Himachal Pradesh Technical University. Deficiency, if any, should not be more than three subjects. The candidate would be required to furnish an undertaking that he/she will attend classes and pass the course found deficient.
> - The institute and the university where the student is studying and the institute, to which migration is sought, have no objection to the migration.
> - There is a vacant seat available in the discipline in the college in which migration is sought. No change of Discipline/course shall be allowed.
> - In addition to the above, migration will be governed by the rules of the concerned University to which the migration is sought.
>
> 13. Migration fee: The migration fees shall be as under:
>
> (a) Rs. 10,000/- for Intra-University Migration.
>
> (b) Rs. 20,000/- for Inter-University Migration.
>
> (i. for those students who seek migration during tenure of the course)
>
> (ii Normal migration fee shall be charged from Him TU passed out students)."

3. From the response so filed by respondent No.1, it is evident that the petitioners are seeking inter University migration, which is governed by the relevant clauses of the Ordinance reproduced supra. The difference between inter and intra University migration stands explained, with which we are not concerned.

4. Certainly one thing is clear that petitioners have not cleared their 1st, 2nd, 3rd and 4th semester examinations.

5. At this point in time, one may only take note of the fact that lack of infrastructure or qualitative education not only stands refuted by respondent No.1, but also remains unsubstantiated by the petitioners. To the contrary, H.P. Technical University, Hamirpur (respondent No.1) has been issuing directions for complying with the norms so issued by All India Council for Technical Education (AICTE). Also it is evidently clear that the examining authority is H.P. Technical University, Hamirpur (respondent No.1) and not MIT College of Engineering and Management (respondent No.2).

6. Respondent No.2 has further clarified that all instructions and guidelines issued by respondent No.1 are complied with in letter and spirit. On merits, it is pointed out that for the course in question i.e. B-Tech (2014-18) out of 156 students so admitted, 148 are still pursuing their courses with no grievance of any nature, whatsoever.

7. In our considered view, petitioners failed to substantiate any lack of proper infrastructure; non compliance of statutory provisions; non compliance of guidelines governing the field; and inadequate standard of teaching. The majority of children admitted to the course in question are still pursuing their studies with respondent No.2-Institution. They have not sought inter University transfer.

8. The Act came to be notified by the Government of Himachal Pradesh. The object and purpose of the Act being establishment, incorporation and regulation of Technical University in the State of Himachal Pradesh. Chapter-VI, Sections 33 to 36 of the Act enable the University to promulgate and issue Ordinances, Statutes and Regulations**.** Section 8 empowers the University to establish and maintain constituent colleges/institutions/off-campus Centres/Off-shore Campuses and Study Centres. Section 5 empowers the University *inter alia* to hold examinations and confer degrees. Section 9 empowers the University to affiliate, admit and recognize any College/Institution as may be prescribed by the Ordinances. That respondent No.2 is one such institution is not in dispute. The overall control of conduct of examination is that with the University. The object of the University is to develop the knowledge of science etc. for advancement of quality of life of mankind; supply the required skilled manpower for fulfilling the needs of society and national development plans; develop pattern for teaching and training at various levels; derive benefits from the ever growing scientific and technological knowledge; to establish close linkage with Industry to make teaching, training and research in the University relevant to the needs of society; to affiliate or recognize colleges or institutions within and outside the State of Himachal Pradesh; and to function as a leading resource Centre for knowledge management and entrepreneurship development in the area of Science and Technology.

9. It is with this avowed object, respondent No.1 is conducting the examination, more so, to enhance the standard of the University. The Ordinance in question came to be promulgated by virtue of Section 35 of the Act.

10. In the instant case, the legislative competence of the State to promulgate the Ordinance is there. The question which arises for consideration is as to whether the provisions thereof, are violative of Part-III of the Constitution or not. Having applied our mind, we do not find it to be so. Once if a student is admitted in a particular Institution, for a particular academic course, it is expected of him to pursue the studies diligently and clear the examination for the semesters in the given year. Examination to be conducted is by the University. It is not left to the *ipse dixit* of the Institution imparting education. There is uniform standardization of courses and the examination to be conducted by the University. Permitting non-meritorious student to migrate may only entail bringing bad name to the Institutions and the University. Hence there is no illegality in imposing the condition of having cleared examination for the academic year in relation to the students seeking migration.

11. The Apex Court in *Medical Council of India vs. Sarang and others,* (2001) 8 SCC 427, while dealing with the regularization which required a student admitted into 1st year of MBBS course, to have completed 18 months study in the transferee college observed as under:-

> "6. In matters of academic standards, courts should not normally interfere or interpret the rules and such matters should be left to the experts in the field. This position has been made clear by this Court in *University of Mysore v. C.D.Govinda Rao,* AIR 1965 SC 491, *State of Kerala v. Kumari T.P. Roshana,* (1979) 1 SCC 572 and *Shirish Govind Prabhudesai v. State of Maharashtra,* (1993) 1 SCC 211. The object of the said Regulation appears to be that although the course of study leading to the IInd professional examination is common to all medical colleges, the sequence of coverage of subjects varies from college to college. Therefore, the requirement of 18 months of study in the college from which the student wants to appear in the examination is appropriately insisted upon. Migration is not normally allowed and has got to be given in exceptional circumstances. In the absence of such a stipulation as contained in Regulation 6(5), it is clear that the migrated student is likely to miss instruction and study in some of the subjects, which will ultimately affect his academic attainments. Therefore, the strained meaning given by the High Court, which actually changes the language of Regulation 6(5), is not permissible. Thus we disagree with the view taken by the High Court and state that the correct interpretation is as given by the Medical Council of India, set forth above by us."

12. While dealing with the restriction of migration imposed by the Medical Council of India, the Apex Court in *Shirish Govind Prabhudesai vs. State of Maharashtra and others,* (1993) 1 SCC 211, has held as under:-

> "7. The recommendations on Graduate Medical Education are by an expert body of the Medical Council of India which is entrusted with certain statutory functions relating to medical education by the Indian Medical Council Act, 1956. The Medical Council of India having chosen to accept these recommendations, such a condition of eligibility for migration/transfer from one medical college to another adopted by the recognized medical colleges cannot be termed unreasonable or arbitrary. The qualitative difference between the non-recognized medical colleges generally as compared to the medical colleges recognized by the Medical Council of India, the recognition being based on certain objective standards relating to medical education, and the competitive merit forming the basis for admission to a recognized medical college justify as reasonable such a restriction for grant of permission for migration/transfer from one medical college to another. One of the purposes served by such a restriction is to permit this inter-college movement of students after passing the first MBBS examination only between students of recognized medical colleges and to prevent indirect entry into recognized medical colleges of students who had failed initially to secure entry into a recognized medical college. Movement of students between recognized medical colleges only is quite often to facilitate the students thereof in certain circumstances without conferring on them any additional benefit after the initial entry to a medical college duly recognized. Viewed in this manner, such a condition of eligibility for migration/transfer to a recognized medical college permitting only students of recognized medical colleges is neither arbitrary nor unreasonable. There being no inherent right in a student admitted to a non-recognized medical college to claim such migration/transfer, this restriction for migration/transfer imposed by the recognized medical colleges on the basis of the recommendations adopted by the Medical Council of India, there is no foundation for the claim for such migration/transfer made by the students of non-recognized medical colleges. "

13. It is a settled position of law that intra University migration can be done only, in accordance with the procedure established by law. It is not a fundamental right vested in the student. [*Medical Council of India vs. Diparani P. Deshmukh and another,* (2000) 9 SCC 163 & *Nitasha Paul vs. Maharishi Dayanand University Rohtak and others,* (1996) 2 SCC 103].

14. The Hon'ble Supreme Court in *Sanchit Bansal v. The Joint Admission Board*, (2012) 1 SCC 157 held:

> "An action is said to be arbitrary and capricious, where a person, in particular, a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the action or decision is founded on prejudice or preference rather than reason or fact. To be termed as arbitrary and capricious, the action must be illogical and whimsical, something without any reasonable explanation. When an action or procedure seeks to achieve a specific objective in furtherance of education in a bona fide manner, by adopting a process which is uniform and non-discriminatory, it cannot be described as arbitrary or capricious or mala fide." (Emphasis supplied)

15. In the present petition the challenged clause is applicable to all students and not only to the petitioners. Furthermore, by requiring that the student must have passed the courses, the rule seeks to ensure that the standards of education that are imparted are those of excellence. Since the challenged clause is applicable to every student with a desire to migrate and since it maintains educational standards it cannot be said that the said clause is arbitrary, or that it does not achieve any object, or that it serves as a mechanism to put *mala fide* intentions into action.

16. The role of statutory expert bodies on education and role of courts are well defined by a simple rule. If it is a question of educational policy or an issue involving academic matter, the courts keep their hands off. If any provision of law or principle of law has to be interpreted, applied or enforced, with reference to or connected with education, the courts will step in. [*All India Council for Technical Education v. Surinder Kumar Dhawan*, (2009) 11 SCC 726]

17. Courts will interfere only if they find all or any of the following: (i) violation of any enactment, statutory Rules and Regulations; (ii) mala fides or ulterior motives to assist or enable private gain to someone or cause prejudice to anyone; or where the procedure adopted is arbitrary and capricious.

With the aforesaid observations, present petition is dismissed, so also pending application(s), if any.

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

Bindu Devi & another .....Petitioners.

Versus

Vinod Kumar .....Respondent.

Cr. Revision No. 135 of 2016
Decided on : 8.9.2017

Code of Criminal Procedure, 1973- Section 125- Wife claimed maintenance for herself and her minor son- Trial Court granted maintenance of Rs. 1,000/- per month to the wife and Rs. 500/- to the son- a revision was filed, which was allowed- aggrieved from the order, present revision has been preferred- held that the Appellate Court had disallowed the maintenance on the ground that wife was in possession of Kisan Vikas Patra, therefore, she was not entitled to any maintenance- Trial Court had not accepted this fact- a Samjhota was entered in which the wife returned Kisan

Vikas Patra to her husband- Appellate Court had wrongly ignored this fact- wife specifically stated that she was subjected to physical cruelty and therefore, she has reasonable cause for residing separately from her husband- revision petition allowed and order passed by Appellate Court set aside, whereas, order passed by Trial Court restored. (Para-2 to 4)

For the petitioners: Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.

For the respondent: Mr. Hemant Kumar Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

One Smt. Bindu Devi instituted an application cast under the provisions of Section 125 Cr.P.C. before the learned Magistrate concerned, wherein she claimed maintenance from the respondent/husband herein, both for herself and for her minor son. The application preferred by the petitioner herein before the learned Magistrate concerned, stood allowed by the Magistrate concerned, whereby he pronounced a direction upon the respondent/husband, to pay a sum of Rs. 1000/- per mensem to the applicant and Rs. 500/- per mensem to co-applicant No.2. A direction was also rendered of the aforesaid liabilities arising from the date of petition. The respondent/husband being aggrieved therefrom instituted a revision petition before the learned Additional Sessions Judge-III, Kangra at Dharmshala. The latter under the impugned order, proceeded to allow the revision petition, whereby he set aside the order recorded upon the apposite application by the learned Magistrate concerned. The wife/petitioner herein is aggrieved therefrom, hence has proceeded to institute the instant petition before this Court.

2. The reasoning, as assigned by the learned Additional Sessions Judge for disallowing the apposite application, is grooved in the factum of sums of money borne in the Kisan Vikas Patras, preeminently with theirs' standing uncontrovertedly purchased by the respondent/husband herein, in, the names of both the applicants', hence, being sufficient for maintaining both the applicants. The aforesaid reasoning would hold strength, only upon apposite evidence(s) making graphic unfoldments qua the petitioner herein holding possession of Kisan Vikas Patras. The learned trial Magistrate had proceeded to refute all the disaffirmative thereto arguments anchored upon the aforesaid facet, the reason for his refuting the arguments of the respondent qua the petitioner herein holding possession, of Kisan Vikas Patras were anviled upon a "Samjhota" existing on file of learned trial Magistrate, with vivid underscoring therein qua possession of Kisan Vikas Patras being handed over by the petitioner herein to her husband. The respondent/ husband in his testification comprised in his cross-examination, has not therein denied the apt occurrence or the validity of execution of "Samjhota" inter-se him and the petitioner herein. However, dehors the said admission of the respondent herein qua occurrence and valid execution of a "Samjhota" inter-se him and his wife also with recital(s) occurring therein, of, possession of Kisan Vikas Patras being handed over by the petitioner herein to him, yet, the learned counsel for the respondent herein has contended, that with the petitioner herein in her cross-examination, denying the existence of any compromise inter-se her and the respondent, thereupon the trite fact occurring in the "Samjhota", of, hers handing over the Kisan Vikas Patras to the respondent also perse standing belied. He thereupon contends that the impugned verdict warrants reverence. However, the aforesaid submission is fallacious, especially when lack of any denial(s) in respect thereto, were, enjoined to emanate not from the petitioner herein rather, was to emanate from the respondent herein, whereas, with the respondent admitting its execution also when he for falsifying all the apposite recitals borne therein, omitted to lead into the witness box, the Investigating Officer concerned of the Police Station, thereupon his relevant omission(s), render all the recitals borne therein to hold veracity. In sequel, the reasoning(s) assigned by the learned trial Magistrate for imputing credence, to the "Samjhota", was amenable for vindication by the learned Additional Sessions Judge, whereas with the latter,

for, untenable reason(s) disimputing credence thereto, has hence committed a grave illegality besides impropriety. Predominantly also with the respondent herein, in the grounds of the apposite criminal revision petition preferred by him before the learned Revisional Court, omitting to therein make any apt ventilations, in respect of validity of execution of "Samjhota" inter-se him and his wife also in respect of authenticity(s) thereof on all facets, thereupon an inference is bolstered, of, his admitting the validity of its execution besides his also admitting the truth of all recitals borne therein, whereupon he now is stopped, to, on any ground hence assail it.

3. The learned counsel for the respondent herein has made a reference to the provisions occurring in sub-sections 4 and 5 of Section 125 Cr.P.C. provisions whereof stand extracted hereinafter:-

> "(4) No wife shall be entitled to receive an {allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,} from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.
>
> (5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

thereupon, he contends that with the hereabove extracted provisions, casting an imperative obligation upon applicant No.1, to, prove qua hers holding a sufficient cause, for, alienating herself from the matrimonial company of the respondent herein besides with a statutory injunction being cast therein upon her, to, also prove qua her prolonged stay with her parents, emanating upon consent in respect thereto purveyed by the respondent herein. He further submits that with the aforesaid apposite imperative statutory provisions, remaining unproved, thereupon the application cast under the provisions of Section 125 Cr.P.C., warranted dismissal. However, there occurs a clear display in the testimony of the applicant, of, hers during the period of her stay at her matrimonial home, hence being subjected to physical cruelty by the respondent herein. The aforesaid marital misdemeanors ascribed by her vis-a-vis the respondent herein, were concerted to be repulsed of their efficacy, by the counsel for the latter, during the course his holding the applicant to cross-examination, yet therein there occur(s) no eruption of any evidence in denial thereto. Even though, merely for the applicant besides her witnesses' in their respective cross-examinations' emphatically denying the relevant ascriptions made vis-à-vis the respondent, by each in their respective examinations-in-chief yet thereupon their apt ascriptions' vis-à-vis the respondent as echoed by each made in their respective examinations-in-chief, would not perse constitute sufficient proof, in respect of the ingredients occurring in sub-section (5) of Section 125 Cr.P.C. Nonetheless predominantly, the fact of her(s) departing from her matrimonial home to her parental home also her prolonged stay at her parental home, may, constrain an inference especially with the respondent, not, making arduous efforts to retrieve her therefrom vis-à-vis her matrimonial home, of, his thereupon subjecting her to mental cruelty besides hers hence holding a sufficient cause, for not, resuming cohabitation with the respondent herein also an inference is bolstered, of the stay of the petitioner herein at her parental home, hence emanating from an implied/tacit consent, in respect thereto being meted to her by her husband. Thereupon the ingredients spelt in sub-section (5) of Section 125 Cr.P.C. beget satiation. Even though, the respondent in his cross-examination has suo moto articulated qua his on 5-6 occasions visiting the petitioner herein at her parental home, for beseeching her to rejoin his company but his efforts failing besides therein he has suo moto echoed, of, the petitioner herein spurning his conciliatory proposal(s) spurnings whereof being reported by him to the Panchayat concerned, yet the aforesaid suo moto deposition(s) occurring in the cross-examination of the respondent herein, are vague and nebulous in respect of specificity(s) in timing of the days, month and years, whereat the respondent herein, hence visited the petitioner herein at her parental home. Also his, not, disclosing the names of persons who accompanied him to the parental home of the petitioner herein besides his not adducing evidence in respect of

his reporting to the panchayat concerned, the purported spurnings by his wife of his conciliatory offers, thereupon beget an inference of the respondent herein miserably failing to discharge the onus, of, proving, of his during the prolonged stay of his spouse at her parental home hence, making arduous, tearing efforts, for retrieving her therefrom vis-a-vis her matrimonial home. Corollary whereof is hence of his encumbering the psyche of his wife with excruciating pain besides his purveying an implied consent to her, for hers staying at her parental home. Consequently, hence the statutory mandate cast under sub-section (5) of Section 125 Cr.P.C., begets satiation.

4. In aftermath the rearing of the aforesaid inference(s) begets a firm concomitant derivative of his wife holding a sufficient cause, to, alienate herself from the company of the respondent herein, conspicuously with her husband besetting her with evident mental cruelty, arising from his gross apathy vis-à-vis her prolonged stay at her parental home. Consequently, the revision petition is allowed. The judgment recorded by the learned Additional Sessions Judge-III Kangra at Dharmshala is set aside whereas, the judgment rendered by the learned Magistrate concerned is affirmed. Pending application(s) also stand disposed of.

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

Charan Dass .... Petitioner.
Versus
Ram Saroop .... Respondent.

CMPMO No.330 of 2016
Date of Decision: September 8, 2017

Code of Civil Procedure, 1908- Order 23 Rule 1- An application seeking permission to withdraw the suit with liberty to file a fresh suit was filed, which was dismissed by the Trial Court- held that the reason for withdrawal was non-filing of the site plan – it is not a defect, which cannot be cured – multiplicity of litigation has to be avoided – the permission was rightly declined by the Court- petition dismissed. (Para-2 to 6)

Case referred:
V. Rajendran and another v. Annasamy Pandian (Dead) through Legal Representatives Iarthyayani Natchiar, (2017) 5 SCC 63

For the Petitioner : Mr. Dheeraj Vashisht, Advocate.
For the Respondent : Mr. Bhuvnesh Sharma, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Petitioner-plaintiff Charan Dass (hereinafter referred to as plaintiff) filed an application, seeking permission to withdraw the suit, with liberty to file afresh, pointing out the only defect of not having filed the site plan. Such application, filed under Order 23 Rule 1, read with Section 151 of the Code of Civil Procedure, stands dismissed by the Civil Judge (Senior Divison), Una, District Una, Himachal Pradesh, in terms of impugned order dated 7.6.2016.

2. Having heard learned counsel for the parties, as also perused the record, this Court, in exercise of its power, under Article 227 of the Constitution of India, finds no ground to interfere. The order cannot be said to be perverse, erroneous or illegal, in any manner.

3. The Apex Court, in *V. Rajendran and another v. Annasamy Pandian (Dead) through Legal Representatives Iarthyayani Natchiar,* (2017) 5 SCC 63, has observed as under:

> "9. .....As per Order XXIII Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order XXIII Rule 1 (3) (a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order XXIII Rule 1 (3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b) that is, existence of a "formal defect" or "sufficient grounds". The principle under Order XXIII Rule 1 (3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.
>
> 10. In K.S. Bhoopathy and Ors. vs. Kokila and Ors, 2000 5 SCC 458, it has been held that it is the duty of the Court to be satisfied about the existence of "formal defect" or "sufficient grounds" before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the "formal defect" or "sufficient grounds", such right cannot be considered to be so absolute as to permit or encourage abuse of process of Court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order XXIII Rule 1(3) CPC, the Court must be satisfied about the "formal defect" or "sufficient grounds". "Formal defect" is a defect of form prescribed by the Rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, mis-joinder of parties, failure to disclose a cause of action etc. "Formal defect" must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.
>
> 11. In terms of Order XXIII Rule 1(3) (b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the word "sufficient grounds", there are two views: One view is that these grounds in clause (b) must be "ejusdem generis" with those in clause (a), that is, it must be of the same nature as the ground in clause (a) that is formal defect or at least analogous to them; and the other view was that the words "other sufficient grounds" in clause(b) should be read independent of the words a 'formal defect' and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with "formal defect" envisaged under clause (a) of Rule (1) sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b) that is "sufficient grounds".

4. Non-filing of site plan is not a defect, which cannot be cured. The Code of Civil Procedure does provide remedy to the plaintiff, which he has chosen not to take resort to. Multiplicity of litigation has to be avoided. Litigation these days is not cheap. It is time consuming. All these aspects have to be kept in mind. Plaintiff's request needs to be turned down also for the reason that no specific grounds stand furnished or explained. Plaintiff is not a rustic villager, not having access to justice delivery system. He had been constantly pursuing the matter and it is not a case of total ignorance, as a consequence of attending circumstances.

5. Having perused the material on record, and in view of the law laid down by the Apex Court in *V. Rajendran (supra),* Court is of the considered view that no interference is

warranted, more specifically when the order passed by the Court below cannot be said to be perverse, illegal or contrary to record.

6. Hence, the impugned order cannot be said to be unreasonable, illegal or perverse, warranting interference by this Court.

7. For all the aforesaid reasons, present petition, devoid of merit, is dismissed.

8. Any observation made hereinabove shall have no bearing whatsoever on the merits of the main case. Parties, through their learned counsel, are directed to appear before the Court below on 3.10.2017.

Petition stands disposed of, so also pending application(s), if any. Interim order dated 22.8.2016 stands vacated.

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

Ajay Kaundal .....Petitioner.
Versus
Santosh Kumar .....Respondent.

Cr. Revision No. 225 of 2016
Decided on : 11.9.2017

Negotiable Instruments Act, 1881- Section 138- Accused borrowed a sum of Rs. 1,70,000/- from the complainant for starting his business – he issued a cheque for Rs. 1,70,000/- for returning the amount- cheque was dishonoured with endorsement 'account closed'- money was not paid despite the receipt of a valid notice of demand- accused was tried and convicted by the Trial Court- an appeal was filed, which was also dismissed- held in revision that the dishonour of the cheque is duly proved and there is a presumption that cheque was issued for consideration – plea taken by accused that chequebook was misplaced is an afterthought and not acceptable- notice was served upon the accused but the payment was not made by him- Court had rightly convicted the accused- appeal dismissed. (Para-4 to 6)

For the petitioner: Ms. Soma Thakur, Advocate.
For the respondent: Mr. Sanjeev Mankotia, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition is directed against the judgment of the learned Sessions Judge Shimla, Himachal Pradesh, rendered in Cr. Appeal No. 8-S/10 of 2014 whereby he affirmed the judgment of 30.11.2013, rendered by the learned Judicial Magistrate 1st Class, Court No. (3), Shimla, District Shimla, H.P., in Case No. 621-3 of 2012, convicting and sentencing the accused/petitioner for his committing offences punishable under Section 138 of the Negotiable Instruments Act.

2. The facts of the case are that the petitioner/accused borrowed the amount of Rs. 1,70,000/- from the complainant/respondent herein for starting his new business. On the demand of complainant for said amount, the accused issued cheque bearing No. 009512 dated 10.5.2012 amounting to Rs. 1,70,000/- drawn on an account maintained by him with Central bank of India, Shimla in favour of the complainant. The complainant presented the said cheque for encashment in his bank but the same was dishonoured due to the reason "Account Closed" by

the accused on 7.6.2012 for arranging the cheque amount within 15 days of the receipt of notice but the accused did not make the payment of cheque amount despite receipt of notice. Upon finding a prima facie case, notice of accusation under Section 138 of the Act has been put and contents of the same have been read over and explained to the accused on 28.5.2013. The accused did not plead guilty on the same and claimed trial.

3. Both the learned courts below have concurrently sentenced the accused/petitioner for his committing an offence punishable under Section 138 of the Negotiable Instruments Act, being aggrieved therefrom, the petitioner/convict has instituted the instant petition before this Court, for his making an effort to beget reversal of the impugned judgments.

4. In pursuance to issuance of cheque borne in Ext. CW1/A, it stood presented by its drawee before the Central Bank of India, however, on its being presented before the Central Bank of India, the latter was constrained to dishonor, it by assigning the reason of the account(s) of the petitioner/accused being closed. The aforesaid reason assigned by the bank concerned in its dishonouring negotiable instrument borne in Ext. CW1/A, is, comprised in Ext. CW1/B. Subsequent thereto, statutory notice borne in Ext. CW1/C, was issued, and evidently served upon the petitioner/convict. However, it did not beget a positive response from the petitioner/convict. Consequently, the respondent/complainant was constrained to institute a complaint, cast, under the provisions of Section 138 of the Negotiable Instruments Act, before the learned Magistrate concerned.

5. The learned counsel for the petitioner/convict has contended that there no evident financial transaction inter-se the petitioner/ convict and the respondent/complainant, hence there was no occasion for the negotiable instrument borne in Ext. CW1/A being issued vis-à-vis the respondent/complainant. However, the aforesaid submission deserves rejection, as it stands anviled upon the factum, of the relevant cheque book wherein it occurred, being misplaced, whereupon obviously the relevant cheque leaf also borne therein, hence coming into the hands of the respondent/ complainant, whereafter its standing misused by him. However, the aforesaid contention, is entirely an afterthought, given its remaining espoused by the petitioner/convict only during the course of his counsel cross-examining the claimants' witnesses and not prior thereto. The further reason for rejecting the aforesaid submission, is embodied in the trite factum of the cheque book wherein the dishonoured negotiable instrument also occurred, standing, as evident on a reading of the cross-examination of CWs, misplaced the year 2012, whereafter an FIR stood lodged before the police station concerned, yet, the effect of any FIR being lodged in respect of any cheque book being misplaced in the year 2012, is of no relevance in respect of loss of the cheque book wherein the dishonoured negotiable instrument also stood borne, given the loss of the relevant cheque book occurring remotely thereafter, more precisely, in the year 2012, in respect of loss whereof no FIR is lodged. Since the petitioner/convict, did not, in respect of the purported loss of the relevant cheque book embodying therein the dishonoured negotiable instrument, make in contemporanity thereof any apposite complaint in the year 2012, besides with the petitioner/convict, not, positively responding to the statutory notice comprised in Ext. CW1/C, despite evident service thereof being effected upon him nor his in his reply propagating all the aforesaid denial(s), thereupon his nowat espousal of Ext. CW1/A being misplaced besides its being misused by the complainant, is rendered construable to be an afterthought.

6. In view of the above, I find no merit in the instant revision petition, which is accordingly dismissed. The judgments of both the courts below are affirmed. Pending application(s), if any, also stand disposed of.

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

Aneep Kumar .....Appellant.
Versus
State ofHimachal Pradesh .....Respondent.

Cr. Appeal No. 99 of 2010
Reserved on: 04.09.2017
Decided on: 11.09.2017

Indian Penal Code, 1860- Section 363, 366-A and 376- Prosecutrix was found missing and it was found on inquiry that accused had taken her with the assurance that he would marry her- police was informed - the prosecutrix was recovered from the house of the accused- accused was tried and convicted by the Trial Court- held in appeal that date of birth of the prosecutrix was not proved satisfactorily- panchayat secretary admitted that certificate was not prepared as per law- same is not connected to the prosecutrix- prosecutrix admitted that she was more than 16 years of age at the time of incident – ossification test shows that age of the prosecutrix was 15½ years at the time of incident - three years margin has to be given to the age determined by the ossification test - testimony of the prosecutrix is suspicious- Trial Court had wrongly convicted the accused- appeal allowed and judgment of the Trial Court set aside- accused acquitted.

(Para-8 to 28)

Cases referred:
Jnish Lal Sha vs. State of Bihar, AIR 2003 Supreme Court 2081
Alamelu and another vs. State, (2011) 2 SCC 385
Mahadeo vs. State of Maharashtra and another, (2013) 14 SCC 637

For the appellant: Mr. Sunil Chauhan, Advocate.
For the respondent: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG and Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal has been preferred by the appellant/accused/convict (hereinafter referred to as "the accused") laying challenge to judgment, dated 21.04.2010, passed by learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, Camp at Reckong Peo, H.P., in Sessions Trial No. 7 of 2007, whereby he was convicted for the commission of the offence punishable under Sections 363, 366A and 376 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. Succinctly, the facts giving rise to the present appeal, as per the prosecution, are that on 01.09.2017 complainant, Shri Nek Ram (father of the prosecutrix) alongwith his brother, Gulab Chand and one Vijay Chand reported that he is resident of village Grange and works as Chowkidar in Government Senior Secondary School, Nichar. As per the complainant, his daughter, prosecutrix (name withheld), aged 15 years, who was studying in 7th standard left the school for about a month. On 28.08.2007, all the family members, after taking dinner, slept and the prosecutrix also slept in her separate room. On subsequent morning, the complainant found his daughter missing and despite best efforts she could not be traced. On 01.09.2007 the complainant came to know that friend of one Madan Lal son of Ram Sukh, resident of Rohru area on 28.08.2007 took the prosecutrix with him after alluring her that he will marry her. On the basis of the complaint, so made by the complainant, police machinery was set into motion and during the course of investigation the police found the prosecutrix in the house of the accused at village Batwari (Rohru), thus the accused was arrested on 03.09.2007 and prosecutrix was

handed over to the complainant. The prosecutrix refused to get herself medically examined. The accused was medically examined and subsequently the prosecutrix also assented for her medical examination. As per her medical examination, possibility of sexual intercourse was not ruled out by the doctor. On the basis of ossification test, age of the prosecutrix was opined between 15 to 15½ years. After thoroughly investigating the matter, the police found involvement of the accused for the commission of the offence under Sections 363, 366A and 376 IPC, thus *challan* was prepared and presented in the Court.

3. The prosecution, in order to prove its case, examined as many as seventeen witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he denied the prosecution case and claimed innocence, however, the accused did not examine any defence witness.

4. The learned Trial Court, vide impugned judgment dated 21.04.2010, convicted the accused for the offence punishable under Sections 363, 366A and 376 IPC and sentenced him under Section 363 IPC to undergo rigorous imprisonment of five years and fine of `5,000/- and in default to undergo one year's rigorous imprisonment. The accused was also sentenced under Section 366A to undergo rigorous imprisonment of five years and fine of `5,000/- and in default to undergo one year's rigorous imprisonment and under Section 376 IPC he was sentenced to undergo seven years' rigorous imprisonment and fine of `10,000/- and in default to undergo one year's rigorous imprisonment. All the sentences were ordered to run concurrently and the fine amount, if realized, was ordered to be paid to the prosecutrix, feeling aggrieved the accused/convict has preferred the present appeal.

5. The learned counsel for the appellant has argued that the Court below, without appreciating the evidence correctly, has convicted the accused. He has further argued that the learned Court below has also failed to take into consideration the fact that as per the prosecutrix her age was more than 17 years on the date of occurrence and also that when she left for Rohru her cousin brother was accompanying her. As per the prosecution story, the medical examination of the prosecutrix nowhere reflects that she was subjected to sexual assault, further that the medical was conducted after a month, as initially the prosecutrix refused to undergo the medical examination. Even as per the radiological examination the bony age of the prosecutrix was 15½ years so there is possibility of three years' plus-minus. Thus, the age of the prosecutrix could very well be 18½ at the time of the occurrence. He has argued that the learned Trial Court ignored all the above vital aspects of the case and wrongly convicted the accused, who is a young man and was only 23 years of age at the time of the incidence. He has argued that the judgment may be set aside and the accused may be acquitted. He has placed reliance on the following judicial pronouncements:

1. Jinish Lal Sha vs. State of Bihar, AiR 2003 Supreme Court 2081; &

2. Alamelu and another vs. State, (2011) 2 SCC 385.

Conversely, Mr. Rajat Chauhan, Law Officer, has argued that it has come on record that the age of the prosecutrix was 15½ years on the day of the occurrence, so the judgment passed by the learned Trial Court is as per the law. Further argued that the record also reflects that accused had enticed away the prosecutrix to accompany him to Rohru from his native place. He has prayed that the findings of conviction, as recorded by the learned Trial Court, need no interference and the appeal of the appellant be dismissed. He has relied upon judgment of Hon'ble Supreme Court rendered in ***Mahadeo vs. State of Maharashtra and another, (2013) 14 SCC 637,*** to support his contentions.

6. In rebuttal, the learned counsel for the appellant has argued that the accused is innocent and he has been falsely implicated in the case and one reason is his poverty, the judgment of conviction which suffers from major lacunae, may be set aside and the accused may be acquitted.

7. In order to appreciate the rival contentions of the parties, this Court has gone through the record carefully and in detail.

8. The complainant, Shri Nek Ram (PW-1), father of the prosecutrix, while appearing in the witness-box deposed that he is working as Chowkidar in Government Senior Secondary School Nichar. He has two children, viz., elder child Pawan and younger is the prosecutrix. As per this witness, the prosecutrix was 15 years of age in August, 2007. On 28.08.2007 when he woke up in the morning, he did not find the prosecutrix in the house and she went missing. He alongwith others searched the prosecutrix, but could not found her and on 01.09.2007 he came to know that a boy of Rohru, who was on visiting terms with nearby house of Madan Lal, enticed away his daughter on the intervening night of 28.08.2007-29.08.2007, so he reported the matter to the police and the police found his daughter and handed over her custody to him. This witness, in his cross-examination, has deposed that he did not search his daughter between 28.08.2007 to 31.08.2007, as he was expecting that she would return on her own. He has further deposed that 2-3 days prior to 28.08.2007, when he took the local deity to his house, he saw the accused there. The accused was working in connection with the visit of the deity and during that time his cousin, Madan, was also present in his house. He has further deposed that he was informed by the children of Madan that accused had enticed the prosecutrix, but it is not so recorded in the FIR, Ex. PW-1/A. He denied the suggestion that he refused for medical examination of the prosecution. However, volunteered that at that time the prosecutrix was under menstrual cycle and on the third day she was taken to MGMSC, Mhaneri for her medical examination and on that day also she was under menstrual cycle. He feigned ignorance whether in his presence the police seized the clothes of the prosecutrix or not. He has further deposed that he had married his son when he was 19 years of age and the prosecutrix is three years younger to his son. This witness did not clearly state the date of birth of the prosecutrix and he deposed that at the time of the incidence the prosecutrix was running in her fifteenth year. He could not state the age of the prosecutrix when she was admitted in the school. As per this witness, the prosecutrix left the school a year prior to 28.08.2007 and he has also informed this fact to the police, however, in FIR, Ex. PW-1/A, it is not so recorded. When inquired from the prosecutrix, she divulged that she is not ready to reside at Rohru and she did not complain against the accused. As per this witness, his wife informed him that the prosecutrix was taken by accused persons in a light vehicle, but he could not tell that the accused was accompanied by whom. Later on, he deposed that son of Madan was accompanying the accused on the day of occurrence.

9. PW-2, Shri Madan Lal, deposed that he has flock of sheep and goats and his son had been taking the flock to Rohru area. As per this witness, accused was friend of his son and he visited his house about fifteen days prior to 28.08.2007, but he was not there, as he had gone with his flock to higher hills. Later on, he came to know that accused enticed away the prosecutrix. The complainant (PW-1) is his first cousin. He also accompanied the police while searching the prosecutrix. He denied that the prosecutrix was recovered in his presence by the police. This witness was declared hostile, as he has resiled from his previous statement and was subjected to exhaustive cross-examination. He, in his cross-examination, deposed that the accused had been on visiting terms to his house and he used to provide him food, boarding and lodging, whenever he use to stay in his house. He signed document, Ex. PW-2/A (recovery memo) at Nichar. He did not state before the police that accused enticed away the prosecutrix. He has further deposed that in his presence no one signed Ex. PW-2/A.

10. PW-3, Shri Krishan Gopal, Secretary, Gram Panchayat Nichar, deposed that birth certificate, Ex. PW-3/A, is correct, as per the original record. As per this witness, the record shows that the prosecutrix was born on 21.02.1992. This witness, in his cross-examination, has deposed that initially the name of the prosecutrix was recorded as *'Guddi'* and he had incorporated her name (name withheld) when he issued the birth certificate, Ex.PW-3/A. As per this witness, on the asking of the police he traced the name of the prosecutrix from column of parentage of the child born and also with the help of *pariwar* register.

11. The prosecutrix was examined as PW-4 and she has deposed that her date of birth is 21.02.1992. House of her uncle, Shri Madan, is close to their house in village Grange. She has further deposed that she is well acquainted with the son of Madan and accused used to

come to the house of Madan. On 28.04.2007, she was sleeping in the upper storey and during the night when she came out to attend call of nature, she found the accused hiding near to their house. The accused caught hold of her and asked not to raise alarm otherwise he would kill her. The accused took her to the nearby place where a vehicle was parked and he took her to his house in Tehsil Rohru. As per the prosecutrix, she was recovered by the police from the house of the accused after four-five days. The accused also sexually assaulted her two-three times against her will. The prosecutrix has further stated that initially, she refused for her medical examination at CHC Nichar. The prosecutrix, in her cross-examination, deposed that when her elder brother was married his age was eighteen years and he was married two-three years back. She further deposed that at that time, she was seventeen years of age. She left the school a month prior to the incident and she met the accused once before the incidence. As per the prosecutrix, they have toilet in their house. She did not raise any hue and cry when she was being taken by the accused, as she was threatened by the accused. She has deposed that she informed the police that the accused had threatened to kill her, however, in her statement recorded under Section 161 Cr.P.C., it is not so recorded. She refused for her medical examination, as she was afraid of it. Later on, she agreed for her medical examination. She further deposed that there were four-five persons in the vehicle, viz., accused, his brother and son of Madan, however, again, it is not so recorded in her statement under Section 161 Cr.P.C. In Rohru, she did not complain about the accused to anyone.

12. PW-5, Shri Milap Chand (uncle of the prosecutrix), deposed that when the prosecutrix went missing, the complainant (PW-1) reported the matter to police and he accompanied the police to Rohru. In his presence, the prosecutrix was recovered from the house of the accused and the police arrested the accused. The accused made disclosure statement, Ex. PW-5/A, and he had also signed the same. Demarcation report is Ex. PW-5/B. This witness, in his cross-examination, deposed that he did not visit the house of the accused and also not enquired from the prosecutrix on their return journey. The prosecutrix did not complain to him against the accused. This witness could not tell, even by guess, the date of birth or the age of the prosecutrix and her brother. As per this witness, the accused pointed out the location of the house of the complainant (PW-1). Lastly, this witness unequivocally deposed that he could not tell whether the prosecutrix accompanied the accused on her own.

13. PW-6, Shri Ravinder Kumar, was associated in the investigation by the police. As per this witness, the accused disclosed and identified the place from where he took the prosecutrix and one Nehar Singh was also present at that time. In his presence, disclosure statement of the accused, Ex. PW-6/A, was recorded, which bears his signatures encircled “A” and Nehar Singh also signed the same. This witness was declared hostile and subjected to exhaustive cross-examination. He deposed that disclosure statement, Ex. PW-6/A, was made on 05.09.2007 and as per this witness, it is correct that he stated the date to be 29.08.2007, as the same was disclosed to him by the accused.

14. PW-7, HC Mohinder Singh, deposed that on 03.09.2007, LHC Daulat Ram deposited with him five sealed samples with specimen impression of the seal. On 08.09.2007, HC Anil Kumar deposited three more sealed parcels with specimen impression of seal. On 25.09.2007 LC Santosh Kumar deposited a sealed parcel alongwith specimen impression of seal. On 17.09.2007, through RC No. 186/2007, he handed over three sealed parcels to Constable Ashwani Kumar, which were to be deposited in SFSL. Receipt qua deposit of the same was handed over to him. On 24.09.2007, five sealed parcels alongwith specimen impression of seal vide RC No. 193/2007 were handed over to Constable Ashwani Kumar and on 02.10.2007, a sealed parcel, vide RC No. 198/2007, was handed over to Constable Kunga Palzor. Receipts after deposit of the same were handed over to him. As per this witness, the case property remained intact, under his custody.

15. PW-8, Constable Kunga Palzor, and PW-9, Constable Ashwani Kumar, deposed qua the deposit of the samples in SFSL and stated that under their custody, the parcels remained

intact. As the role of these witnesses is limited qua deposit of the case property in the SFSL, so, no more comprehensive discussion of their testimonies is required.

16. PW-10, Dr. Bharti Azad, medically examined the prosecutrix on application, Ex. PW-10/B, moved by the police. As per this witness, the prosecutrix was unwilling for her medical examination and she obtained the signatures of the prosecutrix to this effect. This witness, in her cross-examination, has denied that she thoroughly examined the prosecutrix and did not notice any injury on her person. She deposed that she prepared medico legal certificate, Ex. PW-10/C, stating that the prosecutrix is unwilling for her medical examination. PW-11, Dr. Anupam Gupta, deposed that on 24.09.2007 police moved application, Ex. PW-11/A, requesting for medical examination of the prosecutrix with the alleged history of sexual assault on 29.08.2007. As per this witness, he did not notice any struggle marks on the person of the prosecutrix. Slide of vaginal smear could not be done, as the prosecutrix, at the time of her medical examination, was menstruating. He handed over sealed sample of pubic hair, sealed letter to Chemical Examiner with seal sample, i.e., having sample seal inside, X-ray forms of the prosecutrix and original copy of medico legal certificate. This witness, after receipt of the report from the Chemical Examiner, gave final opinion. PW-11 issued medico legal certificate, Ex. PW-11/C, and gave final opinion is Ex. PW-11/D. This witness, in his cross-examination, has denied that secondary sexual characters, as observed by him, are suggestive of the fact that the prosecutrix was 18 years of age.

17. PW-12, Dr. Ashwani Kumar, deposed that the prosecutrix was referred to him for determining her bony age. As per this witness, under his supervision X-ray examination of the prosecutrix was conducted. He has further deposed that acromion of the prosecutrix was found fused and generally it fuses at the age of 15-16 years. Distal tibia of the prosecutrix was found unfused and generally it fuses at the age of 13¾-15½. He opined that as per the skigrams the age of the prosecutrix was between 15-15½ years. X-ray forms are Ex. PW-12/A and Ex.PW-12/B, which bears his signatures encircled in portion 'A'. This witness, in his cross-examination, has deposed that the age of fusion of spiphysis is hereditary, due to climatic conditions and diet. He admitted that fusion of spiphysis may vary from person to person and depends upon living. He further admitted that as per Modi the fusion of acromion takes place at the age of seventeen years. He denied that his opinion qua the age differs between 2-3 years.

18. PW-13, Head Constable Anil Katoch, deposed that on 03.09.2007 he accompanied SHO Ravinder Nath Sood for tracing the accused. They found the accused and the prosecutrix in the house of the accused at Chirgaon in village Pekha. Shri Milap Chand (uncle of the prosecutrix) identified the prosecutrix and she was entrusted in the custody of said Milap Chand. He prepared spot map, Ex.PW-13/A. On 08.09.2007 the accused identified the room where he had kept the prosecutrix. A jean pant, a bed sheet, a *salwar* and a shirt were given by the accused, which were taken into possession, vide seizure memo, Ex. PW-13/B. He prepared the spot map, Ex. PW-13/C, with regard to the recovery of the clothes. This witness, in his cross-examination, has deposed that the house of the accused was identified by one Madan. He did not associate any local persons to identify the house of the accused, as no one assented. As per this witness, there are approximately fifty houses in the village of the accused, but the house of the accused is at a solitary place.

19. PW-14, Dr. Atal Sood, deposed that on 03.09.2007 on application, Ex. PW-14/A, of the police, he medically examined the accused and on examination he found no external injury on his person. He issued medico legal certificate, Ex. PW-14/B, which bears his signatures. As per this witness, there was nothing suggestive that the accused is impotent. PW-15, ASI Chita Ram, deposed that after completion of the investigation, he prepared the final report. Report of SFSL is Ex. PW-15/A. PW-16, Shri Pramod Kumar, deposed that he was associated by the police in the investigation and in his presence police took into possession a bed sheet, jean pant, salwar and a shirt, which are Ex. P-1 to Ex. P-4, vide seizure memo, Ex. PW-13/B, which bears his signatures, encircled in portion 'A'. This witness, in his cross-examination, has deposed that

police had come to Panchayat Bhawan, Gram Panchayat, Deuri Maila, and he was also present there at that time. In his presence no one had delivered anything to the police.

20. PW-17, S.I. Ravinder Nath (Investigating Officer), deposed that on 01.09.2007 FIR, Ex. PW-1/A, was registered and he started investigation. He prepared spot maps, Ex. PW-17/A and Ex. PW-17/B. He, vide memorandum, Ex. PW-17/C, arrested the accused. He also obtained date of birth certificate of the prosecutrix, Ex. PW-3/A, by moving application, Ex. PW-17/D. The accused divulged to him that he took the prosecutrix and he also got identified his house vide memorandum, Ex. PW-5/B. The accused, vide memorandum, Ex. PW-6/A, got identified the place wherefrom he took the prosecutrix. The prosecutrix was medically examined through application, Ex. PW-10/B. Likewise, by moving application, Ex. PW-14/A, the accused was medically examined and his medico legal certificate, Ex. PW-14/B was procured. He recorded the statements of the witnesses under Section 161 Cr.P.C. Statements of witnesses, Shri Madan and Shri Ravinder Kumar, are Ex. PW-17/E and Ex. PW-17/F, respectively. This witness, in his cross-examination, has deposed that he did not obtain copy of *pariwar* register. As per this witness, the prosecutrix did not disclose to him that accused was accompanied with five more persons.

21. Complainant, Shri Nek Ram (PW-1) has categorically stated that the age of his daughter was 15 years at the time of the incidence, but he has admitted that he had married his son, who was 19 years of age at the time of his marriage, a year before the occurrence. He has further deposed that accused had come to their house with the local deity. He has admitted that the prosecutrix had gone to Rohru alongwith her cousin brother Nand Lal, who is son of his maternal brother. It has also come on record that 5-6 persons were sitting in the vehicle with the prosecutrix, who was accompanied by her cousin brother, Shri Nand Lal, and they went to Rohru. It has also come on record that though the prosecutrix had left her home on 28.08.2007, but no report qua her missing was made for three days, as the family of the prosecutrix was expecting her return on her own. Thus, it can be safely held that the prosecutrix had gone from her house on her own and not because of the fact that she was enticed away by the accused. This fact is further fortified by the statement of the prosecutrix (PW-4). The prosecutrix, in her cross-examination, has stated that at the time of marriage of her brother, she was 17 years of age and if it is taken into consideration, then in any case, she was more than 16 years of age at the time of the occurrence.

22. This Court needs to delve into the statement of Dr. Bharti Azad (PW-10), which is very vital, for ascertaining whether the prosecutrix was subjected to sexual intercourse or not. This witness has deposed that on 04.09.2007 the prosecutrix has refused to undergo medical/physical examination, when she was brought for medical examination. She has further deposed that such statement of the prosecutrix was recorded in presence of Lady Constable, Santosh Kumari, and Ward Sister, Vidya Devi. This demonstrates that the prosecutrix was not sexually assaulted, as had it been so, she would have definitely opted for her medical examination. At the same point of time, PW-11, Dr. Anupam Gupta, on 24.09.2007 medically examined the prosecutrix, i.e., after a month of the occurrence. Medico legal certificate, Ex.PW-11/C, issued by this witness, reflects that vagina admitted one finger with difficulty and hymen was torn with tear present on 3 O'clock and 9 O'clock position. Thus, the statement of this witness also castes a serious doubt with regard to veracity of the prosecution story that the accused has committed sexual intercourse with the prosecutrix. On the other hand, Shri Nand Lal, cousin brother of the prosecutrix, who accompanied the prosecutrix upto Rohru, was not examined by the prosecution and the reason for his non-examination goes unexplained. There is nothing on record whether for such a long distance, viz., from the house of the prosecutrix to Rohru, they stopped at any place. Likewise, there is nothing on record which demonstrates that en route the prosecutrix raised any hue and cry, especially when she was allegedly enticed away by the accused. As far as the age of the prosecutrix is concerned, there is no conclusive evidence to hold that she was less than 18 years of age and further there is no evidence on record to demonstrate that the prosecutrix was enticed away by the accused.

23. The date of birth certificate of the prosecutrix, Ex. PW-3/A, has been issued by Shri Krishan Gopal (PW-3), Secretary, Gram Panchayat, Nichar, and as per his statement he prepared the said certificate on the basis of *pariwar* register, which is not as per the procedure. The learned Court below has failed to take into consideration the fact that date of birth certificate, so produced by the prosecution is inadmissible. Further PW-3, has unequivocally deposed that name of the prosecutrix was earlier recorded as Guddi. Thus, the date of birth certificate, Ex. PW-3/A, which is engulfed with suspicions, cannot be made a ground for convicting the accused.

24. The learned counsel for the appellant has placed reliance on a judgment of Hon'ble Supreme Court rendered in ***Jnish Lal Sha vs. State of Bihar, AIR 2003 Supreme Court 2081,*** wherein the Hon'ble Supreme Court observed that physique of girl, as explained by the doctor, indicated probability of girl being above 18 years of age. Evidence of the girl in such a backdrop appeared wholly unreliable, when she deposed that she was only 14 years of age. The Hon'ble Supreme Court held that charge under Section 366-A has failed against the accused on the premise that the prosecution has not been able to establish that the girl was less than 18 years of age on the date of occurrence. Apt para of the judgment (supra) is extracted hereunder for ready reference:

> ***"5. PW-10 the doctor in his evidence has stated that PW-1's X-ray photograph showed partial epiphy seal fusion of iliac crest. In her opinion, PW-1 appeared to be 17 years old which opinion of the Dr. is from the very language used by her shows it to be approximate. The physique of PW-1 as explained by PW-10 also indicates the probability of PW-1 being above the age of 18 years. In this background if we examine the evidence of PWs. 6 and 10 it is clear that evidence of PW-1 is wholly unreliable when she states that she was only about 14 years old. Even though PW-10 Dr. stated that PW-1 appeared to be 17 years old cannot be held that this evidence is conclusive enough to come to the conclusion that PW-1 was really below 18 years on the date of incidence, in view of positive statements made by PW-6 the father. We have already referred to the evidence of the father, according to whose evidence PW-1 was 19 years of age when she left the house of the father. In such situation, we think it not safe to come to the conclusion that PW-1 was less than 18 years of age on the date when she left the house of her father. While discussing this part of the prosecution case, the Trial Court in its judgment has not considered the evidence of PW-6 the father at all. It merely relied upon evidence of PW-10 accepting the same on its face value, without discussing the other material that was available on record. Even the High Court in this regard in its judgment merely stated Dr. who examined the prosecutrix found her age to be 17 years. . . . . ." the High Court has not independently given any findings either accepting this evidence or not. It has also not discussed the evidence of PW-6 in regard to the age of PW-1. In this background for the reasons already stated hereinabove we think that the prosecution has failed to establish that PW-1 was less than 18 years of age as on the date of incidence. If that be so, charge under S. 366-A of which the appellant was found guilty by both the Courts below shall fail. The learned counsel for the State, however, contended that if the charge under S. 366-A should fail then, the appellant is liable to be convicted under S. 366 for kidnapping, abducting or inducing a woman to compel her to marry. He has referred to the evidence of PW-1 in this regard and contends that even though there is no specific charge under S. 366 still on the material available on record a conviction under S. 366 could be based and no prejudice would be caused to the appellant. But then, we will have to notice that even to establish the charge under S. 366, I.P.C., there should be acceptable evidence to show that either PW-1 was***

compelled to marry the appellant against her will and/or was forced to or induced to intercourse against her will. This would therefore, require the prosecution to prove that there was some such undue force on the PW-1 wither to marry the appellant or to have intercourse with him. Therefore, it becomes necessary for us to examine the prosecution case whether there was a threat or whether there was consent as contended by the defence. While we consider this question of existence of consent or absence of it we may also consider the charge under Section 376, I.P.C. of which the appellant is found guilty by the Courts below because one of the ingredients necessary for establishing such a charge in regard to a girl over the age of 16 is the presence or otherwise of consent. Therefore, both for the purpose of Section 366 and for the purpose of S. 376, I.P.C., there should be material to establish that either the alleged marriage or the intercourse has taken place without the consent of PW-1 if she is above the age of 18 years or 16 years as the case may be."

The judgment (supra) on all fours is applicable to the facts of the present case.

25. The learned counsel for the appellant has also placed reliance on another pronouncement of Hon'ble Supreme Court in ***Alamelu and another vs. State, (2011) 2 SCC 385.*** Apposite paras of the judgment (supra) are extracted hereunder for ready reference:

"45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age.

46. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in the case of Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors., 1982 2 SCC 538, In the aforesaid judgment, it is observed as follows:-

> ***"9. .....However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."***

47. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.

48. We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In

this context, it would be appropriate to notice the observations made by this Court in the case of Ravinder Singh Gorkhi Vs. State of U.P., 2006 5 SCC 584 held as follows:-

> ***"38. The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted."(emphasis supplied)***
>
> ***49. In such circumstances, we are constrained to hold that the High Court without examining the factual and legal issues has unnecessarily rushed to the conclusion that the girl was a minor at the time of the alleged abduction. There is no satisfactory evidence to indicate that she was a minor."***

Again, the judgment (supra), as relied upon by the learned counsel for the appellant, is fully applicable to the facts of the present case and the benefit of the same can safely be extended to the appellant.

26. On the other hand, the Law Officer has placed reliance on a judgment of Hon'ble Supreme Court rendered in ***Mahadeo vs. State of Maharashtra and another, (2013) 14 SCC 637,*** wherein it has been held as under:

> ***"13. In the light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the prosecutrix has been clearly noted as 20-5-1990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primacy School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20-5-1990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any good grounds to interfere with the same."***

However, the judgment (supra) is not applicable to the facts of the present case, as in the case in hand the only available proof qua the date of birth of the prosecutrix is Ex. PW-3/A, but even as per PW-3, Shri Krishan Gopal, Panchayat Secretary, Gram Panchayat, Nichar, the certificate had not been prepared as per the law and more over there is nothing on record which unambiguously establishes that the same relates to the prosecutrix. On the other hand, the prosecutrix herself, in her cross-examination, has deposed, while appearing in the Court as PW-4, that she was more

than 16 years of age at the time of the alleged incidence. Further, the ossification test shows that the age of the prosecutrix was 15½ years at the time of the incidence, so applying the principle of plus three it can safely be taken as 18 years, especially when Modi's Medical Jurisprudence and Toxicology says that plus three can be given in normal circumstances, considering extreme climatic conditions, viz., place of living and other circumstances. In the case in hand, the prosecutrix has grown up in extreme climatic conditions and the available record shows that she was more than 15½ years of age at the time of the incidence, thus applying the well accepted method of Modi's Medical Jurisprudence and Toxicology her age can be more than 18 years. Thus, the prosecution has failed to establish that at the time of the incidence the prosecutrix was below 18 years of age. Even otherwise also, the prosecution has failed to prove that the prosecutrix was enticed away by the accused, as the best witness to this effect would have been the cousin brother of the prosecutrix, who as per the story of the prosecution, accompanied the prosecutrix to Rohru, but for the reasons best known to the prosecution, he was not examined.

27. PW-2, Shri Madan Lal, who is one of the material witness, has not supported the prosecution story and nothing favourable to the prosecution has come despite his exhaustive cross-examination. This, coupled with the fact that the prosecutrix while appearing as PW-4, has deposed that she has gone outside during the night to answer the call of nature and the accused took her away, but it has come on record that there is a toilet in the house of the prosecutrix. Thus, it can be safely held that statements of prosecutrix (PW-4) and her father (PW-1) are full of suspicions, as they later on made major improvements in their statements, when they were examined in the Court and on such shabby and slippery evidence the accused cannot be held guilty. Likewise, PW-5, Shri Milap Chand, did not at all support the prosecution story, as he, in his cross-examination, has stated that he could not tell whether the prosecutrix accompanied the accused on her own or not. In fact, as per the prosecution story, he is the person who has brought the prosecutrix from Rohru.

28. In ratiocination, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused and the findings of conviction against the accused/convict, as recorded by the learned Trial Court, are wrong and needs interference, as the same are without appreciating the evidence correctly and to its true perspective. Accordingly, the appeal is allowed and the judgment of conviction, passed by the learned Trial Court, is set aside. Resultantly, the accused is acquitted for the commission of the offence, as alleged by the prosecution.

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

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Pr. Commissioner of Income Tax .....Appellant

Versus

M/s. H. P. Bus Stand Management & Development Authority .....Respondent

ITA No. 26/2015 with ITAs No.27, 28 & 29 of 2015
Date of decision: September 11, 2017

Income Tax Act, 1961- Section 194- Development Authority was established for development and management of bus stands within the State of H.P. – a decision was taken to execute the work through the staff of H.R.T.C. – the payments were released by Development Authority in favour of H.R.T.C. – no tax was deducted from the amount paid by authority to the H.R.T.C. – assessment proceedings were initiated and the income of the assessee was computed by adding

the amount paid to the H.R.T.C. as a taxable income – an appeal was filed, which was allowed by the Commissioner - a further appeal filed before Income Tax Appellate Tribunal was dismissed – held that the arrangement between HRTC and Development Authority was a stop-gap arrangement whereby two entities agreed to share their resources by making an arrangement in which the salaries of staff and other expenditure incurred by HRTC was to be shared proportionately – no professional services were being rendered by either entity – the Authorities had a arrived at a correct conclusion- appeal dismissed. (Para-13 to 16)

For the appellant(s)	Mr. Vinay Kuthiala, Sr. Advocate with Ms.Vandana Kuthiala, Advocate in all the appeals
For the respondent(s)	M/s. Vishal Mohan, Sushant Keprate and Jai Vardhan Khurana, Advocates in all the appeals

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice. (Oral)

All the appeals stand admitted on following substantial questions of law:

i). Whether the Hon'ble ITAT has erred in law in holding that the payments made by the assessee i.e. H.P. Bus Stand Management Development Authority, Bus Stand, Shimla to HRTC are not liable for deduction of tax at source as per provisions of Chapter XVII of the I.T. Act, 1961?

ii). Whether the Hon'ble ITAT has erred in upholding the order of ld. CIT(A) deleting the addition made by AO u/s 40(a)(ia) of the I.T. Act, 1961, especially in view of the judgment of the Hon'ble Punjab & Haryana High Court in the case of P.M.S. Diesel Vs. CIT-2, Jalandhar & others, dated 29.4.2015, (ITA No.716 of 2009)?

2. The sole issue which arises for consideration is as to whether arrangement arrived at inter se M/s. Himachal Pradesh Bus Stand Management Development Authority (hereinafter referred to as the Development Authority) and Himachal Pradesh Road Transport Corporation (hereinafter referred to as HRTC), can be said to be in the nature of latter providing professional or technical services to the former? Incidentally, what is argued is also that reimbursement of expenditure incurred by the latter would not attract the provisions of Section 194J of the Income Tax Act, 1961 (hereinafter referred to as the Act).

3. Section 194J of the Act provides that any person, not being an individual or Hindu Undivided Family, who is responsible for paying to a resident any sum by way of fees inter alia for professional/technical services shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof, by whatever mode, deduct an amount equal to 10% of the said sum as income tax on income comprised therein. The section does provide for certain explanations with which we are not concerned. Noticeably, the said section itself explains/defines as to what is the meaning of expression "professional services and fees for technical services".

4. Professional services have been explained to mean services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or such other profession as is notified by the Board for the purposes of Section 44AA of Section 194J of the Act. Explanation 2 to clause (vii) of sub section (1) of Section 9 has been stated to mean the explanation for "fees for technical services". Now when one examine the said clause, one finds "fees for technical services" to mean any consideration for rendering any managerial, technical or consultancy services, not to include consideration for any construction, assembly, mining or like projects undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries'.

5. It is in this backdrop, we proceed to examine the factual matrix.

6. The Development Authority, an entity established for development and management of bus stands within the State of Himachal Pradesh, was established w.e.f. 01.04.2000. Prior thereto, such work was being carried out by HRTC itself. Since the development authority had no independent establishment and infrastructure of its own to carry out the objects, a decision was taken to have the same executed through the employees of HRTC. This arrangement was to continue till such time the development authority developed its own infrastructure. Since ongoing projects were required to be executed, which was so done in public interest, as per the arrangement arrived at, certain payments were released by the development authority in favour of HRTC. The expenditure was to be shared by way of reimbursement.

7. It is a matter of record that the authority did not deduct any amount in terms of section 194J of the Act.

8. Since the development authority had not deducted the amount of TDS with respect to the amount paid to HRTC, assessment proceedings were initiated and the Assistant Commissioner, Income Tax vide order dated 12.03.2013 (Annexure P-1) computed the income of the assessee by adding the amount paid to HRTC, as a taxable income of the assessee.

9. Aggrieved of the same, the development authority preferred an appeal which was allowed by the Commissioner of Income Tax (Appeals) vide order dated 30.06.2014 (Annexure P-2) in the following terms:

> **"5.** I have considered the submissions of the appellant and carefully gone through the case history and jurisdictional ITAT order relied upon by the assessee. The Hon'ble ITAT, Chandigarh Bench 'A' while deciding the issue of applicability of provisions of section 194j of the Act, in ITA No. 761, 762, 763 & 764/Chd.2012 for the assessment years 2009-10- to 2012-13 vide order dated 31/12/2013, on page 4 to 6 vide para 13 have allowed the appeal of the assessee. The relevant and effective part of the Tribunal's order is reproduced hereunder:-
>
> > "After considering the rival submissions, we find that the assessee authority .....
> >
> > From the above, it becomes clear that the authority had some full time staff for which it was paying itself. Help of the HRTC was taken in the forum of staff and certain other facilities at pre-defined percentage of salary was reimbursed e.g. salaries of various Divisional Mangers/Regional Managers was to be reimbursed @10%. Similarly in case of Junior Engineer 50% of salary was to be reimbursed. Therefore, the assessee authority was basically not having infrastructure and taking help of HRTC and was reimbursing the expenditure to the HRTC. The provisions of TDS i.e. Section 194j are not applicable if it's only a case of reimbursement of expenditure. The reason for the same is very clear. For example if HRTC is giving salary to its Divisional Manger, it will deduct full tax and pay the same accordingly. If the assessee authority deduct the tax on account of salary to Divisional Manger then that would amount to double deduction of taxes of the salary of Divisional Manger which is not possible. The assessee is not paying lump sum charges to the HRTC which can be construed as service charge. It is only reimbursement of pre-determined rates.....
> >
> > Therefore, we are of the opinion that no tax was required to be deducted u/s 194j. Accordingly, we set aside the order of the ld. CIT (A) and hold that no tax is deducible by the assessee authority."
>
> **5.1** Respectfully following the decision of the Hon'ble ITAT in the assessee's own case (supra) and in order to keep up judicial consistency the addition made

> by the A.O. is not sustainable and the same is ordered to be deleted. The appellant succeeds on this ground of appeal for the assessment years 2009-10, 2010-11 & 2011-12."

10. The aforesaid view stands affirmed by the Income Tax Appellate Tribunal vide order dated 20.11.2014 (Annexure PA) in an appeal preferred by the revenue.

11. It is a matter of record that in an appeal assailing the order passed in proceedings pertaining to TDS, this Court disposed of the same purely on the issue of low tax effect (ITA No.25 of 2014 titled as Commissioner of Income Tax Vs. H. P. Bus Stand Management & Development Authority alongwith connected matters, decided on 21.09.2016).

12. Hence, in effect this Court is called upon to adjudicate the correctness of findings of the Commissioner, reproduced supra, as affirmed by the Tribunal, in deciding the appeal preferred by the assessee.

13. The arrangement inter se the development authority and HRTC was clear and simple. It was by way of a stop gap arrangement. Till such time the authority developed its infrastructure and recruited the staff, the work of development and management was required to be carried out by HRTC. Hence, employees of HRTC were called upon to continue to discharge such duties. It is in this backdrop, two entities decided to share their resources by arriving at an arrangement, whereby salaries of certain staff and other expenditure incurred by HRTC was to be shared proportionately.

14. Such an arrangement arrived at between two entities cannot be said to be that of rendering professional services. No legal, medical, engineering, architectural consultancy, technical consultancy, accountancy, nature of interior decoration or development was to be rendered by HRTC. Similarly, no service, which can be termed to be technical service, was provided by HRTC to the development authority, so also no managerial, technical or consultancy services were provided. The arrangement was purely simple. The staff of HRTC was to carry out the work of development and management of the development authority till such time, the said authority developed its infrastructure and the expenditure so incurred by HRTC was to be apportioned on the agreed terms. It is only pursuant to such arrangement, the development authority disbursed the payment to HRTC and, as such, in our considered view, no amount of TDS was required to be deducted on the same. It is only a reimbursement of an expense so incurred by HRTC.

15. In this regard, our attention is also invited to the decision rendered by a Two Judge Bench of High Court of Delhi at New Delhi in ITA No.627/2012 & ITA No.507/2013 on 15.07.2015 titled as Commissioner of Income Tax Vs. M/s. DLF Commercial Project Corporation, relevant portion of which reads as under:-

> **"18.** The assessee has correctly relied upon this Courts ruling in Industrial Engineering Projects Pvt. Ltd., (supra). A Division Bench of this Court in that case specifically held that "reimbursement of expenses can, under no circumstances, be regarded as revenue receipt" and therefore, it is not liable to income tax. The Court relied upon the Supreme Courts decision in CIT v. Tejaji Farasram Kharawalla Ltd., { 1968 } 67 ITR 95 (SC), where the Court had held that it is only the amount that exceeds the expenditure incurred by the agent that would be liable to tax. More recently, this Court in Fortis Health Care Ltd.(supra) has also held that amount received towards reimbursement of expenses is not taxable under the Act.
>
> **19.** In the instant case, it is undisputed that M/s DLF Land Ltd. had deducted TDS on the payments made by it under various heads on behalf of the assessee. Further, it is also not disputed that the assessee deducted TDS on the service charge paid by it to M/s DLF Land Ltd. on the reimbursement expenses.

In such circumstances, this Court holds that the entire amount paid by the assessee to M/s DLF Land Ltd. is entitled to deduction as expenditure.

20. In arriving at the aforesaid conclusion, this Court derives support from the Gujarat High Courts decision in Commissioner of Income Tax-III v. Gujarat Narmada Valley Fertilizers Co. Ltd. (in Tax Appeal No. 315 of 2013, decided on 25.6.2013), where the facts were similar to those in the present case. The Court therein rejected the revenues contention that non-deduction of TDS on reimbursement expenses would lead to disallowance of such reimbursement expenditure. The Court noted that the payee therein had already deducted tax on the various payments made by it to third parties (such as towards transport charges and other charges). Since the payments made by the assessee therein were only for the reimbursement of expenses incurred by the payee on behalf of the assessee, the Court held that no TDS was required to be deducted by the assessee. A special leave petition preferred by the revenue against the High Courts decision was dismissed by the Supreme Court on 17.1.2014 (in SLC CC No. 175 of 2014). This Court is also supported in its reasoning by the text of Section 194C (TDS for "work") and Section 194J (TDS of income from "professional services"- the latter expression defined expansively by Section 194J(3) Explanation (a). Neither provision obliges the person making the payment to deduct anything from contractual payments such as those made for reimbursement of ITA Nos. 627/2012 & 507/2013 Page 11 expenses, other than what is defined as "income'. The law thus obliges only amounts which fulfill the character of "income" to be subject to TDS in such cases; for other payments towards expenses, the deduction to those entitled (to be made by the payee) the obligation to carry out TDS is upon the recipient or payee of the amounts."

16. Hence, substantial questions of law are answered accordingly. All the appeals stand disposed of.

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

Meena Devi and others ...Petitioners.

Versus

State of H.P. and another ...Respondents.

Cr.MMO No. 5 of 2016
Date of decision: 12.09.2017

Code of Criminal Procedure, 1973- Section 190- A complaint was filed before the Magistrate – an FIR was lodged and the police submitted a final report – the informant filed objections and ordered further investigation- again a report was submitted that no case was made out – the Court permitted the informant to examine herself and took cognizance of the commission of offence punishable under Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989- held that Magistrate could not have taken cognizance of the commission of offence punishable under Section SC & ST (Prevention of Atrocities) Act as the case is triable by the Special Judge – the order set aside with liberty to the informant to institute a fresh complaint before the Special Judge. (Para-2 to 7)

For the petitioners: Mr. Sanjeev Kuthiala, Advocate.

For the respondents: Mr. Vivek Singh Attri, Addl. Advocate General and Mr. R.R.Rahi, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

Annexure P-1 embodies a private complaint instituted before the Court of learned Additional Chief Judicial Magistrate, Nalagarh. The aforesaid complaint was instituted on 12.08.2009 also in respect of the offences constituted in the private complaint besides subsequent thereto, an F.I.R. was lodged on 27.08.2009 with the Police Station concerned. The Investigating Officer concerned, who, held investigation(s) with respect to the F.I.R, submitted his report, cast under the provisions of 173 Cr.P.C. before the learned trial Magistrate, wherein he made echoings in respect of, no, offence being made out against the accused. The complainant was aggrieved by the proposal(s) carried in the apposite report filed before the trial Magistrate, hence she preferred objection thereto. As apparent on a reading, of, annexure P-6, the learned Magistrate rejected the proposal made, for closure of case, by the Investigating Officer rather she accepted the objections in respect thereto reared by the complainant. Also on 16/7/2013 she proceeded, to, order for the Investigating Officer holding further investigation(s). The fate of further investigation(s), was, of the Investigating Officer, again submitting his report before the learned trial Magistrate, with echoings therein of, no, case being made out against the accused persons, whereafter the learned Magistrate without pronouncing any affirmative order thereon nor upon the objection(s) in respect thereto as reared by the complainant, rather proceeded to pronounce an order whereby the complainant was permitted to examine her preliminary evidence upon the private complainant. The learned Magistrate in proceeding, to entertain a private complaint in respect of offences exclusively triable by the designated Special Court besides her taking preliminary evidence thereon, has apparently taken an invalid cognizance upon the apposite private complaint, given cognizance thereof visibly infracting the mandate of the apposite provisions borne in Section 190 of the Cr.P.C., provisions whereof stands extracted hereinafter:-

> "190. Cognizance of offences by Magistrates- (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under Sub-section (2) may take cognizance of any offence
>
> (a). upon receiving a complaint of facts which constitute 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 offence has been committed.
>
> The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-Section (1) of such offences as are within his competence to inquire into or try."

2. Especially when the pre-requisite statutory sine qua non for her(s) taking a valid cognizance upon the private complaint, was, comprised in hers holding jurisdiction, by eliciting preliminary evidence thereon to hence inquire into the truth of the allegations constituted therein against the accused, apt statutory jurisdiction whereof would ensue vis-à-vis the Magistrate concerned only upon his/her holding jurisdictional competence, to try the offences embodied therein. Contrarily for reasons assigned hereinafter, hers, being barred by the apposite provisions engrafted in the Scheduled Tribes (prevention of Atrocities) Act, to hold trial of any offences borne therein besides when in respect of commission whereof, a narrative occurs in the private complaint, thereupon rendered her taking cognizance upon the private complaint to be jurisdictionally void.

3. Reiteratedly hence also she has infracted the mandate of the provisions borne in Section 14 of the Scheduled Castes and the Scheduled Tribes (prevention of Atrocities) Act, 1989, provisions whereof stand extracted hereinafter:-

> "14. Special Court- For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court by notification in the official Gazettee, specify for each district a Court of Sessions to be a Special Court to try the offences under this Act."

4. Consequently, in the learned Magistrate proceeding to record preliminary evidence upon the apposite private complainant, begets a conclusion that she has hence proceeded to take an invalid cognizance thereon, conspicuously when otherwise it was exclusively preferable before the notified designated Special Court, Special Court whereof are enjoined to be manned by judicial officer(s), not, below the rank of Sessions Judge/Addl. Sessions Judge, in designation(s) whereof, the trial Magistrate does not fall.

5. Be that as it may, as aforesaid, an F.I.R with respect, to, all the offences embodied therein, stood, subsequent to the institution of the private complaint hence lodged with the Police Station concerned. The learned trial Magistrate after eliciting thereon the apposite status report(s) from the Investigating Officer(s) concerned, thereafter on 16/7/2013 proceeded to record preliminary evidence of the complainant vis-à-vis the private complaint. Nowat with the Investigating Officer concerned making in the apposite report(s), proposal(s), for closure of the case also upon closure of further investigation(s) carried by him in pursuance to a direction pronounced on 16.07.2013 by the learned Magistrate, his, making an alike prior thereto proposal(s) besides with the complainant rearing objection(s) thereto, yet the learned Magistrate without considering the tenacity of the proposal(s) made by the Investigating Officer also without considering the veracity of the objections in respect thereto reared by the complainant, rather thereafter on anvil of preliminary evidence adduced upon the private complaint, she, proceeded to commit the accused for trial by the Special Court, whereas thereupon it was jurisdictionally inapt for her to make a verdict for committing the accused for trial before the learned Special Judge concerned.

6. The aforesaid recording of preliminary evidence by the learned trial Magistrate upon the private complaint also begets gross infraction of sub section 190 Cr.P.C. also begets gross infraction of the mandate of sub section 210 of the Cr.P.C., provision whereof stand extracted hereinafter:-

> 210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.
>
> (1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject- matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.
>
> (2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.
>
> (3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

wherein there occurs, a trite interdicting mandate upon the magistrate(s) concerned against hers/his, upon conclusion of the investigation(s) upon the apposite F.I.R, being thereupon disempowered to inquire into the truth of the alike therewith allegation(s) reared in the private complaint. The reason is not fetched, given the mandate borne therein qua cumulative trial

subject to jurisdictional competence of the trial Magistrate, of, both the F.I.R and of the private complaint by him especially with a statutory prescription therein in respect of merger of private complaint, with, the report filed under Section 173 Cr.P.C. Contrarily with the report filed under Section 173 Cr.P.C. failing to unveil commission of offences by the accused, thereupon also the learned trial Magistrate was disempowered to proceed to record preliminary evidence upon the private complainant. Moreover, she was also not empowered to commit the accused for trial, by the Special Court, preeminently when the complaint was neither validly constituted before her nor was preferable before her.

7. The apt legal procedure to be adopted by the learned trial Magistrate, was, after hers considering the tenacity of the closure report instituted before her by the Investigating Officer, in pursuance to hers ordering him, on 16.7.2013, to hold further investigation besides upon hers discerning the veracity(s) of objection in respect thereof reared by the complainant, hers hence rearing a firm opinion that hence a prima facie case being made out against the accused, thereupon she could befittingly commit the accused to trial vis-à-vis the learned Special Judge. She, however, omitted to adopt the aforesaid mode, contrarily, she, on anchor of preliminary evidence adduced upon the private complaint, thereafter proceeded to commit the accused to trial vis-à-vis the learned Special Judge. As aforesaid with the private complaint being unentertainable by her, given hers not holding any jurisdiction to try or take cognizance upon the offences embodied in the Scheduled caste and Scheduled tribe (prevention of atrocities) Act, thereupon the order of committal of the accused to trial by the learned Special Judge, is vitiated besides defective. Consequently, the order of committal is quashed and set-aside. In sequel thereto, the charge framed against the accused by the learned Special Judge is also vitiated and it is also set-aside. However, the learned trial Magistrate is directed to promptly after considering the complainants' objection(s) and also the proposal(s) made in his report by the Investigating Officer concerned, hence make a decision in accordance with law qua whether, the case, warrants the accused being committed for trial by the learned Special Judge. Needless to say that the complainant, is at liberty to institute a fresh complaint before the learned Special Judge concerned. The petition is disposed of accordingly. Records be sent back forthwith.

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

Suraj Mani Gupta .....Petitioner.
Versus
Sunita & others ....Respondents.

CMPMO No. 54 of 2015
Decided on : 12.9.2017

Code of Civil Procedure, 1908- Order 26 Rule 1- **Indian Evidence Act, 1972-** Section 65- DW-1 was served for proving Kursi deed – DW-1 refused to produce the document on the ground that it is part of voluminous record and the record is required for making daily entry of pilgrims visiting Haridwar – an application for recording the statement of DW-1 by appointment of Local Commissioner was filed- the Trial Court dismissed the application- held that it is permissible to summon the witness by coercive process and the Court had rightly declined to issue the Local Commission for this purpose- however, liberty granted to move the application to prove the document by way of secondary evidence. (Para-2 and 3)

For the petitioner: Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vishista, Advocate.
Mr. Balraj Singh, Advocate, for respondents No. 6 and 8.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

At this stage, the learned Senior Counsel for the petitioner has fairly submited before this Court, that he would not at this stage contest the validity of the order pronounced upon an application cast under the provisions of Section 65 of the Indian Evidence Act. DW-1 Upender Sharma (Purohit) of Haridwar, was served through dasti mode, for his proving photocopies of Kursi Deed of 28.11.2001 and of 13.11.2008, from original(s) thereof as held in his custody. However, despite the aforesaid being served through dasti mode, he refused to produce the documents concerned, before the learned trial Court, on the ground of theirs being part of a voluminous record besides theirs' being required for making daily entries, of pilgrims visiting Haridwar. Consequently, defendant No.1 moved an application cast under the Provisions of Order 26 Rule 1 read with Section 151 CPC, claiming therein a relief that the deposition(s) of the aforesaid be recorded by a Local Commissioner.

2. The learned trial Court in dismissing the aforesaid application, hinged its apposite order of dismissal, upon its holding jurisdiction(s) to through coercive processes ensure his presence therebefore, for facilitating the counsel for defendant No.1, to from apposite original(s) thereof, hence exhibit the aforesaid Kursi Deed(s). Since apparently the aforesaid reason prevailed upon the learned trial Court, in its proceeding to dismiss an application constituted before it under the provisions of Order 26 Rule 1 CPC, thereupon the aforesaid order is not wanting in any propriety nor it suffers from any illegality. Consequently, it is affirmed. However, before parting, the learned trial Court is directed to bear in mind the observation(s) recorded by it in the impugned order, whereby it has reserved liberty vis-à-vis it, to order for issuance of coercive process(s) for ensuring for the relevant purpose, the presence before it, of, one Upender Sharma (Purohit) of Haridwar, DW-1. It hence be forthwith implemented. Also, the learned trial Court may permit defendant No.1, to, in case the aforesaid DW-1, unveils before it, of, his, not, holding possession of original(s) of the relevant documents, to thereupon institute an application cast under the provisions of Section 65 of the Indian Evidence Act, for proving by way of secondary evidence, photocopies of Kursi Deed(s). If the application is instituted, the learned trial Court shall decide the same within four weeks.

3. In view of the above, the instant petition is disposed of. Pending application(s), if any, also stand disposed of. Record of the learned trial Court be sent back forthwith. Any observations made hereinabove shall not be taken as an expression of opinion, on the merits of the application, if filed, by defendant No.1 under the provisions of Section 65 of the Indian Evidence Act and the learned trial Court shall decide the same uninfluenced by any observations made herein above.

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

Court on its own Motion. … Petitioner

Versus

State of Himachal Pradesh & others … Respondents

CWPIL No. 55 of 2017

Date of Decision: September 13, 2017

Constitution of India, 1950- Article 226- A news item was published in the newspaper, according to which forest mafia had felled trees worth several crores- dead body of forest guard was found in jungle- directions were issued to the authorities to file affidavits/status reports-

investigation was transferred to CID by the State- Court directed CBI to investigate into the matter – however, police filed a status report that investigation is at an advance stage and challan would be filed soon - the State also took a decision not to refer the matter to CBI- held that from the affidavits it is apparent that deceased was posted as a forest guard and was discharging his duties pro-actively – he had reported the illicit felling of trees to higher authorities- his dead body was found hanging from the tree- the bag containing a vial of poison was also recovered near the dead body – suicide note mentions the names of certain persons including forest officers- another suicide note was recovered in which the deceased had expressed pain, anguish and shock regarding the manner in which affairs of department were being conducted – deceased had suffered multiple injuries which were ante mortem in nature- all the FIRs were being investigated by the different agencies- directions issued to CBI to investigate into the matter by constituting a Special Investigating Team of not less than three officers, to hand over the record to CBI and to take action against the erring officers. (Para-11 to 40)

For the petitioner	:	Mr. Satyen Vaidya, Senior Advocate with Mr. L.S. Mehta, Advocate, as Amicus Curiae.
For the respondent	:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Addl. AGs & Mr. J. K. Verma, Dy. A.G. for respondents No. 1 to 7-State. Sh. Bhopinder Bragta, Dy.S.P. CID, SIT Incharge, is present in person. Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Ajay Chauhan, Advocate, for respondent No. 8-UOI. Mr. Anshul Attri, Advocate, vice Mr. Anshul Bansal, Advocate, for respondent No. 9- Central Bureau of Investigation.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ (Oral)

On the basis of news reports published in the daily news paper "Amar Ujala" dated 13.6.2017, this Court taking *suo motu* cognizance issued notice to the State. As per news reports, forest mafia had felled trees valuing several crores of rupees and dead body of a Forest Guard, who was missing for two days was found in a jungle.

2. Since 20.6.2017, this Court has been directing the authorities to file affidavits/status reports. Pursuant thereto, Superintendent of Police, Mandi, has filed two affidavits dated 23.6.2017 (page -5) and 17.7.2017 (page-133), Deputy Commissioner Mandi, has filed his affidavit dated 24.6.2017 (page – 60) and Conservator of Forest, Mandi Forest Circle Mandi (respondent No. 6) has filed two composite affidavits dated 24.6.2017 (page – 31) and 17.7.2017 (page – 74) on behalf of respondents No. 1 to 3, 6 & 7.

3. It is a matter of record that on 15.6.2017/17.6.2017, investigation of the case was transferred to the State CID, whereafter two status reports dated 19.7.2017 (page – 120) and 31.7.2017 (page – 164) stand filed by the Deputy Superintendent of Police, CID, Shimla.

4. Considering the sensitivity of the matter as also its importance, the issues involved as also huge public outrage expressing concern about the manner in which investigation was being conducted, this Court requested Sh. Satyen Vaidya, learned Senior Counsel, to assist the Court as an Amicus Curiae. We also requested Mr. L. S. Mehta, Advocate, conversant with the area of crime, to assist as an Amicus.

5. Considering the submissions made by the learned Amicus and the material placed on record by the respondents, this Court directed the State to consider referring the matter for investigation to the Central Bureau of Investigation (in short CBI). On 9.8.2017, the Director General of Police, Himachal Pradesh filed an affidavit (page–168) stating that

"investigation of the case is almost at the stage of completion" and that "shortly, we would be able to file a final report in the case under section 173 Cr.P.C. at the trial court", hence, matter be not transferred to CBI.

6. Since decision was not that of the competent authority, on 9.8.2017, this Court directed the State to take a categorical stand, which now stands conveyed in terms of affidavit dated 23.8.2017 (page – 170) wherein Joint Secretary (Home) to the Government of Himachal Pradesh has averred as under:

> "3. That the matter was discussed in Cabinet and after due deliberations, it has been decided that the investigations may not be handed over to CBI at this stage particularly when the same is at its advanced stage and the State machinery is competent to handle such issues effectively.
>
> 4. That in view of the above submissions, it is humbly prayed that the investigation of this case may not be handed over to the CBI and the State Police (CID) should be allowed to continue with the same.
>
> 5. That leave of this Hon'ble Court may also kindly be allowed for filing charge sheet by State Police (CID) on conclusion of the investigation before the competent Court of Law."

7. Learned Amicus has filed his brief note, pointing out reasons as to why matter be referred for investigation to the CBI. In fact, both of them are insistent that keeping in view the manner in which investigation stands conducted, both by the police as also the CID, matter requires to be investigated by an independent agency.

8. It is in this background we proceed to consider the matter.

9. From the affidavits filed by different officers of the State, two issues arise for consideration: (i) Investigation of the crime in question (ii) lack of adequate infrastructure and mechanism in place required for checking illicit trade of timber resulting into illegal felling of trees in the area.

10. We may point out that insofar as the second issue is concerned, in the instant petition, we are not dealing with the same, which the learned Amicus desires, to be taken up independently in an appropriate petition. We are in agreement and as such leave the question open.

11. However, from the affidavits filed by the Conservator of Forest, certain undisputed facts emerge. Sh. Hoshiar Singh, a newly recruited Forest Guard was posted on contract basis in Katanda Beat, Mahog Block, Magroo Range under Karsog Forest Division (District Mandi, H.P.). Since 16.3.2017, he had been diligently, rather pro-actively discharging his duties. Noticing rampant illicit felling of Deodar trees in Garjub forest area, he reported the matter to the appropriate authorities. Factum of illicit felling of trees, in and around the area of crime, is admitted by the forest officials as is evident from their affidavits dated 24.6.2017 (page – 31) and 17.7.2017 (page – 74). During the course of investigation of the crime in question, forest officials found more than 395 stumps of various species of trees felled in the jungle. An endeavour is made to explain that most of the stumps pertain to felling, which took place in accordance with law, but the fact of the matter, as is so admitted by the forest officials, is that illicit timber was also recovered from the forest. It is also a matter of record that the area in question where Hoshiar Singh was posted is thick dense forest. Thus, *prima facie* the news report was correct.

12. From the affidavit dated 23.6.2017 (page – 5), so filed by the Superintendent of Police, Mandi it is apparent that dead body of the deceased was found hanging on a tree of deodar species. This was in the thick of the jungle. From the noon of 5.6.2017, deceased was found missing and a search party comprising of Up-Pradhan Jeet Ram and Pradhan of Gram Panchayat Kuthed was formed to trace him. An attempt was also made to contact him on his mobile. However, all this did not yield any result and consequently on 7.6.2017 at about 10.36 a.m., Sh.

Tej Ram Verma, Forest Range Officer, Magroo and Ankit Kumar, Forest Guard, reported the matter at police station, Karsog where DD Entry No. 022, dated 7.6.2017 was recorded. It appears that police did take some action and "hue and cry information/notice" was issued. Only on 9.6.2017, a shepherd noticed the dead body of the deceased hanging from a tree, information whereof was passed on to the forest officials, who, after informing the family members of the deceased, visited the spot. Thus on the basis of complaint lodged by Paras Ram, uncle of the deceased, F.I.R. No. 69 of 2017, dated 9.6.2017 was registered at police station Karsog under the provisions of Section 302 IPC. Same day, police party headed by SHO Ashwani Kumar visited the spot for conducting the investigation. The dead body hanging from a tree at Garjub jungle near Seri Katanda (Karsog) and clothes and a bag found close by were taken into possession. Same day a team of officers from the Office of Regional Forensic Science Laboratory, Mandi (in short RFSL, Mandi) visited the spot and on examination of the area noticed vomit at a distance of 60 meters from the place where dead body was recovered, sample whereof was also taken. The bag recovered from the spot was opened on 10.6.2017 from which one vial marked "HAMER INSECTICIDE POISION" and a diary containing suicide note mentioning names of certain persons, including officials of the Forest Department were recovered. Resultantly, police decided to investigate the crime not from the point of homicide but as a case of suicide. Consequently, offence in the F.I.R. was converted from Section 302 IPC to 306 IPC on 10.6.2017 itself and the persons named in the suicide note i.e. Ghanshyam Dass, Het Ram, Anil Kumar, Lobh Singh and Tej Singh (a forest official), all residents of the same area (tehsil) were arrested. The sixth accused Sh. Girdhari Lal (a forest official) was arrested on 13.6.2017.

13. The dead body was sent for post mortem, which was conducted at the Zonal Hospital, Mandi, whereafter relatives performed last rites. Various samples collected during the course of investigation were sent for analysis to RFSL Mandi. Also two additional FIRs, being FIR No. 70 of 2017 dated 12.6.2017 and FIR No.73 of 2017 dated 21.6.2017, both under the provisions of Section 379 IPC read with Sections 32 & 33 of Indian Forest Act, were registered against an unknown person at Police Station Karsog, Distt. Mandi.

14. Postmortem report revealed the deceased to have died as a result of "asphyxia semdans to gross pulmonary indema and corrival academe congestion". This is what, Superintendent of Police, Mandi, states in his affidavit dated 23.06.2017 (page-5). All report from RFSL, Mandi reveals that "The combination of insecticide contains chlorphrifos (organophosphorus compound) and cypermethrin (pyrethroid compound) is commonly used in agriculture, especially in production fruits and vegetables. It is easily available in the local market. The combination of chlorpyrifous and cytpermenthrin is highly toxic for human being".

15. Though he does not disclose the reason for doing so, but it is quite apparent, as is pointed out by the learned Amicus, since there was huge public outcry, about the manner in which the police had conducted the investigation, State decided to constitute an SIT, which was so done on 13.06.2017. Mr.Anup Rattan, learned Additional Advocate General, clarifies that the said SIT was headed by Additional Superintendent of Police, Mandi.

16. Immediately thereafter, Director General of Police, Himachal Pradesh, directed the matter to be investigated by the State CID, which was so done vide communication dated 15.06.2017 and investigation by the said Agency commenced on 17.06.2017.

17. What is important is that only investigation of FIR No. 69 of 2017 was entrusted to the CID and investigation of FIR Nos.70 of 2017, dated 12.06.2017 and 73 of 2017, dated 21.06.2017 were kept with the local Police Station.

18. In his subsequent affidavit dated 17.07.2017 (page-133), Superintendent of Police, Mandi, does not state anything new.

19. From the status report, dated 19.07.2017 (Page-120) and dated 31.07.2017 (Page-164), so filed by the Deputy Superintendent of Police, CID, Shimla, police wants the Court to believe that everything is in order and that investigation was conducted in a fair and proper manner. During the course of investigation, another suicide note and diary was recovered, in

which, deceased expressed his pain, anguish and shock, the manner in which affairs of the Department were being conducted. He expressed complicity of various persons, including officials of the Forest Department in illicit trade and felling of timber. Allegedly, he had also written that it is difficult for an honest person to live in this world (*Chhod kar jana to nahin chahta tha par kya karun sansar sachche aadmi ko jeene nahin deta hai. Is duniya mein imandaar hona sabse bada gunha hai*).

20. From the status report, it is a specific case of the investigating agency that deceased committed suicide by consuming poison.

21. Finding the hypothesis to be not correct, if not true, learned Amicus, points out that the investigating agency did not investigate the matter, in terms of suggestions placed on record vide note dated 20.07.2017 (page-145), also his subsequent note dated 11.09.2017 points yawning gaps and defects in the investigation conducted thus far.

22. What we find intriguing is as to why possibility of murder was not considered and ruled out. It appears that with blinkers investigation was carried out only from the point of suicide. Hand written note of the deceased may be a pointer in that direction but the other possibility is not ruled out.

23. Further, police wants the Court to believe that in the early hours of 05.06.2017, deceased had consumed rice, daal, salad, potato mixed with peas in the house of Pawan Kumar, who was posted as a Trained Graduate Teacher in the area. This was before 8.45 a.m. Significantly from the postmortem report, it is apparent that such undigested food was found in the stomach of the deceased. It has come in the investigation that whereabouts of the deceased could be traced lastly at about 1.17 p.m. as he had called his grandmother from the mobile phone. At that time, deceased was somewhere near the spot where his dead body was recovered. No signs of anxiety were exhibited. Now significantly postmortem was conducted on 10.06.2017, which was five days after the food was consumed. Status report reveals that normally it would take 2-3 hours for the food to be digested and the stomach to be emptied. Relevant portion of the opinion of the experts reads to the effect that "The said team on a pertinent question mentioned at "para-g" of the status report responded as under:-

> "Rice and dal particles retain their form up to 3 hours and 2 hours under ideal conditions usually the bulk of meals leaves the stomach within 2 hours and stomach gets emptied in 4-6 hours. The gastric emptying time may further be delayed in the presence of irritant foreign substance like poison and also dependent upon emotional stroke psychological factor and is delayed in a state of emotional stroke physical shock. All digestive process in the body are to function when the person is dead and the contents will remain same after 100 hours of death."

24. Hence, in view of the murky picture which the learned Amicus points, need emerges for obtaining further opinion of an Expert, with regard to digestion of food consumed by the deceased, five days prior to the conduct of postmortem.

25. The status report reveals that deceased died as a result of consumption of poison. But then from where such poison was obtained is a mystery. There is a missing link. For it is not the case of the Investigating Officer that poison was taken by the deceased from the plant nursery, maintained by the Department of Forest. Crucially did the deceased himself consumed the poison or was it a mischief remains uninvestigated.

26. Another question which remains unanswered is as to how the dead body of the deceased was found hanging upside down from a tree, almost 15 feet, from the ground level. If hypothesis of the Investigating Officer is to be believed, then why would a person intending to commit suicide, climb a tree that too after consuming poison. For it has not come in the investigation that deceased consumed the poison after climbing the tree. Also there is nothing on

record to link the deceased with the bottle of poison recovered from the bag allegedly belonging to him.

27. Learned Amicus, invites our attention to the fact that though bag was recovered from the spot on 09.06.2017 but opened only on 10.06.2017. Crucially on 10.06.2017, there was no opinion of any Expert indicating the suicide note or the diary to be that of the deceased or the notings therein to be in his hand writing. Then on what basis FIR was converted from 302 IPC to 306 IPC remains unexplained. This aspect remains to be investigated. Absence thereof acquires significance as opinion of the Expert, that deceased died as a result of consuming poison was incidently given only on 20.06.2017.

28. As per medical evidence, deceased had suffered several ante mortem injuries. We are in agreement with the learned Amicus that opinion of the doctors at Zonal Hospital, Mandi, that "possibility of such injuries being sustained as a result of fall", could have been reviewed by a team of Experts at the State level Hospital, which for some reason, despite suggestion made during the course of hearing was not considered. Necessity to do so, was all the more in view of opinion of the doctors themselves, who *inter alia* had opined that "the distribution of injury seems to imply more than one contact with the blunt surface".

29. To corroborate their hypothesis of suicide, Investigating Officer seeks reliance upon the opinion of the Expert, suggesting that particles of poison were found in the sample of the vomit taken by the police.

30. Learned Amicus points out that it has come in investigation that from 5th to 9th June, 2017, as per report of Patwari, there was intermittent rain in the area. What was the extent of rain and as to whether particles of vomit could be recovered from the spot on 10.06.2017, after a gap of four days, itself requires to be investigated and examined, rather deeply by the Experts.

31. Also there is variation and improbability in the opinion of the doctor with regard to the tentative date and time of death of the deceased. It varies from 36 to beyond 90 hours.

32. Also to reach out to the genesis of the crime, investigation in all the FIRs ought to have been carried out by the very same agency, which was not so done. It was all the more necessary, for rampant illicit felling allegedly was the cause for the deceased to have committed suicide.

33. It is not disputed before us that deceased was a young and upright officer. He endeavoured in checking illicit felling of trees in the area as also highlighted the issue on several occasions with the authorities (forest mafia was all prevalent).

34. Also whether he was suffering from any ailment or had any domestic issue compelling him to commit suicide, remains unexplained/uninvestigated. Possibility of murder has not been ruled out.

35. It is in this backdrop, we are in agreement with the submission of the learned Amicus that investigation needs to be conducted by an independent agency and more specifically CBI.

36. Learned Amicus, further points out that in relation to another unfortunate incident, keeping in view public sentiments and huge public outcry, State itself had requested this Court to refer the matter for investigation to CBI (CWPIL No.88 of 2017, titled as *Court on its own motion vs. State of H.P. & others*).

37. In the said decision, we have already, in *extentio* discussed the extent of power of this Court in referring the matter to the CBI, in the following terms:-

> "19. This Court in CWP No.169 of 2017, titled as *M/s Paonta HP Centre v. Union of India* (order dated 16.5.2017), had an occasion to deal with a case, where even though no consent was accorded by the State, under Section 6 of the Act, yet issued directions, asking the CBI to investigate the matter and all this,

keeping in view – (a) seriousness of the allegations, (b) the enormity and the extent of the crime, and (c) prima facie coming to the conclusion that there is some truth in the allegations, based on cogent material. This Court observed as under:

> "16. When larger public interest is involved, it is the responsibility of the Constitutional Court, to assure judicial legitimacy and accountability. (See: *Sahid Balwa vs. Union of India and others,* (2014) 2 SCC 687.
>
> 17. Their Lordships of the Hon'ble Supreme Court in *Central Bureau of Investigation through S.P. Jaipur vs. State of Rajasthan and another,* (2001) 3 SCC 333 have held that the powers of the High Court under Article 226 of the Constitution of India or the Supreme Court under Article 32 or Article 142 (1) of the Constitution can be invoked, though sparingly, for giving such direction to Central Bureau of Investigation in certain cases. Their Lordships have held as under:
>
> > ""14. True, powers of the High Court under Article 226 of the Constitution and of the Supreme Court under Article 32 or Article 142(1) of the Constitution can be invoked, though sparingly, for giving such direction to the CBI to investigate in certain cases, [vide Kashmeri Devi vs. Delhi Administration and anr. {1988 (Supple.) SCC 482} and Maniyeri Madhavan vs. Sub-Inspector of Police and ors. {1994 (1) SCC 536}]. A two Judge Bench of this Court has by an order dated 10.3.1989, referred the question whether the High Court can order the CBI to investigate a cognizable offence committed within a State without the consent of that State Government or without any notification or order having been issued in that behalf under Section 6 of the Delhi Act.
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> > 15. In Mohammed Anis vs. Union of India and ors. {1994 Supple (1) SCC 145} Ahmadi, J. (as his Lordship then was) has observed thus (SCC pp. 148-49, para 6):
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> > > "6. True it is , that a Division Bench of this Court made an order on March 10, 1989 referring the question whether a court can order the CBI, an establishment under the Delhi Special Police Establishment Act, to investigate a cognizable offence committed within a State without the consent of that State Government or without any notification or order having been issued in that behalf. In our view, merely because the issue is referred to a larger Bench everything does not grind to a halt. The reference to the expression court in that order cannot in the context mean the Apex Court for the reason that the Apex Court has been conferred extraordinary powers by Article 142(1) of the Constitution so that it can do complete justice in any cause or matter pending before it."
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> 18. Their Lordships of the Hon'ble Supreme Court in *Bhavesh Jayanti Lakhani vs. State of Maharashtra and others,* (2009) 9 SCC 551 have reiterated that superior courts have power to issue direction to Central Bureau of Investigation to investigate a matter. Their Lordships have held as under:
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> > "99. We are not concerned, as it is not necessary for us to determine, whether a direction for making investigation by CBI

by the superior courts of the country is permissible. As the law stands, we place on record such directions by the superior courts are permissible."

19. Their Lordships of the Hon'ble Supreme court in *State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal and others,* (2010) 3 SCC 571 have held as under:-

> "70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be assed as a matter of routine or merely because a party has levelled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.""

20. Further learned Advocate General invites attention of this Court to the following observations made by a Constitution Bench (Five-Judges) of the apex Court in *Committee for Protection of Democratic Rights, West Bengal (supra),* (2010) 3 SCC 571:

> "68. Thus, having examined the rival contentions in the context of the Constitutional Scheme, we conclude as follows:
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> (i) to (vi) .....
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> (vii) When the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the Constitutional Courts. Therefore, exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure.

> 69. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly."

21. In *Zahira Habibulla H. Sheikh and another v. State of Gujarat and others,* (2004) 4 SCC 158, while dealing with a case where the complainant came knocking the doors of the Court, alleging mistrial for whatever reason, the Court directed investigation and retrial, observing that Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice, often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of a particular case, protecting its ability to function as a Court of law in the future, as in the case before it.

22. Taking note of its earlier observations, so made in its previous decisions, the apex Court in Jakia Nasim Ahesan & another v. State of Gujarat & others, (2011) 12 SCC 302, reiterated that the jurisdiction of the Court to issue a writ of continuous mandamus is only to ensure that proper investigation is carried out.

23. At this juncture, we clarify that we have not expressed any opinion, with regard to the fairness or correctness of the investigation carried out by the State, which we leave it open to be considered at an appropriate stage.

24. Though today, it is not the case before us, but we may only take note of the following observations made by the apex Court in *Sudipta Lenka v. State of Odisha and others,* (2014) 11 SCC 527:

> "14. *Rubabbuddin Sheikh vs. State of Gujarat*, (2010) 2 SCC 200, really, carries forward the law laid down in *Gudalure M.J. Cherian* [(1992) 1 SCC 397] and *Punjab & Haryana High Court Bar Assn.* [(1994) 1 SCC 616] which position finds reflection in para 60 of the report which is in the following terms :
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> > *"60.....Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the charge-sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI."*
> >
> > (Emphasis supplied)
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> 15. The position has also been succinctly summed up in Disha to which one of us (the learned Chief Justice) was a party by holding that transfer of the investigation to the Central Bureau of Investigation or any other specialised agency, notwithstanding the filing of the chargesheet, would be justified only when the Court is satisfied that on account of the accused being powerful and influential the investigation has not

proceeded in a proper direction or it has been biased. Further investigation of a criminal case after the chargesheet has been filed in a competent court may affect the jurisdiction of the said Court under Section 173 (8) of the Code of Criminal Procedure. Hence it is imperative that the said power, which, though, will always vest in a Constitutional Court, should be exercised only in situations befitting, judged on the touchstone of high public interest and the need to maintain the Rule of Law."

25. Prominence of truth is the guiding star of judicial process, forming the foundation of justice. What is "fair investigation", we need not dilate, save and except, reproduce the observations made by the apex Court in *Pooja Pal v. Union of India and others,* (2016) 3 SCC 135:

> "….The primacy of credibility and confidence in investigations and a need for complete justice and enforcement of fundamental rights judged on the touchstone of high public interest and the paramountcy of the rule of law. Cause of justice is the ultimate determinant for the course to be adopted by the investigating agency. It is judicially acknowledged that "fair trial" includes "fair investigation", as is envisaged under Articles 20 & 21 of the Constitution of India. Though, well demarcated contours of crime detection and adjudication do exist, if the investigation is neither effective nor purposeful nor objective nor fair, it would be the solemn obligation of the courts, if considered necessary, to order further investigation or reinvestigation as the case may be, to discover the truth so as to prevent miscarriage of the justice. No inflexible guidelines or hard and fast rules as such can be prescribed by way of uniform and universal invocation and the decision is to be conditioned to the attendant facts and circumstances, motivated dominantly by the predication of advancement of the cause of justice.
>
> "Any criminal offence is one against the society at large casting an onerous responsibility on the state, as the guardian and purveyor of human rights and protector of law to discharge its sacrosanct role responsibly and committedly, always accountable to the law abiding citizenry for any lapse. The power of the constitutional courts to direct further investigation or reinvestigation is a dynamic component of its jurisdiction to exercise judicial review, a basic feature of the Constitution and though has to be exercised with due care and caution and informed with self imposed restraint, the plentitude and content thereof can neither be enervated nor moderated by any legislation."
>
> "As succinctly summarised by this Court in Court in *Committee for Protection of Democratic Right (supra)*, the extra ordinary power of the Constitutional Courts in directing the CBI to conduct investigation in a case must be exercised sparingly, cautiously and in exceptional situations, when it is necessary to provide credibility and instill confidence in investigation or where the incident may have national or international ramifications or where such an order may be necessary for doing complete justice and for enforcing the fundamental rights. In our comprehension, each of the determinants is consummate and independent by itself to justify the exercise of such power and is not inter-dependent on each other." (Emphasis supplied)

26. Now, coming to the attending facts and circumstances, as brought to our notice, over a very unfortunate incident, there is an outrage, more so by that of Civil Society. Perhaps, as the public wants to believe, investigation may be tardy, lethargic, lopsided, motivated or malafide, but today we are none to comment

thereupon. Outrage of Civil Society is well founded or not, today we may not adjudicate, more so in the absence of material before us, but this Court cannot be oblivious to the fact that public property stands damaged. There is huge outcry among the public of the manner in which the State SIT has conducted the investigation. One more death has taken place in police custody. Seriousness of the allegations and enormity of crime is another factor which cannot be ignored.

27. Under these circumstances, we cannot resort to the first two options, which we had posed to ourselves. Definitely, in our considered view and in view of all the aforesaid observations and backdrop, interference by this Court is required, more so when the State itself wants to have the matter investigated by an outside agency, i.e. Central Bureau of Investigation, a premier Investigating Agency of the country, on whom the State itself has reposed faith and confidence".

38. Thus, applying the law to the given facts, for the reasons discussed supra, we are inclined to interfere and pass appropriate order.

39. Deeming it as our duty, in exercise of our writ jurisdiction, we direct as under:

i. We entrust to the Central Bureau of Investigation, investigation of FIR No.69 of 2017, dated 09.06.2017, under Section 306 of the Indian Penal code; FIR No. 70 of 2017, dated 12.06.2017, under Section 379 IPC read with Sections 32 & 33 of the Indian Forest Act, 1927; and FIR No.73 of 2017, dated 21.06.2017, under Section 379 IPC read with Sections 32 & 33 of the Indian Forest Act, 1927, all registered at Police Station, Karsog, District Mandi, Himachal Pradesh, as also role played by the officers/officials/ functionaries of the State, in connection thereto.

ii. Direct the Director CBI to forthwith constitute a Special Investigation Team (SIT) of not less than three Officers, headed by the Superintendent of Police with two other Officers not below the rank of Deputy Superintendent of Police. Investigation be started immediately.

iii. Record pertaining to the investigation conducted thus far by the CID, be handed over to the SIT of the CBI.

iv. The State shall ensure that entire evidence is preserved, protected and not tampered with. The Deputy Superintendent of Police, CID, Shimla, who is present in the Court, assures of such fact.

v. The Director General of Police, Himachal Pradesh, is directed to ensure that all assistance be rendered to the SIT for conducting an expeditious, fair, impartial investigation. Infrastructure, in the shape of vehicles, accommodation, shall be made available.

vi. The Chief Secretary to the Government of Himachal Pradesh shall ensure that appropriate action is taken against the erring officials/officers/functionaries of the State, in accordance with law. Within a period of four weeks from today, he shall independently examine the matter and take appropriate action.

vii. Status report by the SIT of the CBI be filed not later than four weeks**.** Registry to have it placed on record and apprise the Court about the same.

viii. Liberty reserved to any person aggrieved or either of the parties to approach this Court.

40. Assistance rendered by Mr.Satyen Vaidya, Senior Advocate and Mr.L.S.Mehta, Advocate, as learned Amicus Curiae, is highly appreciable. Liberty is reserved to the learned

Amicus to raise issues in an appropriate proceeding for management of forest and measures to be taken for checking illicit felling of trees.

With the aforesaid observations, present petition stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Criminal Appeal No.187/2014 and
Cr. Appeal No.190/2014
Date of decision : September 13, 2017

Criminal Appeal No.187/2014

Ravi Kumar ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No.190/2014

Manish Lohat ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Indian Penal Code, 1860- Section 302 and 201 read with Section 34- A dead body was noticed by PW-14 which was lying inside the car – there was a wound on the head and a dog chain was tied around the neck of the deceased – according to prosecution, there was an altercation between the accused and the deceased on the issue of the fare of the taxi – the accused strangulated the deceased with the dog chain – accused M made a disclosure statement leading to the recovery of the car keys - the Trial Court convicted the accused R and M – aggrieved from the judgment, present appeal has been filed- held that the case is based upon circumstantial evidence – in a case of circumstantial evidence, prosecution must establish all the pieces of incriminating circumstances and they must lead to the conclusion of guilt and not to any other conclusion – suspicion cannot take the place of proof – PW-17 did not support the prosecution version and was declared hostile – the theory of last seen sought to be established from this witness has not been established – the purchase of dog chain by the accused has not been established on record – the vehicle was not a taxi or a private vehicle used for commercial purposes- hence, the prosecution version that there was altercation on the issue of fare is not acceptable – juvenile in conflict with law has already been acquitted and no appeal has been filed against the acquittal - the name of the officer who lifted the finger prints has not been given – the recovery was also not proved satisfactorily – the keys were not connected to the car in which the deceased was found- the call data record has not been certified in accordance with Section 65-A of Indian Evidence Act and is not admissible – the Trial Court had wrongly convicted the accused- appeal allowed- judgment of Trial Court set aside- accused acquitted. (Para-5 to 33)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622

Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172
Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560
Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1
State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330
Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99
Eradu vs. State of Hyderabad, AIR 1956 SC 316
Sujit Biswas vs. State of Assam, (2013) 12 SCC 406
Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343
Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509
Anvar P.V. v. P.K. Basheer and others, (2014) 10 SCC 473
Harpal Singh alias Chhota v. State of Punjab, (2017) 1 SCC 734
Vikaram Singh alias Vicky Walia and another v. State of Punjab and another, AIR 2017 SC 3227
Sonu alias Amar v. State of Haryana, AIR 2017 SC 3441

For the Appellants : Mr. Ramesh Sharma, Advocate, as Legal Aid Counsel, for the appellant in Cr. Appeal No.187/2014 and Ms. Ruma Kaushik, Advocate, as Legal Aid Counsel for the appellant in Cr. Appeal No.190/ 2014.

For the Respondent : Mr. V.S. Chauhan, Additional Advocate General, Mr. Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Since both these appeals arise out of the very same impugned judgment, they are being disposed of as such.

2. In relation to FIR No.37/2011 dated 11.4.2011 (Ex.PW12/B), registered at Police Station, East (Shimla), vide judgment dated 1.1.2014/6.1.2014, passed by Sessions Judge (Forests), Shimla, Himachal Pradesh, in Sessions Trial No.41-S/7 of 2013/12, titled as *State of H.P. v. Ravi Kumar and another,* appellants Ravi Kumar and Manish Lohat (hereinafter referred to as the accused), stand convicted for having committed offences punishable under the provisions of Sections 302, 201 read with Section 34 of the Indian Penal Code and sentenced as under:

Offence	Sentence
Section 302 read with Section 34 of the Indian Penal Copde	Each of the accused to undergo imprisonment for life and pay fine of Rs.10,000/- each and in default thereof to further undergo imprisonment for a period of three months each.
Section 201 read with Section 34 of the Indian Penal Code	Each of the accused to undergo imprisonment for a period of two years and pay fine of Rs.2000/- each and in default thereof to further undergo imprisonment for a period of three months each.

3. In relation to the very same FIR, another accused (identity concealed), a juvenile in conflict with law, stands acquitted by the Court having competent jurisdiction. Undisputedly, no appeal against the judgment of his acquittal, stands preferred by the State (Order dated 4.4.2016).

4. Hence, on the basis of the evidence led by the prosecution in relation to the present trial, this Court is called upon to return findings about correctness of the reasons furnished and conclusion arrived at by the trial Court.

5. It is not a case of direct evidence, but that of circumstantial evidence. It is a settled principle of law that the trial Court is necessarily required to cull out the circumstances, which we find not to have been so done. However, from the bare perusal of the judgment, we find the Court to have convicted the accused on the following circumstances:-

a. Accused and the juvenile in conflict with law were lastly seen in the company of deceased (Chaman Lal). This was at about 100 p.m. on 10.4.2011, when a vehicle owned by Dilbar Singh (PW-13), driven by the deceased, was hired by the juvenile in conflict with law, in which, all of them were travelling.

b. An altercation took place over fare which led to the accused and the juvenile in conflict with law, murdering the deceased.

c. The accused had purchased a dog chain from the shop of Ramesh Kumar (PW-18), which was also used as a weapon of offence to strangulate the deceased.

d. In the morning of 11.4.2011, dead body of the deceased, tied with a dog chain, was noticed by Dalbir Singh (PW-14) and Vinod Sharma (PW-15) at a place known as Pujarli, District Shimla.

e. After committing the act, accused stole the mobile phone of deceased Chaman Lal and sold it to one Pradeep Panchal (PW-22) at Karnal (Haryana) for a sum of Rs.500/-. Police learnt about such fact, only after the said phone was kept on surveillance.

f. In police custody, accused Manish Lohat made a disclosure statement (Ex.PW-19/A), in the presence of Shankar Singh (PW-19) and Chander Shekhar (not examined) which led to the identification of the spot and recovery of keys of the car, from which the dead body was recovered.

g. Fingerprints present on the incriminating material, i.e. foot mat (Ex.P-6), wheel spanner (Ex.PY) & danda (Ex.P-4), so collected by the police from the spot/car, matched with that of the accused.

6. Before this Court, no other circumstance stands pressed.

7. Trial Court found absence of motive not to be a reason sufficient enough to acquit the accused. Also, with the prosecution having proven the circumstance of last seen together, Court found the burden to have shifted upon the accused to establish their innocence.

8. At the threshold, it be only observed that trial Court seriously erred in ignoring the settled principle of law, more so, in a case of murder, sought to be established by the prosecution through circumstantial evidence. It is a settled principle of law that onus to establish the case of homicide, beyond reasonable doubt, by linking all the circumstances, establishing the guilt of the accused alone, and none else, has to be only and only that of the prosecution.

9. In *Shivaji Sahabrao Bobade and another Versus State of* Maharashtra, (1973) 2 SCC 793, the apex Court, has held as under:

> "...Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in

> the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". ...

10. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

11. Admittedly there is no eye-witness to the alleged incident in relation to which accused stand convicted. Prosecution case primarily rests upon circumstantial evidence. The law on circumstantial evidence is now very well settled. To base a conviction on circumstantial evidence, prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events, as would permit no conclusion other than the one, only of the guilt of the accused. Circumstances to be proved have to be beyond reasonable doubt and not based on principle of preponderance of probability. Suspicion, howsoever, grave, cannot be a substitute for a proof and courts should take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence.

12. In Bodhraj *alias Bodha & others vs. State of Jammu and Kashmir,* (2002) 8 SCC 45, Hon'ble the Supreme Court of India held that:-

> "9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. ....."
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> 10. .....In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621], it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt." (Emphasis supplied)

13. Also it is a settled proposition of law that when there is no direct evidence of crime, guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with crime. All the links in the chain of circumstances, must be established beyond reasonable doubt, and the proved circumstances should be consistent only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [See: *Pudhu Raja and another Versus State Represented by Inspector of Police,* (2012) 11 SCC 196; *Madhu Versus State of Kerala,* (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat,* (2010) 15 SCC 622; *Ramreddy Rajesh Khanna Reddy v. State of A.P.*, (2006) 10 SCC 172; *Trimukh Maroti Kiran versus State of Maharashtra,* (2006) 10 SCC 681; *Mulakh Raj and others Versus Satish Kumar and others,* (1992) 3 SCC 43; *Ashok Kumar Chatterjee vs. State of M.P.,* 1989 Supp. (1) SCC 560; *Balwinder Singh vs. State of Punjab,* (1987) 1 SCC 1; *State of U.P. vs. Sukhbasi,* 1985 Supp. SCC 79; *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116;

Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330; *Hukam Singh vs. State of Rajasthan,* (1977) 2 SCC 99; and *Eradu vs. State of Hyderabad,* AIR 1956 SC 316]

14. In *Sujit Biswas vs. State of Assam,* (2013) 12 SCC 406, Hon'ble the Supreme Court of India held that:-

> "13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. [Vide: Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, (2011) 3 SCC 109: AIR 2011 SC 1017; and Ramesh Harijan vs. State of U.P., (2012) 5 SCC 777].
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> 14. In Kali Ram vs. State of Himachal Pradesh, (1973) 2 SCC 808: AIR 1973 SC 2773, this Court observed as under:
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> > "25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence.""

15. Relying upon its earlier decision in *Hanumant Govind Nargundkar v. State of Madhya Pradesh*, AIR 1952 SC 343, Hon'ble the Supreme Court of India in *Dharam Deo Yadav v. State of Uttar Pradesh,* (2014) 5 SCC 509, again reiterated that:

> "15. .... Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, the accused may be convicted on the basis of such circumstantial evidence."

16. Having said that, in the instant case, prosecution has to establish, by leading clear, cogent and convincing piece of evidence that the accused alone are guilty of the charged

offences. Evidence led has to be not only clear and cogent, but also convincing. Doctrine of preponderance of probability or suspicion alone would not be sufficient enough to convict the accused. It is in this backdrop that we now proceed to discuss the evidence led by the prosecution.

17. There is no dispute about identity of the deceased. Dilbar Singh (PW-13) has proved that keys of vehicle No.HP-14A-6413 were handed over by him to the deceased on 10.4.2011. The fact that same day at about 10 p.m., the accused, including the juvenile in conflict with law, had hired the said vehicle, for dropping them to a place known as Pujarli, is sought to be established through the testimony of Prakash Thakur (PW-17). However, when we peruse his testimony, we do not find him to have fully supported the prosecution. He was declared hostile and cross-examined by the learned Public Prosecutor. Though initially he did try to state that the accused, at about 11 p.m., were seen sitting with the deceased in the car, but then he contradicted himself by first stating that he could only identify accused Ravi Kumar and further qualified by stating that "*It is also correct that perhaps I am identifying a wrong person here in the court as I had identified the accused about one and half years ago and there was similarity of feature of all the accused".* Now significantly, this witness did not know the accused from before. He admits it to be so. He was neither their acquaintance nor were the accused from his area. Circumstance of last seen is sought to be established through the testimony of only this witness, which we do not find to have been established, beyond reasonable doubt. He identifies only one person. As is so stated by him, he saw the accused sitting in the vehicle in the night of 10.4.2011 at about 11 p.m. However, he does not state that at that time, lights of the vehicle were on or that he had stopped the vehicle and spoken with the accused or the deceased. At this juncture, it be also observed that police did not carry out any test identification parade. This witness was taken to the Police Station, where all the three accused persons, namely Ravi Kumar, Manish Lohat and the juvenile in conflict with law were present, yet he was able to identify only one person, which version of his also cannot be said to be inspiring in confidence. There is no other witness or document establishing identity of the accused, in relation to the circumstance of the accused lastly seen in the company of the deceased. Hence, we do not find this contention to have been proven beyond reasonable doubt.

18. Dead body of the accused was noticed firstly by Dalbir Singh (PW-14), in the morning of 11.4.2011. It was lying inside the car. There was wound on the head and a dog chain was tied around the neck of the deceased. This witness immediately passed on the information to Vinod Sharma (PW-15), who informed the police. Whereafter, Inspector Sarwan Singh (PW-28) reached the spot. It has come on record that the said police official immediately took the dead body into possession and sent it for postmortem. It is also a matter of record that no incriminating article, belonging to the accused, other than the dog chain (Ex.P-20), allegedly purchased by the juvenile in conflict with law, was found, either inside or outside the car.

19. At this juncture, it be noticed that the said dog chain allegedly came to be purchased by the juvenile in conflict with law from the shop of Ramesh Kumar (PW-18), a salesman working in a shop at Lower Bazaar, Shimla. Well, all that this witness states is that in the month of April, 2011, all the accused had purchased a dog chain from the shop, by making payment of Rs.30/-. We are unable to persuade ourselves in accomplishing the veracity of such statement and this we say so for the reason that no record with regard to his employment in the shop stands produced by the police. The Investigating Officer also does not state as to how he was able to reach to this witness or the shop where he was working as a salesman. Allegedly, police got the accused identified from this witness, two months after the occurrence of the incident, but then it is not the case of prosecution that any identification process was undertaken by the police. Further, this witness admits that dog chains are easily available in the market. Most importantly, no receipt/bill for the sale of the dog chain was prepared or issued. Hence, purchase of the dog chain by the accused persons cannot be said to have been established on record. What is also important is that the witness has not identified the dog chain (Ex.P-20) used as a weapon of offence to be one which, allegedly was purchased by the accused persons.

Accused were not known to this witness from before. Hence, his version with regard to identification thereof, is unbelievable. Save and except, for the testimony of this witness, there is no other evidence, ocular or documentary, linking the accused to the weapon of offence. No fingerprints of the accused or signs of blood of the deceased were found on the chain. Hence, the contention that the accused having either purchased the dog chain or used it in the crime cannot be said to have been proven on record.

20. The dead body, recovered by PW-28, was sent for postmortem, which was conducted by Dr. Piyush Kapila (PW-24). When we peruse the postmortem report (Ex.PW-24/D), we find that the deceased had consumed alcohol. It is the case of prosecution that an altercation took place between the accused and the deceased, on the issue of fare of the taxi. Well, this is factually incorrect, for it be observed that the vehicle in question is not a taxi or a private vehicle used for commercial purpose. Also, there is no evidence on record, establishing factum of any dispute, more so with regard to fare. The fact that deceased was under the influence of alcohol may not have any bearing on the outcome of this case, but then one cannot forget that deceased had more than 14 lacerated wound injuries on his head, as is evident from the postmortem report. It is the pointed case of the prosecution that injuries on the head were inflicted by the juvenile in conflict with law, who stands already acquitted by the Court having competent jurisdiction and in relation to which no appeal stands preferred. Qua the present accused, it is the case of the prosecution that they strangulated the deceased with a dog chain. We do notice Dr. Piyush Kapila to have opined that injuries found on the body of the deceased could have been inflicted with the dog chain (Ex.P-20) and spanner (Ex.PY), but then as is evident from the report of the Forensic Science Laboratory (Ex.PW-24/E), no stains of blood were found on the dog chain, so also on the spanner. There is nothing else to establish the factum of use of these weapons for murdering the deceased.

21. For establishing the factum of the accused having used the vehicle, our specific attention is invited to the report of the Fingerprints Bureau, Bharari (Shimla) (Ex.PW-16/B). Perusal of testimony of ASI Sanjeev Kumar (PW-16) does establish that fingerprints, so lifted from the side seat, dashboard and glass of the window, matched with that of accused Manish Lohat. But then the fundamental question, which arises for consideration, is as to who took sample fingerprints of the accused, more so that of accused Manish Lohat. None of the police officials have testified to such effect. Also, there is no document in this regard. In any case how does police establish presence of accused Ravi Kumar on the spot. Repetitive though it may sound, but we must reiterate that no fingerprints of any one of the accused were found on the weapon of offence.

22. It is the case of prosecution, as is evident from the testimony of the Investigating Officer that accused Ravi Kumar was arrested on 2.4.2011 and accused Manish Lohat was arrested on 5.4.2011. Further accused Manish Lohat made a disclosure statement (Ex.PW-19/A), which led to recovery of keys of the car as also identification of spot of crime, vide memo Ex.PW-20/B. Clothes worn by the accused were also taken into possession and the spot where they had burnt the jacket of the deceased was also got identified. On this issue, we may only observe that no fact came to be discovered, pursuant to the said disclosure statement, save and except about recovery of keys of the vehicle. Even here, we find there is material contradiction, for one of the witnesses to the recovery states that the key was recovered from a place near Tara Bhojalaya, whereas other witness states that it was near a place known as 'AG Chowk'. Well, both the witnesses may be referring to the very same place, but the fact of the matter is that water tank where the keys were lying was visible to all. In fact, it is a public place/path and easily accessible to the general public. But crucially, whether the key recovered was actually that of the car or not, that fact remains unestablished. In fact, Rajinder Kumar (PW-20), who is witness to the recovery, does not state with certainty as to whether the key recovered was that of the car in which deceased was found. Dilbar Singh (PW-13), owner of the car has not identified the key. Also, such fact has not been established by any mechanical expert. Hence, even this circumstance has not been proved by the prosecution.

23. Much emphasis is laid on the circumstance of accused Ravi Kumar stealing the mobile phone of the deceased and selling it to a shopkeeper in another State, i.e. Haryana at Karnal. For establishing such fact, our specific attention is invited to the ocular evidence of Constable Navdeep Kumar (PW-3), Sunny (PW-4), Vikas Kashyap (PW-5), Manoj Sharma (PW-7), Pradeep Panchal (PW-22), HC Manoj Kumar (PW-27), Inspector Sarwan Kumar (PW-28) and Vishal Thakur (PW-29), as also documents (Ex.PW-3/A, Ex. PW-3/B, Ex.PW-23/A-1, Ex.PW-23/B-1 to B-47 and Ex.PW-29/A).

24. In crux, it is the case of prosecution that after stealing the mobile phone of the deceased, Ravi Kumar sold it to Pradeep Panchal (PW-22), a shopkeeper at Karnal (Haryana), for a sum of Rs.500/-, who in turn allowed his nephew Sunny (PW-4) to use the same for his personal use.

25. During the course of investigation, the IMEI number of the mobile was kept on tracking, which revealed that immediately prior to the occurrence of incident, deceased had made a call to an unknown number and two days thereafter Manoj Sharma (PW-7), a friend of accused Ravi Kumar had called him on his mobile number, SIM of which was inserted and used in the handset of the mobile phone of the deceased. It is only with the help of the IMEI number and the record of the mobile number, i.e. statement of calls so provided by the service provider, that police was able to arrive at such a conclusion.

26. We may only observe that even this circumstance cannot be said to have been established on record and this we say so for two reasons - (a) record produced by the service provider, i.e. call data record (Ex.PW-23/A-1, Ex.PW-23/B-1 to Ex.PW-23/B-47 and Ex.PW-29/A), have not been certified, as is so required under the provisions of Section 65-A of the Evidence Act. As such, in view of law laid down by the Apex Court in *Anvar P.V. v. P.K. Basheer and others,* (2014) 10 SCC 473; *Harpal Singh alias Chhota v. State of Punjab,* (2017) 1 SCC 734; *Vikaram Singh alias Vicky Walia and another v. State of Punjab and another,* AIR 2017 SC 3227; and *Sonu alias Amar v. State of Haryana,* AIR 2017 SC 3441, (a) the said documentary evidence is wholly inadmissible in law, and (b) in any event, prosecution has not been able to establish that mobile of the deceased was ever used by accused Ravi Kumar. Manoj Sharma (PW-7) does state that on 12.4.2011, he had conversation with accused Ravi Kumar on phone. Allegedly, he made a call from his mobile number on the mobile number of the accused, but then, he is conspicuously silent with regard to the number of the mobile. He has not disclosed either his mobile number or that of accused Ravi Kumar. In fact, he is certain of having informed the police about the mobile number of accused Ravi Kumar. Thus, what prevented the police to take the investigation its logical end is a mystery.

27. Further, it is not the case of prosecution that accused Ravi Kumar was either known to Pradeep Panchal (PW-22) from before or was a frequent visitor to Karnal (Haryana). In any case, Pradeep Panchal (PW-22) is not a registered retailer. His version that he purchased the mobile from the accused for a sum of Rs.500/- is unbelievable. No receipt ever came to be issued. Why would he purchase a phone from an unknown person? Except for this ocular version police has not been able to establish movement of accused Ravi Kumar from Shimla to Karnal. For after all, why would the said accused travel all the way to Karnal to sell a mobile phone and that too only for a sum Rs.500/-. It is nobody's case that otherwise said accused happened to be at Karnal. At this juncture, we may also observe that police tried to identify the mobile phone of the deceased through the testimony of his brother, namely Vikas Kashyap (PW-5). But then, careful perusal of his testimony also does not conclusively establish that mobile phone so recovered by the police was in fact used by the deceased at the time of the incident, for the witness admits that the deceased had changed his mobile twice or thrice. At this juncture, it be observed that the prosecution wants the Court to believe that in fact mobile number 9129071808 was actually being used by accused Ravi Kumar for his personal use, of which this witness and as already observed Manoj Sharma (PW-7) does not disclose such fact and from the record (Ex.PW-29/A), it is evident that the said mobile number belonged to one Kishori of Muhal

Sital, Tehsil Chamba, District Chamba, Himachal Pradesh, a place distant from Shimla and prosecution has not been able to establish the link between any one of the accused with this person. Also, the fact of this mobile number being used by accused Ravi Kumar remains unestablished on record.

28. It is in this backdrop, we find the trial Court not to have correctly and completely appreciated the evidence, as also correctly applied the principles of law, thereto. Trial Court presupposed the guilt of the accused. It pre-judged and presupposed certain facts. It believed that the accused were known to the deceased. Also, accused had hired the car and that an altercation took place between them over the amount of fare. Now this fact remains unestablished on record. What was the fare? For what purpose vehicle was hired? Whether it could have been hired at all? What was the starting point and the destination? Who all fought? remains unestablished on record.

29. Absence of motive has been held a ground not sufficient to acquit the accused. Yes, it is the law that absence of motive, in the facts and circumstances, may not be a reason for acquittal, but then, in the instant case, more so where prosecution is seeking to establish the case by way of circumstantial evidence prosecution ought to have assigned some reasons for the assault. It is not the case of prosecution that scuffle took place on the spur of the moment, making the motive to be an irrelevant factor. As already observed, prosecution has not been able to establish the circumstance of last seen. Hence, motive was a relevant factor, which ought to have been established by the prosecution.

30. At this juncture, it be only observed, as is so evident from Para-40 of the impugned judgment, that the Court accepted the factum of the prosecution having established the circumstance of last seen together, obligating the accused to discharge the burden, explaining their presence on the spot at the relevant time. It is here, we find the Court below to have erred in not appreciating, that onus to prove every circumstance interlinking each one of them, leading to no other presumption, save and except that of the guilt of the accused, was on the prosecution.

31. The Court presupposed that dog chain came to be purchased from Ramesh Kumar (PW-18) and that it was used as a weapon for strangulating the deceased. On this issue, one may only observe that trial Court has not discussed the evidence at all. Further, it erred in believing the prosecution case of the accused having sold the mobile phone to Pradeep Panchal, for a sum of Rs.500/-. Another link in the chain, which weighed with the trial Court, was the report of the Expert (Ex.PW-16/B). It did not bother to even examine the record for ascertaining the fact, as to who and at which place sample fingerprints of the accused were taken by the police or sent to the Forensic Science Laboratory, without the same having been tampered with.

32. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused.

33. Hence, for all the aforesaid reasons, the appeals are allowed and the judgment of conviction and sentence, dated 1.1.2014/6.1.2014, passed by Sessions Judge (Forests), Shimla, Himachal Pradesh, in Sessions Trial No.41-S/7 of 2013/12, titled as *State of H.P. v. Ravi Kumar and another,* is set aside and both the appellants-accused Ravi Kumar and Manish Lohat are acquitted of the charged offences. They be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to them accordingly. Release warrants be immediately prepared.

Appeal stands disposed of, so also pending application(s), if any.

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

Santosh ...Petitioner.
Versus
State of H.P. & others ...Respondents.

CWP No.7563 of 2012.
Reserved on : 05.09.2017.
Date of decision:13th September, 2017.

Constitution of India, 1950- Article 226- **Administrative Tribunal Act, 1985**- Section 15- The process of filling the posts of Takniki Sahayaks was initiated by the Executive Officer, Panchayat Samiti as per the scheme formulated by the Government of H.P. to ensure the quality and cost effectiveness of civil works being carried out by the Gram Panchayat – the question is whether Takniki Sahayaks hold civil post or not – held that the posts of Takniki Sahayaks are not statutory posts – they are being created in terms of the scheme – panchayat sahayaks do not carry on any function of the State, they do not hold post under the statute, their posts are not created, recruitment rules applicable to the employee of the State are not applicable to them and the process of selection for their appointment does not fall within the constitutional scheme – they do not hold any civil post and Tribunal does not have jurisdiction over them. (Para-17 to 25)

Cases referred:
The State of Assam and others vs. Kanak Chandra Dutta AIR 1967 SC 884
State of Karnataka and others vs. Ameerbi and others (2007) 11 SCC 681
R.N.A.Britto vs. Chief Executive Officer and others (1995) 4 SCC 8

For the Petitioner : Mr.Sanjeev Bhushan, Senior Advocate with Ms.Abhilasha Kaundal, Advocate.
For the Respondents: Ms.Meenakshi Sharma, Addl. A.G. with Mr.Neeraj K.Sharma, Dy. A.G., for respondents No.1 to 3.
Mr.Rakesh Kumar Dogra, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

A learned Division Bench of this Court vide order dated 20.04.2017 directed this Court to decide the question of jurisdiction.

2. Before deciding the issue, I have heard the learned counsel for the parties and gone through the records.

3. The question of jurisdiction, as referred to above, is as to whether the "Takniki Sahayaks" are holding a civil post and their disputes are required to be adjudicated at the first instance only by the learned Tribunal or that they do not hold any civil post, there only exists a relationship of employer and employee by and between the State and the "Takniki Sahayaks" and, therefore, their cases are not maintainable before the learned Tribunal and thus are required to be adjudicated by this Court alone.

4. Section 15 of the Administrative Tribunals Act, 1985, reads thus:-

"***15.Jurisdiction, powers and authority of State Administrative Tribunals.***—*(1) Save as otherwise expressly provided in this Act, the Administrative Tribunal for a State shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court [1] [***]) in relation to—*

(a) recruitment, and matters concerning recruitment, to any civil service of the State or to any civil post under the State;

(b) all service matters concerning a person [not being a person referred to in clause (c) of this sub-section or a member, person or civilian referred to in clause (b) of sub-section (1) of section 14] appointed to any civil service of the State or any civil post under the State and pertaining to the service of such person in connection with the affairs of the State or of any local or other authority under the control of the State Government or of any corporation [2] [or society] owned or controlled by the State Government;

(c) all service matters pertaining to service in connection with the affairs of the State concerning a person appointed to any service or post referred to in clause (b), being a person whose services have been placed by any such local or other authority or corporation [2] [or society] or other body as is controlled or owned by the State Government, at the disposal of the State Government for such appointment.

(2) The State Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of sub-section (3) to local or other authorities and corporations[2] [or societies] controlled or owned by the State Government:

Provided that if the State Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this sub-section in respect of different classes of, or different categories under any class of, local or other authorities or corporations[2] [or societies].

(3) Save as otherwise expressly provided in this Act, the Administrative Tribunal for a State shall also exercise, on and from the date with effect from which the provisions of this sub-section apply to any local or other authority or corporation [2] [or society], all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court [1] [***]) in relation to—

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation[2] [or society]; and

(b) all service matters concerning a person [other than a person referred to in clause (b) of sub-section (1) of this section or a member, person or civilian referred to in clause (b) of sub-section (1) of section 14] appointed to any service or post in connection with the affairs of such local or other authority or corporation [1] [or society] and pertaining to the service of such person in connection with such affairs.

(4) For the removal of doubts, it is hereby declared that the jurisdiction, powers and authority of the Administrative Tribunal for a State shall not extend to, or be exercisable in relation to, any matter in relation to which the jurisdiction, powers and authority of the Central Administrative Tribunal extends or is exercisable."

5. The post in question is nomenclatured as "Takniki Sahayak" and the process for filing up of the same was initiated by the Executive Officer, Panchayat Samiti, Ghumarwin vide Annexure P-1. It is not in dispute that the recruitment of the "Takniki Sahayak" is as per the scheme floated by the Government of Himachal Pradesh vide notification Annexure P-2 and the objective thereof is to strengthen "Takniki Sahayaks" to ensure that the quality and cost effectiveness of civil works being carried out and executed by the Gram Panchayats under the National Rural Employment Guarantee Scheme (now MANREGA). The scheme provides for

accreditation of technically qualified person at the block level for which minimum educational and other qualifications required for accreditation in the panel is as under:-

"1. Minimum Educational and other qualifications required for accreditation in the panel.

a. Degree/Diploma in Civil Engineering from recognized institution. However, the existing persons who are in the panel are also eligible for accreditation in the panel.

b. Basic knowledge of computer.

c. The Candidate should be of sound mind and good physical health.

d. The candidate should not have any criminal record.

e. The candidate should not have any outstanding dues payable to the State Government or the Gram Panchayat.

f. The candidate should not have been disqualified under any law for the time being in force from holding any office under the government.

2.Minimum age limit: The candidate should have attained the age of 18 year as on 1st January of the year in which he/she applied to the post."

6. The mode of accreditation is provided in Clause 3 of the scheme which reads thus:-

"Mode of accreditation in the panel.

Any person possessing aforementioned qualification can apply for accreditation in the panel to concerned Executive Officer Panchayat Samiti. The Executive Officer Panchayat Samiti will invite the applications for this purpose by putting a notice on the notice board of the Panchayat Samiti, Block Development Office as well as Gram Panchayat Office and all other conspicuous places. At least 15 days notice will be given for inviting applications. The panel will be an open ended. There would no restrictions on the number of eligible to be accredited."

7. The mode of allocation of Gram Panchayat is provided in Clause 4 of the scheme and reads as thus:-

"4. Mode of allocation of Gram Panchayats.

The Executive Officer, Panchayat Samiti, in consultation with concerned Pradhan Gram Panchayats will constitute a group of 3 to 12 Gram Panchayats keeping in view the geographical condition, contiguity and quantum of work in the concerned Gram Panchayats. The group should be such that a Takniki Sahayak get sufficient work and service charges. The number of Panchayats in a group could further be modified by Director (PR) in special cases. After constituting the groups of Panchayats in the block, the Executive Officer Panchayat Samiti will invite applications from the accredited engineers from the panel for allocation of a group of Panchayats to a Takniki Sahayak. He will also fix the headquarters of the Takniki Sahayak in one of the Gram Panchayats of the group. The allocation of group of Panchayats to a specific Takniki Sahayak will be made by a selection committee. The composition of the selection committee will be as under:-

(i)	*Sub Divisional Officer(Civil)*	*:*	*Chairman*
(ii)	*Chairman Panchayat Samiti*	*:*	*Member*
(iii)	*Assistant Engineer (Dev.)*	*:*	*Member*
(iv)	*Executive Officer, Panchayat Samiti:*		*Member Secretary."*

8. In order to work out merit of the candidates, who appear before the selection committee, the maximum marks allocated are 100 which are to be distributed as per Clause 5 of the scheme which reads thus:-

"5. Distribution of Marks:

Sr. No.	*Qualification*	*Total Marks*	*Procedure of calculation*
(a)	*Performance in degree/ diploma*	*47*	*1.Percentage of marks in degree divided by 2.127* *or* *2. Percentage of marks in 3 years Diploma divided by 2.5* *Or* *3. Percentage of marks in 2 years I.T.I. diploma divided by 3 (only for existing Takniki Sahayaks. For new Takniki Sahayaks the qualification will be Degree /3 years Diploma in civil Engineering).*
(b)	*Experience*	*10*	*@ 2 marks per year of experience of relevant nature.*
(c)	*Candidates belonging to the category of BPL SC/ST/OBC*	*10*	
(d)	*Candidate having no Family member in Government service.*	*10*	
(e)	*Preference for resident of concerned Block*	*5*	
(f)	*Handicapped*	*3*	
(g)	*Interview*	*15*	
	Total	*100"*	

9. After selecting the required number of "Takniki Sahayaks", a waiting list is prepared in order of merit of selected candidates and the same is valid for one year.

10. The powers of the "Takniki Sahayak" as enumerated in Clause-6 for according technical approval and assessment of work is Rs.1,50,000/-. The Executive Officer of the Panchayat Samiti is required to issue Measurement Books (for short MB) to the "Takniki Sahayak" and also maintain proper records for the MBs so issued. The "Takniki Sahayaks" are to be paid fee in the following manner:-

"(i) Works costing up to 50,000/- : @ 2% of the total cost of the work.

(ii) Work costing more than 50,000/- upto 1,50,000/-: @ 1.5% of the total cost of the work."

11. The payment is to be made on the basis of the assessment made by the Panchayat Sahayak and actual expenditure incurred on the work whichever is less. The payment of service fee can be made either by pooling the resources at Panchayat Samiti level or by the concerned Gram Panchayats as deemed proper by the Executive Officer, Panchayat Samiti. The fee structure can be changed by the Director, Panchayati Raj, from time to time.

12. As per Clause 8 of the scheme, job charts are to be given to the "Takniki Sahayaks", who are then required to render all such assistance to the Gram Sabha, Gram Panchayat right from the preparation of estimate till the completion of the work/scheme which would include the following:-

"(i) Preparation of estimates, execution/supervision of works.

(ii) Making entries in M.B. (M.B.s to be provided by E.O. Panchayat Samiti).

(iii) Maintenance of all registers relating to work.

(iv) Reporting of physical and financial progress of departmental works.

(v) Any other related works assigned by the Department Panchayat Samiti or the Executive Officer."

13. Clause 9 of the scheme envisages de-accreditation of Takniki Sahayaks in the following eventualities:-

"9. *De-accreditation of Takniki Sahayaks:*

1. *The Takniki Sahayak will be de-accredited from the panel by Executive Officer Panchayat Samiti and he will not be assigned any Panchayat if the work assessed/measured by him/her is found wrong on consecutive occasions on test check done by other Technical persons or the majority of Panchayats of the group assigned to him/her, has passed resolutions for his/her removal. Provided that before de-accreditation of Takniki Sahayaks opportunities of being heard shall be provided to him/her.*
2. *If it comes to the notice of the Rural Development or Panchayati Raj Departments that there has been gross misconduct or misappropriation of developmental scheme, money by the Takniki Sahayak or he has failed to perform the duties assigned to him/her by the Gram Panchayats or any authority of the above departments and his/her continuance in the office is undesirable, the services of the Takniki Sahayak can be de-accredited and no Panchayats will be assigned to him/her. The order in this behalf will be based on the enquiry report conducted by E.O. Panchayat Samiti or any other officer appointed by Director (Panchayati Raj)."*

14. Clause 10 provides for assignment of Group of Panchayats (3 to 12 Panchayats) to new "Takniki Sahayak" wherein it is envisaged that in the event of de-accreditation of a "Takniki Sahayak", the new "Takniki Sahayak" will be selected for a group of Gram Panchayats by E.O., Panchayat Samiti from the waiting list. In the event of non availability of candidate in the waiting list, new "Takniki Sahayaks" as will be selected by following the procedure as detailed at Sr.No.3 to 5 of the Scheme.

15. As regards the dispute resolution regarding accreditation and allocation of Gram Panchayats, the same is envisaged under Clause 11 of the scheme which states that an aggrieved party may prefer an appeal before the Deputy Commissioner of the concerned District within 30 days from the accreditation and allocation of Gram Panchayats or from the date of de-accreditation from the panel, as the case may be. It is further provided that the decision of the Deputy Commissioner in such matters shall be final.

16. Lastly, Clause 12 of the scheme provides for power to remove difficulties, wherein it is provided that if any difficulty arises in the implementation or interpretation of the scheme, the matter may be referred to the State Government for clarification/guidance, who shall be competent, by an order, to do anything to remove such difficulty not inconsistent with the provisions of the scheme.

17. From the entire conspectus of the scheme, it would be noticed that the posts of "Takniki Sahayak" are non-statutory posts. They are being created in terms of the scheme. It is one thing to say that there exists a relationship of employer and employee by and between the State and the "Takniki Sahayaks", but it is another thing to say that they are holders of the civil post.

18. What is a "civil post" was considered in detail by a Constitution Bench of the Hon'ble Supreme Court in ***The State of Assam and others*** *vs.* ***Kanak Chandra Dutta AIR 1967 SC 884*** wherein the question posed as to whether Mauzadar appointed for the purpose of collection of revenue under the scheme prevalent in the Assam Valley would be a holder of "civil post". The answer to this question was rendered in affirmative by observing as under:-

> "9. *The question is whether a Mauzadar is a person holding a civil post under the State within Art. 311 of the Constitution. There is no formal definition of "post" and "civil post". The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Art. 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State. See marginal note to Art. 311. In Art. 311, a member of a civil service of the Union or an all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State. See the marginal notes to Arts. 309, 310 to 311. The heading and the sub-heading of Part XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.*
>
> *10. In the context of Arts. 309, 310 and 311, a post denotes an office. A person who holds a civil post under a State holds "office" during the pleasure of the Governor of the State, except as expressly provided by the Constitution, see Article 310. A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post. Article 310(2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post, and it emphasises the idea of a post existing apart from the holder of the post. A post may be created before the appointment or simultaneously with it. A post is an employment, but every*

employment is not a post. A casual labourer is not the holder of a post. A post under the State means a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of persons appointed to the post."

19. Applying the said principles of law, it was held that a Mauzadar holds a civil post under the State as:

"(i) the State has the power and the right to select and appoint him;

(ii) he is subordinate to public servant;

(iii) he receives remuneration by way of a commission and sometimes a salary;

(iv) there exists a relationship of master and servant;

(v) he holds an office on the revenue side of the administration to which specific and onerous duties in connection with the affairs of the State are attached;

(vi) the office falls vacant on the death or removal of the incumbent;

(vii) he is a responsible officer exercising delegated powers of the Government;

(viii) he is appointed Revenue Officer."

20. The aforesaid principle was thereafter applied by the Hon'ble Supreme Court to "Anganwadi" workers, in ***State of Karnataka and others*** *vs.* ***Ameerbi and others (2007) 11 SCC 681*** wherein it was observed as under:-

"20. Anganwadi workers, however, do not carry on any function of the State. They do not hold post under a statute. Their posts are not created. Recruitment rules ordinarily applicable to the employees of the State are not applicable in their case. The State is not required to comply with the constitutional scheme of equality as adumbrated under Articles 14 and 16 of the Constitution of India. No process of selection for the purpose of their appointment within the constitutional scheme existed. We do not think that the said decision has any application in the instant case."

21. Applying the tests as have been applied by the Hon'ble Supreme Court in ***Ameerbi's case*** (supra), it would be noticed that:-

(i) "Takniki Sahayaks" do not carry on any function of the State.

(ii) They do not hold post under a statute.

(iii) Their posts are not created.

(iv) Recruitment rules ordinarily applicable to the employees of the State are not applicable in their case.

(v) The State is not required to comply with the constitutional scheme of equality as adumbrated under Articles 14 and 16 of the Constitution of India.

(vi) No process of selection for the purpose of their appointment within the constitutional scheme exists.

22. However, learned counsel for the respondents would at this stage refer to the judgment of the Hon'ble Supreme Court in ***R.N.A.Britto*** *vs.* ***Chief Executive Officer and others (1995) 4 SCC 8*** wherein after following the judgment in ***Kanak Chandra's case*** (supra), it was held by the Hon'ble Supreme Court that the Panchayat Secretaries having regard to the Karnataka Village and Local Boards Act are government servants by observing as under:-

"*13. Another significant provision is sub-section (2) of Section 80 of the Act which says that subject to the provisions of Rules made under the proviso to Article 309 of the Constitution, the qualifications, powers, duties, remuneration and conditions*

of service including disciplinary matters of such Secretary shall be such as may be prescribed.

14. The provisions in the Act to which we have adverted, clearly show that several functions which were required to be performed by the State are entrusted to the Panchayats. They also show that the properties vested in the Panchayats and the funds of the Panchayat are that of the Government and those collected by way of tax or fee by exercising the power of taxation vested in the Panchayat by the Government. Above all, provisions of the Act make it abundantly clear that the Panchayats have to function under the ultimate control of the State Government. When it comes to the Secretaries of the Panchayats appointed under the Act, their selection for appointment, their termination from service, their liability for transfer and all other conditions of their services are as provided for under the Rules made under the Act or other rules made under Article 309 of the Constitution in respect of services of the State Government servants. When Sub-section (2) of Section 80 of the Act to which we have adverted states that subject to the provisions of Rules made under the proviso of Article 309 of the Constitution, the qualifications, powers, duties, remuneration and conditions of service including disciplinary matters of such Secretary shall be such as may be prescribed, it leaves no room for doubt that the Secretaries of the Panchayats are Government servants, like other Government servants, who are subjected to the Rules to be made under the proviso to Article 309 of the Constitution as regards their service conditions."

23. Noticeably, the aforesaid judgment in ***R.N.A. Britto's case*** (supra) was also a subject matter of discussion before the Hon'ble Supreme Court in ***Ameerbi's case*** (supra) and it was held that the said decision *ex facie* cannot be said to be applicable to the case of "Anganwadi Workers". The reason for the same was because the Secretaries of the Panchayats were appointed under the Karnataka Village and Local Boards Act, their selection for appointment, their termination from service, their liability for transfer and other conditions of the services were provided for under the rules made under the Act or other rules made under Article 309 of the Constitution in respect of the services of the State Government servants, which obviously is not a fact situation obtaining even in the instant case.

24. As observed above, the "Takniki Sahayaks" do not hold a "civil post" as:-

(i) "Takniki Sahayaks" do not carry on any function of the State;

(ii) they do not hold post under a statute;

(iii) their posts are not created;

(iv) recruitment rules ordinarily applicable to the employees of the State are not applicable in their case,

(v) the State is not required to comply with the constitutional scheme of equality as adumbrated under Articles 14 and 16 of the Constitution of India; and

(vi) no process of selection for the purpose of their appointment within the constitutional scheme exists.

25. Therefore, the learned Tribunal will have no jurisdiction to entertain much less to adjudicate their claims and since there exists a relationship of employer and employee between the State and the "Takniki Sahayaks", it would be this Court which would have the jurisdiction to entertain and adjudicate the matters of instant kind.

The question of jurisdiction is answered accordingly.

List for orders on **15.09.2017.**

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

Yog Raj ..... Petitioner
Versus
State of H.P. ..... Respondent

Cr. M.P. (M) No. 904 of 2017
Date of Decision: September 13, 2017

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offence punishable under Section 420 of I.P.C- petitioner claims that he is innocent and has been falsely implicated- he is joining investigation and is not in a position to flee from the justice- he has aged parents and two minor children, on these grounds the pre-arrest bail was sought- police filed a report stating that petitioner is not disclosing the truth- chassis number was tempered and the vehicle was sold- there is involvement of other persons as well- held that petitioner is involved in the sale of the truck and is responsible for the change of registration number of truck- petitioner is not co-operating with the police and is not telling the truth- investigation is at initial stage- hence, discretion of grant of bail cannot be exercised in favour of the petitioner- petition dismissed. (Para-8)

For the Petitioner Mr. Jagat Pal, Advocate
For the Respondent Mr. Virender K. Verma, Additional Advocate General and Mr. Rajat Chauhan, Law Officer, for the respondent-State

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral)**:**

The present petition has been moved by the petitioner under Section 438 of the Code of Criminal Procedure for releasing him on bail in case FIR No. 67 of 2016, dated 22.10.2016, for the offences, punishable under Section 420 of the Indian Penal Code, registered at Police Station, Darlaghat, Tehsil Arki, District Solan, H.P.

2. As per the petitioner, he is innocent and has been falsely implicated in this case. Further, the petitioner is joining and cooperating with the investigation as and when asked for by the Investigation Agency and not in a position to flee from justice. He further stated that he is having old aged parents and two minor children and in case he is arrested, they will also suffer. As per petitioner, he undertakes to join investigation and cooperating in the investigation as and when required. He be released on bail.

3. Police report stands filed. As per prosecution, on 22.10.2016, one Lekh Ram son of Shri Sunder Ram, resident of Village Kyard, Post Office Bharighat, Tehsil Arki, District Solan H.P. visited Police Station Darlaghat, Tehsil Arki, District Solan and stated that he is permanent resident of Village Kayrad, District Solan and his Truck bearing registration No. HP62-2311 has been stolen which was purchased by him in the year, 2013 and the same was deputed for carrying material in JP Company Baga. Due to less work of carrying material with JP Company Baga, he has parked his truck about five months ago in a corner of road and when he went to see his truck on 13.09.2016, the truck was not found standing there, whereas, he had seen the truck very much standing there on 12.09.2016, He has stated that he inquired about the truck from nearby people and shopkeepers but no clue about missing of the truck was found. Despite all efforts being made by him, he failed to trace out the vehicle. Qua this, an FIR was registered in Police Station Darlaghat. The I.O. Ram Narayan visited the spot and map etc, were prepared and statements of witnesses were recorded. All the documents with regard to stolen vehicle bearing registration No. HP-62-2311 were taken into possession and also inquired about the same from many persons. After investigation, it was found that the truck of

complainant Lekh Ram, which was stolen, was being plied with the JP Company in the name of Mast Ram, resident of Karog and in this truck, there is a plate bearing No. HP-51A-1677. When this information found correct, the alleged truck bearing No. HP-51A-1677 was brought for inspection in the police Station and was inspected through experts of FSL Junga. As per FSL Junga report, the truck which is being run in the name of Mast Ram, truck bearing No. HP-51A-1677, in LPT, chassis No. MAT 373141D5B21640 and its original chassis No. MAT 373339D1E05483, front Axle No. 5161WY37406 and rear Axle No. 5162204WY433400 were found tempered. In this truck , the original chassis number as per investigation were found of the stolen truck bearing registration No. HP-62-2311 and Chassis and Axle number are found same, from which it has been recognized that the above said truck No. HP51A-1677 which is being plied by Mast Ram in Baga, is factually is the truck which was stolen bearing registration No. HP-62-2311. Therefore, the police has taken into custody Truck No. HP 51A-1677. During this, Yog Raj has filed bail petition in this Hon'ble High Court and after the directions of this Hon'ble Court, the matter was investigated in detail and it was found that truck bearing registration No. NL02Q-1584 was purchased in Chandigarh from one Shri Ramesh Kumar and about for 2 years, this truck was used for carrying articles in Chandigarh and this truck was being driven by one Rajesh Kumar @ Kaku. After plying this truck at Chandigarh, on receipt of NOC from Nagaland, this truck was registered by agent namely at Shimla, but Yog Raj has neither disclosed about Ramesh Kumar, his address, about the Transport Company and he has also not given any information about the residence of driver Rajesh to the Police. As per Yog Raj, aforesaid truck NL02Q-1584 through one Sanjeev Gautam was sold to Mast Ram and on demand of documents, he failed to produce the same and further he has not provided information about agent. On disclosure of name of Sanjeev Gautam, he was also interrogated and on asking he told that being an agent he used to purchase this vehicle for Mast Ram resident of Karog and he do not know about anything else. With regard to sale purchase of the truck, nothing has been produced before the police and Yog Raj is only telling that all the documents have been submitted before RLA (Rural), Shimla through agent.

4. As per FSL Junga report the truck which is being run in the name of Mast Ram, bearing No. HP-51A-1677, in LPT front Axle and rear Axle were found tempered. On investigation, it was found that Yog Raj has prepared fake documents of the alleged truck No. HP51A-1677 and after tempering chassis number this vehicle sold through Sanjeev Gautam to Mast Ram whereas this vehicle was found as stolen vehicle No. HP62-2311 and as such FIR was registered under Sections 420,465, 467, 120-B IPC. In the entire episode, it cannot be said that there is no involvement of other persons. Yog Raj was interrogated but he is not telling the truth and is suppressing the material facts. It is yet to be found from Yog Raj that who are the persons factually involved in preparing fake documents and also to temper with the chassis and Axle number. It is not come on record that factually Truck No. HL02Q-1584 has been purchased or not because as per investigation, Yog Raj and Mast Ram both have not given the documents pertaining to truck No HP 51A-1677 with regard to sale and purchase of this vehicle to the police. Yog Raj lastly come for investigation on 29.07.2017 and disclosed that vehicle No. HP17D-1530 was to be inspected and he told that this vehicle is stationed at the house of his friend and he was again called for 30.07.2017 and he visited the police on 30.07.2017 at about 11.00 AM but aforesaid vehicle was not produced by him to police nor he told about this vehicle. He was also inquired about change of plate but he is not disclosing truth about the same. He is only stating that this number plat was put by one boy but in case his name is disclosed his career will be ruined. Yog Raj is not cooperating intentionally to the police.

5. Heard. Learned counsel for petitioner, submits that the petitioner is joining investigation as and when he was asked to do so. It is further stated that he remained admitted in the Hospital and immediately on discharge from the Hospital, he has gone to police Station but Investigating Officer has not met him. He states that the petitioner is ready and willing to join investigation as and when called to do so.

6. On the other hand learned Additional Advocate General submits that in fact the petitioner is not disclosing the true facts with regard to the address of Ramesh Kumar from whom

he purchased the truck NL02Q-1584 nor the truck is recoverable. He argued that many other aspects which came in investigation, the petitioner is not telling about the same and not cooperating in the investigation. He argued that the recoveries are to be effected and as such prayed for dismissal of bail.

7. Learned counsel for the petitioner in rebuttal vehemently argued that the petitioner has nothing to do with the truck as he has already sold the said truck to someone else and those are the real culprits and the petitioner is being involved without any basis. He has argued that the petitioner is required to be released on bail and no purpose will be served in putting the petitioner behind the bar.

8. After going through the police report and after hearing learned counsel to the petitioner, it is found that the petitioner is involved in the sale of truck bearing Registration NL02Q-1584 and is responsible to change registration number of the truck bearing registration No. HP-51A-1677 and the recovery of the truck stolen as well as the name and address of person who are involved in the said episode are yet to be traced out and the petitioner is not co-operating and telling truth. Also taking into consideration the complicated facts which come on record, this Court finds that the investigation still is in the initial stage and after going through all the aspects of the case, this Court comes to the definite conclusion that it is not a fit case to exercise judicial direction in favour of the petitioner.

9. The instant petition is devoid of merits, require to be dismissed and accordingly, dismissed. Copy ***'Dasti'.***

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

M/s B.K. Sons (deceased) through LRs. ...Petitioner.
Versus
Babu Lal ...Respondent.

Civil Revision No. 52 of 2008.
Date of decision: 15th September, 2017.

H.P. Urban Rent Control Act, 1987- Section 14- The petition for eviction was allowed by the Rent Controller on the ground of arrears of rent amounting to Rs. 46,200/- along with interest @ 9% per annum and cost of Rs. 1,000/- - the tenant deposited an amount of Rs. 43,000/- which was less than the adjudged arrears – the tenant filed an appeal which was dismissed – held in revision that the stand taken by the tenant is contradictory – the deposit by the tenant will not help him in absence of any findings that landlord had neglected or refused to accept the rent – the Rent Controller had rightly held the tenant to be in arrears of rent- petition dismissed.

(Para-14 to 25)

Case referred:
Hans Raj Khimta versus Smt. Kanwaljeet Kaur alias Sardarni Babli, Latest HLJ 2016 (1) HP 303

For the petitioner: Mr. B.C. Negi, Sr. Advocate with Mr. Inderjeet Singh Narwal, Advocate.
For the respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice *(Oral)*

On 25.7.2003, Babu Lal respondent (hereinafter referred to as 'landlord') filed a petition for ejectment against petitioner M/s B.K. and sons (hereinafter referred to as 'tenant') on the ground of non-payment of rent w.e.f. 1.3.2003.

2. Significantly, in the response, tenant admitted *(a) factum of tenancy (b) amount of rent to be Rs.1650/- per month.* Also, it stood averred that rent for the month of March, 2003 was adjusted against necessary repairs/white wash/painting carried out for the maintenance of the shop. Rent for the months of April, May and June, 2003, though tendered, was refused, hence sent by way of money order, which also was not accepted by the landlord. Resultantly, an amount of Rs.9900/- was deposited as rent for the period April, 2003 to September 2003, with the Rent Controller, Shimla.

3. On the basis of pleadings of the parties, Rent Controller framed the following issues:

(i) *Whether the respondent/ tenant is in arrears of rent of the demised premises from 1.3.2003 at the rate of 1650/-P.M. till date as alleged? ….OPP*

(ii) Whether the petition is not maintainable as alleged? …..OPR.

(iii) Whether there is no cause of action in favour of the petitioner as alleged? …OPR

(Iv) Relief.

4. To prove the same, landlord examined himself as PW1 and tenant examined Brij Gopal as RW1. Significantly, none of the parties led any documentary evidence.

5. Based on the ocular evidence of the two witnesses, Rent Controller, vide order dated 17.8.2005, passed in case No. 28/2 of 2003, titled Sh. Babu Lal versus M/s B.K. and sons, by answering the issues in favour of the landlord, passed an order of ejectment holding the tenant to be in arrears of rent w.e.f. 1.3.2003 till 1.8.2005, for a period of 28 months and thus, quantified the arrears due and payable to be a sum of Rs.46200/-. Additionally, landlord was held entitled to interest @9% per annum thereupon and cost of Rs.1000/-.

6. It is a settled principle of law that to avoid execution of such an order of eviction, tenant is statutorily protected if he were to deposit the amount due so quantified by the Rent Controller, within a period of 30 days from the date of passing of the order. (3rd proviso to clause (i) of sub-Section 2 of Section 14 of the Himachal Pradesh Urban Rent Control Act, 1987, for short "the Act").

7. It is not in dispute that subsequent to the passing of order of ejectment by the Rent Controller, on 15.9.2005 tenant deposited an amount of Rs.43000/- in the Treasury. Though there is nothing on record to establish that prior to such deposit, the amount was actually tendered to the landlord and/or, acceptance thereof refused by him. It may only be clarified that deposit of the amount in the Treasury was with the permission of the Rent Controller.

8. It cannot be disputed that the amount so deposited was not in terms of the direction contained in the order passed by the Rent Controller. Thus making the order to be executable and the tenant not entitled to the statutory protection contained in the proviso.

9. However, independently aggrieved of the findings returned by the Rent Controller, in the petition for ejectment filed by the landlord, tenant also preferred an appeal under Section 24 of the Act.

10. Record reveals that delay in filing the appeal was condoned and during the pendency of the appeal, tenant filed an application under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure, seeking permission to place on record documents relating to certain proceedings and other documents, indicating legal tender of rent due and admissible to the landlord. These documents pertain to the period both prior to the filing of the petition for ejectment and subsequent to its decision.

11. Such an appeal stands dismissed by the Appellate Authority, in terms of judgment/order dated 14.1.2008, passed in Rent Appeal No. 21-S/14 of 2007/06 titled as M/s B.K. & Sons versus Sh. Babu Lal. Findings on merit, qua non-payment of rent stand affirmed.

12. Noticeably, the Rent Controller finding such application to have been filed only with the purpose of delaying the proceedings and necessary ingredients so required for allowing the application to be missing, rejected the same.

13. Having heard learned counsel for the parties as also perused the record, so made available, this Court is of the considered view that even if application is considered to have been allowed and the documents allowed to be adduced in evidence, even then the tenant cannot be held entitled to the benefit of statutory protection, thus, saving his ejectment from the tenanted premises.

14. However, it is clarified that if the documents filed alongwith the application for additional evidence are ignored, tenant has not established (a) the amount of rent tendered by him to the landlord (b) deposit of any amount of rent with the Rent Controller (c) receipt of any rent by the landlord through money order (d) any amount spent for carrying out the repairs of the tenanted premises. The findings are thus borne out from the record.

15. Independent of such findings and view, this Court proceeds to otherwise examine the findings by accepting the documents to be admissible in evidence.

16. In so far as merits are concerned, one only finds the tenant to have taken a contradictory stand. The receipt dated 11.3.2003 of money order reveals that the landlord did receive a sum of Rs.1650/-. But then this document does not indicate as to for what purpose the amount was received. Assuming it to be the amount of rent, still it cannot be inferred that it pertained to the month of March 2003, as is so urged now. In fact, the stand taken is mutually contradictory. In the written statement, it is the specific plea of the tenant that rent for the month of March 2003, was adjusted against the repairs carried out in the tenanted premises of which there is no proof, thus the plea is false.

17. Still further, it is argued that the tenant had filed an application under Section 21 of the Act for deposit of the rent, in which an amount of Rs.11550/- stood deposited on 21.11.2003. Let us examine what is the effect thereof. Such application for deposit of rent was filed on 14.10.2003. The application was incomplete, not accompanied with the requisite request for deposit of the amount in the Court, as is so required under Section 21 of the Act. Realizing that the application is defective and perhaps liable to be rejected, on 12.11.2003, tenant moved a separate application seeking permission to deposit the said amount of Rs.11550/-, which was so done very same day.

18. Significantly, this amount of Rs.11550/-, as per the tenant's own admission was for the period from May, 2003 to November, 2003, whereas petition for ejectment was allowed for non-payment of rent w.e.f. 1.3.2003.

19. Also what is crucial for determination of the instant case is that in the said application, there is no finding of the Rent Controller that the landlord had refused to accept the amount, prompting the tenant to move such an application and deposit the same in the Court. The fate of the application filed by the tenant, resulted into dismissal in default for want of prosecution. Thus, there is no finding of any authority of a valid tender or refusal to accept the rent so quantified by the Rent Controller in the order of eviction.

20. There is yet another document. It is a money order sent by the tenant to the landlord. Even this document would not make any difference. It does not specify the purpose or period of rent, if any.

21. The language of Section 14 of the Act is clear. Tenant is liable to be evicted "if he has not paid or tendered the rent due from him". Now what is the meaning of expression "tender" is no longer *res integra*. It stands settled by this Court in case titled *Hans Raj Khimta versus Smt. Kanwaljeet Kaur alias Sar*darni Babli reported in *Latest HLJ 2016 (1) HP 303.*

22. Section 20 of the Act enables the tenant to deposit the rent with the Rent Controller but then, this must precede tender of the amount due to the landlord, and his refusal to accept the same.

23. In *Hans Raj case* (supra), this Court, after considering judicial pronouncements rendered by various Courts, including the apex Court, has held the amount due to include the component of rent, interest and cost.

24. In the instant case, there is nothing on record to establish that the amount of Rs.11550/- so deposited by the tenant with the Rent Controller was *(a) towards complete amount so determined by the Rent Controller to be due and payable as arrears of rent (b) deposited pursuant to the same having been tendered to and refused by the landlord (c) In any case such deposit was within 30 days of the passing of the order.* Hence it is not a legal tender of rent entitling the tenant for statutory protection against an order of eviction.

25. Thus, for all the aforesaid reasons, in the instant case, it cannot be said that findings returned by the authorities below, holding the tenant to be in arrears of rent are perverse, illegal or erroneous. As such, present petition, devoid of merit, is dismissed.

26. Pending applications, if any, also stand disposed of.

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

Ashish Kumar ....Petitioner.
Versus
State of Himachal Pradesh ...Respondents.

Criminal Appeal No.643 of 2008
Date of Decision: September 16, 2017

N.D.P.S. Act, 1985- Section 20(b)(i)(B)- Accused was found in possession of 900 grams charas – he was tried and convicted by the Trial Court- held in appeal that prosecution witnesses supported the prosecution version – defence witness admitted his presence on the spot, his signature on the recovery memo and the presence of the accused –he admitted the recovery of packets containing charas – the link evidence was proved and provisions of Section 42 were complied with – failure to produce the seal is not important as the fact that the case property remained intact is duly proved – the Trial Court had properly appreciated the evidence – appeal dismissed. (Para-6 to 22)

For the Petitioner : Mr. Dalip K. Sharma, Legal Aid Counsel.
For the Respondent : Mr. R.S. Verma, Additional Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

In relation to FIR No.215/07, dated 22.8.2007, registered at Police Station, Nalagarh, District Solan, Himachal Pradesh, accused-convict Ashish Kumar (hereinafter referred to as the accused), was charged for having committed an offence, punishable under the provisions of Section 20(b)(i)B) of the Narcotic Substances and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). Findings of conviction and sentence rendered by the Sessions Judge, Solan, Himachal Pradesh, in Case No.1-NL/7 of 2008, titled as *State of Himachal Pradesh v. Ashish Kumar,* are subject matter of challenge in the present appeal.

2. In short, it is the case of prosecution that on 22.8.2007, SI Raj Kumar (PW-11) received secret information that a person, with a lean body, wearing particular type of clothes, was suspected to be carrying some psychotropic substance. He sent 'reasons to believe' to the Superior Officer (Deputy Superintendent of Police, Nalagarh) and after forming a search party, comprising also of independent witnesses Niksan Kumar (PW-1) and Dheeraj Sharma (DW-1) searched for the said person, who was present at Dattowal, near Dargah Pir Baba (Nalagarh). Appearance of the accused matched the description, as such, he was informed of his statutory rights. He consented to be searched on the spot and from the bag carried by him, on his left shoulder, contraband substance, i.e. Charas, was recovered. It was weighed and found to be 900 grams. Two samples, each weighing 50 grams, were drawn. Both the samples and the bulk stuff were packed and sealed with a seal of impression 'B'. On the spot, SI Raj Kumar filled up requisite particulars in the NCRB form. Ruka (Ex.PW-3/A), prepared on the spot was carried to the Police Station by Narinder Kumar (PW-3), on the basis of which FIR No.215 dated 22.8.2007 (Ex.PW-8/A) was registered by Yusuf Ali (PW-8). Since SI Raj Kumar (PW-11) himself was the SHO, there was no requirement of resealing the case property. With the completion of proceedings on the spot, accused was arrested and brought to the Police Station, where case property was entrusted to Vishesh Kumar (PW-9), who deposited it in the Malkhana. Thereafter, Raman Kumar (PW-4) took the sealed samples for chemical analysis to the Forensic Science Laboratory, Junga and report (Ex.PX) thereof collected. Special Report (Ex.PW-5/A) was prepared and sent to Superior Officer, which was received by Prem Lal (PW-7). With the completion of investigation challan was filed in the Court.

3. In order to establish its case, prosecution examined as many as 11 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded. He pleaded false implication and innocence. In defence, he examined Dheeraj Sharma (DW-1), who was not examined by the prosecution for the reason that its case already stood corroborated by an independent witness Niksan Kumar (PW-1).

4. Finding the testimonies of the witnesses, so examined by the prosecution, to be inspiring in confidence, trial Court convicted the accused and sentenced him to undergo rigorous imprisonment for a period of two years and pay fine of Rs.25,000/- and in default of payment thereof, further undergo rigorous imprisonment for a period of six months.

5. Having heard learned counsel for the parties as also perused the record, this Court finds the view taken by the trial Court to be correct and borne out from the record.

6. At this juncture, it be only observed that independent witnesses have also supported the prosecution case. In fact, witness to recovery, so examined by the accused, has also corroborated the prosecution version.

7. From the testimony of SI Raj Kumar, it is clear that on 22.8.2007, he received an information that a boy, aged about 20 years, having thin body with whitish complexion, wearing orange coloured shirt and carrying a blue coloured bag on his left shoulder, is seen strolling in Nalagarh Bazaar and selling psychotropic substance. The information was reduced into writing and sent to the Deputy Superintendent of Police, Nalagarh, through Constable Krishan Lal (PW-6), who corroborates such version of having carried the 'reasons to believe' and handed it over to the Reader in the Office of the Deputy Superintendent of Police. There is also documentary proof. Thus, the version to this extent stands established on record. There is no discrepancy in the testimony of the witnesses on this count.

8. SI Raj Kumar further states that upon receipt of information, he formed a team, comprising of Police officials Kamal Nain, Narinder Kumar (PW-3) and Raj Pal, and proceeded towards Dattowal in a Government vehicle. When they reached near Pir Baba Shrine, they associated two independent witnesses, i.e. Niksan Kumar (PW-1) and Dheeraj Sharma (DW-1), who were present on the spot. Soon the party noticed the accused coming from opposite side. On query, accused disclosed his name as Ashish Kumar, resident of a village in District

Hamirpur. This witness informed the accused that police suspected him of carrying some psychotropic substance. Accordingly, he was informed of his right of being searched by a Magistrate or a Gazetted Officer (Memo Ex. PW-1/A). He opted to be searched by the witness on the spot. When searched, from the bag carried by the accused on his left shoulder, two *Khaki* packets tied with adhesive tapes were found. On checking, the stuff contained in the packets smelt like Charas. Accordingly, Memo (Ex.PW-1/B) was prepared. Recovered stuff was weighed with the weighing scales carried in the IO Kit. To record the proceedings of weighing the stuff, a photographer was called, who took photographs (Ex.P-1 to P-4). Two samples, each weighing 50 grams, were drawn. Samples and the recovered stuff were packed separately in cloth parcels and sealed with seal bearing impression 'B'. NCRB form was filled up on the spot and impression of the seal embossed thereupon. The recovered stuff was taken into possession vide Memo (Ex. PW-1/D). Prior thereto, various documents pertaining to search and seizure were also prepared. The independent witnesses also signed these documents. Thereafter, Ruka (Ex.PW-3/A) was taken by Constable Narinder Kumar to the Police Station, where FIR (Ex.PW-8/A) was registered. With completion of all formalities, accused was arrested and case property entrusted to Vishesh Kumar (PW-9), who deposited it in the Malkhana.

9. When cross-examination part of testimony of this witness (PW-11) is perused, Court does not find the version to be incorrect or his testimony, in any manner, to be shattered. It cannot be said that the witness has deposed falsely.

10. What the Court also finds is the testimony of SI Raj Kumar to have been corroborated by Narinder Kumar (PW-3), another police official.

11. Not only that even independent witness Niksan Kumar (PW-1) has corroborated the version to the fullest. This witness is categorical that the he was associated by the police in carrying out search and seizure operations, which were carried out in his presence and the contraband substance recovered from the conscious and exclusive possession of the accused. He is signatory to documents of search and seizure (Ex.PW-1/A, 1/B, 1/C & 1/D).

12. Though defence witness Dheeraj Sharma (DW-1) tried to save the accused, but then, in the cross-examination part of his testimony, even he admits (a) his presence on the spot, (b) police having associated him in carrying out search and seizure operations, (c) his signatures on the recovery memo, and (d) presence of the accused on the spot. And above all, in his unrebutted testimony, he states that "*Police asked the accused that they want to check the bag which he is carrying. Then police checked the bag which accused was carrying. It is correct when the bag was checked two packets containing charas were found in it which were weighed*".

13. Not only that from the conjoint reading of testimonies of Vishesh Kumar (PW-9) and Raman Kumar (PW-4), it is apparent that till and so long the contraband substance remained in their possession, it was not tampered with. Seals were not broken. From the report of the Forensic Science Laboratory (Ex.PX), it is apparent that the contraband substance recovered from the spot and analyzed by the experts is Charas.

14. In this view of the matter, accused was obligated in law to rebut the statutory presumption, in view of Section 35 of the Act, which in the instant case, Court finds not to have been so done.

15. Not only that, Court finds the Police Officer to have taken adequate precaution of informing the Superior Officer of recovery of the contraband substance, information whereof was sent in accordance with law. Thus, it cannot be said that there is infraction of provisions of Section 42 or 50 of the Act.

16. Mr. Dalip K. Sharma, learned Legal Aid Counsel, submits that the NCRB form appears to have been prepared lateron, for the reason that dispatch number and FIR number appear to have been written in the same handwriting. The Court is not inclined to accept such a submission, for the reason that number of the FIR is not written in the same flow of hand.

17. Further, learned counsel points out contradictions in the testimonies of the witnesses, with regard to exact place of search and seizure operation. According to Niksan Kumar (PW-1), recovery took place near Dargah, whereas according to Narinder Kumar (PW-3) and SI Raj Kumar, it was near the office of the Forest Range Officer. Well, what is important is that Nalagarh is a small town and it is not that the Dargah and the office of Forest Range Officer are at a distant place. They are in the same place. Hence, contradiction cannot be said to be material, moreso in view of testimony of the defence witness.

18. It is next pointed out that computer generated certificates (Ex.PW-9/D, 9/E, 9/F & 9/G) do not bear any number or date of certification. Well, even this would not make any difference. These certificates pertain to the entries made in the DD Register, with regard to secret information; registration of the FIR, and other documents prepared in the Police Station. Certificates pertain to the documents prepared by Vishesh Kumar in the Police Station, who has stepped into the witness box and testified about correctness of the certificates. The certificates are in fact signed by him. Simply because they are undated and do not bear any number, would not make any difference, more so when accused has not been able to highlight any prejudice caused to him, purely on this count.

19. It is also argued that seal 'B', with which the recovered stuff was sealed has not been produced in Court. Well, it has come in the testimony of Niksan Kumar that he lost the same. No doubt, no report in relation thereto was lodged, but even this fact would not make any difference. What is the purpose of producing the seal in the Court? It is only to ensure that the case property remains intact, which fact already stands established through the testimony of respective witnesses.

20. It is also argued that personal search of the accused was not conducted and also police officials did not offer themselves to be searched by the accused. Even this would not make any difference, for the reason that information which the police had was that the accused was carrying the contraband substance in the bag and when the bag was searched it was found to be correct. It is not the case of accused that the police present there had planted the contraband substance on him.

21. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

22. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Evidence led by the prosecution is clear, cogent, convincing and reliable. Hence, the appeal is dismissed.

23. Assistance rendered by Mr. Dalip K. Sharma, learned Legal Aid Counsel, is highly appreciable.

24. Bail bonds furnished by the accused stand cancelled. A copy of this judgment be sent to the trial Court for taking follow-up action. Records of the Court below be immediately sent back.

Appeal stands disposed of, so also pending application(s), if any.

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

Daleep Singh @ Deepu .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No.256 of 2017
Decided on: 16/9/2017

Indian Penal Code, 1860- Section 452 and 376- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Accused raped the prosecutrix, when she was alone in her room – the prosecutrix disclosed the incident to her mother on her return – the accused was tried and convicted by the Trial Court- held in appeal that the FIR was lodged on the same day – the medical examination corroborated the prosecution version – mere absence of semen in the vaginal swab will not make the prosecution version doubtful- the prosecutrix was proved to be less than 18 years on the date of incident – therefore, the question of consent will not arise – the Trial Court had rightly convicted the accused- appeal dismissed. (Para-8 to 11)

For the Appellant: Mr. Ajay Chandel, Legal Aid Counsel.
For the Respondent: Mr. R.S.Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed against the impugned judgment of 15.03.2017 rendered by the learned Special Judge, Chamba, in Sessions trial No. 3 of 2016, whereby the learned trial Court convicted the appellant (hereinafter referred to as "accused") for his committing offences punishable under Sections 452 and 376 of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual offences Act, 2012.

2. The brief facts of the case are that PW-1 being victim of the case had studied upto the 5th standard in a Government school. At home, the parents of the victim have kept cattle. On 8.11.2015 at about 6. a.m all the other family members, i.e. the parents, brothers and sister had gone to collect fuel wood at place Chukrasa i.e. by the side of river Ravi. She left back at home in the room where she alongwith her brothers and sister used to sleep. When the victim was sleeping in the room the accused came there and firstly switched on the light. He thereafter had switched it off. At that time the victim was lying on the bed. Without saying anything to the victim, the accused at once came on the bed and removed her slacks and committed forcible sexual intercourse. At about 8-9 a.m. when the parents of the victim had returned back home, on inquiries being made, the victim had disclosed the entire incident to her mother Achhro Devi. The victim alongwith her parents had gone to Police Post Gehra where her father Sarbo lodged the report on the same day. After collecting all the inculpatory evidence(s) and after completing all codal formalities and upon conclusion of investigation(s) into the offences, allegedly committed by the accused, thereafter the Investigating Officer concerned presented the challan before the learned trial Court.

3. A charge stood put to the convict/appellant herein, by the learned trial Court, for his committing offence(s) punishable under Sections 452, 376 and 506 of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual offences Act, 2012, to, which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 16 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. However, he did not choose to lead any evidence in defence.

5. The accused stands aggrieved by the findings of conviction recorded upon him by the learned trial Court, for his committing offences punishable under Sections 452 and 376 of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual offences Act, 2012, hence prefers the instant appeal. The learned counsel appearing for the accused has concerted to vigorously contend qua the findings of conviction recorded by the learned Court below standing not based on a proper appreciation by it of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of material on record. Hence, he contends qua the findings of conviction warranting reversal 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 appearing for the State has with considerable force and vigour, contended qua the findings of conviction recorded by the Courts below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather 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. In respect of penal misdemeanor(s) perpetrated upon the victim/prosecutrix by the accused, on, 8.11.2015, a report with the Police Station concerned, was, lodged on the very same day. On anvil of a statement made by the prosecutrix before the Officer Incharge of the Police Station concerned, an. F.I.R borne in Ext.PW-1/A was registered with the Police Station concerned. The victim was, on, 8.11.2015 taken by the Investigating Officer, before PW-8, for enabling the latter to hold her medical examination. On PW-8 conducting the medical examination of the victim, she prepared MLC qua the prosecutrix, MLC whereof is borne in Ext.PW-8/B. She while stepping into the witness box has proven all the contents borne therein.

9. The victim as displayed by her birth certificate borne in Ext.PW-4/B was born on 9.7.1998, whereas, with the perpetration of penal misdemeanor(s) on her person by the accused, occurring on 8.1.2015, thereupon on the day when the ill-fated occurrence befell her, she, was thereat hence a minor. Consequently, she was legally incompetent to mete any consent vis-à-vis the accused, for his subjecting her to sexual intercourse. Ext. PW-5/B was proven by PW-5, who, has in his deposition made a disclosure that in his issuing Ext.PW-4/B, his meteing reverence to the apposite register maintained with respect to births and deaths, of, residents within the jurisdiction of Radi. He was subjected to a rigorous cross-examination by the learned defence counsel, during course whereof, he admitted the suggestion put to him that, no, name has been mentioned in the birth certificate borne in Ext.PW-5/B. From the aforesaid admission made by PW-5, the learned counsel, for, the accused has contended that no reliance can be imputed vis-à-vis Ext.PW-4/B, even if it therein holds the name of the victim/prosecutrix, especially given want of inter se compatibility in the apposite respect thereof interse Ext.PW-4/B vis-à-vis Ext.PW-5/B However, the aforesaid submission is rejected, given the birth certificate borne in Ext.PW-5/B in its apposite column of parentage bearing the names respectively of one Sarbo and of one Achro. The aforesaid Sarbo and Achro are evidently the parents of the victim. Even if one Sarbo and one Achro, had, offsprings' other than the prosecutrix also if thereupon the birth certificate(s) comprised in Ext.PW-5/B and in Ext.PW-4/B, are, appertaining to the siblings of the prosecutrixs', yet it was incumbent upon the learned defence counsel, to, establish by adducing trite best evidence qua Ext.PW-5/B, not, appertaining to the prosecutrix whereupon Ext.PW-4/B also would acquire a concomitant nullificatory effect. However, the aforesaid endeavour has not been made. Consequently, the mere factum of the name of the prosecutrix, not, being borne in birth certificate Ext.PW-5/B, is, of no avail to the learned counsel for the appellant, to, contend of PW-4/B and of Ext.PW-5/B both, not, appertaining to the identity of the prosecutrix.

10. As aforesaid, the doctor who subjected the prosecutrix to medical examination, has, proven MLC Ext.PW-8/B, PW-8 during her cross-examination answered in the affirmative, a suggestion, of no semen being detected in the vaginal swab slides, on anvil thereof the learned counsel for the accused contended, that thereupon, no, sexual intercourse occurred interse the victim and the accused. Contrarily, with Pw-8 in her examination in chief making a

communication that on hers subjecting the prosecutrix to medical examination, hers observing qua separating libia minora also of hymen holding multiple raptures also hers opining that hence the victim being subjected to sexual intercourse, does, constrain a conclusion that with the deposition of PW-8 being in consonance with PW-1, thereupon the prosecution succeeding in proving the charge against the accused, dehors non detection of semen in the vaginal slab(s), occurrence(s) whereof therein is not preemptory for establishing the apt penal penetration, "penetration" whereof stands displayed by existence of its features in Ext.PW-8/B, exhibit whereof is prepared with respect to the medical examination of the prosecutrix and stands proven by PW-8.

11. Be that as it may, as aforesaid with the prosecution establishing in proving that at the time contemporaneous to the ill-fated occurrence, the victim being a minor, thereupon hers' evidently omitting, to, in contemporaneity of the accused holding her to sexual intercourse(s) hence raise shrieks and cries, is wholly insignificant given omission(s) whereof entirely devolving upon the apt penal sexual misdemeanor emanating upon hers purveying consent vis-à-vis the accused, significance(s) if any, whereof, stand subsumbed by hers evidently thereat being a minor hence being legally incapacitated to mete any validatory consent vis.-a-vis the accused. The deposition of the prosecutrix inspires confidence and is trustworthy besides credible, hence, necessitates its being revered and vindicated, especially when the trial Court, on, gauging her intelligibility from hers meteing intelligible answers to its queries, for hence adjudging her competence to depose as a witness, thereafter its proceeding to declare her a competent witness. However, during the course of her cross-examination, she, has minimally deviated from her previous statement recorded in writing, deviation whereof, is qua hers testifying of hers switching on the light of the Veranda, whereafter the accused entered her room, whereas the aforesaid echoings are not borne in Ext.PW-1/A. The aforesaid purported improvement and embellishment(s), do not, erode the genesis of the prosecution story, especially when the report of RFSL Dharamshala borne in Ex.PX, reveals that human semen was detected on the slacks of the victim besides human semen being detected on pubic hair.

12. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court not suffering from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of conviction has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of conviction recorded by the learned trial Court merit interference.

13. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh .....Petitioner

Versus

Ashok Kumar .....Respondent

Cr. Appeal Nos. 447 of 2007 and
Cr. Appeal No. 448 of 2007.
Decided on : 16/09/2017

Indian Penal Code, 1860- Section 379 and 411- Informant G has parked his vehicle no. HP-10-0483 at Nav Bahar Parking, Sanjauli on 6.9.2005 - when he came to take his vehicle at about 10 am on the next day, the vehicle was found missing- he reported the matter to the police on which

FIR was registered- vehicle of the informant was recovered from the possession of accused R and S at Patiala on 8.9.2005- the accused disclosed on inquiry that they had got prepared a duplicate key – the place was got identified - accused were tried and acquitted by the Trial Court- held in appeal that custody of the stolen vehicle was handed over by the official(s) of Punjab Police to the official(s) of Police Station Dhali – the recovery memo was not proved by examining the author – the original memo was not produced but its photocopy was produced – the document is in Punjabi and its English translation was also not proved - identities of the accused were not proved - the recovery was also not established – there are contradictions in the testimonies of the prosecution witnesses – the trial Court had rightly acquitted the accused- appeal dismissed.

(Para-10 to 15)

For the petitioner: Mr. R.S.Thakur, Addl. A.G.

For the Respondent: Mr. Adarsh Vashist, Advocate in Petition No. 447
Mr. Naresh Kaul, Legal Aid Counsel in Petition No. 448

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

Since, both these appeals arise from a common judgment rendered on 21.08.2007 in Criminal Appeal No. 26-S/10 of 2006 and in Criminal Appeal No. 33-S/10 of 2006, by the learned Sessions Judge, Shimla, hence, they are decided by a common judgment.

2. The instant appeals stand directed against the impugned judgement of acquittal recorded upon the aforesaid by the learned Sessions Judge, Shimla.

3. The brief facts of the case are that on 6.9.2005 complainant Gopal Singh has parked his vehicle No. HP-10-0483 at Nav Bahar Parking, Sanjauli at about 4.30 p.m and after having locked the same and removing the papers, he had left to his quarter at Pirta Niwas. On 7.9.2005 at about 10.00 a.m when he came to take his vehicle at Nav Bahar Car Parking, the vehicle was found missing. He searched his vehicle at Shimla and other station but in vain. Therefore, on 9.9.2005 complainant met police officials at Sanjauli and made complaint Ext.PW-7/A on which F.I.R Ext.PW-5/A was registered. Spot map Ext.PW-5/B was prepared. Complainant produced documents and key of the vehicle which were taken into possession vide memo Ext.PW-1/A. On 14.9.2005 ASI Bhag Singh and ASI Virender Singh of C.I.A staff Patiala came to P.P.Sanjauli in connection with case F.I.R. No. 504/05 under Section 379, 411 IPC that vehicle No. HP-10-0483 had been nabbed from accused Rajesh and Sanjeev at Patiala on 8.9.2005. Therefore, on 16.9.2005 ASI Jai Gopal Incharge P.P. Sanjauli alongwith HHC Jeet Ram and complainant Gopal Chhajta rushed to Patiala and got transferred custody of accused Sanjeev and Rajesh from case F.I.R. No. 504/05 P.S Patiala to present case F.I.R. During interrogation, accused disclosed that after having opened the lid of petrol tank of car, they had got prepared a duplicate key from Sikh gentleman and on 20.09.2005 accused Sanjeev and Rajesh got the place of theft identified, qua which memo Ext.PW-4/A was prepared. After collecting all the inculpatory evidence(s) and after completing all codal formalities besides upon conclusion of investigation(s) into the offences, allegedly committed by the accused, thereupon the Investigating Officer concerned presented the challan before the learned trial Court.

4. A charge stood put to the accused by the learned trial Court, for theirs committing offences punishable under Sections 379 IPC, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 12 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any defence evidence.

6. On an appraisal of evidence on record, the learned trial Court returned findings of conviction upon them with respect to the charges put to them "whereas" the learned Sessions Judge, Shimla, returned findings of acquittal upon the accused.

7. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Court below standing not based on a proper appreciation, by it, of evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

8. The learned counsel(s) appearing for the respondents also with equal considerable force and vigour contend qua the findings of acquittal recorded by the Sessions Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

9. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

10. The best incriminatory evidence available with the prosecution, for sustaining the charge is comprised in Ext.PW-10/A, wherein recitals purportedly occur of the accused while occupying stolen vehicle bearing No. HP-10-0483, theirs being arrested by the police officials of the Punjab Police and also thereafter the stolen vehicle being impounded. However, the trite factum of Ext.PW-10/A purportedly embodying therein the apt recitals, in respect of the accused occupying the stolen vehicle, cannot, at this stage be imputed any sanctity or veracity, given all its contents being scribed in Punjabi. Ext.PW-10/A is also merely a photocopy of the original. Significantly also its author has not stepped into the witness box nor hence obviously has not proven the recitals occurring therein. Apart therefrom there is no communication in the verdict recorded by the learned trial Magistrate that at the time of, its, exhibition its contents being explicated to the Court, by, a person well conversant in Punjabi also exhibition thereof occurring in the presence of the learned defence counsel, who, after understanding authentic translation(s) thereof from Punjabi to Hindi, his permitting its exhibition. Lack of aforesaid pronouncement(s) in the verdict of the learned trial Magistrate, constrains this Court to conclude that its exhibition being a mere sequel of both the learned Public Prosecutor concerned and of the learned defence counsel, importantly also of the learned trial Magistrate, all of whom, hence perfunctorily, without understanding its contents besides its being not proved by its author nor an authenticated translated copy thereof being placed on record yet, proceeded to emboss an exhibition mark thereon. The aforesaid recitals borne in the best incriminatory evidence, for purportedly proving the incriminatory roles of the accused in the relevant occurrence, are, per se thereupon rendered unreadable nor with its author proving its recitals also renders it to be both irrelevant besides inadmissible.

11. Be that as it may, the learned Additional Advocate General has contended with vigour, that, thereafter with the custody of the stolen vehicle being handed over by the official(s) of Punjab Police, to, the official(s) of Police Station Dhali, thereupon the trite factum of the identity of the accused besides their role in the ill-fated occurrence standing firmly established. However, the aforesaid espousal warrants its rejection. The learned Additional Advocate General was enjoined to prove the trite factum of the accused standing nabbed by the Punjab Police at Patiala besides was enjoined to prove qua thereat theirs occupying the stolen vehicle. Since in sequel whereto(s), an, F.I.R. was lodged with police Station Patiala, thereupon the prosecution was also enjoined to prove of thereafter the accused being subjected to face trial before the learned trial Magistrate, Patiala besides theirs on conclusion thereof, suffering a conclusive mandate of conviction, whereas proof in the aforesaid regard being abysmally amiss, hence cumulatively therewith also with the contents of Ext.PW-10/A standing not proved in accordance with law, thereupon the fact of custody of the stolen vehicle also of the accused being handed over by the officials of the Punjab Police to the official(s) of the Police Station Dhali, cannot, clinchingly establish the incriminatory role of the accused. Contrarily absence of the aforesaid

best evidence renders the factum of the custody of the accused being handed over by the officials of Punjab Police vis-à-vis officials of Police Station Dhali to be susceptible to skepticism also envelopes a shroud of doubt in respect of the incriminatory role of the accused, benefit(s) whereof ought to ensue vis-à-vis them.

12. The learned Additional Advocate General also depends upon the testimony of one PW-8, who, has testified in respect of his, on, a date prior to the ill fated occurrence, noticing, the accused at his Dhaba also in consonance with his previous statement recorded in writing he has disclosed that he overheard each of the accused calling each other by their respective names, thereupon his being equipped with the requisite knowledge to proceed to identify them in the Police Station concerned also his hence proceeding to identify the accused in Court hence his testification being imputed credence also thereupon the identity of the accused being established.. However, apparently, his previous statement stands recorded, on 29.9.2005, recording whereof occurred after immense delay, since the lodging of the F.I.R., also with immense time elapsing, since the police official(s) of the Police Station Dhali took over custody of the accused on 14.9.2005 from the official(s) of Punjab Police thereupon the belatedly recorded previous statement in writing of PW-8 is bereft of vigour Since the custody of the accused was prior thereto received on 14.9.2005, by, official(s) of Police Station Dhali, from the officials of Punjab Police, cumulatively hence the effect of the aforesaid delay, is of (a) PW-8 in connivance with the police official(s) making disclosure(s) only in respect of the name(s) of the accused, whereas his omitting to describe their key characteristic features, omission(s) in his describing their key characteristic features, renders all emanations' occurring in his previous statement in writing besides in his testification rendered before the learned trial Magistrate, to be construable to stand generated, by, the Investigating Officer concerned, apprising PW-8 about the identity(s) of the accused, whereafter he proceeded to identify the accused in the Police Station. (b) The aforesaid inference is aptly fortifingly drawable from PW-8 proceeding to in his testification borne in his cross-examination make a disclosure therein, of, his identifying the accused, while theirs being incarcerated at Police Station Dhali. Consequently, with this Court drawing an inference that the identity of the accused being unveiled to PW-8 only by the Investigating Officer concerned, whereas his prior thereto holding, no, knowledge of the respective persons concerned, thereupon the aforesaid manner of identification of accused by PW-8, cannot, be accepted by this Court, for, hence constraining a firm conclusion that the identity(s) of the accused in the relevant occurrence being firmly established.

13. The learned Additional Advocate General has also relied upon the identification, of, the site of occurrence, by the accused, in respect whereof Ext.PW-4/A stood prepared, on anvil whereof, he, contends, of, the prosecution firmly establishing the incriminatory role of the accused. However, a thorough scanning of the entire record underscores qua prior thereto, no, signatured disclosure statement(s) of the respective accused standing recorded by the Investigating Officer thereupon, omissions thereof render Ext.PW-4/B to be bald, insignificant besides inadmissible in evidence.

14. For reiteration, since the preparation of signatured disclosures statement(s) of the respective accused, by the Investigating Officer, prior to theirs, identifying the site whereat, the stolen vehicle was parked besides wherefrom it was stolen by them, in respect whereof Ext.PW-4/A stood prepared, was a statutorily enjoined imperative, for hence Ext.Pw-4/A acquiring sanctity, whereas, evidently prior thereto, no, apposite signatured disclosure statement(s) of the respective accused by the Investigating Officer standing not evidently recorded by the Investigating Officer also galvanizes a further inference from this Court, of, Ext.PW-4/A being unamenable for any reliance being imputable thereto. Conspicuously with its hence infringing the mandate of Section 27 of the Indian Evidence Act.

15. For the reasons which have been recorded hereinabove, this Court holds that the learned Sessions Judge has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge does not suffer from any perversity or absurdity of mis-appreciation and non

appreciation of evidence on record, rather it has aptly appreciated the material available on record.

16. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement of the learned Sessions Judge, Shimla, is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Brig Harmesh Sethi (Retd) ...Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

CWP Nos. 4217, 4218, 4224, 4225 and 4434 of 2015
Reserved On:22.06.2017
Date of Decision: September 18, 2017

H.P. Tenancy and Land Reforms Act, 1972- Section 118- The Government introduced a scheme by the name of "Incredible India Bed and Breakfast/Homestay Establishments" encouraging owners of the houses to allow the tourists to reside with them – Government of Himachal Pradesh notified the scheme known as Himachal Pradesh Homestay Scheme, 2008 – incentives and exemption from taxes were provided in the scheme – the petitioner registered the accommodation as a homestay – a notice was received by the petitioner to stop the commercial activity as it was in violation of Section 118 – petitioner explained that there was no violation but an order for cancelling the registration certification was issued- the State contended that a clarification has been issued prohibiting the use of the land for any purpose without the permission of the State Government – held that the petitioner has not violated any terms and conditions of the scheme floated by the State or the Central Governments – no action has been taken by the State for violation of Section 118 of Tenancy and Land Reforms Act- the scheme applies to the private house and not to a commercial property- the scheme was to supplement the availability of accommodation in the rural tourist destination – the owners are exempted from the payment of tax and they have to maintain minimum standards of cleanliness, sanitation and quality of food – the guest stays in the house as a member of the family – there is no prohibition in the H.P. Tenancy and Land Reforms Act for the use of house for the purpose of homestay and condition cannot be imposed by executive order- writ petition allowed and order passed by respondent No. 4 quashed and set aside. (Para-13 to 26)

Cases referred:

Tukaram Kana Joshi and others vs. Maharashtra Industrial Development Corporation and others, (2013) 1 SCC 353

Chairman, Indore Vikas Paradhikaran vs. Pure Industrial Coke & Chemicals Ltd. and others, (2007) 8 SCC 705

Lachhman Dass vs. Jagat Ram and others, (2007) 10 SCC 448

K.T. Planatation Private Limited and another vs. State of Karnataka, (2011) 9 SCC 1

Jilubhai Nanbhai Kachar and others vs. State of Gujarat and another, 1995 Supp (1) SCC 596

Union Territory of Lashdweep and others vs. Sea Shells Beach Resort and others, (2012) 6 SCC 136

For the Petitioner:	Mr. R.L.Sood, Sr.Advocate with Mr.Arjun Lal, Advocate, for the petitioner(s).
For the Respondents:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, for the State, in all the petitions. Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate, for the respondent-Union of India, in all the petitions.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice.

In all these petitions following questions arise for consideration: (a) as to whether the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (hereinafter referred to as the Act) prohibits use of property purchased pursuant to permission accorded under Section 118, for the purpose of "Home Stay"; (b) whether in the absence of any condition imposed by the Government in the permission so accorded under the Act is it not permissible for the owner of a residential house to use the property as a "Home Stay"; (c) as to whether by way of an executive order can the State impose any prohibition in the lawful use and enjoyment of a property by an individual. Is such action not violative of human and constitutional right; and (d) as to whether providing of accommodation to a tourist as a "Home Stay", can be said to be an activity commercial in nature, in every aspect of the word.

2. Since, common question of law and fact are involved in the present petitions, they are being heard and disposed of by a common judgment. However, as agreed, for the sake of convenience, facts of only CWP No.4217 of 2015, are being noticed.

3. After having served the nation as Brigadier in the Indian Army, petitioner decided to settle down in the pristine atmosphere of lower Himalayas.

4. In order to promote tourism, more so in the rural areas, Government of India, introduced a Scheme by the name of "Incredible India Bed and Breakfast / Homestay Establishments", encouraging owners of houses to allow tourist to reside with them. Apparently the idea was for inclusive understanding of the lifestyle, culture and Indian Heritage.

5. Pursuant thereto, on 15.07.2008, Government of Himachal Pradesh notified a Scheme known as 'Himachal Pradesh Home Stay Scheme-2008' (hereinafter referred to as the Scheme). Clearly the object being to provide comfortable Home Stay with facilities and services to the tourists, both domestic and foreign, as also to supplement availability of accommodation in rural destinations. In the Scheme, the term "Home Stay" is defined as under:-

> "Any private house located in rural areas of the State in good condition and easily accessible in the country-side i.e. within the Farm House, Orchards, Tea-Gardens etc. will primarily qualify under the Scheme. The house shall fulfill the minimum requirement of having one of more room's to cover under the scheme with attached toilet facility which will be made available to the tourists as Home Stay accommodation. The promoters are at liberty to submit fresh proposals for approval for setting up Home Stay in the country-side under the "Himachal Pradesh Home Stay Scheme, 2008". (Emphasis supplied)

6. In order to popularize and promote such object, the Scheme also provided for certain incentives and exemptions in the nature of taxes and fees, as specified in Clause-7.

7. The petitioner as owner of residential accommodation at Kasauli, decided to promote the cause of the Government and as such registered his accommodation as a Home Stay, so defined under Clause-4 of the Scheme, in the name of 'Guns and Roses Home Stay'. This was so done on 07.04.2011.

8. All was well till the time petitioner received a notice dated 29.07.2015 (Annexure PF, Page-53) from the Department of Tourism & Civil Aviation, Government of Himachal Pradesh, asking him to immediately stop the "commercial activity" for the reason that it was violative of Clause(dd) or clause (h) of sub-section (1) of Section 118 of the Act. Vide various communications (Annexure PG), while refuting such allegation, petitioner explained as to how the activity carried out by him was totally legal and within the four corners of law.

9. Not finding favour with the same, District Tourism Development Officer (H.P.), passed an order dated 04.09.2015 (Annexure PJ, Page-60), cancelling the registration certificate so issued in favour of the petitioner.

10. This is the backdrop, which led the petitioner assailing the show cause notice dated 29.07.2015 (Annexure PF, Page-53) and order of cancelling registration certificate dated 04.09.2015 (Annexure PJ, Page-60). By way of interim protection, implementation of the orders were stayed by this Court.

11. From the response filed by the Commissioner, Tourism, as on 12.04.2017, number of Home Stays registered within the State of Himachal Pradesh, are as under:-

Sr.No.	District	No.of Home Stay Unit Registered
1.	Kangra	111
2.	Una	06
3.	Hamirpur	02
4.	Mandi	63
5.	Bilaspur	07
6.	Chamba	46
7.	Solan	61
8.	Sirmour	21
9.	Shimla	200
10.	Kullu	233
11.	Lahaul and Spiti	50
12.	Kinnaur	07

12. In the response, so filed by respondents No.1 to 5, issuance of Scheme and it being still in operation is not disputed. In fact, State admits that any proprietor/owner of a private house located in the rural area of the State can apply in a prescribed proforma to the District Tourism, H.P., under whose jurisdiction the area falls for approval/registration of the Home Stay unit under the Scheme. The only reason for taking action against the petitioner is the clarification dated 15.11.2014, so issued by the State Government *inter alia* to the effect that "the land purchased by a non-agriculturist under clause(dd) of clause(h) of sub section(1) of section 118 of the Act ibid shall not be utilized for any other purpose without the permission of the State Government. The provision of Section 118 of the said Act has overriding effect on anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, as such, the Tourism Department cannot register the unit without the permission of competent authority".

13. Now, there is nothing on record to establish that petitioner violated anyone of the terms of the Scheme, be that the one floated by the Central Government or the State Government. Presumably, petitioner is a law abiding person. Significantly, no action under the Act stands initiated by the State, for violation of anyone of the provisions of the Act or conditions of sanction accorded in purchasing the property. Department of Tourism did not amend the Scheme prohibiting its applicability to the properties purchased by the owners, pursuant to permissions

accorded under the Act. Till and so long, the Scheme is in vogue, allowing such use, it was not open for the Additional Director, Tourism & Civil Aviation to have withdrawn the certificate of registration.

14. Now what needs to be considered is as to whether providing facility of Home Stay is really a commercial activity. We have minutely examined the Scheme. The Scheme itself clarifies that it is applicable to a "private house". It applies only to residential and not commercial properties. The whole object and purpose of the Scheme is: (a) to Broaden the Stake holder's base for tourism in the State; (b) Take tourism to rural and interior areas of the State; (c) Decongest Urban areas, which cannot support any further tourism load; (d) Provide employment and economic avenues in the interior areas; and (e) The activity to be ecologically sustainable.

15. It was introduced to supplement availability of accommodation in the rural tourist destinations in the backdrop of the policy framed by the Ministry of Tourism, Government of India under the "Incredible India Bed & Breakfast Scheme". The basic idea is to provide a clean and affordable place for foreigners and domestic tourists, enabling them to experience Himachali customs and traditions and relish authentic Indian/Himachali cuisine. Tourists are required to live in a "homely environment". The purpose also being to easily make accessible areas of country-side, within the "Farm House; Orchards; Tea-Gardens etc." All that is required is minimum accommodation of 1 to 3 rooms with a toilet facility which has to be in the house. The owners of Home Stay are also not required to pay taxes and fee. They are totally exempted from the same. All that is expected of the owners is to "maintain minimum standards of the cleanliness, sanitation and quality of food". Of course, the Scheme provides for monitoring of these Home Stays by the Department. Well, that is about all.

16. Thus, the object and purpose, as also activity carried out by the owner, by no stretch of imagination, can be said to be commercial in nature. A guest comes and stays in the house as a member of the family, intermingles, enjoys his stay, relishes the food, and leaves for next destination. The whole object and purpose being to make the society and culture inclusive and not commercialize it in any manner. There is no commercial activity at all. In this process, all stand to gain. The Government has no accommodation in rural, remote and far flung areas. It wants to open up its destinations to tourists, who are welcome as guests with the moto "Atithi Devo Bhava". In this process, there is exchange of ideas and views with the local populace, also giving them avenues and opportunities of interacting, moving out and exploring the world, thus broadening their horizon in every aspect of the matter.

17. In the instant case, property is situate in Kasauli, where also the Scheme is applicable. It is not the Government's decision to exclude township of Kasauli from the Scheme, but then definitely if a person residing in his own private house at Kasauli, chooses to make available part of his residential accommodation, up to three rooms for stay of a guest as a tourist, then there is nothing illegal or commercial about it. After all, he also needs company and opportunity to interact and exchange views with others, enhancing the quality of life making him happy. He lives an enjoyable life.

18. Let us examine the matter from another angle. Does the Act really prohibit such an activity? From the show cause notice, it is not clear as to whether violation is that of Clause (dd) or clause (h) of sub-section (1) of Section 118 of the Act. In any event, for the purposes of proper appreciation, relevant clauses thereof are reproduced as under:-

> "(dd) a person who, on commencement of this Act, worked and continues to work for gain in a estate situated in Himachal Pradesh; for the construction of a dwelling house, shop or commercial establishment in a municipal area, subject to the condition that the land to be transferred does not exceed—
>
> (i) In case of a dwelling house—500 square meters; and '
>
> (ii) In the case of a shop or commercial establishment—300 square meters:

Provided that such person does not own any vacant land or a dwelling house in a municipal area in the State.

… … …

(h) a non-agriculturist with the permission of the State Government for the purposes that may be prescribed:

Provided that a person who is non-agriculturist but purchase land either under clause (dd) or clause (g) or with the permission granted under clause (h) of this sub-section shall, irrespective of such purchase of land, continue to be a non-agriculturist for the purpose of the Act:

Provided further that a non-agriculturist who purchases land under clause (dd) or in whose case permission to purchase land is granted under clause (h) of this sub-section, shall put the land to such use for which the permission has been granted within a period of two years or a further such period not exceeding one year, as may be allowed by the State Government for the reasons to be recorded in writing to be counted from the day on which the sale deed of land is registered and if he fails to do so or diverts, without the permission of the State Government, the said user for any purpose or transfer by way sale, gift or otherwise, the land so purchased by him shall, in the prescribed manner, vest in the State Government free from all encumbrances."

19. Now bare reading of the Section does not indicate there being any prohibition in the use of property for the purpose of home stay. It is a residential property put to use as such and registered as a home stay under the Scheme, where such properties are opened up for use of guests with the avowed purpose of making the society inclusive and promote international brotherhood.

20. Significantly there is no statutory embargo for using the property as 'Home Stay'. By way of an executive fiat such condition cannot be imposed, more so, without any reasonable justification. Order, executive in nature, is ultra vires the Act, apart from being unreasonable and illegal.

21. Right to property has now been held to be not only a constitutional or statutory right, but also a human right.[*Tukaram Kana Joshi and others vs. Maharashtra Industrial Development Corporation and others,* (2013) 1 SCC 353; *Chairman, Indore Vikas Paradhikaran vs. Pure Industrial Coke & Chemicals Ltd. and others,* (2007) 8 SCC 705; & *Lachhman Dass vs. Jagat Ram and others,* (2007) 10 SCC 448]

22. A Constitution Bench (Five Judges) of the Apex Court in *K.T. Planatation Private Limited and another vs. State of Karnataka,* (2011) 9 SCC 1, has held that no person can be deprived of his right to enjoy the property, save by an authority of law.

23. In *Jilubhai Nanbhai Kachar and others vs. State of Gujarat and another,* 1995 Supp (1) SCC 596, the Apex Court has also held that "deprivation of the property can be only by authority of law, be it an act of Parliament or State legislation, hut not by an executive fiat or an order".

24. Thus when neither the Act, nor the Scheme prohibited use of the house as a "Home Stay', by way of a clarification-an executive order-State could not have imposed such an embargo.

25. Mr. Anup Rattan, invites our attention to the decision rendered by the Apex Court in *Union Territory of Lashdweep and others vs. Sea Shells Beach Resort and others,* (2012) 6 SCC 136. The decision, in our considered view, is distinguishable and inapplicable to the given facts. There the Hon'ble Supreme Court was dealing with the establishment of a Home Stay, which was being run in violation of Coastal Regulation Zone Act, 1991 (in short CRZ) and in a totally prohibited area, which is not the position here.

26. Hence, for all the aforesaid reasons, we allow the present petition and quash the impugned notice dated 29.07.2015 (Annexure PF), passed by respondent No.4 and the impugned order dated 04.09.2015 (Annexure PJ).

With the aforesaid observations, present petition stands disposed of, so also pending applications(s), if any.

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

Changar College Sanghrsh Samiti, Ranital ...Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

CWP No. 1919 of 2016
Reserved on:06.09.2017
Date of Decision: September 18, 2017

Constitution of India, 1950- Article 226- A survey was conducted for establishing a new Government College at Ranital District Kangra but the college was opened at a different place known as Takipur that too without any proper infrastructure – aggrieved from the decision of the government, the present writ petition has been filed- held that a Court will not interfere with the policy decision unless the action of State is erroneous, unreasonable, irrational or illegal – the issue raised is purely political in nature and the Court should not interfere with the same – the decision was taken in great haste without obtaining necessary permissions from the Competent Authorities but the steps are being taken to complete the formalities – 50% of the work has been done and remaining would be completed at the earliest – Takipur is at a short distance of 5 k.m. from Ranital- it is well connected and on the highway- it has more feeding area than Ranital - the excess area of the school is being used to house the college and there is no infirmity in the same – petition disposed of with a direction to obtain the necessary clearance within four weeks and in case of default to stop the construction and to ensure the availability of adequate infrastructure and staff. (Para-2 to 17)

For the Petitioner: Ms.Suman Thakur, Advocate, for the petitioner.

For the Respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General & Mr.J.K.Verma, Deputy Advocate General, for the respondents

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice.

Petitioner alleges that despite a proper survey having got conducted for establishing the new Government College at Ranital, District Kangra, H.P., Government of the day has chosen to open the same at a totally different place known as Takipur and that too without there being any proper infrastructure. Apart from this, it is in violation of the provisions of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the Education Act, 2009) and the construction carried out is against the environmental laws of the land.

2. It is a settled principle of law that unless and until action of the State is erroneous, unreasonable, irrational, thus illegal, a Constitutional Court would not interfere in quashing a policy decision. To us, the issue raised appears to be purely political in nature.

Hence, such battles are best left to be fought in a totally different arena, lest allowed to be pursued by proxy litigation, for Courts cannot be a party to any decision, more so which has got political overtones. From the material so placed before us, it cannot be said that action of the State warrants interference.

3. Yes it is true, as is so admitted by the State, that a Committee of Experts did submit its report, way back in June, 2012, recommending a College should be established at Ranital, but then, as an afterthought, decision to establish the College at another place stands taken, finding the new location to be more suitable and convenient.

4. At the threshold, we may only state that the decision of the Government in opening up the college has been in great haste. There is no doubt about it. Without obtaining clearances under various environmental laws, State decided to commence construction of the college building at a new place. This was in the year, 2015. But the matter came to be filed in the Court sometime in the month of July, 2016, whereafter, State took all steps for obtaining the necessary sanctions/permissions. As is evident from the affidavit of the Chief Secretary to the Government of Himachal Pradesh (Page-98), the matter for obtaining the permission, under the provisions of the Forest Conservation Act, 1980 (hereinafter referred to as the Forest Act) is in process and is likely to be completed at the earliest. Orally we are informed that the Chief Secretary is himself pursuing the matter and permissions are expected to come in the near future. Ordinarily we would have stopped the construction, but refrain from doing so, for we are orally informed that all sanctions are likely to come in the near future and positively within a period of three weeks.

5. There is yet another reason for us not to stay construction of the complex and that being, as is evident from the affidavit of the Chief Secretary, that almost 50% of the work stands completed and construction is in full swing, and vigorously attempted to be completed at the earliest.

6. Insofar as suitability, convenience and locational advantage of both the sites is concerned, we do not find action of the State, in choosing the latter to be absolutely illogical or unreasonable. Takipur is at a short distance of 5 kms from Ranital. It is well connected. It is on the highway. For any college student to travel 5 kms cannot be a cause of inconvenience. The Government has also explained that the said site was chosen keeping in view the directions issued by this Court in CWP No.1468 of 2013, titled as *Dhrub Dev Sharma and others vs. State of Himachal Pradesh and others,* whereafter guidelines dated 02.01.2014 came to be notified by the Government of Himachal Pradesh, dealing with every aspect of establishment of Government Colleges in the State. Takipur has got more feeding area of Government Senior Secondary School in the vicinity.

7. It is further argued that the decision, political in nature, is only to gain political mileage, without fulfilling statutory obligation and norms for establishing the college.

8. Well we are not inclined to accept such contention. There is no foundation to substantiate such averment.

9. Absence of any infrastructure, if any, in the new building, would still entitle the petitioner to approach the Court and agitate the issue afresh.

10. It is not in dispute that for the present, college is being run from the premises of a Government school.

11. Mr.Anup Rattan, learned Additional Advocate General, has clarified that the college was made functional and is being run in that part of accommodation which is in excess and not required by the school.

12. Decision was taken to temporarily house the college in the school. It is not that functioning of the school is being compromised in any manner. If the school has got excess accommodation, then what is the harm in having the college run from such premises. After all children passing out from 12th standard are to take admission in the college. Transition from school to college for all adolescents would only be convenient and easy. Also, there is nothing on record to establish that today the college lacks any infrastructure. Rather than pointing out deficiencies in complying with the norms and guidelines, statutory or otherwise, petitioner insists upon the college to be established only at Ranital, which incidently and unfortunately for them is too late in the day to urge. Recommendation to set up the college at Ranital was way back in the year, 2012 and the petitioner approached the Court only in the year, 2016.

13. It is pointed out that premises of the school cannot be allowed to be used in view of the Right of Children to Free and Compulsory Education Rules, 2010. Special attention is invited to sub-rule (4) of Rule 15. This is not how we read the provisions. Any activity relating to education can be carried out in the premises of the school and higher education being such an activity, is definitely not prohibited under the Education Act. In fact it is permissible.

14. The decision of the State cannot be said to be, in any manner, illegal, arbitrary or capricious. This, as we have already observed, except for one exception and that being, starting construction without obtaining prior permission and sanctions, but then this does not itself make the action to be mala fide as is so pointed out by the petitioner. Action can be illegal, but not mala fide and we do not find the foundation of malice, factual or otherwise, to be there on record

15. There is nothing to establish that action of the State is not in conformity with the law laid down by this Court in *Dhrub Dev Sharma* (supra).

16. As such, at this point in time, we are not inclined to quash the decision of the State in establishing the college at Takipur.

17. However, we do not allow the matter to rest here and dispose of the present petition with the following directions:-

i. The Chief Secretary to the Government of Himachal Pradesh, shall ensure that environmental clearances, more so, under the provisions of the Forest Act, are positively obtained within a period of four weeks from today;

ii. We clarify that in the event of State failing to do so for whatever reason, all construction activity on the forest land, situate within Mauja Takipur, where building of Government Degree College is being constructed, shall be stopped forthwith;

iii. The Chief Secretary shall intimate all concerned, including the Contractor about such fact;

iv. The Government shall ensure establishment of infrastructure and posting of staff at both the places from where the college is being temporarily run as also in the building under construction, which eventually is to be utilized for said purpose;

v. The guidelines dated 02.01.2014 passed by the Government, shall be strictly adhered to; and

vi. Liberty reserved to the petitioner to approach the Court for agitating these issues afresh, if need so arises.

With the aforesaid observations, present petition stands disposed of, so also pending applications(s), if any.

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

Diwakar Dutt Kukreti ....Petitioner.
versus
EIH Associated Hotels Ltd. & another ....Respondents.

Civil Revision No.79 of 2017
Reserved on: July 14, 2017
Date of Decision: September 18, 2017

H.P. Urban Rent Control Act, 1987- Section 14- The East India Hotel Limited is the owner of the demised premises which was let out to the respondent- the respondent sublet the same to S without the consent of the landlord – the tenant defaulted in the payment of the rent and also covered open veranda outside the demised premises materially impairing its value and utility - the demised premises is bonafidely required for rebuilding and reconstruction work which cannot be carried out without its vacation- the landlord filed an eviction petition against the tenant on these grounds – the eviction petition was partly allowed by the Rent Controller – an appeal was filed by the landlord which was allowed – aggrieved from the order, the tenant has filed the present petition- held that the tenant or his brother to whom the possession was handed over did not step into the witness box- no evidence was produced despite having been granted six opportunities – it is proved that existing structure is more than 100 years old – reconstruction cannot be carried out without eviction of the tenant – the names of respondent No. 2 and his family members have been mentioned in the ration card – respondent No. 1 is residing in Ghaziabad – tenant admitted that he had constructed flush latrine and washing space – the tenant has forfeited all rights in the tenanted premises after delivering possession – the eviction was rightly ordered- the tenant is liable to pay Rs. 6,000/- per month for each of the three premises in his possession i.e. Rs.18,000/- per month- the petition disposed of. (Para-11 to 33)

Cases referred:
Vinod alias Raja vs. Smt. Joginder Kaur, 2012 (3) Him. L. R. (FB) 1401
Hindustan Petroleum Corporation Limited vs. Dilbahar Singh, (2014) 9 SCC 78
Ashok Kumar and others v. Uttam Chand, 1995(2) Sim.L.C. 373
Kusum Devi v. Mohan Lal (Dead) by LRs, (2009) 11 SCC 594

For the Petitioner : Mr. Harsh Khanna, Advocate.
For the Respondents : Mr. R.L. Sood, Senior Advocate, with Mr. Sanjeev Kumar, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

M/s EIH Associated Hotels Limited is the owner of demised premises, i.e. Quarters No.11, 12 & 13, Block No.4, Cecil Hotel Estate, Chaura Maidan, Shimla, Himachal Pradesh (hereinafter referred to as the Landlord). Undoubtely, the said premises were let out to respondent Diwaker Dutt Kukreti (hereinafter referred to as the tenant).

2. According to the landlord, without any authorization, tenant has sublet the same to Shambu Prashad. Tenancy was on a monthly rental of Rs.95/- plus Rs.75/- as water charges, which the tenant defaulted in paying and upto 31.10.2010, the amount due was Rs.680/-. Also, tenant had covered the open verandah outside the demised premises and unauthorizedly constructed a flush toilet, thus making substantial additions and alterations, after the commencement of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter referred to as the Act), materially impairing the value and utility of the premises. Further, entire Block No.4,

including the demises premises, situate therein, is bonafidely required for re-building and reconstruction work, which cannot be carried out without being vacated. The entire existing block needs to be completely demolished for carrying out the work of reconstruction.

3. With these facts and grounds, the landlord filed a petition for ejectment of the tenant, under the provisions of the Act, also impleading a third person, to whom possession stands parted.

4. Record reveals that joint response was filed by the tenant and the third person, adimitting that (a) tenancy is in the name of the tenant, who is the real brother of the person to whom possession of the premises stood handed over, (b) since 1979, as a joint family, both the brothers have been residing in the premises, (c) flush toilet was constructed in the year 1984-85, though prior thereto a common toilet in the compound was being used, (e) rent was increased from Rs.40/- to Rs.78/- and to Rs.95/- plus Rs.75/- as water charges, when additional facility of flush latrine and washing space in the verandah was constructed. Hence, construction is with the consent of the landlord.

5. In the rejoinder, factum of construction of toilet with authorization stands refuted. Further, post-retirement, tenant having permanently settled down in his own house at Ghaziabad (Uttar Pradesh) and the demised premises being in the exclusive possession of third person stands averred.

6. On the basis of pleadings of the parties, the Rent Controller struck the following issues for adjudication:

1. Whether the respondents are in arrears of rent as alleged, If so its effect?OPP

2. Whether the building housing the demises premises is bonafide required by the petitioner for rebuilding and reconstruction, which cannot be carried out without the vacation of the building as alleged? OPP

3. Whether the respondent No.1 has sub let the demises presmises to respondent No.2, as alleged? OPP

4. Whether the respondent No.1 has made substantial addition and alteration in the demises premises, as alleged? OPP

5. Whether the petitioner is stopped by way of his acts, omission, commission and acquiescence from filing the present petition?OPR

6. Whether the petition is malafide?OPR

7. Whether the petition is not maintainable? OPR

8. Relief.

7. After trial, the Rent Controller, after answering issues No.2 and 3 in favour of the landlord, issues No.1 & 4 in favour and issues No.5,6 & 7 against the tenant, allowed the petition in the following terms:

> In view of the discussion made herein before and findings returned on the aforesaid issues, the present petition stands partly allowed and the petitioner is entitled to the eviction of the respondent from the demises premises, i.e. Quarter No.11,12&13, Block No.4, Cecil Hotel Estate, Chaura Maidan, Shimla, H.P. As such, respondent is directed to handover the vacant possession on the ground that the demised premises is bonafidely required by the petitioner for rebuilding and reconstruction by the petitioner, which cannot be carried out except by vacation of the above premises by the respondents and also on the ground that respondent No.1 has sublet the premises in question to respondent No.2 without the written consent of the petitioner/ landlord.
>
> However, petition for eviction on the ground of arrears of rent and substantial additions and alteration stands dismissed. But, the respondent NO.1 will have right of re-entry as provided under Section 14(3)(c) of the Act and the

petitioner after gaining possession of the demises premises will raise construction on old lines and after completion of the same will –re-induct the respondents in the building so constructed providing the accommodation in the same place, location and area to the respondents as was in possession f the respondents before passing of this order. Memo of cost be prepared accordingly."

8. It is not in dispute that the tenant and his brother accepted the findings returned by the Rent Controller and only the landlord preferred an appeal, which stands allowed vide judgment dated 30.12.2016, passed by Additional District Judge (II), Shimla, in Civil Appeal No.RBT 2-s/14 of 2016, titled as *EIH Associated Hotes Ltd. v. Diwakar Dutt Kukreti.*

9. Appellate Authority concurred with the findings returned by the Rent Controller on Issues No.2 and 3. Findings on Issue No.4 that no substantial additions or alterations were carried out in the demised premises were altered and set aside. Since the tenant had carried out substantial additions and alterations, without the consent of the landlord, impairing the value and utility of the demised premises and also the demised premises bonafidely required for rebuilding and reconstruction, the appeal was allowed. Significantly, since the tenant had parted with the possession of the demised premises, in favour of respondent No.2, no right of re-entry, as envisaged under Section 14(3)(c) of the Act, was granted in his favour. Also, findings on issue No.1 were reversed.

10. It is in this backdrop, tenant alone has filed the present petition, under sub-section (5) of Section 24 of the Act, assailing the order of eviction.

11. In support of the petition, the landlord has placed on record rough sketch plan and several orders passed by the Courts, awarding use and occupation charges with respect to the adjoining and other premises in the vicinity so owned by them.

12. For the purpose of convenience and ready reference sub-Section (5) of Section 24 of the Act is extracted as under:-

"Vesting of Appellate Authority on officers by the State Government.

Section 24 … …

… …

(5) The High Court may, at any time, on the application of the aggrieved party or on its own motion call for and examine the records relating to any order passed or proceedings taken under this Act for the purpose of satisfying itself as to the legality or propriety of such order or proceeding and may pass such order in relation thereto as it may deem fit." [Emphasis supplied]

13. A Full Bench of this court in *Vinod alias Raja vs. Smt. Joginder Kaur,* 2012 (3) Him. L. R. (FB) 1401 has held the right of appeal to be a statutory right, not to be circumscribed by the delegatee/State Government.

14. The order of the authority attaches finality not to be called in question in any Court of law, except by the High Court in exercise of its revisional jurisdiction which can be either on an application filed by an aggrieved party or *suo motu* by the Court. The Court can call for and examine the records for "satisfying itself" about the "legality and propriety" of the "order" or the "proceedings". The High Court may pass orders as it may "deem fit".

15. What is the scope of interference in a petition seeking revision of order passed by the Rent Controller or Appellate Authority is now no longer res integra.

16. A five-Judge Bench of the apex Court reported in *Hindustan Petroleum Corporation Limited vs. Dilbahar Singh,* (2014) 9 SCC 78. The findings can be summarized as under:

(i) The term 'propriety' would imply something which is legal and proper.

(ii) The power of the High Court even though wider than the one provided under Section 115 of the Code of Civil Procedure is not wide enough to that of the appellate Authority.

(iii) Such power cannot be exercised as the cloak of an appeal in disguise.

(iv) Issues raised in the original proceedings cannot be permitted to be reheard as a appellate Authority.

(v) The expression "revision" is meant to convey the idea of much narrower expression than the one expressed by the expression "appeal". The revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the CPC but certainly it is not wide enough to make the High Court a second court of first appeal. While holding so the Court reiterated the view taken in *Dattonpant Gopalvarao Devakate vs. Vithalrao Maruthirao Janagawal,* (1975) 2 SCC 246.

(vi). The meaning of the expression "legality and propriety" so explained in *Ram Dass vs. Ishwar Chander,* (1988) 3 SCC 131 was only to the extent that exercise of the power is not confined to jurisdictional error alone and has to be "according to law".

(vii) Whether or not the finding of fact is according to law or not is required to be seen on the touch stone, as to whether such finding of fact is based on some legal evidence or it suffers from any illegality like misreading of the evidence; overlooking; ignoring the material evidence all together; suffers from perversity; illegality; or such finding has resulted into gross miscarriage of justice. Court clarified that the ratio of *Ram Dass (supra)* does not exposit that the revisional power conferred upon the High Court is as wide as an appellate power to reappraise or reassess the evidence for coming to a finding contrary to the findings returned by the authority below.

(viii) In exercise of its revisional jurisdiction High Court shall not reverse findings of fact merely because on reappreciation of the evidence it may have a different view thereupon.

(ix) The exercise of such power to examine record and facts must be understood in the context of the purpose that such findings are based on firm legal basis and not on a wrong premise of law.

(x) Pure findings of fact are not to be interfered with. Reconsideration of all questions of fact is impermissible as Court cannot function as a Court of appeal.

(xi) Even while considering the propriety and legality, high Court cannot reappreciate the evidence only for the purposes of arriving at a different conclusion. Consideration of the evidence is confined only to adjudge the legality, regularity and propriety of the order.

(xii) Incorrect finding of fact must be understood in the context of such findings being perverse, based on no evidence; and misreading of evidence.

17. Next issue, which arises for consideration is as to whether in the absence of any appeal having been preferred by the tenant or the sub-tenant, assailing the findings returned against them by the Rent Controller, is it open for the tenant to now assail the same and that too in the present petition. It be only observed that the Rent Controller decided issues No.2 and 3 (supra) against the tenant.

18. Even this question is no longer res-integra. Clause (b) of sub-section(1) of Section 24 provides for the remedy of appeal against an order passed by the Rent Controller. Such right is not confined to a particular party. In fact, right to file an appeal against an order passed by the Rent Controller is conferred upon "any person aggrieved" by such an order.

19. A Coordinate Bench of this Court in *Ashok Kumar and others v. Uttam Chand,* 1995(2) Sim.L.C. 373, has observed as under:

> "9. Learned Counsel for the petitioner has tried to take advantage from1983 SLJ(HP) Vol. XIII, P. 160, *M/s Ram Asra Hari Chand v. Shri Tara Chand and Another*, wherein, it has been held that right to file an appeal provided in the Act can be availed of by any person aggrieved by an order passed by the Rent Controller, and 'person aggrieved' means a person against whom a decision has been pronounced which has lawfully deprived him of something or wrongfully refused him something or wrongfully affected his title to do something. In this reported case, it has been held that the landlord was a person aggrieved and could file an appeal against the order of ejectment passed in his favour by the learned Rent Controller on the ground of non-payment of rent, which could be nullified by depositing the arrears of rent within the statutory period of 30 days and not on any other ground. It was held that landlord was definitely a person aggrieved as he was not granted relief on any other ground and could file an appeal against the order of Rent Controller.
>
> 10. On the strength of the aforesaid rulling, it is being argued that the landlord did not assail the findings given against him by the Rent Controller by way of an appeal, but only by way of cross-objections, therefore, as the cross-objections were not legally maintainable, the appellate authority acted illegally in allowing the cross-objections, and in case, those cross objections are excluded, there does not remain anything in favour of the landlord."

20. Significantly, even in the appeal preferred by the landlord, tenant did not agitate the correctness of findings returned by the Rent Controller.

21. Having said that, still to satisfy its conscience, this Court ventured to examine the correctness of such findings.

22. Record reveals that neither the tenant nor his brother (third person, to whom possession stands handed over) stepped into the witness box.

23. In support of the petition, landlord examined seven witnesses and on 26.4.2013, evidence was closed. Thereafter, despite six opportunities granted to the tenant, he did not produce any evidence. It appears that in order to delay and procrastinate the proceedings, tenant preferred two applications, and one of them for seeking amendment of the response. With the dismissal of the application, another opportunity to lead evidence was afforded, which was also not availed. Since none was present on 3.9.2015, tenant was proceeded exparte and on 2.12.2015 arguments heard and order pronounced on 11.12.2015.

24. From the perusal of testimony of Desraj (PW-7) and Rakesh Mehta (PW-5), it stands established that the existing structure is more than 100 years old. As per the building plan (Ex.PW-2/A), reconstruction cannot take place without the tenant being evicted and the premises vacated.

25. Also, document (Ex. PW-1/A), being a Ration Card so prepared in the year 2004, negates the plea taken by the tenant of both the brothers residing together as a joint family. Only names of respondent No.2 and his family members are entered therein. It has come in the evidence that the tenant is permanently residing in Ghaziabad (Uttar Pradesh), which averment is also not disputed. Hence, reasonable presumption about existence of such fact can be drawn, particularly when no evidence was led by the tenant, for had he done so, it would have been only unfavourable to him and as such deliberately withheld the same.

26. In the response, the tenant admits having constructed a flush latrine and washing place. Now, under what circumstances, it came to be set up, onus to prove the same was upon the tenant, which he failed to discharge by leading any evidence, ocular or documentary.

27. Even on the question of non-payment of rent findings are correct.

28. The next question, which arises for consideration, is as to whether a tenant, who has parted away with possession of the premises in favour of respondent No.2, has forfeited his right of re-entry in the premises or not. The answer cannot be in the affirmative, for with the parting of possession, tenant forfeits all rights in the tenanted premises.

29. In *Kusum Devi v. Mohan Lal (Dead) by LRs,* (2009) 11 SCC 594, the Hon'ble Supreme of India, has held as under:

> "18. As stated above, what is to be ascertained by the court in a suit for eviction under Clauses (e) and (g) is the bona fide requirement of the landlord; under Clause (e) for own occupation and under Clause (g) for carrying out repairs, etc. in the suit premises. If, on the basis of the pleadings and evidence led, the court is satisfied that the landlord has established his bona fide requirement of the suit premises for his own occupation or for any member of his family under Clause (e), it may order eviction of tenant under the said clause. Once such a decree is passed, the landlord, by grant of such decree in his favour, gets a right to either move to the building so vacated without or after making repairs, alterations, additions, etc."
>
> "50. In case decree for eviction is passed only under Clause (e), the landlord would be entitled to move into the premises without or after making any repairs and the provisions of Section 17 of the Act would apply. But if the same is passed under Clause (g) alone, the provisions of Section 18 would apply. However, in case decree is passed under Clauses (e) and (g) both, in that eventuality, the same shall be deemed to have been passed mainly under Clause (e), as such the provisions of Section 17 of the Act would alone apply and not Section 18 thereof."

30. In any event, this aspect would have no bearing on the outcome of the decision, for eviction on the ground of value and utility having been impaired and the premises being bonafidely required for reconstruction, which cannot be carried out without the tenant being evicted, has to be unfettered and absolute in every aspect.

31. The landlord filed the petition for ejectment, on the grounds of arrears of rent [Section 14(2)(1)], rebuilding and reconstruction [Section 14(3)(c)], sub-let the premises [Section 14(2)(ii)(a)], and that the tenant has made substantial additions and alteration [Section 14(2)(iii)], impairing the value and utility of the demised premises.

31. There is yet another issue, which needs to be considered and that being, payment of use and occupation charges to the landlord. Order of eviction was passed in December, 2015. Appeal of the landlord was also allowed vide order dated 30.12.2016. This Court had not stayed operation of the order of eviction. Under these circumstances, tenant is required to pay use and occupation charges to the landlord. Mr. R.L. Sood, learned Senior Advocate, has placed on record interim order dated 29.12.2015, passed by this Court, in CR No.189 of 2015, titled as *Smt. Kunta Devi v. EIH Associated Hotels Limited*, whereby, tenant in the very same Block (building) agreed to pay a sum of Rs.6,000/- per month. Record reveals that in relation to Quarters No.35 and 6, Block No.4 itself, where the demised premises are situate, various Courts/authorities have passed orders, directing the tenants to pay use and occupation charges at the rate of Rs.6,000/- per month. This is for premises comprising only of one quarter.

33. Under these circumstances, this Court is unable to fathom as to why similar order be not passed in the present case. As such, it is directed that w.e.f. 1.1.2016, till the time possession of the premises is handed over to the landlord, the tenant/occupier shall pay a sum of Rs.6,000/- per month, for each one of the three quarters (premises) in their possession. In all a sum of Rs.18,000/- per month shall be paid as use and occupation charges.

Hence, for all the reasons, present petition is disposed of in the terms. Pending application(s), if any, also stand disposed of.

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

Ganesh Dutt ...Petitioner
versus
R.K. Pruthi ...Respondent.

COPC No.932 of 2015
Reserved on: July 6, 2016
Date of Decision: September 18, 2017

Contempt of Courts Act, 1971- Section 12- Petitioner filed a writ petition, which was disposed of with a direction to the respondent to examine the case of the petitioner in the light of the judgments passed by the Court and to take a decision within a period of six weeks – the petitioner claimed that respondent had violated the direction passed by the Court- the respondent passed an order dated 25.7.2015 and the applicability of the judgment passed by the Court was considered – a fresh order was passed in which the judgments were considered – it was observed that the case of petitioner was different from the cases of other persons in as much as appointment of petitioner was not in accordance with the Rules and hence, the petitioner was not entitled for the grant-in-aid – held that the case of the petitioner was considered - applicability of the judgments to his case were considered but they were not found applicable – the Court will exercise jurisdiction under Contempt of Courts Act cautiously and only where a clear case of breach of the order of the Court is made out – the petitioner has to prove his case beyond reasonable doubt – no violation of the judgment of the Court is made out in the present case- petition dismissed. (Para-2 to 28)

Cases referred:
Babu Ram Gupta v. Sudhir Bhasin and another, (1980) 3 SCC 47
Bank of Baroda v. Sadruddin Hasan Daya and another, (2004) 1 SCC 360
Vishram Singh Raghubanshi v. State of U.P., (2011) 7 SCC 776
Prem Surana v. Addl. Munsif & Judicial Magistrate, (2002) 6 SCC 722
E.M. Sankaran Namboodripad v. T. Narayanan Nambiar, (1970) 2 SCC 325
Mrityunjoy Das vs Sayed Hasibur Rahaman, (2001) 3 SCC 739
R.K. Anand v. Registrar, Delhi High Court, (2009) 8 SCC 106

For the Petitioner : Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Rakesh Chauhan, Advocate.
For the Respondent : Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REBUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

The Constitution of India starts with the said Preamble. These are the opening words of Constitution of India. Fortunately, since then, citizens are not dependent on the mercy of any individual and dispensation of justice is not dependent or determined with and on the basis of length of the Chancellor's Foot, but the principle of Rule of Law, as the procedure established by law.

2. Petitioner, who was appointed as an Art and Craft Teacher, by the School Management Committee (SMC), claiming parity in the disbursement of Grant-in-Aid, approached this Court, and the petition, so filed, was disposed of vide judgment dated 20.3.2015, passed in CWP No.912 of 2013, titled as *Ganesh Dutt* v. *State of H.P. and others*, with the passing of the following order:

> "Mansoor Ahmad Mir, C.J. (Oral)
>
> It is contended that the respondents have released the grant-in-aid to the writ petitioners in CWP(T) No.4939 of 2008 and CWP(T) No.5156 of 2008, but the petitioner, being similarly placed, has been denied the same."
>
> 2. Respondent No.1 has filed the reply.
>
> 2. In the facts of the case, I dispose of the writ petition by directing the respondents to examine the case of the petitioner in the light of the judgments passed by this Court in the writ petitions referred to above and make a decision within a period of six weeks from today.
>
> 3. Pending CMS, if any, also stand disposed of.
>
> Sd/-
>
> Mansoor Ahmad Mir, CJ"

3. Alleging violation of the same, petitioner has filed the instant petition, praying for initiation of proceedings for contempt, under the provisions of Contempt of Courts Act. In the course of discharge of his duties as Director, Elementary Education, Himachal Pradesh, the respondent has willfully disobeyed the directions of this Court, reproduced supra.

4. What is pointed out is also violation of the following interim orders passed by this Court, in the instant proceedings:

> "27.6.2017
>
> .....
>
> The petitioner has filed the rejoinder alongwith two copies of judgments made by the learned Single Judge of this court Annexure C3 and C4. In given circumstances, we deem it proper to direct the respondent to pass fresh consideration order while keeping in view Annexure C3 and C4. Ordered accordingly. List on 3rd August, 2016"
>
> "29.03.2017
>
> .....
>
> "Vide order dated 27th June, 2016, passed in this contempt petition, the respondent as commanded to pass fresh consideration order while keeping in view the judgments passed by this Court, Annexures C-3 and C-4, annexed alongwith the rejoinder filed by the learned Counsel for the petitioner.

We have gone through the fresh consideration order, which appears to have been passed on 1st August, 2016, in compliance to the order dated 27.06.2016. It appears that the respondent is in breach.

Issue notice. Mr. J.K. Verma, learned Deputy Advocate General, waive the same on behalf of the respondent. Respondent to show cause and also to appear in person on the next date.

List on 27.04.2017.

Copy dasti to the learned Advocate General."

5. Little background, leading to the passing of the said interim orders.

6. Pursuant to directions issued by this Court in *Ganesh Dutt (supra),* respondent did pass order dated 25.7.2015 (Annexure C-2). Applicability of the decisions rendered in CWP(T) No.4939 of 2008, titled as *Vijay Atri v. State of Himachal Pradesh and others*; and CWP(T) No.5156 of 2008, titled as *Amarjit Kaur v. State of Himahcal Pradesh & others,* was considered. Thus far, in our considered view, the matter could have been put to rest.

7. Be that as it may, on 29.3.2017, this Court did record, that apparently respondent was in breach of the order. One may only observe that pursuant to interim order dated 27.6.2016, respondent did pass a fresh order dated 1.8.2016, by considering judgments (Annexures C-3 & C-4), which incidentally are the very same decisions referred to in the decision dated 20.3.2015.

8. Thus, in terms of directions issued by this Court, respondents have issued order dated 25.7.2015 and 1.8.2016.

9. In response to the Show Cause Notice, it stands clarified that cases of Amarjit Kaur (supra) and Vijay Atri (supra) are totally distinct and distinguishable, inasmuch as mode of appointment of the petitioner therein as SMC was totally different than that of the present petitioner. Allegedly, petitioner's appointment is not in accordance with the Rules. Hence, making him ineligible for disbursement of Grant-in-aid. Well, we are not adjudicating correctness of such fact, for we leave it open to be considered and decided in an appropriate proceedings, if the petitioner so chooses to do so. For, the scope of consideration in the instant petition is totally different.

10. This Court is concerned with the questions as to whether, (a) there has been violation of the directions issued by this Court, in judgment dated 20.3.2015, passed in CWP No.912 of 2013 (supra), or interim orders dated 27.6.2017 and 29.3.2017, passed in the instant petition; (b) violation, if any, is willful in nature; and (c) act and conduct of the respondent is contumacious or not.

11. In the given facts, we find it not to be so and this we say so for the reason that (a) there has been consideration of the petitioner's case with the passing of orders dated 25.7.2015 (Annexure C-2) and 1.8.2016 (Annexure R-1); (b) applicability of the decisions referred to in the judgment, with respect to the petitioner's case also stands considered; (c) the decisions, which are distinguishable, have been held to be not applicable in the petitioner's case, and correctness of such findings, in our considered view, requires adjudication on facts, in an appropriate proceedings, based on correct and complete appreciation of material on record, which at the first instance, petitioner ought to have so done; (d) there was no adjudication of this Court, any which way, of the rights of the petitioner, making the said decisions also applicable to the case of the petitioner, binding the respondent.

12. The Contempt of Courts Act, 1971 (hereinafter referred to as the Act), was enacted to define and limit the powers of certain Courts in punishing for contempt of courts and to regulate their procedure in relation thereto. "Contempt of Court" can be "civil" or "criminal". In the instant case, petitioner alleges the respondent to have committed the former. Now what is "civil contempt" stands defined in clause (b) of Section 2 of the Act. It means willful disobedience

to any judgment, decree, directions, order, writ or other process of a Court or willful breach of an undertaking given to a Court.

13. The instant case is definitely not that of breach of an undertaking, for none came to be given.

14. What is "disobedience", and that too willful, has been a matter of discourse, so to say, over a period of time.

15. Yes, the Court cannot allow its majesty and authority to be compromised and be a mute spectator in seeing its order violated, but then it is also a settled principle of law that every act cannot be said to be willful disobedience and even if it were so, then also it is not the requirement of law that the Court must, under all circumstances, punish the alleged offender and send him behind the bars.

16. In *Babu Ram Gupta v. Sudhir Bhasin and another,* (1980) 3 SCC 47, the Hon'ble Supreme Court of India, has held that

> "Even if an undertaking is given to the Court, it should be carefully construed to find out the extent and nature of the undertaking actually given by the person concerned. It is not open to the Court to assume an implied undertaking when there is none on the record. While it is duty of the Court to punish a person who tries to obstruct the course of justice or brings into disrepute the institution of the judiciary, this power has to be exercised not casually or lightly but with great care and circumspection and only in such cases where it is necessary to punish the contemner in order to uphold the majesty of law and the dignity of the Courts."

17. To similar effect is the judgment rendered by the Apex Court in *Bank of Baroda v. Sadruddin Hasan Daya and another,* (2004) 1 SCC 360.

18. Power to punish for contempt has to be exercised not casually or lightly but with great care and circumspection; and only where it is necessary to punish the contemnor to uphold the majesty of law and the dignity of the Courts, it must do so. (*Babu Ram v. Sudhir Bhasin,* (1980) 3 SCC 47).

19. Contempt jurisdiction is to uphold the majesty and dignity of the Courts. It is not aimed at protecting judicial officers from criticism. (*Vishram Singh Raghubanshi v. State of U.P.,* (2011) 7 SCC 776).

20. True, the Judges should not be hypersensitive but that does not mean and imply that they ought to maintain angelic silence also. Immaterial it is as to the person but it is the seat of the justice which needs protection: it is the image of the judicial system which needs protection. Nobody can be permitted to tarnish the image of the temple of justice. The majesty of the Court shall have to be maintained and there ought not to be any compromise or leniency in that regard. (*Prem Surana v. Addl. Munsif & Judicial Magistrate,* (2002) 6 SCC 722).

21. The law of contempt stems from the right of the courts to punish by imprisonment or fine persons guilty of words or acts which either obstruct or tend to obstruct the administration of justice. This right is exercised in India by all courts when contempt is committed in facie curaie and by the superior courts on their own behalf or on behalf of courts subordinate to them even if committed outside the courts. Formerly, it was regarded as inherent in the powers of a Court of Record and now by the Constitution of India, it is a part of the powers of the Supreme Court and the High Courts. (*E.M. Sankaran Namboodripad v. T. Narayanan Nambiar*, (1970) 2 SCC 325).

22. The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment;

so also to enable it to administer justice fairly and to the satisfaction of all concerned. (*Chandra Shashi vs. Anil Kumar Verma*, (1995) 1 SCC 421)

23. Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice. [*Chandra Shashi (supra)*].

24. Be it noted that exercise of powers under the Contempt of Courts Act shall have to be rather cautious and use of it rather sparingly after addressing itself to the true effect of the contemptuous conduct. The Court must otherwise come to a conclusion that the conduct complained of tantamounts to obstruction of justice which if allowed, would even permeate in our society. This is a special jurisdiction conferred on to the law courts to punish an offender for his contemptuous conduct or obstruction to the majesty of law. (*Mrityunjoy Das vs Sayed Hasibur Rahaman*, (2001) 3 SCC 739)

25. The other aspect of the matter ought also to be noticed at this juncture viz., the burden and standard of proof. The common English phrase "he who asserts must prove" has its due application in the matter of proof of the allegations said to constitute the act of contempt.

26. Now, it is one thing to say that the standard of proof in a contempt proceeding is no less rigorous than a criminal trial but it is something entirely different to insist that the manner of proof for the two proceedings must also be the same. It is now well settled and so also the High Court has held that the proceeding of contempt of court is sui generis. In other words, it is not strictly controlled by the provisions of the CrPC and the Indian Evidence Act. What, however, applies to a proceeding of contempt of court is the principles of natural justice and those principles apply to the contempt proceeding with greater rigour than any other proceeding. This means that the Court must follow a procedure that is fair and objective; that should cause no prejudice to the person facing the charge of contempt of court and that should allow him/her the fullest opportunity to defend himself/herself. (*R.K. Anand v. Registrar, Delhi High Court*, (2009) 8 SCC 106).

27. Hence, in our considered view, act of the respondent, in any manner, cannot be said to be contumacious, by this Court. Notice is discharged. Liberty reserved to the petitioner to independently assail the order, in accordance with law, if so required and desired.

As such, present petition stands dismissed. Pending application(s), if any, also stand disposed of.

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

Manju Bala ....Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr.MP(M) No. 878 of 2017

Decided on: 18th September, 2017

Code of Criminal Procedure, 1973- Section 439- An FIR was registered for the commission of offence punishable under Section 420 read with Section 34 of I.P.C and Sections 6, 7, 8 and 9 of Lotteries Act (Regulation) and Sections 3, 4 and 6 of the Prize Chit and Money Circulation Schemes (Banning) Act, 1978 with the allegations that petitioner and other Directors had allured the people with attractive prizes and bumper prize of car – 800 people joined the scheme but only 66 were given prizes and remaining 73 people did not get anything- Rs. 40 lacs were embezzled

in this manner – the petitioner filed an application seeking bail pleading that she has been falsely implicated and investigation has not been conducted fairly – held that the petitioner and other co-accused had dealt with the money of others and they have not returned the money – the money was taken on the false promise of the award of gifts - a prima facie case is made out against the petitioner and co-accused - in case of bail, the petitioner will flee from justice – the bail cannot be granted to the petitioner in these circumstances- the petition dismissed. (Para-7)

For the petitioner:	Mr. Satyen Vaidya, Sr. Advocate, with Mr. Varun Chauhan, Advocate.
For the respondent/State:	Mr. Pushpinder Jaswal, Deputy Advocate General and Mr. Rajat Chauhan, Law Officer.

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 for releasing her on bail, in case FIR No. 42 of 2017, dated 07.03.2017, registered under Section 420 read with Section 34 of Indian Penal Code, 1860 (for short "IPC"), Sections 6, 7, 8 and 9 of The Lotteries Act (Regulation) and Sections 3, 4 and 6 of The Prize Chit and Money Circulation Schemes (Banning) Act, 1978, registered at Police Station Barmana, District Bilaspur, H.P.

2. As per the learned senior counsel for the petitioner, the petitioner is innocent and has been falsely implicated in the present case. The petitioner is resident of the place and not in a position to tamper with the prosecution evidence and flee from justice, thus she may be released on bail. He has further argued that the petitioner has been roped in by one Shri Manoj Kumar with ulterior motive and the police are not conducting fair investigation.

3. Police reports stand filed. As per the prosecution story, on 06.03.2017 police received a complaint wherein it was alleged that a company with name and style Electronics B.I.V. Three D Pvt. Ltd. is doing the business of lotteries. The petitioner alongwith others is Director of the said company and the address of the company is Sharma Building Main Chowk Kharsi, Tehsil Sadar, District Bilaspur, H.P. The petitioner and other Directors of the company allured the people with attractive prizes and with bumper prize of Eon car. Approximately 800 people joined the company, however, only 66 people were given prizes in the draws and remaining 734 people did not get anything. All 800 people, who joined the company, paid `6000/- (`500/- for twelve months). Therefore, it is alleged that the company embezzled around `40,00,000/- (rupees forty lac) by cheating 734 people. Police investigated the matter, took into possession receipts, lottery tickets and laptops. Statements of the witnesses were also recorded. Account statements of the petitioner and accomplice were also obtained. The account statement of petitioner revealed that during 01.01.2015 to 16.03.2017 total sum of `31,43,649/- (rupees thirty one lac forty three thousand six hundred forty nine) was deposited and `31,43,239/- (rupees thirty one lac forty three thousand two hundred thirty nine) was withdrawn. One Manoj has given nine cheques of different amounts to one Sanjeev Kumar (co-accused). All nine cheques were taken into possession by the police. Manoj Kumar has given total sum of `4,15,000/- (rupees four lac fifteen thousand), through cheques, and `8,89,250/- (rupees eight lac eighty nine thousand two hundred fifty), through receipts, to Sanjeev Kumar. Likewise, other two agents have also given money to the petitioner and co-accused. As per the prosecution, lap tops of the petitioner and co-accused have been sent for data recovery to FSL, Junga, and the report is awaited. The total worth of the property of the petitioner and co-accused is yet to be ascertained. Lastly, the prosecution prayed for dismissal of the bail application of the petitioner.

4. I have heard the learned counsel for the petitioner, learned Deputy Advocate General for the State and have gone through the record, including the police reports, carefully.

5. The learned Senior Counsel for the petitioner has argued that the petitioner, being lady, having minor children and as she was not involved in commission of the offence, may be released on bail. He has further argued that no fruitful purpose will be served by keeping the petitioner behind the bars for an unlimited period. Conversely, the learned Deputy Advocate General has argued that the petitioner has cheated many persons and in case she is enlarged on bail, she will repeat the same offence and she can also tamper with the prosecution evidence by siphoning money, which she has collected and the chances of recovery of money will become bleaker. He has argued that as the petitioner has committed economic offence by cheating many people, she may not be released on bail. Lastly, he has argued that taking into consideration the seriousness of the crime, the bail application of the petitioner may be dismissed.

6. In rebuttal, the learned counsel for the petitioner has argued that the petitioner, without being held guilty, be not kept behind the bars and may be enlarged on bail.

7. At this stage, taking into consideration the fact that the petitioner alongwith co-accused has been dealing with money of others and now she is not returning/repaying the money of the people. The people of the area have been duped and are deprived from their substantial amounts under the false promise of award of gifts/returns through monthly draws. This Court also findings that *prima facie* it seems that the petitioner and co-accused Sanjeev Kumar have mis-appropriated huge amount of the poor people. This Court finds that in case the petitioner is enlarged on bail, she will be in a position to tamper with the prosecution evidence and also to flee from justice, therefore, present is not a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in her favour. The petition, being devoid of merits, deserves dismissal and is accordingly dismissed. However, in case the petitioner approaches the learned Trail Court at any appropriate stage and the learned Trial Court comes to the conclusion that the petitioner can be enlarged on bail, this order shall not serve any hindrance to the learned Trial Court to conclude so.

8. In view of the above, the petition stands disposed of.

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

Sudhir Kumar & anr. ...Petitioners.

Versus

Kalpna Kumari ...Respondent.

Cr.MMO No.224 of 2016
Reserved on : 30.8.2017.
Decided on: 18th September, 2017.

Protection of Women from Domestic Violence Act, 2005- Section 12, 18, 19 and 20- Wife filed a complaint pleading that her husband started harassing her physically and mentally- he neglected and refused to maintain her and raised the demand of dowry – she was humiliated, tortured and maltreated – husband and his family members did not visit the wife, even when a child was born to her- the complaint was allowed by the Trial Court – an appeal was filed, which was dismissed – held that it is the responsibility of the husband to maintain his wife and not to commit any act which amounts to domestic violence – it is duly proved that husband is not looking after his wife and son and is not paying any maintenance to them- he has retained stridhan of the wife- the maintenance allowance of Rs. 6,000/- awarded by the Court cannot be said to be excessive – the Courts have passed just and reasoned order and no interference is required – petition dismissed. (Para-6 to 9)

For the petitioners : Mr. Ashwani K. Sharma, Advocate.
For the respondent : Mr. Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition under Section 482 of the Code of Criminal Procedure (*for short 'Code'*) has been preferred by the petitioners against the judgment, dated 2.3.2016, passed by the learned Additional Sessions Judge, Hamirpur, upholding the order dated 5.8.2014, passed by the learned Additional Chief Judicial Magistrate, Hamirpur, District Hamirpur, with a prayer to allow the present petition and set aside the impugned order passed by the learned Court below.

2. Brief facts giving rise to the present petition are that petitioner No.1, herein and the respondent, are husband and wife. As per the petitioner, respondent-wife filed a complaint under Sections 12, 18, 19 and 20 of the Protection of Women from Domestic Violence Act (hereinafter referred to as 'Domestic Violence Act'), before the learned Court below. It is averred in the petition that the marriage between petitioner No.1 and the respondent was solemnized on 17.11.2009 and after marriage, the petitioner started harassing her physically as well as mentally. The respondent has further alleged that the petitioner had started neglecting and also refused to maintain the respondent and has raised demand of dowry. Even otherwise, she was not regarded, as a wife, rather she was humiliated, tortured and maltreated. The respondent has further alleged that she has tried her best to settle in the family of the petitioner, but all in vain. The respondent has further alleged that on the intervention of parents, the matter was amicably settled on 12.9.2010, in the presence of witnesses and thereafter both had started living together. The respondent has alleged that even after amicable settlement between the parties, by interference of her parents, even thereafter the petitioners have started harassing her physically as well as mentally on account of the demand of dowry. The respondent was restrained from having any conversations with her parents. On 18.8.2011, respondent gave birth to a child, but the petitioner and his family members did not turn up to take care of their well being. The aforesaid act and conduct of the petitioners including his family members depicts that they have disowned the respondent in all respects having no source of income. The petitioner is working as a Lecturer in a Private Academy and earning handsome income. The respondent has left the matrimonial home at her own and the petitioner went to bring her back, respondent threatened to commit suicide and insulted him. Petitioner No.2 is an old diabetic lady suffering with blood pressure and other ailments, therefore, the allegations of domestic violence cannot sustain against her.

3. Learned counsel appearing on behalf of the petitioners has argued that the salary of petitioner No.1-husband, which is proved on record, the maintenance granted to the respondent-wife is very much on the higher side. He has further argued that the respondent-wife has left the company of the petitioners on her own will. He has further argued that petitioner No.1 has to maintain his mother-petitioner No.2 and he is having small house only. In these circumstances, the orders passed by the learned Courts below may be set aside.

4. On the other hand, Mr. Lovneesh Kanwar, learned counsel appearing on behalf of the respondent-wife has vehemently argued that petitioner No.1-husband is earning huge amount and he is working at Ludhiana and he has produced false certificate of his income only in order to defeat the claim of petitioners. He has further argued that there is no averment with regard to the income in reply filed by the petitioners in the learned Court below. Even, RW-3 has stated before the learned Court below that petitioner No.1-husband is paying `5000/- for domestic help. When he is paying this amount to the domestic help, maintenance granted to the respondent-wife cannot be said to be excessive at all.

5. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

6. The learned Court below has held that the acts of petitioners constitutes domestic violence with the respondent-wife. These findings of the learned Court below is considered *viz-a-viz*, the evidence which has come on record. This Court finds that the petitioner-husband has admitted the fact in his affidavit Ex.RW1/A, that he used to pay

maintenance to the respondent-wife by way of money order. He has also stated that respondent-wife is doing a private job and earning `12,000/- per month. In his cross-examination, he has admitted the fact that after the petition was filed, he has not paid any maintenance allowance either to his wife or to his son. He denied the fact that respondent-wife is not doing any job and she is having no source of income.

7. From this evidence, it is clear that the respondent-wife is being neglected by the petitioners without any reasonable cause. The admission so made by petitioner-husband, in his cross-examination that after filing of the petition, he has not paid any maintenance allowance to the respondent-wife and her son for their survival proves the conduct of petitioner-husband that he is escaping from his responsibility to maintain his wife and son. No evidence was adduced by the petitioner-husband to prove that respondent-wife is self dependent and is having a proper source of income for her maintenance and for the maintenance of her child. Here the question is not only of the maintenance, but also of the acts of the domestic violence. The fact that petitioner-husband is not paying any maintenance allowance to the respondent-wife and her son amounts to domestic violence. It is the responsibility of petitioner-husband to maintain the respondent-wife and son and not to commit any such act which amounts to domestic violence. It is clear that the petitioner-husband is neither looking after his wife and son nor paying them any maintenance allowance. Further, the petitioners herein, have failed to prove on record before the learned Courts below that they have *not* withheld *'istri dhan'* of respondent-wife, this is also cruelty.

8. It has come on record that respondent-wife and son are not being looked after by the petitioner-husband, when the petitioner's house is at Hamirpur as well as petitioner-husband is a Science Graduate and having sufficient experience capable to earn. The averments with regard to income of petitioner-husband as made out by the respondent-wife in her application were not specifically denied by the petitioner-husband in the learned Courts below. This makes it clear that the petitioner-husband has concealed the facts with regard to his income. The judicial notice of this fact can be taken with regard to the income of the petitioner-husband, who is a trained Graduate Science teacher and is teaching in a School. In these circumstances, this Court finds that the maintenance allowance of `6000/-, as awarded by the learned Court below cannot be said to be excessive at all. The petitioner-husband is duty bound to provide her either appropriate accommodation in the share household or in alternative, some rented accommodation consisting of at least two rooms having facilities of toilet, bathroom, kitchen at the place where the respondent-wife is residing. The respondent-wife is residing in a village and this Court finds that the rent of the accommodation in a village will not be at all beyond the control of petitioner-husband. In these circumstances, after careful appreciation of the evidence and the material, which has come on record, this Court finds that the orders passed by the learned Courts below are just and reasoned and so, no interference is required by this Court.

9. In view of what has been discussed hereinabove, the present petition, which sans merits, deserves dismissal and is accordingly dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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

Cr. Appeal No.242 of 2016 a/w Cr. Appeal No.215 of 2016
Reserved on: 20.06.2017
Decided on: September 19, 2017

Cr. Appeal No.242 of 2016:

Hikmat Bahadur — Appellant

Versus

State of Himachal Pradesh — Respondent

Cr. Appeal No.215 of 2016:

Narain Singh Chauhan Appellant

Versus

State of Himachal Pradesh Respondent

Arms Act, 1959- Section 25- **Indian Penal Code, 1860-** Section 302- PW-12 had deployed the deceased as Chowkidar to look after his orchard on the payment of Rs. 2,500/- per month- PW-12 received a call that deceased and accused No. 1 had quarreled with each other - PW-12 called the deceased who informed that accused No. 1 had fired a gunshot causing injury to him- PW-12 asked PW-1 to visit the spot- PW-1 informed that the deceased had succumbed to the injuries – the police was informed – the police party found the deceased lying in critical condition in a pool of blood- he was taken to hospital but died on the way- the accused No. 1 made a disclosure statement and got the gun recovered – the gun belonged to accused No. 2 – accused No. 1 was charged for the commission of offence punishable under Section 302 of I.P.C. while accused No. 2 was charged for the commission of offences punishable under Sections 25 and 27 of Arms Act – the accused were tried and convicted by the Trial Court – held in appeal that the case is based on circumstantial evidence – the circumstances from which the guilt of the accused is to be established should be proved satisfactorily and they should lead to no other inference other than the guilt of the accused – no evidence was led against the accused No. 2 that he was the owner of the gun – the gun belonged to the grandfather of the accused No. 2 – the details of the phone call were not brought on record – the motive to commit crime was not established – the prosecution version that PW-12 had made a call to the deceased is doubtful in view of the medical evidence – the disclosure statement and the recovery have not been proved – the prosecution version was not proved beyond reasonable doubt- appeal allowed – accused acquitted. (Para-16 to 39)

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

Cr. Appeal No.242 of 2016:

For the appellant Mr. S.S. Rathore, Advocate.

For the respondent Mr. D.S. Nainta & Mr. Virender Verma, Additional Advocate Generals.

Cr. Appeal No.215 of 2016:

For the appellant Mr. Surender Sharma, Advocate.

For the respondent Mr. D.S. Nainta & Mr. Virender Verma, Additional Advocate Generals.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

This judgment shall dispose of the present appeal and also the connected one, i.e. Criminal Appeal No.215 of 2016, having arisen from the judgment dated 02.05.2016, passed in Sessions Trial No.38-S/7 of 2017, passed by learned Additional Sessions Judge-II, Shimla, whereby both convicts-appellants, i.e. Hikmat Bahadur and Narain Singh Chauhan (hereinafter are called as accused No.1 and accused No.2), have been convicted and sentenced. Accused No.1 Hikmat Bahadur, in the present appeal, has been convicted for commission of offence punishable under Section 302 of Indian Penal Code and sentenced to undergo rigorous imprisonment for life and to pay Rs.1,00,000/- as fine and in default of payment of fine to undergo simple imprisonment for three years, whereas accused No.2 Narain Singh Chauhan, in the connected appeal, has been convicted for commission of offence punishable under Section 25 of Indian Arms Act and sentenced to undergo rigorous imprisonment for three years and also to pay Rs.25,000/- as fine and in default of payment of fine to undergo simple imprisonment for six months.

2. PW-12 Mast Ram belongs to village Dhawandli, Tehsil Chopal, District Shimla. He had two apple orchards i.e. one at village Dhawandli and the other at Pouran. In order to look after his orchard at village Pouran, deceased Dil Bahadur, a Nepali National, was deployed as Chowkidar on payment of Rs.2,500/- per month.

3. On 18.05.2014, PW-12 Mast Ram, while on his way to Chandigarh for medical check up of his son, around 11.30 a.m., he received a telephonic call from his neighbour Narain Singh Chauhan (convict-appellant in connected appeal), who informed that deceased Dil Bahadur and accused No.1 Hikmat Bahadur had quarrelled with each-other. On this, he called deceased Dil Bahadur who informed that accused No.1 has fired a gunshot on him and thereby caused bullet injury to him. On hearing so, PW-12 Mast Ram, immediately informed his brother-in-law PW-1 Satish Kumar and asked him to visit the spot. PW-1 Satish Kumar, in turn, went to the spot and informed PW-12 that deceased Dil Bahadur had succumbed to the injuries inflicted to him. PW-12 Mast Ram allegedly informed the police of Police Station, Nerwa, also at about 12.30 p.m. over telephone. After arrival of PW-1 Satish Kumar, alongwith one Mr. Sanjeev, at the spot, a police party headed by PW-23, SI/SHO Jasbir Singh, comprising of HC Sant Ram, HHC Virender Chand, HHC/Driver Madan Lal and PW-11 Constable Sameer Kant, rushed to the spot in official vehicle. Deceased Dil Bahadur was lying in a critical condition. He had received gunshot injury and was lying in pool of blood. The villagers had also gathered by that time on the spot. The deceased though was being shifted to hospital, however, he succumbed to the injuries he received on the way to hospital. The statement Ext.PW-1/A of PW-1 Satish Kumar was recorded under Section 154 of the Code of Criminal Procedure. The Rukka Ext.PW-11/A was prepared and handed over to PW-11 Constable Sameer Kant for being taken to Police Station for the purpose of registration of case. PW-11 Constable Sameer Kant has handed over the Rukka to PW-18 LHC Shamim, the then MHC in Police Station, Nerwa. On registration of F.I.R. Ext.PW-16/A, the file was handed-over to PW-11 Constable Sameer Kant, who has taken the same to the Investigating Officer. The Investigating Officer PW-23 SI Jasbir Singh, has prepared the site plan of the place of occurrence Ext.PW-23/A. The photographs Ext.PW-15/A-1 to Ext.PW-15/A-24 were clicked. The blood stained soil and grass from the place of occurrence were taken into possession in presence of PW-1 Satish Kumar and Sanjeev Kumar vide seizure memo Ext.PW-1/C. The sample of seal Ext.PW-1/B was drawn separately. The dead body was brought to CHC Nerwa. The inquest papers Ext.PW-23/B were filled in. Accused No.1 was arrested and the dead body was kept in the dead-house.

4. On the next day, i.e. 19.05.2014, PW-16 ASI Kalyan Singh and PW-6 LHC Suresh were deputed to Indira Gandhi Medical College, Shimla, for getting the post mortem of the dead body conducted. PW-16 ASI Kalyan Singh had clicked the photographs Ext.PW-15/A-3 and Ext.PW-15/A-4 with his cell phone. After getting the post mortem of the dead body conducted vide post mortem examination report Ext.PW-5/C, the same was handed over to one Virender for performing last rites.

5. On 20.05.2014, accused No.1 Hikmat Bahadur, allegedly made a disclosure statement Ext.PW-18/B that he has hided the gun in a field nearby the spot and Drat inside his Dera and that it is he who alone who can get the same, recovered in the presence of PW-18 LHC Shamim and PW-20 HHC Virender Sharma. The Investigating Officer PW-23, SI Jasbir Singh alongwith HHC Virender Sharma, Constable Sunil and Driver Madan, accompanied by the witnesses, went to the spot. On the identification given by the accused, the gun was recovered from “Maind /boundary” of field, which was kept inside the grass. The identification memo Ext.PW-2/D was prepared in presence of PW-2 Raghuvir Singh and Bir Singh. The Khaka of gun Ext.PW-2/A was also prepared. The photographs Ext.PW-2/J to Ext.PW-2/L were clicked. The site plan of the place of recovery Ext.PW-23/C was prepared. The gun was thereafter sealed and taken into possession vide seizure memo Ext.PW-2/B. The *‘Drat’* found to be hidden by the accused below the pillow cover in his *‘Dera’* was also taken into possession vide recovery memo Ext.PW-2/F. The identification memo Ext.PW-2/G was again prepared in presence of PW-2 Raghuvir Singh and Bir Singh. The Khaka of *‘Drat’* Ext.PW-2/E was separately prepared.

6. The case property was deposited with MHC for safe custody in Police Malkhana. All the incriminating articles were sent to Forensic Science Laboratory, Junga, through PW-17 Constable Rajneesh vide R.C.24/2014 Ext.PW-18/E for chemical analysis. The application Ext.PW-19/A was made to Naib Tehsildar, Nerwa, for conducting the demarcation of the place of occurrence. The demarcation was conducted and the report Ext.PW-8/A obtained alongwith copy of Jamabandi Ext.PW-8/B and copy of Akas Sajra Ext.PW-8/C. On receipt of the reports Ext.PW-23/F and Ext.PW-23/G of Chemical Examiner, Forensic Science Laboratory, Junga, the same were also added in the police file.

7. On completion of the investigation, report under Section 173 of Code of Criminal Procedure, was filed in the learned Court below. Learned trial Judge, on taking into consideration the same and also hearing learned Public Prosecutor as well as learned defence counsel and on finding a case for commission of offence punishable under Section 302 of Indian Penal Code, having been made out against accused No.1 Hikmat Bahadur, whereas a case for commission of offence punishable under Sections 25 and 27 of the Indian Arms Act against accused No.2 Narain Singh Chauhan, charge against each of them was framed accordingly. Both the accused, however, pleaded not guilty and claimed trial.

8. The prosecution in order to sustain charge against the accused persons, have examined twenty three witnesses in all.

9. The star prosecution witnesses, as noticed hereinabove, are: PW-1 Satish Kumar at whose instance FIR Ext.PW-16/A came to be registered against the accused persons. PW-2 Raghuvir Singh is a witness to recovery of gun Ext.PW-2/B and 'Drat' Ext.PW-2/F. PW-3 Mahavir Kashyap, who is Junior Engineer, PIU Sub Division, HPPWD, Nerwa, who on the request of Police vide Ext.PW-3/A, prepared the scale map Ext.PW-3/B. PW-4 Raj Kumar, Proprietor Raj Photo Studio, Nerwa, has not supported the prosecution case and rather turned hostile. PW-5 Dr. Dhruv Gupta, Registrar, Department of Medicines, IGMC, Shimla, has proved the post mortem report Ext.PW-5/C. PW-6 LHC Suresh Kumar, accompanied by PW-16 ASI Kalyan Singh, got conducted the post mortem of the dead body in IGMC, Shimla. PW-7 Rakesh Kumar, claims that he also accompanied PW-1 Satish Kumar to the spot where on asking the deceased as to what happened to him, he informed that accused No.1 fired a gunshot and caused injury on his person. PW-11 Constable Sameer Kant accompanied the Investigating Officer PW-23 SI Jasbir Singh to the spot and taken the Rukka Ext.PW-11/A to the Police Station for registration of case. PW-12 Mast Ram, the owner of the orchard where deceased Dil Bahadur was working as Chowkidar, has set the machinery in motion on coming to know about the death of his Chowkidar from his brother-in-law PW-1 Satish Kumar. PW-13 Raj Kumari, is widow of deceased Dil Bahadur. PW-23, SI Jasbir Singh is the Investigating Officer. PW-8 Jai Ram, Sr. Assistant, in the office of S.D.M., Chopal, has proved the demarcation report Ext.PW-8/A, Jamabandi Ext.PW-8/B and Akas Sajra Ext.PW-8/C. PW-9 Bhajan Dass, Field Kanungo, has prepared the demarcation report Ext.PW-8/A. PW-10 Mela Ram is Patwari, who assisted PW-9 Bhajan Dass in conducting the demarcation Ext.PW-8/A. PW-14 Dr. Sangeet Dhillon, had conducted the post mortem of the dead body of deceased Dil Bahadur and proved the report Ext.PW5/C. PW-15 Vivek @ Vickey, had developed photographs Ext.PW-15/A-1 to Ext.PW-15/A-24 and also prepared C.D. Ext.PW-15/B-1 & Ext.PW-15/B-2. PW-17 Constable Rajneesh and PW-18 LHC Shamim, are witnesses to the disclosure statement Ext.PW-18/B. PW-16 ASI Kalyan Singh, had obtained the demarcation and conducted the investigation partly. PW-20 HHC Virender Sharma, is again a witness qua visit to the spot alongwith the Investigating Officer PW-23 SI Jasbir Singh, on receipt of information. PW-21 Nasib Singh Patial, Scientific Officer, State Forensic Science Laboratory, Junga and PW-22 SI Narinder Singh, had prepared supplementary challan on receipt of D.N.A. analysis, who are formal in nature.

10. Learned trial Judge, on appreciation of oral as well as documentary evidence, discussed hereinabove, has concluded that the prosecution has proved its case against both the accused beyond all reasonable doubts and as such, accused No.1 Hikmat Bahadur has been rightly convicted and sentenced for commission of offence punishable under Section 302 of the

Indian Penal Code, whereas accused No.2 Narian Singh under Section 25 of the Indian Arms Act, in the manner as aforesaid.

11. Both the accused aggrieved by the findings of conviction and sentence recorded by learned trial Court, have questioned the legality and validity thereof on the grounds, inter-alia, that learned trial Court has gone wrong in convicting the appellants for the offences they allegedly committed under Section 302 of Indian Penal Code and Section 25 of Indian Arms Act, respectively. There is no direct evidence available in the case in hand. The circumstantial evidence is not at all dependable for the reason that the change of circumstances is not at all complete nor the evidence so produced is consistent only with the apotheosis of the guilt of the accused, i.e. not explainable on any other apotheosis aspect that the accused is guilty. Learned trial Court has ignored all settled principles and convicted the appellants on mere surmises, conjectures and highly inadmissible as well as unreliable evidence. The prosecution story that the convict-appellant Hikmat Bahadur, accused No.1, made a disclosure statement on 20.05.2014 and pursuant to that got the gun recovered, stands falsified from the statements of the prosecution witnesses, who while in the witness-box, stated that the gun was recovered on the day of occurrence, i.e. 18.05.2014. Therefore, it is not at all proved that appellant Narain Singh Chauhan was the owner of gun and that the same is recovered from his conscious and physical possession. It is not at all proved that said convict was owner of gun. There is again no evidence available on record to show that said convict had provided that gun to his co-accused Hikmat Bahadur, accused No.1, for protection of the orchard. The disclosure statement leading to recovery of gun and drat, is not at all proved. It is also contended that the prosecution, firstly, invented a false story and thereafter purported to create false evidence in support of the said theory. The medical evidence is suggestive of that the deceased died immediately after the injury. The story also that during the course of conducting post mortem of the dead body one coin was found in the mouth of the deceased, which suggests that the deceased brought dead to the spot by someone and thrown there. The deceased, as such, was not in a position to disclose to PW-1 Satish Kumar and PW-7 Rakesh Kumar that it is accused No.1, who fired gunshot on him and thereby inflicted the injury on his person. The only circumstance that the dead body was recovered from a place near the Dhara of accused No.1, is not sufficient to prove his guilt. Both appeals, therefore, have been sought to be allowed and the accused acquitted of the charge framed against each of them.

12. The circumstances pressed into service to bring guilt home to the accused persons, are as under:

(i) PW-12 Mast Ram and accused No.2 Narain Singh Chauhan, both are orchardists and having their orchards adjoining to each-other in Villages Pouran, Tehsil Chopal, District Shimla and that while PW-12 Mast Ram had hired the services of deceased Dil Bahadur as Chowkidar, accused No.2 Narian Singh Chauhan that of accused No.1 Hikmat Bahadur, for watch and ward of their respective orchards.

(ii) Accused No.2 Narian Singh Chauhan was holding the gun Ext.PW-2/A and ammunition without any licence and given the said gun to his co-accused Hikmat Bahadur, Chowkidar, for his protection from wild animals while on duty in the orchards.

(iii) On 18.05.2014, accused No.1 and deceased Dil Bahadur quarrelled with each-other on the issues such as the deceased owed money to the accused and also that Bhim Bahadur, the brother of deceased, Dil Bahadur had kidnapped the wife of accused No.1 Hikmat Bahadur and the said accused fired a shot on the deceased with gun Ext.PW-2/A and thereby inflicted injury on his person. The deceased Dil Bahadur succumbed to the injury so received, while was being removed to hospital from the place of occurrence.

(iv) PW-12 Mast Ram, on 18.05.2014, while on his way to Chandigarh in connection with medical treatment of his son, received a call around 11.30 a.m.

from accused No.2 Narian Singh Chauhan, who informed the former about the fight between his Chowkidar (accused No.1 Hikmat Bahadur) and Chowkidar of said witness (deceased Dil Bahadur).

(v) PW-12 called Dil Bahadur over his mobile phone to know the cause of fight between the two and the latter told that he was shot with gun by accused Hikmat Bahadur.

(vi) On this PW-12 asked his brotherin-law PW-1 Satish Kumar over his mobile phone to rush to the spot, who went there and informed this witness that Dil Bahadur has succumbed to the injury he received.

(vii) PW-12 had also informed police of Police Station, Nerwa, on which the Investigating Officer PW-23 SI/SHO Jasbir Singh, accompanied by other police staff, rushed to the spot in official vehicle and found deceased Dil Bahadur lying in a pool of blood there nearby the Dhara of accused Hikmat Bahadur.

(viii) The police with the assistance of local people gathered there, shifted the deceased to a vehicle on road side to take him to CHC Nerwa for treatment, who, however, succumbed to the injury he received on the way to Hospital, Nerwa.

(ix) The accused was arrested on 18.05.2014 itself and while in custody, made disclosure statement Ext.18/B on 20.05.2014 and got recovered the gun Ext.PW-2/A and Drat Ext.PW-2/E.

13. Mr. S.S. Rathore, learned defence counsel, has very ably argued that the Court below has gone wrong in convicting accused No.1 Hikmat Bahadur on the basis of the circumstantial evidence which neither is cogent nor reliable and rather contradictory in nature nor is sufficient to prove that the chain of evidence is so complete, hence, sufficient to believe that it is the accused who alone has committed the offence and there is no escape from the conclusion that within all human probability, the crime was committed by the accused alone and none-else. In a case of circumstantial evidence motive to kill the deceased, assume considerable significance and as the motive, if any, for which the accused No.1 has killed deceased Dil Bahadur, is not proved, no finding of conviction could have been recorded against him. It was never complained to the police that the deceased owed Rs.20,000/- to accused No.1 and that the wife of said accused was kidnapped by Bhim Bahadur, the brother of the deceased. Therefore, the story to this effect according to Mr. Rathore, has been invented lateron to connect accused No.1 falsely with the commission of offence. Mr. Rathore has further urged that the recovery of gun and drat at the instance of accused No.1, is planted one as the recording of so called disclosure statement and recovery pursuant thereto, is not at all proved on record.

14. Mr. Surender Sharma, learned counsel representing accused No.2, has argued that there is no iota of evidence that the gun Ext.PW-2/A was owned by the said accused. There is again no evidence to show that it is the said accused who has purchased the ammunition and provided the same to his co-accused Hikmat Bahadur. Therefore, the findings of conviction passed against accused No.2, are the result of surmises and conjectures.

15. On the other hand, Mr. D.S. Nainta, Additional Advocate General, assisted by Mr. Virender Verma, Additional Advocate General, in order to repel the arguments addressed on behalf of the accused and in support of the impugned judgment, has contended that the evidence available on record is cogent and reliable, hence, was sufficient to convict both the accused with the commission of offences they allegedly committed. Learned lower Court, therefore, has not committed any illegality and irregularity while convicting both the accused under Section 302 of the Indian Penal Code and Section 25 of the Indian Arms Act, respectively.

16. The present being not a case of direct evidence and rather hinges upon circumstantial evidence casts an onerous duty 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 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.

17. 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.**

18. 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. Whether the present is a case where the evidence available on record is suggestive of that it is the accused No.1 who fired a gunshot on deceased Dil Bahadur intentionally to cause his death and such an act on his part amounts to culpable homicide amounting to murder or not, needs re-appraisal of the evidence available on record. However, before that it is deemed appropriate to point out that if the accused No.1 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 testimony of eye witnesses.

19. If coming to the commission of an offence punishable under section 25 of the Indian Arms Act, the allegations against accused No.2 Narain Singh Chauhan, are that Gun Ext.PW-2/A, was in his possession without any license and he was having ammunition also without licence. The offence, he allegedly committed, is under Section 25(1)(B)(a) of the Indian Arms Act. As such, contravention falls within the mischief of Section 3 of the Act. Therefore, in order to infer the commission of an offence punishable under Section 25 of the Act by accused No.2, the necessary ingredients are that he was the owner of gun Ext.PW-2/A and holding the ammunition also without any licence.

20. Before the evidence produced by the prosecution in this case is elaborated, the present being a case of circumstantial evidence, the Court seized of the matter has to appreciate such evidence in the manner as legally required. We can draw support in this regard from a judgment of Division Bench of this Court in **Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550**. The relevant extract of this judgment is re-produced here-as-under:-

> ***"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., AIR 1952 SC 343, has laid down the following principles:*
>
> *"It is well 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 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."...

21. Similar case is the ratio of judgment rendered again by this Bench in **State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (5) (HP) 213**. 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. L.C. 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.

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 Suppl.(3) S.C.C. 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 by 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."...

22. The guilt of innocence of accused persons has to be determined in the light of parameters laid down in the judgment cited (supra) as well as the evidence available on record. We have already detailed the circumstances as relied upon by the prosecution against both the accused persons to bring guilt home to them. It is now to be seen in the light of the evidence available on record as to whether the chain of evidence furnished by these circumstances is so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all probability it is accused No.1 alone who has murdered deceased Dil Bahadur with gun Ext.PW-2/A, which as per the prosecution case is owned and possessed by accused No.2 un-authorizedly and was provided to the accused No.1 for his protection from wild animals.

23. It is in this backdrop, we now propose to discuss the circumstances pressed in service in this case one by one.

Circumstance No.1:

24. There is no controversy about the orchards of accused No.2 Narian Singh Chauhan and PW-12 Mast Ram, situated in villages Pouran adjoining to each-other. The prosecution case to this effect finds support from the testimony of PW-12. There is again no dispute qua the services of deceased Dil Bahadur as Chowkidar were hired by PW-12 Mast Ram to look after and keep watch & ward of his orchard, whereas that of accused No.1 Hikmat Bahadur by his co-accused Narain Singh Chauhan. The orchards were adjoining to each-other. This part of the prosecution case even finds support from the testimony of PW-13 Smt. Raj Kumari, widow of deceased Dil Bahadur also. Therefore, this circumstance pressed in service by the prosecution, stands established on record.

Circumstance No.2:

25. As per the prosecution case, accused No.2 Narian Singh Chauhan, was in unauthorized possession of the gun Ext.PW-2/A as he was not holding any licence in this regard. He was also holding the ammunition without any licence, hence, unlawfully. As per further case of the prosecution, accused no.2 had given the gun Ext.PW-2/A and provided the ammunition also to accused No.1 Hikmat Bahadur for his protection from wild animals while on duty in the orchards. However, there is no iota of evidence to show that the gun Ext.PW-2/A belongs to accused No.2 Narain Singh Chauhan. In order to prove this aspect of its case, the reliance has been placed upon the so called interrogation of accused Narian Singh Chauhan during the course of investigation on 21.05.2014, in which he allegedly disclosed that the gun belongs to him and it was provided by him to his Chowkidar Hikmat Bahadur. The Investigating Officer PW-23 SI Jasbir Singh, while in the witness box, though has stated in his cross-examination-in-chief that accused No.2 during his interrogation disclosed that the gun belongs to him and that the same was handed over to accused No.2 alongwith bullets for his safety from wild animals. Also that accused No.2 further revealed that the gun was of his grand-father Ramia Ram, however, when cross-examined, it is admitted that no statement of accused No.2 was recorded when he was arrested on 21.05.2014 and he has not even recorded the statement of anyone else also that the gun belongs to accused No.2. Strangely enough, had it been disclosed by accused No.2 that the gun is of his grand-father and that it is he who had provided the same to accused No.1 for his protection, the Investigating Officer would have investigated this part of prosecution case further and had he did so would have easily collected the evidence to show that the gun was that of

accused No.2. The story that the said accused during his interrogation has revealed that the gun belongs to him, is germane of the mind of Investigating Officer which has been invented falsely to implicate accused No.2 in the commission of offence punishable under Section 25 of the Indian Arms Act by hook and crook.

26. As a matter of fact, the present is a case of no evidence against accused No.2 and he has been erroneously convicted for the commission of offence punishable under Section 25 of the Act. Learned trial Judge though has observed repeatedly in the impugned judgment that the golden thread which runs through the web of administration of justice in criminal cases, is that the accused has to be presumed to be innocent until and unless the prosecution is otherwise able to establish charge against him beyond all reasonable doubt.

27. However, in view of the above discussion, the prosecution has miserably failed to apply such rule of law in the present case and to the contrary recorded the findings of conviction against accused No.2 without there being any evidence available on record.

Circumstance No.3:

28. It is PW-12 Mast ram who set the machinery in motion in the present case as he allegedly not only informed his brother-in-law PW-1 Satish Kumar about the alleged fight between accused No.1 Hikmat Bahadur and deceased Dil Bahadur on 18.05.2014 (in Ext.PW1/A, however, names not mentioned and rather word "Gorkha" used), but the information was also given to the police of Police Station, Nerwa also. He did so consequent upon the alleged information in this regard received from accused No.2 Narian Singh Chauhan. In order to prove this part of the prosecution case, the Investigating Officer was required to obtain the detail of so called phone call received by PW-12 Mast Ram from accused No.2 Narain Singh Chauhan and call allegedly he made on the mobile phone of deceased Dil Bahadur and subsequently on that of his brother-in-law, PW-1 Satish Kumar.

29. As a matter of fact, had such scientific investigation been got conducted it would have given the better results. For want of such evidence, which in our opinion, could have been easily collected in order to rule out all suspicion qua this aspect of the prosecution story, we are not able to persuade us on the basis of oral testimony of PW-12 Mast Ram and PW-1 Satish Kumar that accused No.1 and deceased had quarrelled and the latter succumbed to the injuries he received on his person. Therefore, it cannot be believed by any stretch of imagination that accused Narain Singh Chauhan had given the information to PW-12 qua the fight having been taken place between accused No.1 and deceased Dil Bahadur. We failed to understand as to how the call made to the deceased could have been received by him with bullet injury on his person. Therefore, it lies ill that the deceased informed PW-12 Mast Ram about gunshot fired on him by accused No.1. In Ext.PW-1/A, the statement of PW-1 Satish Kumar recorded under Section 154 of Code of Criminal Procedure, there is no mention of the fight having taken place between accused Hikmat Bahadur and deceased Dil Bahadur. The same rather reveals that PW-12 Mast Ram informed PW-1 Satish Kumar qua fight having taken place between two Gorkhas. Therefore, with such evidence it is difficult to believe that fight had taken place between accused No.1 and the deceased. True it is that as per the medical evidence, i.e. post mortem report Ext.PW-5/C and the statement of PW-5 Dr. Dhruv Gupta that the bullet injury caused with gunshot was close to the heart and the same being vital part of the body, according to PW-5, was amenable to profuse bleeding. However, he has not ruled out the possibility of death of the injured within a span of 1 ½-2 hours from receiving such injury, in case of non-availability of medical assistance. PW-5 Dr. Dhruv Gupta has further admitted that the injured, in such a situation, may lose his consciousness in the intervening period, meaning thereby that the deceased may have died within 1 ½-2 hours from the receipt of said injury on his person and during the period, i.e. immediately after the receipt of the injury till his death, may have remained unconscious. Therefore, in such a situation, the prosecution story qua he having informed PW-12 Mast Ram on mobile phone that it is accused No.1 who inflicted bullet injury on his person, cannot be believed true by any stretch of imagination. The time of the fight between two Gorkhas has not come anywhere in the investigation conducted by the police and the same to us seems to be deliberately concealed. In

the mouth of the deceased, the team of Doctors which has conducted autopsy on his dead body, has found a coin already inserted. Therefore, the deceased must have died within 1½ -- 2 hours from receiving the injury, hence, was not alive when PW-12 Mast Ram allegedly rang up on his mobile phone and PW-1 Satish Kumar came to the spot. What was the mobile number of the deceased and for want of call details again, it cannot be said that PW-12 had made the call to the deceased who in turn disclosed that is the accused who fired at him. The story in this regard also seems to be engineered and fabricated.

30. Merely that the dead body was lying nearby the Dera of accused No.1, cannot be taken to conclude that it is accused No.1 alone and none-else had murdered the deceased. There was even no occasion to PW-1 Satish Kumar and Saneev (not examined) to have conversation with the deceased and to inform that it is accused No.1 who had fired gunshot on the deceased. PW-7 Rakesh Kumar also tells us that he had gone with PW-1 Satish Kumar to the spot. It is, however, not mentioned so either in the statement of PW-1 Satish Kumar recorded under Section 154 Cr.P.C. Ext.PW-1/A nor this witness has stated so in the witness box.

31. In order to prove the so called motive that deceased Dil Bahadur owed Rs.20,000/- to accused No.1 Hikmat Bahadur and that the brother of the deceased namely Bhim Bahadur, had kidnapped the wife of the said accused, the reliance has been placed on the testimony of PW-12 Mast Ram. This witness only tells us that it is accused No.1 who owed a sum of Rs.20,000/- to deceased Dil Bahadur and the deceased had gone to the accused to collect his money. PW-12 Mast Ram as already observed, has not deposed correctly. Otherwise also, while in his cross-examination, he has expressed his ignorance that deceased Hikmat Bahadur had been advancing money to Dil Bahadur or that Bhim Bahadur abducted the wife of accused No.1. He also expressed his ignorance qua inimical relations of accused No.1 and deceased. Therefore, the testimony of PW-12 Mast Ram is not of any help to the present case. The another witness examined to substantiate this part of the prosecution case, is PW-13 Smt. Raj Kumari, widow of deceased Dil Bahadur. Though she has deposed while in the witness box that accused owed a sum of Rs.20,000/- from the deceased and that the deceased had gone to the accused to collect the same and also that the wife of the accused was abducted by Bhim Bahadur, the brother of deceased. However, when she as per her version was away from Dera to collect *Guchhi* from nearby forest, how she could have said that her deceased husband had gone to collect money from Himkat Bahadur. Otherwise also, when it is the deceased who owed money to accused No.1, there was no occasion to the former to have gone to the latter for collecting the same as it was to be collected by the accused.

32. Now, coming to her cross-examination, the suggestion that her husband was sitting in the Dera of other Nepalis and consuming liquor and that he was a drunkard man, were denied being wrong. However, in the post mortem report, the contents of alcohol in his blood were found to the extent of 219 mg. Therefore, PW-13 Smt. Raj Kumari is also not reliable and dependable witness. Otherwise also, she being the wife of deceased is an interested witness, hence, her testimony cannot be relied upon.

33. In view of the re-appraisal of the evidence in the manner, as aforesaid, it is crystal clear that the prosecution has miserably failed to prove that the accused was inimical to the deceased and it is he who had fired gunshot on the latter and thereby caused his death.

Circumstance No.4:

34. As already observed while discussing point No.1 (supra) in the absence of detail of telephone calls, it cannot be believed that accused No.2 Narain Singh Chauhan had informed PW-12 Mast Ram that accused No.1 and deceased both had quarrelled and the accused had fired gunshot on the deceased. There is again no evidence that PW-12 was on his way to Chandigarh in connection with medical treatment of his son. Had it been so, the prosecution could have easily produced in evidence the record qua the treatment of the son of PW-12 Mast Ram. Therefore, the prosecution story to this effect has also been engineered and fabricated to falsely implicate accused No.1 Hikmat Bahadur in a case under Section 302 of the Indian Penal Code.

Circumstance No.5:

35. While discussing circumstance No.5 (supra), it has already been held that for want of calls detail, it can not be believed by any stretch of imagination that PW-12 Mast Ram, on coming to know about fight between accused and the deceased, called the deceased over his mobile phone to find out the cause of said quarrel and that the deceased in turn informed that it is accused No.1 Hikmat Bahadur who fired a gunshot on him and he received injury. On the basis of medical evidence available on record, it has also been observed by us that in view of the nature of the injury the deceased received, he may have died within 1 ½-2 hours form the receipt of the injury and in the meanwhile, may have remained unconscious. Therefore, it is difficult to believe that the call was made by PW-12 Mast Ram to deceased Dil Bahadur and the same was attended by the latter and he disclosed the manner to the former in which the injury was received by him. The prosecution story in this regard is also not proved at all.

Circumstance No.6:

36. It is again doubtful that PW-12 Mast Ram informed PW-1 Satish Kumar to rush to the spot and find out about the quarrel having taken place between two *Gorkhas*. Even if it is believed to be true, PW-1 Satish Kumar, on reaching at the spot and taking stock of the circumstances prevailing there, informed PW-12 Mast Ram that the deceased has succumbed to the injury received on his person. Therefore, the prosecution story that deceased Dil Bahadur told PW-1 Satish Kumar that accused No.1 fired a gunshot on him, is false and fabricated merely to implicate the accused falsely in this case. The prosecution case on this ground also liable to fall to the ground.

Circumstances No.7 & 8:

37. Again the calls detail to show that PW-12 Mast Ram had made a call to Police Station, Nerwa, is not produced in evidence, hence, it is difficult to believe this part of the prosecution case as true. The Rapat Roznamcha Ext.PW-18/F has been pressed in service in this regard. Even if this part of the prosecution case is believed to be true and correct, the same is not going to make any difference because the possibility of police having rushed to the spot cannot be ruled out as deceased Dil Bahadur was shot dead there. However, it is accused No.1 Hikmat Bahadur alone who had murdered deceased Dil Bahadur, is not at all proved on record. Since a coin was found in the mouth of the deceased at the time of his post mortem, therefore, the possibility of the deceased being already dead cannot be ruled out and the prosecution story that he was shifted to Nerwa Hospital by the police, seems to be not true and correct.

Circumstance No.9:

38. It is the disclosure statement Ext.18/B allegedly made by the accused in the presence of PW-18 LHC/MHC Shamim and PW-20 HHC Virender Kumar Sharma and recovery of gun as well as *drat* pursuant to it at the behest of accused No.1 Hikmat Bahadur, is heavily relied upon against accused No.1. The disclosure statement dated 20.05.2014 Ext.PW-18/B recorded in the manner, as claimed by the prosecution, however, is highly doubtful. Similarly, the recovery of gun Ext.PW-2/A and Drat Ext.PW-2/E on the basis thereof, is also doubtful because as per the version of PW-23 SI Jasbir Singh, the accused was arrested on 18.05.2014 and the recovery of gun and drat was also effected on the same day. The testimony of above said witnesses has, therefore, demolished the entire prosecution case qua the recovery of the weapon of offence, i.e. gun and ***Drat*** (scythe) at the instance of accused N.1. Otherwise also, as per the evidence having come on record by way of the testimony of PW-2 Raghuvir Singh, the place from where the gun was recovered, is adjoining to a path, hence, thoroughfare. The people had access at the path on account *Guchhi* (Wild Mashroom) collection season. Therefore, it is difficult to believe that the gun was hidden by the accused after commission of offence. Similarly, the *drat* allegedly was found to be hidden beneath the pillow of the cot of accused No.1. The weapon such as drat otherwise used to be kept beneath pillow on the bed by the people in rural areas. Therefore, it cannot also be believed that drat was hidden by accused No.1 after commission of offence. Interestingly enough, PW-2 Raghuvir Singh, in his cross-examination has stated that the

gun in question was not seen by him in the orchard of accused No.2 Narain Singh Chauhan. Therefore, it would not be improper to conclude that neither the disclosure statement Ext.PW-18/B of accused No.1 was recorded by the police nor recovery of the gun and drat effected on the basis thereof. Learned trial Judge has failed to appreciate this part of the prosecution case also vis-a-vis the evidence available on record.

39. The present, in view of the discussion hereinabove, is a case where the circumstances pressed into service against the accused persons are not satisfactorily established on record nor consistent only with the hypothesis of the guilt of the accused nor are of conclusive nature. The chain of evidence is also not complete so as to leave any reasonable ground for a conclusion inconsistent with the innocence of the accused and to satisfy the conscience of the Court that in all human probability, it is accused No.1 who shot deceased Dil Bahadur with gun Ext.P5 and that the said gun was of accused No.2, who had provided the same alongwith ammunition to accused No.1 for his protection from wild animals while on duty in the orchard.

40. Learned trial Judge though has noticed in the impugned judgment that the criminal trial is not like a fairy tale and the prosecution must built its case on the edifice of evidence legally admissible. Also that an offence may be gruesome and revolt the human conscience, but an accused can only be convicted on legal evidence and not on surmises and conjectures. However, such principles taken note of by learned trial Judge have not been relied upon and to the contrary the findings of conviction against the accused persons have been recorded mechanically and without application of mind.

41. Be it stated that deceased Dil Bahadur had died on account of bullet injury, he suffered on his person. It is, however, not proved beyond all reasonable doubt that it is accused Hikmat Bahadur alone, who fired gun shot and Dil Bahadur succumbed to the injury so received by him at the hands of the above said accused. The deceased as per the post-mortem report was found to have consumed liquor. Therefore, it is just possible that he had consumed liquor somewhere else, may be in the Dera of other Gorkhas, as the accused have pleaded in their defence.

42. For want of cogent and reliable evidence, it cannot be said that the fatal injury was inflicted to the deceased by accused No.1 alone. The so called motive that deceased owed a sum of Rs.25,000/- to accused No.1 and that he had gone to the said accused to collect the same is not at all plausible because no investigation to enquire this aspect of the matter was conducted by the police. The prosecution case that Bhim Bahadur, the brother of deceased, had kidnapped the wife of accused No.1 is not plausible nor gone into during the course of investigation. Therefore, such motive attributed to accused to kill the deceased is not at all proved. Learned trial Court, as such, was not justified in recording the findings of conviction against the accused.

43. The present, rather is a case where two possible views emerge on record from the appreciation of the evidence and in a case of this nature the view favourable to the accused should be followed and the benefit of doubt given to him. Support in this regard can be drawn from the judgment of the Apex Court in ***State of Rajasthan*** vs. ***Islam and others***, ***(2011) 6 SCC 343***. The relevant extract whereof reads as follows:

> "15. The golden thread which runs through the administration of justice in criminal cases is that if two views are possible, one pointing to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from a conviction of an innocent."

Therefore, the accused are entitled to the benefit of doubt and consequently acquittal of the charge.

44. In view of what has been said hereinabove, these appeals succeed and the same are accordingly allowed. Consequently, accused No1 Hikmat Bahadur is acquitted of the charge

under Section 302 IPC framed against him, whereas accused No.2 Narain Singh Chauhan of the charge framed under Section 25 of the Arms Act. Accused Hikmat Bahadur is serving out the sentence. The said accused be set free forthwith, if not required in any other case. Registry to prepare the release warrants accordingly. The personal bonds furnished by accused Narain Singh Chauhan, however shall stand cancelled and the surety discharged. The amount of fine if already deposited be refunded to the accused persons against proper receipt.

Both the appeals stand disposed of.

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

State of Himachal Pradesh .....Appellant.
Versus
Diwan Chand and anr. .....Respondents.

Cr. Appeal No.427 of 2008.
Decided on : 19th September, 2017.

Punjab Excise Act, 1914- Section 61(i)(a)- Accused were carrying a bag on a motorcycle – accused threw the bag and fled away on seeing the police party- police officials grabbed the accused D, while another accused ran away from the spot- 9 bottles of country liquor bearing mark 'Lal Kila' were found on the bag- accused could not produce any licence/permit for transporting the liquor- recovered bottles were taken into possession and sealed with seal impression 'A'- accused were tried and acquitted by the Appellate Court- held in appeal that no independent witness was associated – the seal was handed over to PW-1 after the use but PW-1 did not state that any seal was handed over to him- the possibility of tempering with the case property cannot be ruled out in these circumstances- the Appellate Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-6 to 11)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415

For the appellant : Mr. Pushpinder Singh Jaswal, Dy. Advocate General and Mr. Rajat Chauhan, Law Officer.
For the respondents : Mr. O.C. Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral)

Assailing the impugned judgment dated 11.3.2008, passed by the learned Additional Sessions Judge, Fast Track Court, Solan, District Solan, (H.P), in Case No.31FTC/10 of 2007, whereby accused persons stand acquitted, State of Himachal Pradesh, has maintained the present appeal.

2. The key facts, giving rise to the present appeal, as per the prosecution story, are that on 31.3.2005, at about 4:00 PM, ASI Prakash Chand (PW-8) alongwith HHC Ujjagar Singh (PW-1) and Constable Hardev Singh (PW-5) were on patrolling duty, at village Chabal, where accused persons carrying a bag, came on a motorcycle bearing No.HP-15-4674 from Jubbar side. On seeing the police party, accused persons threw bag from the motorcycle on the road and tried

to fled away from the spot. They also left the motorcycle and ran towards forest. The police party chased them, one of the accused, namely, Diwan Chand, was nabbed by the police party, whereas another accused ran away from the spot. On search of the bag thrown by the accused persons from the motorcycle, it was found to have contained 09 bottles of country liquor marka '***Lal Kila'***. One bottle was broken. Accused persons could not produce any licence or permit for carrying 09 bottles. Out of the recovered bottles, three bottles were opened and one sample was separated from each, so opened bottle. The recovered bottles were also sealed with seal impression '***A***' and taken into possession by the police. Specimen of seal impressions was separately taken and the seal after its use was handed over to HHC Ujjagar Singh (PW-1). Ruqua was prepared on the spot and sent to Police Station, on the basis of which, FIR was registered against the accused persons. The samples, on chemical examination, were found to be of country liquor. Police thoroughly investigated the matter and after conclusion of investigation *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as eight witnesses. Statements of the accused persons were recorded under Section 313 of the Code of Criminal Procedure, wherein they have denied the prosecution case and claimed innocence. However, they did not lead any defence evidence.

4. Learned Deputy Advocate General appearing on behalf of the appellant has argued that the learned lower Appellate Court without appreciating the facts to its true perspective and also without appreciating the law correctly has acquitted the accused. He has further argued that the present is a fit case, where the accused is required to be convicted. On the other hand, Mr. O.C. Sharma, learned counsel appearing on behalf of the respondents has argued that the prosecution has miserably failed to prove the guilt of the accused. No independent witness was associated by the prosecution, however the independent witnesses were available. The case property was deposited after three days of the alleged occurrence in the 'Malkhana' and there is no explanation of the delay. In these circumstances, the judgment of acquittal passed by the learned lower Appellate Court is just, reasoned and no interference is called for.

5. To appreciate the arguments of learned Deputy Advocate General and learned counsel for the accused, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

6. It has come on record that as far as the presence of accused persons are concerned, case of the prosecution is that they had fled away from the spot, after throwing a bag. In these circumstances, the case of the prosecution is required to be taken into consideration from other evidence, which has come on record to its true perspective.

7. PW-1 HHC Ujjagar Singh, deposed that on 31.3.2005, he alongwith ASI Prakash Chand (PW-8) and other police officials was present at Chabal, when at about 4:00 PM, two persons came on motorcycle bearing registration No.HP-15-4674 from the side of Jubbar, on seeing police officials, those persons got confused and they threw a bag on the road and thereafter fled towards the forest. On conducting the search of a bag, nine bottles of country made liquor mark '***Lal kila'*** were recovered from the bag. The seizure memo Ex.PW1/A, was prepared by the Investigating Officer, which bears the signature of Constable Hardev Singh (PW-5). He has also identified the bottles Ex.P-1 to Ex.P-5 and broken bottles Ex.P6 to be the same. In his cross-examination, he has stated that at village Jubbar, there are 7-8 shops. He has stated that from the police post they had gone in the private vehicle. He has stated that in Village Chabal, there are 8-10 houses. He has also specifically deposed that from Village Chabal and Jubbar or Garkhal, no independent witnesses were associated. He has also specifically denied that no liquor was recovered from the exclusive and conscious possession of the accused persons. PW-2 Head Constable Bharat Singh, has also partly investigated the case and stated that on receipt of the report from CTL, Kandaghat, he handed over the case file to Station House Officer, for preparation of the challan. PW-3 Constable Dukhbhanjan, took the sample bottles to the Chemical Examiner, Kandaghat. PW-4 Constable Shyam Lal, witness of seizure memo

Ex.PW4/A, vide which, the motorcycle bearing No.HP-15-4674 alongwith its documents was taken into possession by the police. PW-5 Constable Hardev Singh, deposed about the recovery of 09 bottles of country made liquor from the bag carried by the accused persons on motorcycle. PW-6 Head Constable Ved Prakash, deposed about scribing of FIR Ex.PW6/A. He has also deposed that on 3.4.2005, the case property as well as the sample parts and the specimen of seal Ex.PW6/B were received through Constable Krishan Lal, at the Police Station qua which, he had made an entry in the register of 'Malkhana'. PW-7 Constable Krishan Lal, deposed that on 3.4.2005, Incharge Chowki, handed over the case property and the same was deposited with MHC Ved Parkash. PW-8 ASI Prakash Chand, Investigating Officer, deposed that at the relevant time, he was on patrolling duty at village Chabal. He has stated that from the side of Jubbar, two persons came on motorcycle bearing registration No.HP-15-4674, and on seeing the police party, they threw a bag on the road and fled towards the jungle. On conducting the search of a bag, nine bottles of country made liquor mark ***'Lal kila'*** were recovered, out of which, one bottle was broken. The recovered liquor was seized vide seizure memo Ex.PW1/A. Three bottles as sample were separated out of the entire lot of liquor and sealed with seal having impression '***A***'. The remaining bottles were put in the bag and it was also sealed with seal having impression '***A***'. Ruqua Ex.PW1/E was sent to Police Station, for registration of the FIR. In his cross-examination, he has stated that from Garkhal, they had gone in a private vehicle. He has stated that there are number of shops at place Jubbar. He admitted that he had not associated any independent witness. As far as the seal in the present case is concerned, as per PW-8 ASI Prakash Chand, that it was handed over to Head Constable Ujjagar Singh, but Ujjagar Singh (PW-1), while appearing in the witness box has not been stated that the seal after its use was handed over to him. In these circumstances, the possibility of tampering with the case property cannot be ruled out, when it has come on record, that case property, was deposited in the 'Malkhana' on 3.4.2005. The recovery was effected on 31.3.2005, where the case property remained upto 3.4.2005, is something, which cast a doubt in the prosecution story. So, the non production of the seal by HHC Ujjagar Singh (PW-1) to whom, it was handed over or his deposition to the effect, the seal was handed over is material, which he has not stated before the learned Trial Court. In these circumstances, this Court finds that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt.

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

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

10. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal :

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
>
> ***(2) The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.***

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

11. In view of the aforesaid decisions of the Hon'ble Supreme Court and discussion made hereinabove, I find no merit in this appeal and the same is accordingly dismissed. Record of the learned Trial Court be sent back forthwith.

****

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

Akash Rani and others … Petitioners.

Versus

Sushant Prabhakar and others … Respondents.

CMPMO No.: 351 of 2017.
Decided on: 20.09.2017.

Code of Civil Procedure, 1908- Order 17 Rule 1- Trial Court closed the evidence on the ground that plaintiffs had failed to lead the evidence despite numerous opportunities granted to them to do so – held that the evidence was not completed despite eight opportunities – the procedure is a hand maiden of justice and its purpose is to facilitate the adjudication but it has to be respected by both the litigants and the Courts – Order 17 Rule 1 provides that the Court can grant adjournment on showing the sufficient cause but the adjournments cannot be granted more than three times to a party during the hearing of a suit – no reason was given as to why the evidence should not have been closed by the Court – the Court should grant the adjournment only on showing sufficient cause and not otherwise – petition dismissed. (Para-3 to 6)

For the petitioners Mr. Sunny Modgil, Advocate.
For the respondents Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj Vashisht, 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, the petitioner has challenged order dated 05.06.2017, passed by the Court of learned Civil Judge,

Court No. 2, Una, in case RBT No. 767/17/12, titled Smt. Akash Rani and others Vs. Sushant Prabhakar and others, whereby right of the plaintiffs to lead evidence was closed on the ground that despite numerous opportunities having been granted to the plaintiffs, the plaintiffs had failed to lead evidence. Order so passed by the learned Court below *inter alia* stands impugned on the ground that the same is against the law and facts and further is passed on conjectures and further that closing of the evidence of the plaintiffs by the learned trial Court is an act of material illegality, irregularity and impropriety which is a result of mis-construing the facts of the case as well as the law applicable to the facts of the case.

2. The case was part heard on 30th of August, 2017, on which date, this Court had called for records of the case from the learned trial Court.

3. I have heard learned counsel for the parties and also gone through the records of the case. A perusal of the records of the learned trial Court demonstrates that issues were framed in the case by learned trial Court on 16.10.2014. Thereafter the case was order to be listed for recording of statement of plaintiffs' witnesses for 11.03.2015. On the said date, plaintiffs' witnesses were not present and accordingly, the case was ordered to be listed for 04.08.2015 for the said purpose. On the said date also, no P.W. was present, however, an application was filed on behalf of plaintiffs under Order 7 Rule 14 CPC, which application was ultimately disposed of by learned trial Court vide order dated 13.06.2016. While disposing of the said application, the case was ordered to be listed for recording statement of plaintiffs' witnesses on 29.08.2016. On the said date also, no P.Ws were present and the case was ordered to be listed on 08.11.2016 for recording the statement of plaintiffs' witnesses subject to same being the last opportunity. On 08.11.2016, again no P.Ws were present and the case was ordered to be listed for 18.01.2017 for recording the statement of plaintiffs' witnesses and it was clarified that no further opportunity shall be granted for the said purpose. Thereafter on 18.01.2017 also, no plaintiffs' witnesses were present and the Court ordered the summoning of plaintiffs' witnesses for 25.03.2017. On 25.03.2017, plaintiffs' witnesses were present but were discharged as learned Counsel for the plaintiffs sought time for moving application under Order 7 Rule 14 of CPC to bring on record certain material. The case was accordingly ordered to be listed on 28.04.2017 and opportunity to file the application was granted subject to payment of cost of ` 300/-. On 28.04.2017, no application under Order 7 Rule 14 CPC was filed and the case was ordered to be listed on 05.06.2017 for recording of remaining plaintiffs' witnesses as a matter of last opportunity. On 05.06.2017, two plaintiffs' witnesses, namely, Vipan Kumar and Praveen Kumari were present, however, learned Counsel for the plaintiffs vide separate statement stated not to examine the said witnesses. Taking into consideration the number of opportunities already granted to the plaintiffs to lead their evidence, learned trial Court on the said date, vide order dated 05.06.2017, closed the plaintiffs' evidence and ordered the case to be listed on 17.08.2017 for recording the statement of defence witnesses.

4. This order is under challenge before me. Undoubtedly,the procedure is hand maiden of justice and the purpose of procedure is to facilitate the adjudication of a lis rather than to serve as an impediment in this regard. However, even then procedural law has sanctity which has to be adhered to and respected by both the litigants and the Court. Here is a case where eight opportunities were granted to the plaintiffs to lead their evidence, however, despite this, the plaintiffs did not lead their evidence. In these circumstances, it cannot be said that impugned order vide which evidence of the plaintiffs was closed is either against law or facts or is passed on conjectures. Similarly, it cannot be said that learned trial Court committed material illegality, irregularity or impropriety by closing the evidence of the plaintiffs.

5. Order 17 Rule 1 of the Civil Procedure Code provides that the Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing provided no such adjournment shall be granted on more than three times to a party during the hearing of a suit.

6. In the present case, as has been discussed above, eight opportunities were granted by the learned trial Court to the plaintiffs to lead their evidence. However, as the plaintiffs failed to lead evidence despite so many opportunities having been granted to them, it is in these circumstances that learned trial Court closed the evidence of the plaintiffs. A perusal of the records of the case demonstrates that no cogent cause stood demonstrated by the plaintiffs before the learned trial Court as to why their evidence should not have been closed on 05.06.2017. Not only this, even in this petition, there is no plausible explanation given by the plaintiffs as to why witnesses who were present on 05.06.2017, were not examined and what was the bona fide reasons on account of which, plaintiffs could not lead their evidence on the said date. Therefore, order so passed by learned trial Court does not suffers from any illegality or irregularity. Learned trial Court has closed the evidence of the plaintiffs after the plaintiffs failed to lead their evidence despite availing sufficient opportunities.

7. Before parting with this judgment, this Court may observe that number of opportunities which a Court may grant to the parties to lead their respective evidence have to be reasonable and in case, despite three opportunities having been granted, the Court is inclined to give more opportunities to the parties to lead their respective evidence, then the Court should in the order itself incorporate the reasons as to why the indulgence is being shown by the Court to the party concerned. This will not only deter the parties from unnecessarily prolonging the matters but will also clothe the orders so passed by the learned Courts with reasonableness because reasons which have led the Court to grant further opportunity shall stand incorporated in the order itself.

8. In view of above discussion, as I do not find any merit in the present petition, the same is accordingly dismissed. Registry is directed to return the records of the learned trial Court forthwith. Parties through their learned Counsel are directed to appear before the learned trial Court on the date already fixed by learned trial Court. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Dr. Ramesh Kaundal and others ...Petitioners.

Versus

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

CWPs No.831, 1251, 1259, & 1381 of 2017
Reserved on: August 22, 2017
Date of Decision : September 20, 2017

Constitution of India, 1950- Article 226- Department of Medical Education and Research, Himachal Pradesh, issued a Prospectus-cum-Application Form for admission to the Postgraduate Degree (MD/MS) Courses, in Indira Gandhi Medical College & Hospital, Shimla, and Dr. Rajindra Prasad Medical College and Hospital, Tanda, District Kangra, Himachal Pradesh providing a condition that selected candidate for PG Degree/diploma will have to execute a bank guarantee of Rs. 10 lacs (Rs. 3 lacs in 1st and 2nd year respectively and Rs. 4 lacs in third year) - the condition was challenged as unreasonable, irrational, illogical and illegal, and the condition having not been imposed in the past etc. – held that the condition was contained in the prospectus – prospectus is a complete code in itself – candidates seeking admission under the prospectus are bound by the terms and conditions contained therein- the petitioner did not challenge the condition prior to or during the process of selection – further, the candidates are being paid stipend, which is more than the amount of bank guarantee – any candidate of all India quota who does not take stipend is exempted from the condition – the purpose is to ensure the availability of

best medical care and facilities to the natives residing in remote far-flung and tribal area – Court cannot interfere with a policy decision, unless the same is unreasonable, irrational, illogical and illegal – the policy can be altered with the change in circumstances – the condition cannot be said to be unreasonable – petition dismissed. (Para-10 to 25)

Cases referred:

Aswath Kumar R. v. State of Gujarat, (2000) 4 GLR 369
Gunjan Kapoor v. State of Himachal Pradesh and others, 1999 (1) Shim.L.C. 246
D.N. Chanchala v. The State of Mysore and others, 1971(2) SCC 293
Centre for Public Interest Litigation v. Union of India and others, (2016) 6 SCC 408
Brij Mohan Lal v. Union of India and others, (2012) 6 SCC 502
National Insurance Company Limited v. General Insurance Development Officers Association and others, (2008) 5 SCC 472
Kailash Vhand Sharma v. State of Rajasthan & others, (2002) 6 SCC 562
Union of India and another v. International Trading Co. and another, (2003) 5 SCC 437
Union of India and others v. Dinesh Engineering Corporation and another, (2001) 8 SCC 491

For the Petitioners	:	Mr. Sanjeev Bhushan, Senior Advocate with Ms Abhilasha Kaundal, Advocate, and Mr. Sameer Thakur, Advocate.
For the Respondents	:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocates Geneal and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Since in all these petitions common questions of law and fact are involved, they are being disposed of by a common judgment.

2. Department of Medical Education and Research, Himachal Pradesh, issued a Prospectus-cum-Application Form for admission to the Postgraduate Degree (MD/MS) Courses, in Indira Gandhi Medical College & Hospital, Shimla, and Dr. Rajindra Prasad Medical College and Hospital, Tanda, District Kangra, Himachal Pradesh.

3. Prospectus contained two parts, i.e. Part-A and Part-B. Serial No.4 of Part-B, prescribed the following conditions, reproduction of which is necessary for adjudication of the present petition:

> **"4. BOND, BANK GURANTEE AND STIPEND**
>
> 4.1 All the In-Service regular medical Officers will be treated on duty during their entire period of doing PG Degree / Diploma course and will be paid their regular pay and allowances.
>
> 4.2 Medical Officers appointed on contract basis will be paid the contractual salary as per their contract agreement or as decided by the Govt. by time to time. No other incentive for serving as Medical Officer will be paid to such contractual appointees, while pursuing PG Degree/Diploma course.
>
> 4.3 The candidates who are the part of the All India Quota and chose not to take any stipend during the PG course shall be exempted from the bond conditions.
>
> 1.4 Direct candidates will be paid stipend as applicable to them:
>
> 1st year Rs. 35000/- per month
>
> 2nd year Rs. 40000/- per month

3rd year Rs. 45000/- per month

4.5 There shall be condition of Bond for all the candidates (All India quota and State Quota) to serve the State for five years after completion of the PG course.

4.6 The candidate selected for PG Degree/Diploma will have to execute a Bank Guarantee which shall be amounting to Rs. 10 lacs(Rs.3 lacs in 1st 2nd year respectively and Rs. 4 lacs in 3rd year). The Bank Guarantee shall be submitted before the commencement of each academic year. In the event of the candidates rescinding on the terms of the bond, the State Government shall have the right to forfeit the amount of bank Guarantee. Simultaneously the request for cancellation of registration of their Degree/Diploma shall be made to the MCI.

Note: (i) No fee shall be refunded in any case, if the candidates leaves PG degree course after last cut of date of admission.

(ii) No candidate will be allowed to draw more than one stipend/scholarship/financial assistance etc.

(iii) The selected candidates are required to submit requisite bond as prescribed in the Prospectus at the time of admission failing which stipend will not be paid to them. The stipend will be paid w.e.f. commencement of academic session. If any candidate will submit bond after commencement of academic session, then stipend will be paid to him/her from the date of submission of Bond in the concerned Medical College.

(iv) All the Postgraduate students (Direct and In-Services) shall be entitled for 30 days leave only per academic year during P.G. course. No carry forward of leave shall be allowed."

4. Appendix-6 of the Prospectus is the Bond, which the candidate, so selected and admitted to a particular course, is required to furnish, relevant portion of which is extracted hereinbelow:

"BOND

"Know all me by these present that I.....S/O/D/O Sh.....Resident of.....Tehsil.....Distt. .....Himachal Pradesh, presently undergoing Postgraduate Degree/Diploma in the specialty of _____ from Indira Gandhi Medical College/Dr.R.P. Govt. Medical College, Kangra at Tanda (Principal Obligor) and (2) Shri ..... Resident of .....Tehsil.....Distt. (Himachal Pradesh) and at present working/employed as ..... (3) Shri .....S/O _____(Sureties) are jointly and severally, pursuant to the provisions of the Prospectus for Counseling and admission to postgraduate Degree(MD/MS) courses in IGMC, Shimla/Dr. R.P. Govt. Medical College, Kangra at Tanda for the academic session 2017-2020, bound to the Governor of Himachal Pradesh, (hereinafter unless the context otherwise require, referred to as the Himachal Pradesh Government) to the extent of serving in the State for Five years after doing Postgraduate Degree course to the said Governor or his successors in office, or assign him or his certain attorneys for which Bank Guarantee amounting to Rs. 10 Lacs, (Rs.3 Lacs in 1st & 2nd year respectively and Rs.4 Lacs in 3rd year) to be furnished to serve the State of Himachal Pradesh for aforesaid period after completion of above Postgraduate Degree Course failing which the State Government shall have the right to forfeit the amount of Bank Guarantee. Simultaneously the request for cancellation of registration of their Degree shall be made to the MCI and we bind ourselves, our executors, administrators and representatives firmly by these presents. Further,

> the above Principal Obligor (In service GDO/Direct) and his sureties bind not to leave the above course in mid-session failing which the Principal Obligor (Direct) shall have to refund the entire stipend in lump sum within the period of one month failing which penal interest will be charged and in the case of GDO, such period shall be treated as leave of kind due. Further, the Principal Obligor shall be debarred from seeking admission in any other subject for a period of Five years from the date of leaving the course. Besides, the period spent on incomplete course in the case of GDO's will be treated as "dies on" for all intends and purposes.
>
> Signed and delivered by ourselves at .....this.....day of .....
>
> Whereas, the said Dr.....(Principal Obligor) has been admitted in to the Indira Gandhi Medical College/Dr.R.P. Govt. Medical College, Kangra at Tanda for doing Post Graduate course (Degree).
>
> And Whereas, the Himachal Pradesh government has agreed to award him a stipend at the rate of Rs...../- (In case of fresh candidate full pay and allowances/study leave (in case of in-service candidate of the health Service) per month for a period of three years during his stay at the said College subject to his entering into a Bond for serving in the State for 5 years after completion of Postgraduate Degree Course with two sureties in the same sum. (And whereas the said Shri.....(Principal Obligor) has agreed to enter into the said bond."

5. It is not in dispute that in terms of the Prospectus, petitioners were selected and admitted to the respective courses of their choice, on the basis of their respective merit.

6. Academic session for the Postgraduate courses was to start from 1.5.2017.

7. Subsequent to the date of admission, but prior to commencement of the academic session, petitioners approached this Court, assailing the condition of furnishing of Bank Guarantee, so stipulated in Clause-4.6 of Part-B and Appendix reproduced supra.

8. The challenge is on the grounds that (a) such condition is unreasonable, irrational, illogical and thus illegal, (b) in the past no such condition was imposed, (c) with more and more doctors being available and willing to serve the State, the condition has lost its purpose, (d) the condition is violative of Articles 14 & 21 of the Constitution of India, inasmuch as it restricts admission only to economically affluent candidates, (e) it casts an unnecessary burden upon the students belonging to economically backward families, (f) necessary co-relation with imposition of condition and admission to the degree course is non-existent, (g) nexus with the object sought to be achieved is missing.

9. In support, learned counsel for the petitioners have referred to and relied upon several decisions and more specifically the one rendered by the Gujarat High Court in *Aswath Kumar R. v. State of Gujarat,* (2000) 4 GLR 369.

10. It is a settled principle of law that Prospectus is a complete code in itself. It is also settled principle of law that candidates seeking admission under the Prospects are bound by the terms contained therein. (*Gunjan Kapoor v. State of Himachal Pradesh and others,* 1999 (1) Shim.L.C. 246).

11. In *D.N. Chanchala v. The State of Mysore and others,* 1971(2) SCC 293, the Apex Court held has under:

> "So long as the rules for selection applicable to the colleges run by the Government do not suffer from any constitutional or legal infirmity, they cannot be challenged as the Government can regulate admission to its own institutions. The objection that it cannot, by such rules, provide for requirements over and above those laid down by the universities for eligibility cannot be sustained."

> "The Government which bears the financial burden of running the Government Colleges is entitled to lay down criteria for admission in its own colleges and to decide the source from which admission would be made, provided of course, such classification is not arbitrary and has a rational basis and a reasonable connection with the object of the rules. So long as there is no discrimination within each of such sources the validity of the rules laying down such sources cannot be challenged. Candidates passing through the qualifying examination held by a University form a class by themselves as distinguished from those passing through such examination from the other two Universities. Such a classification has a reasonable nexus with the object of the rules, namely to cater to the needs of candidates who would naturally look to their own University to advance their training in technical studies. The rules do not violate Article 14."

12. In the instant case, either prior to or during the process of selection, petitioners did not lay any challenge to anyone of the conditions stipulated therein. Also, they did not raise any objection at the time of counselling or took their admission under protest. Having participated in the selection process, they are bound by the terms and conditions. Hence, petitioners can be non-suited purely on this count.

13. However, we are not inclined to adopt such an approach, for we want to examine the legality of the condition impugned herein.

14. A brief background leading to the imposition of the condition in the Prospectus. Ninety percent of the population in the State of Himachal Pradesh resides in difficult/remote areas. Providing medical health is a constitutional duty and obligation of the State. For such object, doctors, who are Specialists, are posted in remote areas. In the past, there had been instances where instead of serving the State, more so in remote areas, with the completion of their Postgraduate Degree from the Medical Colleges of the State, they left the State for greener pastures. Doctors refused to serve the State for at least five years. Previously, the only condition imposed was furnishing of a bond, amounting to Rs.15,00,000/-, which was rescinded with the doctors not serving the State. Recovery of money was an issue. Keeping in view the past experience, a conscious decision was taken to reduce the amount of bond with a condition of furnishing Bank Guarantee, also linking disbursement of the admissible salary/stipend with the same.

15. Candidates seeking admission to MD/PG courses are not adolescents, graduating from school, seeking admission to the first level of a medical degree. They have already undertaken their studies for five years. Some of them are now serving the State in one capacity or the other. While undertaking studies of a Specialist course, they are paid money as salary or stipend on monthly basis ranging from Rs.35,000/- to Rs.45,000/-, during the entire course. Also, State spends huge amount of money in imparting education.

16. Let us examine the conditions stipulated in the Prospectus. It deals with different categories of students, i.e. those, who are in regular service of the State; on contractual basis; and direct candidates being part of the All India Quota. Significantly, direct candidates are also paid stipend at the rate of Rs.35,000/- per month in the first year, with a corresponding increase of Rs.5,000/- in the next two successive years. Clause 4.3 exempts direct candidates – from All India Quota (who do not choose to take any stipend during the PG course, shall be exempted from the condition of furnishing the bond). Significantly all candidates, in one capacity or the other, are entitled to receive payments/financial assistance from the State. It is in this backdrop, we find the condition to be absolutely reasonable.

17. For first three years, Bank Guarantee is for a sum of Rs.3,00,000/- each and only in the fourth year, the amount is increased to Rs.4,00,000/-. The Bank Guarantee is to be furnished in stages.

18. Noticeably, the amount of bank Guarantee is less than the amount which a candidate would be receiving as a stipend/salary.

19. Thus, the condition of furnishing of bond as also Bank Guarantee with the release of the amount of salary/stipend and the candidate serving the State for more than five years is with the avowed object of ensuring availability of best medical care and facilities to the natives of the State, residing in remote, far flung and tribal areas.

20. We are unable to persuade ourselves with the view taken by the learned Single Judge of Gujarat High Court in *Aswath Kumar R. (supra)*, in directing the State not to insist upon the candidates to furnish Bank Guarantee. Significantly the Court was concerned with the Prospectus, containing a stipulation, that surety was to be furnished by a person, who had stayed or belonged to the State of Gujarat. It is this, what essentially prompted the Court to interfere all the more. Each case has to be seen and considered in the backdrop and the peculiar facts and circumstances.

21. Scope of judicial review of a policy is well settled. Unless and until the policy fails the test of reasonableness; it is not fair or beneficial to the public at large; it impinges upon Part-III of the Constitution of India; it is whimsical and motivated with an ulterior purpose.

22. In *Centre for Public Interest Litigation v. Union of India and others,* (2016) 6 SCC 408, the Apex Court held as under:

> "22. Minimal interference is called for by the Courts, in exercise of judicial review of a Government policy when the said policy is the outcome of deliberations of the technical experts in the fields inasmuch as Courts are not well-equipped to fathom into such domain which is left to the discretion of the execution. It was beautifully explained by the Court in *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664 and reiterated in *Federation of Railway Officers Assn. v. Union of India*, (2003) 4 SCC 289 in the following words:
>
> > "12. In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise the court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters."
>
> 23. Limits of the judicial review were again reiterated, pointing out the same position by the Courts in England, in the case of *G. Sundarrajan v. Union of India v. Union of India*, (2013) 6 SCC 620 in the following manner:
>
> > "15.1. Lord MacNaughten in Vacher & Sons Ltd. v. London Society of Compositors, 1913 AC 107 has stated:
> >
> > > "... Some people may think the policy of the Act unwise and even dangerous to the community. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction."
> >
> > 15.2. In *Council of Civil Service Unions v. Minister for the Civil Service, 1985 AC 374 , it was held that it is not for the courts to determine whether a particular policy or particular decision taken in fulfilment of that policy are fair. They are concerned only with the manner in which those decisions have been taken, if that manner is unfair, the decision will be tainted with what Lord Diplock labels as "procedural impropriety*".
> >
> > .....

25. Taking aid from the aforesaid observations of the Constitution Bench, the Court reiterated the words of caution in *Peerless General Finance and Investment Co. Limited v. Reserve Bank of India*, (1992) 2 SCC 343 with the following utterance:

> "31. The function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts."
>
> .....
>
> 27. The raison d'etre of discretionary power is that it promotes decision maker to respond appropriately to the demands of particular situation. When the decision making is policy based judicial approach to interfere with such decision making becomes narrower. In such cases, in the first instance, it is to be examined as to whether policy in question is contrary to any statutory provisions or is discriminatory/arbitrary or based on irrelevant considerations. If the particular policy satisfies these parameters and is held to be valid, then the only question to be examined is as to whether the decision in question is in conformity with the said policy."

23. Condition of furnishing a bond as also Bank Guarantee, in our considered view, cannot be said to be unreasonable, irrational, illogical and thus illegal. Simply because in the past such condition was not imposed, that fact itself cannot be a reason good enough not to review the Policy. In fact, it is only on the basis of previous experience that the Policy came to be altered and the Prospectus amended. Under the Constitution of India, State is to provide good health to all residents, in all areas, be it urban or rural. It is with this object, so to say to check the brain-drain, the condition stands imposed. State does require more and more specialists to be posted in remote/rural areas. Under these circumstances, the condition cannot be said to be violative of Articles 14 & 21 of the Constitution of India. It also cannot be said that the condition is violative of Part-III of the Constitution, as it does not restrict admission only to such of those persons, who are economically affluent. Not only the State is incurring expenditures in imparting education, but is also making payment to them in one form or the other. That apart, the Bank Guarantee is required to be furnished in phases and not in one go. Rs.3,00,000/- per annum is not a huge amount, which a specialist cannot afford to arrange for and that too for the purpose of Bank Guarantee. Yes, Bank Guarantee is furnished against some tangible security, but then a sum of Rs.3,00,000/- is also not such that no doctor can afford. In our considered view, it does not cast any unnecessary burden upon the students belonging to economically backward families. In any case, none has approached the authorities, expressing such concern. Nexus with the object sought to be achieved is very much evident and explained. There is co-relation between the imposition of condition and admission to a degree course. For after all, State is incurring huge expenditure and as already observed the endeavour is to stop brain-drain and enable the specialists to serve the residents of the State to provide benefits to the residents of the State.

24. Learned counsel have referred to the following decisions rendered by Hon'ble Supreme Court of India for our consideration, which is reflective of their industry:-

> *Brij Mohan Lal v. Union of India and others,* (2012) 6 SCC 502; *National Insurance Company Limited v. General Insurance Development Officers Association*

and others, (2008) 5 SCC 472; *Kailash Vhand Sharma v. State of Rajasthan & others,* (2002) 6 SCC 562; *Union of India and another v. International Trading Co. and another,* (2003) 5 SCC 437; and *Union of India and others v. Dinesh Engineering Corporation and another,* (2001) 8 SCC 491.

However, keeping in view the latest judicial pronouncement in *Centre for Public Interest Litigation (supra)*, we feel no need to deal with each one of them separately.

25. Thus, in view of the above discussion, it cannot be said that the condition of furnishing Bank Guarantee is unreasonable, irrational, illogical and thus illegal, or that it is violative of Articles 14 & 21 of the Constitution of India. Also, it cannot be said that the said condition casts an unnecessary burden upon the students belonging to economically backward families.

Hence, all the petitions stand dismissed. Pending application(s), if any also stand disposed of.

****

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

Vijay Goyal, Director of Express Projects (Pvt.) Ltd. .....Accused/Petitioner.

Versus

Lt. Col. Vivek Gupta. .....Complainant/Respondent.

Cr.MMO No. 54 of 2017
Reserved on: 18.09.2017
Decided on: 22.09.2017

Code of Criminal Procedure, 1973- Section 482- A complaint was filed for the commission of offences punishable under Sections 403, 405, 406, 415, 417, 418, 420, 499, 500 and 120-B pleading that the complainant was approached by accused No. 6 for investing in a housing project to be constructed in District Sonipat- promise was made to deliver possession by the end of 2014 and not later than January, 2015 – the complainant decided to buy 4-BHK independent apartment for Rs. 46,79,000/- - the accused appropriated the money and constructed 2-BHK and 3-BHK apartments as they were in higher demand – the Trial Court summoned the accused under Sections 417, 418 and 420 for trial- the accused filed the petition pleading that the complaint discloses the matter of civil nature – the Court had wrongly summoned the accused – held that the accused had assured that the facility will be available in the express city – the complainant had invested the money to buy second floor in a building at a far off place, which had no amenities – the amount invested by the complainant has been utilized for the construction of type-II and type-III quarters – the possession was not delivered to him despite the receipt of the money – the Trial Court had passed a reasoned order while summoning the accused- the Trial Court had jurisdiction to pass the order- the petition dismissed.

(Para- 8 to 20)

Cases referred:

Amit Kapoor vs. Ramesh Chander and another, (2012) 9 Supreme Court Cases 460
Lalmuni Devi vs. State of Bihar and others, (2001) 2 SCC 17
Sonu Gupta vs. Deepak Gupta and others, (2015) 3 SCC 424
Udai Shankar Awasthi vs. State of Uttar Pradesh and another, (2013) 2 SCC 435
Bhushan Kumar & another vs. State (NCT of Delhi) & another, AIR 2012 Supreme Court 1747

For the petitioner: Mr. Ankush Dass Sood, Sr. Advocate, with Mr. S.C. Sharma, Advocate.

For respondent No. 1: Mr. G.C. Gupta, Sr. Advocate, with Mr. Deepak Gupta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition has been maintained by the petitioners/accused (hereafter referred to as "the accused persons") under Section 482 of Criminal Procedure Code (for short 'Cr.P.C') seeking a direction of this Court to quash Criminal Complaint No. 54-2 of 2016, which was filed by the complainant/respondent No. 1 (hereinafter referred to as the "respondent No. 1.") under Sections 403, 405, 406, 415, 417, 418, 420, 499, 500 and 120B of Indian Penal Code, 1860 (for short "IPC"), which is pending adjudication in the Court of learned Judicial Magistrate 1st Class, Court No. IV, Shimla. A simultaneous prayer for quashing order dated 04.08.2016, passed by learned Judicial Magistrate 1st Class, Court No. IV, Shimla, whereby the accused persons were summoned under Sections 417, 418 and 420 IPC for trial in the aforementioned complaint, has also been made.

2. The factual matrix of the case can tersely be summarized as under:

As per the accused persons, respondent No. 1 maintained a false complaint before the learned Trial Court against them, wherein it has been alleged that he was contacted by the accused No. 6, Manoj, Sales representatives at Express Projects (Pvt.) Ltd. (before the learned Trial Court) at the instance of accused No. 2 to 5 (petitioners herein) in the month of February, 2013, for investing in a housing project, i.e., Express Projects (Pvt.) Ltd. (Company incorporated under the Indian Companies Act, 1950), having Registered office at 810, Surya Kiran Building, Kasturba Gandhi Marg, New Delhi, 110 001 (hereafter referred to as "the Express Projects"). As per respondent No. 1, he was dishonestly induced to invest in the housing project, which was proposed to be constructed in and around village Rathdana Akbarpura Barota and Liwan, District Sonipat. It was further contended in the complaint, so filed by respondent No. 1, that a promise had been made that expected possession of the flat would be handed over by the end of year 2014 and not later than January, 2015. Respondent No. 1 believing the delusive assurances, decided to buy a 4-BHK independent floor/apartment for Rs.46,79,000/- (rupees forty six lac seventy nine thousand only) plus EDC charges of Rs.3,05,000/- (rupees three lac five thousand only), totaling Rs.49,84,000/- (forty nine thousand eighty four thousand only). It has been further averred in the complaint that accused persons, despite availing 91% of the total amount of money dishonestly misappropriated the same and used it for the construction of other 2BHK and 3BHK flats, as the same have higher demand. The accused persons have violated the contract, which was entered into between the parties. The learned Trial Court, on the basis of the complaint and statement of the complainant, took cognizance of the offence and issued impugned order dated 04.08.2016, whereby the accused persons were summoned under Sections 417, 418 and 420 IPC for trial.

3. The accused persons/petitioners averred that the learned Trial Court without considering the facts, which have come on record, going through the contents of the complaint, dispute being of civil nature, and also without appreciating the law on the subject, issued notices to the accused persons under Sections 417, 418 and 420 IPC. The accused persons pray that order issuing notices against them, orders consequential thereto and the complaint may be quashed.

4. In reply to the petition, the complainant/respondent No. 1 averred that the accused persons have maintained the present petition just to delay the proceedings before the learned Trial Court. He has further submitted that earlier the accused persons have been evading service and now to delay the proceedings before the learned Trial Court, the present petition has been maintained. On merits, it has been submitted that the petition is devoid of merits and the same deserves dismissal. It is further contended that the learned Trial Court has rightly issued the summoning order against the accused persons, as they has dishonestly

misappropriated the hard earned money of respondent No. 1. The accused persons dishonestly induced respondent No. 1 to invest in the housing project and they have also concealed the facts. The accused persons made false assurances and managed to induce respondent No. 1 to invest his whole life's earnings in the project. The accused persons dishonestly used the money of respondent No. 1 to their own use, thereby causing wrongful loss to respondent No. 1. The action of accused persons caused harassment, humiliation to respondent No. 1 and it also caused mental tension, agony and hardship to him. Lastly, respondent No. 1 contended that the present petition is an abuse of process of law, hence the same may be dismissed.

5. I have heard Mr. Ankush Dass Sood, learned Senior Advocate, for the petitioners, Mr. G.C. Gupta, learned Senior Advocate, for respondent No. 1 and gone through the record in detail.

6. Mr. Ankush Dass Sood, has argued that the learned Trial Court without taking into consideration the fact that the dispute is a consumer dispute, which is still pending in appeal, wherein the rights of the parties are to be decided, had issued process against the accused persons and respondent No. 1 maintained a total false complaint just to coerce the accused persons. He has argued that the proceedings are liable to be quashed. The Courts at Shimla have no jurisdiction to try and entertain any type of dispute, as per the provisions contained in the agreement. He has specifically referred to averments made in the complaint, the provisions of law, the provisions of law and paras 62 and 62 of the agreement. The date of possession of the flat was upto 10.03.2017 when the possession letter was issued and this fact was also not considered by the learned Trial Court. He has argued that the complaint, so filed by respondent No. 1, is sheer abuse of the process of law and the same may be quashed alongwith impugned order dated 04.08.2016. On the other hand, Mr. G.C. Gupta, Senior Advocate, has argued that the present petition is not maintainable under Section 482 Cr.P.C., as the petitioners have a remedy available before the learned Court below and he can always go to the learned Court below by filing a revision petition against the impugned order. He has further argued that extra ordinary jurisdiction cannot be exercised when specific remedy is available. He has argued that as the payments were made from Shimla and the complainant was induced by presenting a false picture, which was not true, at Shimla and respondent No. 1 was cheated at Shimla, the Court at Shimla has the jurisdiction. He has further argued that the learned Trial Court on the basis of the record before, issued process after full satisfaction and the learned Magistrate has given reasons while issuing the process. He has argued that as per the mandate of the law it is only the satisfaction of the Magistrate who has to issue the summons. As the petitioners have cheated respondent No. 1, the complaint so filed by respondent No. 1 is maintainable. He has further argued that as the petitioners have not come before this Court with clean hands and earlier they were evading service and now they have choosen to delay the proceedings pending before the learned Trial Court, thus the present petition deserved dismissal and may be dismissed.

7. In rebuttal Mr. Ankush Dass Sood, learned Senior Counsel for the petitioners has argued that taking into consideration the law as settled by this Hon'ble Court in ***Cr.MMO No. 52 of 2017, M/s CNN-IBN7 vs. Maulana Mumtaz Ahmed Quasmi & others,*** the present petition may be allowed. He has further argued that when there is nothing in the complaint, the same is required to be dismissed.

8. The ambit of Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") is indeed wide, however, certainly it is not so wide, which gives unfettered revisionary and inherent jurisdiction to the High Courts. The law qua sweep and extent of revisional and inherent jurisdiction of High Courts has been exhaustively and lucidly laid down by Hon'ble Apex Court in ***Amit Kapoor vs. Ramesh Chander and another, (2012) 9 Supreme Court Cases 460.*** Relevant paras of the judgment (supra) are reproduced hereunder:

> ***"25. Having examined the inter-relationship of these two very significant provisions of the Code, let us now examine the scope of interference under any of these provisions in relation to quashing the***

charge. We have already indicated above that framing of charge is the first major step in a criminal trial where the Court is expected to apply its mind to the entire record and documents placed therewith before the Court. Taking cognizance of an offence has been stated to necessitate an application of mind by the Court but framing of charge is a major event where the Court considers the possibility of discharging the accused of the offence with which he is charged or requiring the accused to face trial. There are different categories of cases where the Court may not proceed with the trial and may discharge the accused or pass such other orders as may be necessary keeping in view the facts of a given case. In a case where, upon considering the record of the case and documents submitted before it, the Court finds that no offence is made out or there is a legal bar to such prosecution under the provisions of the Code or any other law for the time being in force and there is a bar and there exists no ground to proceed against the accused, the Court may discharge the accused. There can be cases where such record reveals the matter to be so predominantly of a civil nature that it neither leaves any scope for an element of criminality nor does it satisfy the ingredients of a criminal offence with which the accused is charged. In such cases, the Court may discharge him or quash the proceedings in exercise of its powers under these two provisions.

26. This further raises a question as to the wrongs which become actionable in accordance with law. It may be purely a civil wrong or purely a criminal offence or a civil wrong as also a criminal offence constituting both on the same set of facts. But if the records disclose commission of a criminal offence and the ingredients of the offence are satisfied, then such criminal proceedings cannot be quashed merely because a civil wrong has also been committed. The power cannot be invoked to stifle or scuttle a legitimate prosecution. The factual foundation and ingredients of an offence being satisfied, the Court will not either dismiss a complaint or quash such proceedings in exercise of its inherent or original jurisdiction. In the case of Indian Oil Corporation v. NEPC India Ltd. & Ors., 2006 6 SCC 736, this Court took the similar view and upheld the order of the High Court declining to quash the criminal proceedings because a civil contract between the parties was pending.

27. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be :

27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents

submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3 The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the

records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

{Ref. State of West Bengal & Ors. v. Swapan Kumar Guha & Ors., 1982 AIR(SC) 949; Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors., 1988 AIR(SC) 709; Janata Dal v. H.S. Chowdhary & Ors., 1993 AIR(SC) 892; Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors., 1996 AIR(SC) 309; G. Sagar Suri & Anr. v. State of U.P. & Ors., 2000 AIR(SC) 754; Ajay Mitra v. State of M.P., 2003 AIR(SC) 1069; M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors., 1998 AIR(SC) 128; State of U.P. v. O.P. Sharma, 1996 7 SCC 705; Ganesh Narayan Hegde v. s. Bangarappa & Ors., 1995 4 SCC 41; Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors., 2005 AIR(SC) 9; M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors., 2000 AIR(SC) 1869; Shakson Belthissor v. State of Kerala & Anr., 2009 14 SCC 466; V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors., 2009 7 SCC 234; Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr., 2009 11 SCC 203; Sheo Nandan Paswan v. State of Bihar & Ors., 1987 AIR(SC) 877; State of Bihar & Anr. v. P.P. Sharma & Anr., 1991 AIR(SC) 1260; Lalmuni Devi (Smt.) v. State of Bihar & Ors., 2001 2 SCC 17; M. Krishnan v. Vijay Singh & Anr., 2001 8 SCC 645; Savita v. State of Rajasthan, 2005 12 SCC 338; and S.M. Datta v. State of Gujarat & Anr., 2001 7 SCC 659}.

27.16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence."

9. The accused/petitioners issued a brochure and pursuant thereto the complainant/respondent No. 1 was attracted to invest for the purchase of flat. The brochure, so issued by the petitioner, contained the following stipulations:

"Express Royale
Affordable independent floors

The Project

Express Royale is a collection of aesthetically designed affordable independent floors strategically located in Sector-35, Sonepat having easy access to Delhi-NCR and cities like Rohtak, Panipat etc. the project is spread over acres of lush greenscape in Express City which shall boast of world class infrastructural facilities like nursery schools, shopping complex and much more. These

independent floors on Ground, First and Second floor have been designed with a touch of comfort and modernism. Accommodation consists of Drawing Room, Dining Room Four Bedrooms, Kitchen, Two Toilets and Balconies. It offers world class living experience with increased economic opportunities coming up in the form of proposed education hub and cyber city. A classic combination of amenities, comforts and luxuries in close civinity would take living to the next level

Features

- ***Low rise row-housing***
- ***G + 2Structure***
- ***Ground Floor owner gets individual front & back garden with covered verandas***
- ***First Floor owner gets large balconies***
- ***Second Floor owner gets terrace***
- ***Reserved car parking slot for each floor***

Specifications

Structure: ***RCC frame structure with filler walls***

Flooring: ***Vitrified Tiles in Drawing Room, Dining Room and Bedrooms. Ceramic Tiles in Kitchen, Bathrooms & Balconies.***

Internal and external finish: ***Oil bound distemper in pleasing shades on inner walls. Textured paint finish/Exterior emulsion on external façade.***

Doors and windows: ***Windows in UPVC/Aluminum. Internal Door frames in wood. All internal doors shall be flush doors.***

Electrical: ***Modular Switches, Sufficient light and power points, Cable TV and telephone points in Drawing Room. Copper wires in concealed PVC conduits.***

Toilets: ***Provision of hot and cold water supply in all toilets, Ceramic glazed tile dado upto 7 feet high, White sanitary ware.***

Kitchen: ***Polished Granite Kitchen Counter, Ceramic Glazed Tile dado upto 2 feet high over Kitchen Counter, Stainless steel sink with drain board.***

Ground Floor plan
4 Bedroom + 2 Toilet
Super area : 1725 Sq.ft
Park area : 1725 Sq. ft + Front & Back Park

The above mentioned dimensions are indicative only and may vary from plot to plot.

First & Second Floor Plan
4 Bedroom + 2 Toilet
Super area 1st Floor : 1725 Sq. ft
Super area 2nd Floor : 1725 Sq. ft + Terrace

The above mentioned dimensions are indicative only and may vary from plot to plot.

Group
The Express Group as a legacy needs no introduction. The Group rests over an accomplished reputation of over 40 years as Developers of prime Commercial and Residential Properties. Each project designed by The Group stands for architectural landmarks and reflects innovation, professionalism and transparency.
As the most popular Promoter, Developer and Colonizer, Express Group understands its responsibility and shoulders clients' expectations perfectly. Delivering end to end realty business solutions; on the spot by the clock, the Group has always impressed its esteemed clients.
Through its new project- Express Royale that's affordable, independent floors, Express Group is going all the way to set a new benchmark in the real estate industry.

Few of our prestigious projects
Express City, Sonepat
Express Garden, Indirapuram
Express Homz, Sonepat
Express Villa, Sonepat

Completed projects
Express Garden, Indirapuram,
Express Market, Indirapuram,
Express Apartments, Vaishali,
Express Apartments, Lakdi-ka-pul, Hyderabad,
Express apartments, Richmond Road, Bangalore,
Express House, Ulsoor, Bangalore,
Anjali Apartments, Bangalore,
Anjali Corner, Bangalore,
Anjali Layout, Bangalore,
Express New City, Bangalore,
Express Court, Bangalore,
Express Residency, Bangalore,
Express Elegance, Bangalore,
Daffodils, Bangalore,
Express Plaza, Ashok Vihar, Delhi,
Express Market, Ajmeri Gate, Delhi,
Express Tower, Azadpur, Delhi,
Express Market, Dilshad Garden, Delhi,
Express Market, Kalkaji, Delhi,
Express Plaza, Derawal Nagar, Delhi,
Express Building, Ishwar Nagar, Delhi,
Aashirwad Enclave, Delhi,
Super Bazar, Moradabad.

Ongoing Projects

Express city, Sonepat,
Express Homz, Sonepat,
Express Zenith, Noida,
Express Eternity, Noida Extension.

. Express Royale are independent floors located in Express City, Sector-35, Sonepat
. Prime Location next to Kundli-Manesar-Oalwal Expressway
. Opp. O.P. Jindal global University
. Only 25 minutes drive from Azadpur Bypass
. Near Rajiv Gandhi Education City
. Proposed metro rail connectivity."

"Express KMP City
Regular geometrical shape of plots
Infinite possibilities for personalized designing
Free flowing area for movement
Dwelling surrounded with liberal amount of greenery
Vaastu friendly layout
Well-lit wide roads
24x7-manned security
A modern sewage disposal system

The villas and plots are available in varied sizes to suit individual tastes and needs. The regular shaped plots ensure flexibility in planning and personalized design.

Adequate open space is being provided in front of the plots for development of green cover.

Innovatively designed with eco-friendly features, the villas shall compliment the modern cosmopolitan lifestyle of its residents.

Express City invites you to an open lush green environment with well carpeted, wide, illuminated arterial road network.

BUIT UP INDEPENDENT DUPLEX VILLAS AND PLOTS IN VARYING SIZES.

Maximum Open Area
Beautiful landscaping
Wide & networked jogging tracks
Picturesque water bodies
Demarcation of residential and non-residential areas to minimize noise and air pollution
Provision of rain-harvesting system.

Express City is a visual feast with a vast green belt stretching along both sides of the township and a touch of greenery at every corner.

Express City has star attractions of fountains, joggers tracks etc.

The "exotic exteriors" of Express City will mesmerize you endlessly through the cool surroundings.

Designed in harmony with the tenents of Vaastu Shastra, Express City is a creative bled of innovative space management, with perfect synergy of privacy, aesthetics and vast green spaces.

ENJOY THE CHARISMATIC SET UP TO EXPERIENCE THE CELEBRATION OF YOUR LIFE.

Ultra Modern recreational area with Swimming Pool
An up-to-date Gymnasium withmodern facilities
Provision of illuminations
Pole lights for dazzling bays and spaces
Security Posts at all essential junctures
A power station that will remain 24 hrs functional

RECEIPTION AREA

Leading life with style is the motto of Express City. Exclusive as well as all-inclusive recreation facilities will keep your social nerve ticking. Various means of entertainment, indoor sporting facilities and leisure games will be there for that extra dash of stimulation required by mind and body.

Have an early morning tryst with nature at the jogging track. Melt your lethargy and experience a healthy lifestyle after an invigorating walk along well-trimmed track. A tempting water pool will invite you for a cool leisure swim during summers.

WHAT A WAY....
TO START YOUR DAY!

A mini super market will ease out your daily shopping rigmarole. It is going to be very convenient to simply get everything of your needs within a very short distance. Even your children would be able to hop-and-shop for you.

Also stop worrying about the basic necessity of medical facility. An updated and adequately staffed nursing home will take care of the residents of the township.

AMENITIES

Express Group is aware that apart from beauty and chic style a lot more is needed for actually living. We have made elaborate arrangements for the daily needs of the residents like shopping, grocery demands, educational provision and medico facility. A state-of-the-art mall would be right close to your vicinity for all your shopping and entertainment needs.

A branch of a renowned and reputed school will be present right within the township to make you carefree of your children's education.

EXPRESS CITY: A WORLD WHERE LIFE IS NOT LIVED BUT CELEBRATED.

Express Group has carved a niche for itself, as the developers of prime Commercial and Residential Properties across India.

The Express Group is a legacy that needs no introduction. The Express Group rests over the sturdy platform of architectural eminence that is firmly supported by the pillars of dedication, perseverance, innovation and modernism.

Express Group stands for real architectural landmarks and exemplary end-to-end realty business solutions that are not only integrated with innovation, but are endorsed by a high octane professional experience that is a class apart.

Today the group is growing by leaps and bounds, developing a niche for itself as a highly acclaimed Promoter, Developer and Colonizer working with perfection and excellence.

WITH OVER 3 DECADES EXPERIENCE THE LEGACY CONTINUES.....

Some of our projects are:

Express Garden, Indirapuram,
Express Market, Indirapuram,
Gitanjali Layout, Bangalore,
Express Apartments, Bangalore,
Express apartments, Hyderabad,
Express Apartments, Vaishali,
Express Plus, Vasundhara,
Express Mall, Indirapuram
Super Bazar, Moradabad,
Express Tower, Delhi,
Gitanjali apartments, Bangalore,
Ashirwad Enclave, Delhi,
Express Plaza, Delhi,
Express Market, Delhi,
Gitanjali Corner, Bangalore,

Express Market, New Delhi,
Palm Court, Bangalore, Express Residency, Bangalore,
Express Elegance, Bangalore,
Express New City, Bangalore.

LOCATION

Prime location next to Kundli-Manesar-Palwal Expressway
Good connectivity to Delhi and Indira Gandhi International Airport
In close civinity of proposed IT Parks and SEZ
Only 15 minutes drive from Azadpur Bypass
Fastest developing area of NCR
Easy connectivity with southern districts of Haryana such as Gurgaon, Faridabad, Rohtak and Jhajjhar
Proposed metro rail connectivity."

10. This Court after going through the abovementioned stipulations, comes to the definite conclusion that the petitioners and the proforma respondents gave a specific allurement to respondent No. 1 and they made him to believe as under:

a. All the above facilities were shown to exist in near future in the Express City. When the respondent applied for the flat in the second floor, he was made to believe and understand that these facilities will exist in the Express City;

b. The respondent was made to invest his hard earned money, which he had earned while working as Lt. Col. in the Army and after taking loans from different financial institutions;

c. It cannot be expected that the respondent had invested with the petitioners his earnings of whole life, being Lt. Col. in the Army only to buy 2nd floor in a building to be constructed in a far of place without there being any amenities.

d. So, the contentions of the petitioners that these amenities may or may not come taking into consideration the persons who will come for opening the school, hospital etc. etc. and it was dependent on many other factors, is not reliable. *Prima facie* it seems that respondent was induced by the petitioners.

e. At the same point of time the accused/petitioners have invested the amount deposited by the respondent in a different scheme, i.e., for construction of Type-II and Type-III quarters and *prima facie* it is evident as in spite of receiving the whole money from the respondent till January, 23015, his premises was not constructed for more than a year. Thereafter, the premises was supposed to be completed by January, 2015 and till that time last installment was paid. These allegations have been made specifically in the complaint.

f. The petitioners have failed to demonstrate before this Court, even after producing other material that they are fulfilling the promises they made in the brochure or thereafter to induce the complainant/respondent to invest in their project.

g. The petitioners will be having an opportunity to defend only when there is trial and these allegations cannot be thrown out at the threshold.

The petitioners fully knew that these facilities/amenities, which respondent No. 1 was made to believe, are not likely to come, had they disclosed to respondent no. 1 that these facilities will not come in future and these facilities/amenities, which the respondent No. 1 was made to believe, are nothing but inducement.

11. This Court, after going through the record, finds that the learned Trial Court has passed a reasoned order while issuing the process against the petitioners, therefore, the impugned order, whereby the process against the petitioners was issued for securing their presence, cannot be said to be against law. At the same point of time, this Court also finds that the complaint, so made by respondent No. 1, made out a *prima facie* case in favour of the petitioners and part of cause of action has arisen within the jurisdiction of Shimla, so the Courts at Shimla have the jurisdiction.

12. The learned Senior Counsel for the petitioners has placed reliance on a decision of Hon'ble co-ordinate Bench of this Court, rendered in ***Cr.MMO No. 52 of 2017 (alongwith other batch matters), titled M/s CNN-IBN7 vs. Maulana Mumtaz Ahmed Quasmi & others***, decided on 29.08.2017. In the judgment (supra) it has been held as under:

> ***"49. Thus, on the basis and in the light of discussion made above, considering the facts that in the complaint as also statements recorded under section 202 of the Code, there is no specific allegations with regard to the role played by each of the petitioners in making or publication of the defamatory material against the complaint, the issue of process against them by virtue of they being office holders / position holders in the Broadcasting Company/ news channel that is by invoking the principle of vicarious liability is neither legally justifiable nor sustainable in law.***
>
> ***.... ....***
>
> ***55. Thus, on the basis of the aforesaid discussion, it is established that:***
>
> ***i) the complainant has failed to make a positive averments against the petitioners in the complaint as also in the evidence led to attribute specific role of each of them in committing the alleged offence warranting initiation of criminal proceedings;***
>
> ***ii) Unlike civil liability, the penal provisions have to be strictly construed wherein there is no vicarious liability in criminal law unless statute takes that within its fold and thus the petitioners merely by virtue of their being Managing Director, Editor-in-Chief, Editor and Founder Editor-in-Chief would not make them vicariously liable for the acts of their employees;***
>
> ***iii. CDRs which formed the sheet anchor of the case of the complainant have not been certified in accordance with law, more particularly, section 65-B of the Indian Evidence Act and will have to be excluded from consideration. Therefore, once the CDR is excluded from consideration, then obviously the process against the petitioners could not have been ordered to be issued on the basis of the material available with the Magistrate; and***
>
> ***iv. Once the Magistrate has failed to take into consideration all the aforesaid facts as have been noticed above, it can conveniently be held that the learned Magistrate has not applied his judicial mind before issuing process against the petitioners."***

However, the judgment (supra) is not applicable to the facts of the present case, as respondent No. 1, through his complaint, so filed against the accused persons, made out a *prima facie* case against them and in that complaint positive averments have come against the petitioners. The learned Trial Court, after perusing the record, has also found specific role of each petitioner, thus the petitioners are liable. This Court also finds that the petitioners are liable for their acts jointly

and individually in inducing the complainant/respondent No. 1 to make the payment, so the judgment (supra), as cited by the learned Senior Counsel for the petitioners, is not applicable to the present case.

13. The learned Senior Counsel for the petitioners has argued that the matter is pending before the Consumer Forum and thus the Trial Court has no jurisdiction. This aspect has already been settled by Hon'ble Supreme Court in ***Lalmuni Devi vs. State of Bihar and others, (2001) 2 SCC 17,*** wherein it has been held that merely because a civil claim is maintainable does not mean that the criminal complaint cannot be maintained. Relevant para 8 of the judgment (supra) is extracted hereunder for ready reference:

> ***"8. There could be no dispute to the proposition that if the complaint does not make out an offence it can be quashed. However, it is also settled law that facts may give rise to a civil claim and also amount to an offence. Merely because a civil claim is maintainable does not mean that the criminal complaint cannot be maintained. In this case, on the facts, it cannot be stated, at this prima facie stage, that this is a frivolous complaint. The High Court does not state that on facts no offence is made out. If that be so, then merely on the ground that it was a civil wrong the criminal prosecution could not have been quashed."***

The judgment (supra) is fully applicable to the facts of the present case. In view of what has been held in ***Lalmuni Devi's case*** (supra) the contention that the matter is pending adjudication before the Consumer Forum is without any basis and the same is not sustainable in the eyes of law.

14. Admittedly, there is clear cut provision under Section 245 Cr.P.C., which provides as under:

> ***"245. When accused shall be discharged:***
>
> *(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no cause against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.*
>
> *(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."*

Thus, the petitioners have alternative efficacious remedy and on this score only the present petition can be dismissed.

15. Certainly, power under Sections 482 and 227 Cr.P.C is exceptional. The Hon'ble Supreme Court in ***Sonu Gupta vs. Deepak Gupta and others, (2015) 3 SCC 424,*** has held as under:

> ***"8. Having considered the details of allegations made in the complaint petition, the statement of the complainant on solemn affirmation as well as materials on which the appellant placed reliance which were called for by the learned Magistrate, the learned Magistrate, in our considered opinion, committed no error in summoning the accused persons. At the stage of cognizance and summoning the Magistrate is required to apply his judicial mind only with a view to take cognizance of the offence, or, in other words, to find out whether prima facie case has been made out for summoning the accused persons. At this stage, the learned Magistrate is not required to consider the defence version or materials or arguments***

nor he is required to evaluate the merits of the materials or evidence of the complainant, because the Magistrate must not undertake the exercise to find out at this stage whether the materials will lead to conviction or not.

9. It is also well settled that cognizance is taken of the offence and not the offender. Hence at the stage of framing of charge an individual accused may seek discharge if he or she can show that the materials are absolutely insufficient for framing of charge against that particular accused. But such exercise is required only at a later stage, as indicated above and not at the stage of taking cognizance and summoning the accused on the basis of prima facie case. Even at the stage of framing of charge, the sufficiency of materials for the purpose of conviction is not the requirement and a prayer for discharge can be allowed only if the court finds that the materials are wholly insufficient for the purpose of trial. It is also a settled proposition of law that even when there are materials raising strong suspicion against an accused, the court will be justified in rejecting a prayer for discharge and in granting an opportunity to the prosecution to bring on record the entire evidence in accordance with law so that case of both the sides may be considered appropriately on conclusion of trial."

In view of the judgment (supra) it can safely be held that while issuing process, the Magistrate is only required to evaluate the merits of the material or evidence of the complainant and the conclusion that the accused will be ultimately convicted is not required to be gone into.

16. At the same point of time, the Hon'ble Supreme Court in ***Udai Shankar Awasthi vs. State of Uttar Pradesh and another, (2013) 2 SCC 435,*** held that investigation under Section 202 Cr.P.C. is limited to ascertain truth or falsehood of allegations made in a complaint and nothing more and the learned Court has to take into consideration the fact that whether the Magistrate has territorial jurisdiction or not. In the present case, the Magistrate has territorial jurisdiction as part of cause of action has arisen within the jurisdiction of his Court. Relevant para of the judgment is extracted in *extenso* for ready reference:

"40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 Cr.P.C., though the appellants were outside his territorial jurisdiction. The provisions of Section 202 Cr.P.C. were amended vide Amendment Act 2005, making it mandatory to postpone the issue of process where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases.. Shivjee Singh v. Nagendra Tiwary & Ors., 2010 AIR(SC) 2261; and National Bank of Oman v. Barakara Abdul Aziz & Anr., 2012 12 JT 432.

17. The Hon'ble Supreme Court in ***Bhushan Kumar & another vs. State (NCT of Delhi) & another, AIR 2012 Supreme Court 1747,*** held that Section 204 Cr.P.C. states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. It is further held that order summoning need not

to be reasoned. However, in the present case, the order of the learned Trial Court, summoning the petitioners, is reasoned one. The relevant extract of the judgment (supra) is as under:

> ***"10. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory meaning thereby that it is not a prerequisite for deciding the validity of the summons issued."***

18. In ***Bhushan Kumar's*** case (supra) it has been held that Section 204 Cr.P.C. states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. The relevant extract of the judgment (supra) is as under:

> ***"8. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code."***

19. After exhaustively discussing both facts and law and also the material, which has come on record, the natural corollary is that the petitioners have no case in their favour to invoke the extraordinary jurisdiction of this Court under Sections 227 and 482 Cr.P.C.. Indeed, the petitioners have alternative efficacious remedy. There exists a *prima facie* case in favour of respondent No. 1, as discussed hereinabove and the learned Trial Court has the jurisdiction to pass the impugned order. The learned Trial Court has passed the impugned order after taking into consideration all the material which has come on record.

20. In view of what has been discussed hereinabove, the petition, which sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stand(s) disposed of.

21. The parties, through their learned counsel, are directed to appear before the learned Trial Court on ***18th October, 2017.***

****

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

Vivek Singh .....Appellant.

Versus

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

Cr. Appeal No. 31 of 2017.
Reserved on: 10.7.2017.
Decided on: 22.9.2017.

Indian Penal Code, 1860- Section 376- **Protection of Children from Sexual Offences Act, 2012-** Section 4- PW-1, wife of the accused made allegations against her husband that he had committed sexual intercourse with her daughter aged less than 2 years under the influence of liquor- this fact came to her notice on the medical examination of the victim – the accused was tried and convicted by the Trial Court- held in appeal that PW-1 had materially improved upon her version – the improvement goes to the very root of the prosecution case – the informant had made three different statements on three different occasions which did not match each other – the relationship between the wife and husband was strained and possibility of lodging the false FIR cannot be ruled out – the prosecution version is not probable – the child was suffering from infection in her uterus and the possibility of sustaining injury by application of medicine in the infected part cannot be ruled out – the Trial Court had wrongly rejected the defence version – the prosecution version was not proved beyond reasonable doubt- appeal allowed- judgment of Trial Court set aside. (Para-12 to 36)

For the appellant: Mr. Sat Prakash, Advocate.
For the respondent: Mr. D.S,Nainta, Addl. AG with Mr. Virender Verma, Addl. AG.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J

In this appeal, judgment dated 12.04.2016, passed by learned Special Judge, Chamba (H.P.), in Sessions Trial No.21 of 2015, whereby the appellant (hereinafter referred to as the accused) has been convicted for commission of offence punishable under Section 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act (hereinafter referred to as POCSO Act in short) and sentenced to undergo rigorous imprisonment for ten years and also to pay Rs.5,000/- as fine, has been challenged on the grounds, inter-alia, that the evidence available on record has not been appreciated in its right perspective. The highly interesting evidence produced by the prosecution has been given undue weightage and the evidence produced by the accused has been erroneously brushed aside and to the contrary the impugned judgment has been based upon surmises and conjectures.

2. The inconsistencies and contradictions in the prosecution evidence which have rendered the prosecution story highly doubtful were erroneously ignored and the findings of conviction recorded against the accused were passed on the story which was engineered and concocted. The accused had not committed the alleged offence. On the other hand, the child already suffering from infection, was under treatment in NHPC Hospital at Karian, District Chamba. The complainant, none-else but the wife of accused as well as her mother were not in cordial relations with him and other members of his family as she (complainant) even had implicated his brother with the allegations that he raped her. The testimony of DW-3 Rajesh Kumar that the complainant PW-1 Anju was previously married to his brother and when he went to bring her to matrimonial home, she got him beaten up from 5-6 hired *Gundas* and after that he expired within 10-15 days, has not at all been taken into consideration. Therefore, the involvement of the accused in the alleged offence is not at all established and the impugned judgment has been sought to be quashed.

Facts of the Case:

3. If coming to the factual matrix, the prosecution case discloses a sorrow state of affairs because PW-1 Anju, the complainant, none-else but the wife of accused has levelled allegations against him in the application Ext.PW-1/B to the Deputy Commissioner, Chamba, that her husband, the accused, has committed sexual intercourse with her daughter less than two years of age. The complainant PW-1 Anju, has levelled the allegations in Ext.PW-1/B that her husband, the accused, has subjected her minor daughter below two years of age to sexual intercourse while under the influence of liquor about 1 ½ months ago. This fact came to her notice when the victim child was got medically examined in the hospital from a lady doctor. The

doctor disclosed that her daughter was subjected to sexual intercourse. The Additional District Magistrate, Chamba, District Chamba, H.P., had forwarded the application Ext.PW-1/B to S.H.O. Police Station Sadar, Chamba, for necessary action. Consequently, FIR Ext.PW-1/A came to be registered on 10.02.2015 under Section 376 of the Indian Penal Code and under Section 4 of POCSO Act.

4. The police swung into action. The investigation was conducted by PW-10 Inspector/SHO Tilak Raj of Police Station Sadar, Chamba. The application Ext.PW-7/B was made to Medical Officer, Regional Hospital, Chamba, for medical examination of the victim. The MLC is Ext.PW-7/A. The application Ext.PW-4/A was made to the Executive Officer, Municipal Committee, Chamba, for obtaining date of birth certificate Ext.PW-4/B of the prosecutrix. The statement of the complainant Ext.PW-1/C was got recorded under Section 164 of the Code of Criminal Procedure. The application Ext.PW-8/A for medical examination of the accused, was made to Medical Officer, Regional Hospital, Chamba. The MLC is Ext.PW-8/B. The site plan Ext.PW-10/B was also prepared by the Investigating Officer.

The Outcome of the Investigation Conducted:

5. On completion of the investigation, it transpired that it is somewhere in the month of December, 2014, the accused subjected his own minor daughter (name withheld), aged one year eight months, to sexual intercourse. The victim child was born to her in April, 2013. She gave birth to her second child (son) in the year 2014. At the time of delivery, she shifted to the house (rented accommodation) of her mother PW-2 Chino Devi at village Karian and started residing there. She used to sleep with her newly born son and her mother on the bed, whereas the accused and the victim child used to sleep on floor by spreading mattress thereon. In December, 2014, in the midnight, on hearing cries of the victim child she asked from the accused as to what happened to her. He allegedly told that his arm got struck against the victim child. However, the child cried again on the next night also and came to her on the bed. When she asked her husband, the accused as to what had happened, he told that the child is searching for her. She made the victim child to sleep with her. On the following morning when her mother (PW-2) was getting the child bathed, noticed blood stains and white stains on her thigh. She asked the accused about it, who told that child was suffering from some infection. However, when the complainant Smt. Anju (PW-1) asked him, he told that he committed a mistake and will not repeat the same in future.

6. With such allegations, the final report came to be filed against the accused in the Court. Learned Special Judge on appreciation of the record and finding a prima-facie case having been made out against the accused, framed charge against him for the offence punishable under Section 376 of the Indian Penal Code and Section 4 of POCSO Act. The accused, however, pleaded not guilty and claimed trial.

Evidence in a nut shell:

7. The prosecution in order to sustain the charge against him, has examined 10 witnesses in all. The material prosecution witnesses are PW-1 Anju, the complainant, her mother Smt. Chino Devi (PW-2) and Dr. Minakshi (PW-7). The remaining prosecution witnesses are formal. According to PW-3 Darshan Kumar, PW-2 Chino Devi had hired one room accommodation from one Mushafir at Karian and PW-4 Yogesh Sharma has proved the date of birth certificate Ext.PW-4/B of the prosecutrix. PW-5 Satish Kumar, Peon in the office of Deputy Commissioner, Chamba, has delivered the complaint Ext.PW-1/B in Police Station Sadar, Chamba, whereas PW-6 Constable Vinod Kumar, has videographed the proceedings qua recording of statement of complainant in the Police Station. PW-8 Dr. Kamaljeet has examined the accused and proved the MLC Ext.PW-8/B. PW-9 ASI Ashok Kumar, the then SHO Police Station Sadar, Chamba, had taken the photographs of the spot on the demarcation given by the complainant. PW-10 Inspector Tilak Raj is the Investigating Officer.

8. 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. His medical examination was got conducted by the police. It is pleaded in his defence that he has been falsely implicated by the complainant in this case. Earlier also, she had implicated his brother in a false case of commission of rape by him with her. The complainant and her mother (PW-2), according to him, are the ladies of easy virtue. He has also examined DW-1 Smt. Usha Devi, real sister of complainant and DW-2 Rajesh Kumar, his brother, to prove that the complainant and her mother, both are ladies of easy virtue and the complainant is in habit of making such false complaints. DW-3 Sh. Pritam is brother of deceased Narian Singh to whom the complainant was earlier married, whereas DW-4 Baljinder Singh is former Vice President of Gram Panchayat, Baror.

9. As already stated, learned trial Judge on appreciation of the evidence available on record, has convicted and sentenced the accused for the commission of offence punishable under Section 376 of the Indian Penal Code and Section 4 of POCSO Act.

Rival Submissions:

10. Mr. Sat Prakash, Advocate learned counsel has argued with all vehemence that learned trial Judge in a case of no evidence has not only held a father (the accused) guilty of the commission of sexual intercourse with his own daughter aged less than 2 years, but also convicted him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 5,000/-. The highly interested evidence as has come on record by way of testimony of the complainant PW-1 (wife of the accused), who in view of the evidence available on record was inimical to the accused has erroneously been relied upon. The overall conduct of the complainant and that of her mother PW-2, the so called star prosecution witnesses itself speaks in plenty about their *modus operandi* to involve the accused in a false case so that not only his property may be grabbed by them but he being only hurdle in her way could also be removed. The evidence on record i.e. own admission of the complainant that Rajesh (DW-2), the brother of accused and his wife used to quarrel with her and that she had lodged false complaint qua her alleged molestation and having assaulted sexually by said Rajesh, goes to show that she is in the habit of making false complaints. Therefore, according to learned counsel, the accused has also been implicated by the complainant falsely in this case. Learned trial Court, while brushing aside the cogent and reliable evidence having come on record by way of testimony of DWs 1 to 4, has not assigned any plausible reason and to the contrary disbelieved the same at its whims and fancies. The accused, as such, has been sought to be acquitted of the charge framed against him.

11. On the other hand, Sh. D.S.Nainta, learned Addl. Advocate General has supported the impugned judgment while arguing that the same is well reasoned and based upon proper appreciation of the evidence available on record.

Our findings:

12. The present is a case where the allegations against the accused if proved are not only grievous and heinous in nature but constitute a gruesome and brutal act attributed to noneelse but father of the victim child. Looking to the sensitivity of the matter and the gravity as well as seriousness of the allegations as leveled, the law casts an onerous duty upon this Court to separate grain from the chaff and find out the truth with the help of evidence available on record.

13. The very first version qua the manner in which the occurrence allegedly took place is the application Ext. PW-1/B made by PW-1, the complainant to Dy. Commissioner, Chamba against her husband, the accused. The allegations against him in this document are that her husband, the accused has subjected her daughter less than 2 years of age to sexual intercourse about 1 ½-2 months ago while under the influence of liquor and she came to know about it when the victim child was got medically examined from Gynecologist (lady doctor), who in her opinion found the victim child having been subjected to sexual intercourse. The application

Ext. PW-1/B was forwarded by Addl. District Magistrate Chamba to SHO Police Station Sadar, Chamba and it is PW-5 Satish Kumar, Peon in Dy. Commissioner's Office who accompanied by the complainant delivered the same in the Police Station. The FIR Ext. PW-1/A, therefore, is replica of the application Ext. PW-1/B.

14. The another material piece of evidence is the statement of the complainant Ext. PW-1/C recorded under Section 164 Cr.P.C. She in her statement Ext. PW-1/C has introduced a different story that about 4 months ago when she delivered a male child, she used to sleep along with newly born baby and her mother on the bed whereas her husband, the accused used to sleep with her minor daughter on the floor by spreading a mattress thereon. As per her version, about 2 months ago in the mid-night i.e. 1:30 AM, the victim child cried very loudly. On this, she (the complainant) woke up and enquired from her husband as to what had happened. He told that the arm of the victim got pressed from him. She, however, was made to sleep by them thereafter. However, during the next night also, the victim again cried and on this her mother brought her to the bed and made her to sleep with her. On the following morning when her mother PW-2 was getting the victim child bathed, she noticed blood and whitish stains on her private part. When she (complainant) asked strictly from her husband about it, he confessed the mistake he committed and felt sorry for that. He threatened her that if she got the child medially examined, the reputation of the entire family would be spoiled and when the child would grow up, it would cast a stigma throughout during her lifetime. As per her further version, when the condition of her daughter did not improve, she brought this matter to the notice of the other family members, including Rajinder, the brother of the accused and his wife Jyoti. They, however, did not believe her and told that in case the matter is reported by her to the police the reputation of the child would be maligned. When the condition of the child deteriorated, she had taken the victim to Govt. Hospital, Chamba on 5.2.2015 where the child was examined by male doctor. The said doctor advised the complainant to get her medically examined from Gynecologist. The child was as such brought to Gynecologist on 10th who told that there was struggle with the child and that firstly a report is to be lodged with the police and it is only thereafter she could be examined. Thereafter, she made an application to Addl. District Magistrate who forwarded the same to PS Sadar Chamba where FIR was registered and ultimately medical examination of the victim was got conducted.

15. Now, if coming to the statement of the complainant while in the witness box as PW-1, she has deviated from her statement Ext. PW-1/C recorded under Section 164 Cr.P.C. on material aspects because instead of 1:30 AM, she has deposed that the child cried during first night around 2- 2:30 AM. On the next night, the child allegedly cried around 1-1:30 AM though it was not found to be recorded so by her in Ext. PW-1/C. In Ext. PW-1/C, nothing has come that on enquiry as to why the child is crying, her husband told that she is looking for her (the complainant), however, while in the witness box as PW-1 has stated so. Not only this, but as per Ext. PW-1/C it is her mother PW-2 who made the child to sleep with her when cried on the next night, however, while in the witness-box it is stated that it is she (the complainant) who made the child to sleep with her. As per her version in the witness-box, it is her mother who asked the accused about the cause of there being blood stains and whitish coloured stains on thighs of the victim child who in turn told that she is suffering from infection. However, in Ext. PW-1/C, she has stated that the cause of such stains when she strictly asked from her husband, he admitted the mistake and ensured her not to repeat the same. In her statement in the Court, it is stated that lady doctor on examination of the child told that she was subjected to sexual intercourse, however, as per Ext. PW-1/C, the doctor had told PW-1 that force has been applied against her daughter.

16. The critical analysis of the two statements leaves no manner of doubt that the same are inconsistent, discrepant and this witness has improved her version considerably, which goes to the very root of the prosecution case. Though she has denied the suggestion that her statement is inconsistent, however, in view of the above discussion, her version is false. She further improved her version in cross-examination while stating that since her husband used to

take medicines and liquor to enhance capacity to have sexual intercourse, she had the reason to believe that he may have done wrong act with the victim. Though the complainant has stated that she did disclose that her daughter cried during two nights to the police, however, when confronted with her statement Ext. D-1, it was not found to be so recorded therein.

17. Now, if coming to the immediate version qua the manner in which the incident has taken place as recorded in the application Ext. PW-1/B addressed to Deputy Commissioner, Chamba, nothing of the sort as mentioned in Ext. PW-1/C and the statement of the complainant in the witness-box as PW-1 has come there. The story that the victim child used to sleep on the floor of the room with the accused and cried during two successive nights and that the victim child was examined by a male doctor on 5.2.2015, does not find mention in Ext. PW-1/B.

18. It is, thus seen that the three statements made by the complainant at three different occasions do not match at all with each other and as such, it would not be improper to conclude that she has implicated the accused falsely, may be due to their inimical relations with each other, just to wreck vengeance against him forgetting that there exists a pious relation between a father and daughter. We have reason to make such observations as living separately from the accused with her mother that too in one room accommodation taken on rent at Village Karian itself speak in plenty that the complainant was not interested to live in the company of her husband, the accused, of course to the reasons best known to her. The conclusion so drawn by us is supported by the own admission of the complainant in her cross-examination as she has admitted that they used to quarrel off and on. Interestingly enough, even her mother PW-2, admittedly was residing away from her family i.e. husband and other members of family to the reasons best known to her. The mother of the complainant has admitted that she was residing separately on account of being tortured by her daughter-in-law. We are, however, not satisfied with any such explanation which to our mind is false. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C. has pleaded that the complainant and her mother both were women of easy virtue. The complainant when cross-examined, has admitted that her mother PW-2 was residing separately at Village Karian for the last 5-6 years whereas her father in his own house at Village Gagla.

19. The story that the victim had urinating problem or was not in a position to pass stool as PW-1 has stated in her cross-examination, has neither come in Ext. PW-1/B nor in Ext. PW-1/C and rather has been introduced for the first time in her cross-examination. The enmity of complainant stands established from her own admission while in the witness box that she had lodged the case against the sister of the accused and her husband. Not only this, but as per her own version, her (devar) Rajesh Kumar DW-2 had torn her clothes and on this, she had registered a case against him in PS Sadar Chamba. Though, in the same breath, it is denied that she threatened her father-in-law and Rajesh Kumar to implicate them in false cases, however, as per her own admission that she had registered a case against DW-2 Rajesh Kumar, her denial is nothing but palpably false. Not only this, as per the version of PW-1 in her cross-examination, the brother of the accused (DW-2) and his wife used to threaten her with dire consequences, therefore, the possibility of she having implicated DW-2 Rajesh Kumar by lodging FIR against him falsely cannot be ruled out. As per the own version of the complainant, she did not lodge any report either against DW-2 or his wife against such threatening advanced to her, therefore, it can be reasonably believed that she has deposed falsely because had there been any threatening given to her by them, she would have definitely lodged the report against them.

20. The complainant has denied her first marriage with someone else at village Mehla, however, DW-3 Pritam while in the witness-box who belongs to Village Mehla, tells us that she was married to his brother Narain. She deserted him and started living with her mother at Karian. When his brother came to Karian to take her back to matrimonial home, she not only refused to do so but hired 5-6 persons who had beaten up his brother said Narain and he died after 10-15 days on account of beatings given to him. Not only this, but the photographs Ext. D-

1 & D-2 in which the complainant is in the dress and ornaments of bride, is visible with her husband (deceased Narain).

21. As per version of the complainant, the accused supported his sister and her husband in the case she registered against them. It is also admitted that she is residing with her mother in village Karian for the last 7-8 months. Such evidence speaks in plenty about her relations with her husband, the accused. She admitted that when the victim child was got medically examined from the doctor in NHPC hospital, the said doctor told that she was suffering from infection. Such evidence on record amply demonstrate the plea raised by the accused in his defence that the victim child was suffering from infection is nearer to the factual position because it is not expected from a father that he would do such a gruesome and brutal act with his own daughter that too below 2 years of age. Otherwise also, we fail to understand that how a fully grown up man like the accused can subject a child below 2 years of age to sexual intercourse. Though, it is denied by the complainant that she has foisted a false case against the accused to grab his property, however, the suggestion so given to her seems to be correct.

22. Therefore, the evidence as has come on record by way of own admission of the complainant and also the application Ext. PW-1/B, she made to Deputy Commissioner, Chamba, her statement Ext. PW-1/C recorded under Section 164 Cr.P.C. and while in the witness box as PW-1 is highly contradictory and inconsistent. On the basis of different statements she made at different occasions, it is crystal clear that the present is a case of no evidence as the complainant has improved her version at each and every stage during the course of enquiry, investigation and trial.

23. The other material prosecution witness is PW-2 Chino Devi, mother of complainant PW-1. The perusal of her statement makes it crystal clear that she has not uttered even a single word qua the victim child having cried during two successive nights. She has also not stated that when the child cried during second night, she made her to sleep with her. Nothing has also come in her statement that when the child cried on the first night, when asked as to what had happened, the accused told that her arm got pressed from him. She has also not said that blood or whitish stains on thighs of the victim child were noticed by her on the following morning when she was getting the child bathed. Therefore, PW-2 Chino Devi has not supported the testimony of PW-1 on all material aspects.

24. As per further version of PW-2 Chino Devi, the victim child when fell ill and was taken to hospital, the doctor told that the child had infection in her uterine. It is at this occasion, she asked from her daughter (PW-1) to tell truth as to what had happened to the child. On this, PW-1 told that the accused had committed sexual intercourse with his own daughter. On 10.2.2015, when the child was taken to doctor for her treatment, they were advised to report the matter to the police. It is thereafter, the matter was reported to Deputy Commissioner, Chamba by the complainant.

25. Interestingly enough, PW-2 Chino Devi tells us that though she had three sons and two daughters, however, since her relations were not cordial with her daughter-in-law, therefore, it is for this reason, she is residing separately at Karian in a room taken on rent. Though, she denied that her daughter (PW-1) was married in village Mehla, however, volunteered that she had only been engaged in the said village. Her testimony is contrary to that of the complainant who has flatly denied that she was married/engaged at village Mehla. The statement of PW-2 Chino Devi that PW-1 was engaged in the said village is nearer to the version as has come on record by way of testimony of DW-3 Pritam Singh, who belongs to village Mehla and as per his version, the complainant was married to his late brother Narain. The photographs Ext. D-1 and D-2 also substantiate this part of the case of the defence. PW-2 Chino Devi though tells us that her daughter after marriage resided with the accused, however, at the same time admitted that PW-1 had filed a complainant against brother and father of accused with the allegations of committing sexual intercourse by them with her. It is proved satisfactorily that the complainant

not only implicated her brother-in-law Rajesh DW-2 but also her father-in-law with the allegation that they both subjected her to sexual intercourse falsely because had there been any truth in the allegations so levelled, at least a case would have been made out and filed against them as well as tried by a competent Court. No such evidence, however, was produced by the prosecution to remove doubts qua the genuineness and authenticity of the allegations so leveled against the accused. The accused, according to her, was residing in her room when the victim child was taken to hospital. At the first instance, it is the accused who himself had taken the child to the hospital whereas on the second occasion, the child was taken by her to the doctor at Karian. It is on such visit, the doctor told that the child had infection in her utrine. The condition of the child according to PW-2 Chino Devi became critical and she used to cry during night meaning thereby that the cries of the child, if any, were not on account of the accused having committed sexual intercourse with her but due to infection in her utrine.

26. The close scrutiny of the testimony of PW-2 Chino Devi, therefore, leads to the only conclusion that she has demolished the entire prosecution case. Learned Trial Judge believing her statement and that of the complainant PW-1 as dependable, has proceeded to record the findings of conviction against the accused which in our opinion are erroneous.

27. The next material witness is PW-7 Dr. Minakshi, M.O. RH Chamba. On internal examination, this witness had noticed redness and swelling in the uterine of the victim child and hymen was found absent. Vaginal laceration was also noticed. Therefore, in her opinion, the child was subjected to sexual intercourse within two months from the date of her examination. Her opinion, however, cannot be termed as very specific and authentic particularly when past medical history i.e. the treatment of the victim child in the hospital(s) was neither in her knowledge nor disclosed to her by the complainant. Above all, as per her own version, she did not consult/refer any book on medical jurisprudence while forming the opinion. The opinion was based upon the medical examination of the victim child she conducted. She admitted that the nature of the injuries she noticed in the vagina of the victim child could have been caused had someone inserted/applied medicine through finger or thumb in vagina by way of domestic treatment. Since as per the own admission of the complainant and her mother PW-2 Chino Devi to the effect that doctor when examined the child found infection in her utrine, the possibility of the injury noticed by PW-7 Dr. Minakshi while applying some medicine in the infected vaginal part cannot be ruled out. Though the suggestion that the child rubbed her vagina with her own finger due to infection were denied by PW-7 Dr. Minakshi being wrong, however, there being infection in vagina, the possibility of the child having rubbed the infected part of her vagina cannot be ruled out. Therefore, the medical evidence is also not dependable so as to believe that the victim child was subjected to sexual intercourse.

28. As per the prosecution case, the victim child was examined in the hospital by a male doctor who advised the complainant to get the child medically examined from Gynecologist. Who was that male doctor and when the victim was got medically examined from him; nothing has come on record. As a matter of fact, the said doctor was a material witness in this case and to our mind, he has been withheld initially during the course of investigation of this case and later on during the course of trial intentionally and deliberately and as such an adverse inference has to be drawn against the prosecution.

29. Now, if coming to the testimony of the I.O. Insp. Tilak Raj (PW-10), though in his examination-in-chief he has corroborated the prosecution case qua the manner in which he conducted the investigation, however, when cross-examined, it is surprising to note that he expressed ignorance to the suggestions put to him which were relevant to find out truth because according to him, he did not enquire from the complainant as to why she was not residing in her own house. He even did not enquire from PW-2 Chino Devi as to why she was not residing in her house. He also did not try to find out the duration of stay of complainant with her mother at Karian nor anything qua the previous medical history/treatment given to the victim child. Not only this, but as per his version, the accused was arrested from his own house, meaning thereby

that he was not residing in Karian. It is again surprising to note that the I.O. did not enquire about the relations of the accused and his wife, the complainant nor about the complaint she lodged against the brother and father of the accused regarding the sexual assault they committed on her. He even expressed his ignorance that the said complaint ultimately had turned false. He has also expressed his ignorance that the relations of the accused with his mother-in-law and complainant (wife) were not cordial. He also did not investigate the matter as to where the accused was residing at the time of the incident. We fail to understand that when I.O. did nothing during the course of investigation, how the allegation against the accused that he had been residing in the room taken on rent by PW-2 Chino Devi at the time when the incident allegedly took place is proved. As a matter of fact, he believed the version of the complainant and her mother PW-2 Chino Devi before him in view of the discussion hereinabove turned false as a gospel truth and not made any effort to enquire into the allegations leveled against the accused by investigating the matter further and to find out the truth by associating independent witnesses and collect evidence through independent source. Learned trial Judge has failed to take note of such factual position having emerged on record and to the contrary recorded the findings of conviction against the accused in a case which was of no evidence.

30. Surprisingly enough, learned trial Judge has criticized the defence evidence in sundry and without any justification thereto because overall act and conduct of the complainant PW-1 and her mother PW-2 Chino Devi leads to the only conclusion that PW-2 Chino Devi was residing away from other members of family in a rented accommodation to the reasons best known to her. In her cross-examination, she has denied that the accused used to reside with PW-1 and PW-2 Chino Devi at Karian at the time of birth of the second child.

31. DW-1 Usha Devi is none else but real sister of PW-1 and daughter of PW-2 Chino Devi. She has denied the prosecution case that the accused was not residing with the said witnesses at the time of birth of male child. DW-2 Rajesh Kumar is none else but real brother of the accused. He has categorically stated that not only he but his father were falsely implicated by PW-1 complainant in a case of molestation and they were arrested. The report after enquiry was, however, found false. The complainant, according to this witness had threatened the accused to implicate him in a false case which she managed and when he was in jail, she had taken her ornaments and other articles from his house. He has also denied that the accused used to reside in the company of the complainant and her mother PW-2 Chino Devi at Karian and that he subjected his own daughter to sexual intercourse. The complainant and her mother PW-2 Chino Devi, both have admitted that the report was lodged against DW-2 and his father by the complainant with the police. The said report, however, as per the evidence available on record had turned false. Therefore, the possibility of the complainant having lodged a false complaint against the accused cannot be ruled out.

32. The testimony of DW-3 Pritam has already been discussed in para supra, hence suffice would it to say that he has proved the previous marriage of the complainant (PW-1) with Narain, his real brother. DW-4 Brijinder Singh is former President of Gram Panchayat Baror. His testimony that no dispute was ever reported to the Panchayat by them has erroneously been taken to believe that their relations were cordial in complete departure to the evidence having come on record because as per the own testimony of the complainant and her mother PW-2 Chino Devi itself their relations were not cordial. Therefore, in our considered opinion, learned trial Judge has brushed aside the evidence produced by the accused in his defence without any justifiable reasons. The same rather was criticized on flimsy grounds.

33. The close scrutiny of the evidence as has come on record by way of the testimony of the so called star prosecution witnesses and also the defence version amply demonstrate that the complainant party in order to wreck vengeance against the accused did not even spared her own daughter i.e. the victim child, a minor below two years of age and thereby not only tarnished the reputation of the accused who happens to be the father of the victim but also put a big question mark on the pious relations between a father and daughter. Not only this, but the false

prosecution story has culminated in a discussion that a father can also assault his own daughter in this manner. In the given facts and circumstances, it is the complainant who in connivance with the local police has implicated the accused in a false case.

34. The evidence as has come on record by way of the testimony of Yogesh Sharma PW-4 who has issued the birth certificate Ext. PW-4/B of the victim child, PW-5 Satish Kumar, Peon in the office of Deputy Commissioner, Chamba who has delivered the application Ext. PW-1/B made by the complainant to Deputy Commissioner, Chamba in Police Station Sadar Chamba, PW-6 Const. Vinod Kumar who had videographed the proceedings when the statement of the complainant was being recorded in the Police Station vide CD Ext. PW-6/A, PW-8 Dr. Kamaljeet who has examined the accused vide MLC Ext. PW-8/B and PW-9 ASI Ashok Kumar who had investigated the case partly could have been used as link evidence had the prosecution otherwise been able to prove its case against the accused beyond all reasonable doubt.

35. The reappraisal of the evidence, therefore, leads to the only conclusion that the complainant and her mother in connivance with the local police has falsely implicated the accused in the present case. The charge framed against the accused for the foregoing reasons, therefore, fails. He, as a matter of fact is entitled to the benefit of doubt and consequently acquittal. Being so, the findings of conviction recorded against the accused are neither legally nor factually sustainable. The impugned judgment, as such, does not stand for the test of judicial scrutiny, hence, deserves to be quashed and set aside.

36. In view of what has been said hereinabove, this appeal succeeds and the same is allowed. Consequently, the impugned judgment is quashed and set aside and the accused is acquitted of the charge framed under Section 376 IPC and Section 4 of the POCSO Act. He presently is undergoing sentence, therefore, if not required in any other case, be set free forthwith. The release warrant be prepared accordingly. The fine amount as imposed upon the accused, if deposited, shall be refunded to him against proper receipt.

37. Before parting, we would be failing in our duty if not point out the overall conduct of the Investigating Agency which has implicated the accused in a false case on the basis of highly interested evidence i.e. the only statement of complainant who was not only inimical to the accused but also to other members of his family. Her mother PW-2 Chino Devi, though helped her daughter, the complainant in getting the accused booked falsely, however, unsuccessfully. Any how, we leave it open to high ups in police department to take steps as warranted to sensitize the officers/I.Os so that any such instance does not reoccur.

38. Learned trial Judge has also failed to appreciate the evidence in its right perspective and swayed only by the severity of the allegations and the alleged incident of rape with a minor below two years of age by none else but allegedly her father. Since the allegations leveled against the accused were highly sensitive having repercussions in the society as a whole, an onerous duty was cast upon learned trial Judge to have examined the given facts and circumstances of the case and also evidence available on record with all circumspection and more care and caution. Due to such an approach in the matter, pious relations between a father and daughter got tarnished. We hope and trust that in a case of this nature, the Investigators, Prosecutors and Adjudicators shall discharge their respective duties in the light of the principles we settled in this judgment and also in accordance with law. With the above observations, the appeal is finally disposed of.

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

Smt. Bhanu Devi .....Petitioner
Versus
State of H.P. & Ors. .....Respondent

CWP No. 3720 of 2009
Decided on : 20.03.2017

Constitution of India, 1950- Article 226- Deceased was a Junior Engineer in Public Works Department – he died in an accident on 19.11.2006 on collapse of a bridge during its load testing – the petitioner is the wife of the deceased who has filed the present writ petition seeking compensation for the death – respondents No. 1 to 4 pleaded that it was the obligation and responsibility of respondent No. 5 to pay damages against any loss or injury which might occur to any person by or arising out of carrying out the contract – held that the death of the deceased during the course of employment is not disputed – according to inquiry report, the construction of bridge was responsibility of the firm and safety measures were to be taken by the firm in consultation with departmental officers – inquiry report also stated that the procedures were not followed while load testing of the bridge which led to its failure – respondent No. 5 did not appear in the Court to give its version – the bridge was being constructed by respondent No. 5 on behalf of respondent No. 1- the bridge would not have collapsed in normal circumstances and respondent No. 5 was to explain the cause of the failure which was not explained – the negligence is proved by the report of the inquiry committee – the fact that compassionate appointment was provided to the family members will not help as the compassionate appointment is provided in all cases of death of employees – there was no contributory negligence on the part of the deceased – the deceased was drawing salary of Rs. 12,704/- per month and after deducting 1/3rd share, the loss to legal heirs comes to be Rs. 8,470/- per month or Rs. 1,01,640/- per annum- the age of the deceased was 41 years and multiplier of 15 will be applicable – the amount of compensation payable would be Rs. 15,24,600/- - the legal heirs are thus held entitled to a compensation of Rs. 15 lacs with interest @ 7.5% per annum. (Para-6 to 27)

For the petitioner : Mr. Digvijay Singh, Advocate.
For the respondents No. 1 to 4. Mr. Pankaj Negi, Deputy Advocate General.
For respondent No. 5 : Mr. J.S. Bhogal, Sr. Advocate, with Mr. Parmod Negi, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge *(Oral)*

Petitioner is wife of deceased Rajinder Singh, Junior Engineer H.P. Public Works Department, expired in an accident dated 19.11.2006 on collapse of a bridge during its load testing. She has approached this Court under writ jurisdiction praying for compensation from respondents for causing death of her husband in the accident in question on account of negligence on the part of respondents.

2. Respondents 1 to 4 have filed reply, admitting the claim with averment that on the basis of indemnification clause 74.2 of the contract agreement signed between department and respondent No. 5, it was obligation and responsibility of respondent No. 5 to ensure and pay damages against loss or injury which might occur to any person (including an employee of department) by or arising out of carrying out the contract. Objection of nonjoinder of insurance company, name of which was to be disclosed by respondent No. 5, has also been taken.

3. It is also objected by respondent-State that there are four legal heirs of deceased whereas present petition has been filed only by one legal heir i.e. wife of deceased Rajinder Singh

and non joinder of necessary party on this count is pleaded by placing legal heir certificate of deceased Rajinder Singh, on record.

4. Respondent No. 5, despite granting opportunities since 2009 till 2012, has not preferred to file reply.

5. I have heard learned counsel for parties and have also gone through records.

6. From arguments of learned counsel for parties and documents on record following undisputed facts emerge:-

(a) That deceased Rajinder Singh, having date of birth 31.1.1965, aged 41 years, working as Junior Engineer with H.P. Public Works Department in the pay scale of Rs. 5800-9200 with gross salary Rs. 12704/- per month was posted in B&R Division, Kalpa Division in Jaunary 2005 vide office order dated 31.12.2005

(b) That respondent No. 5 was awarded work of construction of super structure of 65 meter effective span motorable steel truss bridge over river Satluj at Tashigang, District Kinnaur, H.P. vide letter dated 25.10.1999 issued by Executive Engineer, Kalpa Division with time limit of two years for completion i.e. on or before 10.11.2001.

(c). That launching of bridge and fixing of bearings was done in Jaunary 2005 and July 2005 respectively prior to posting of deceased. Thereafter deck slab was laid in September 2006 and date for load testing was fixed on 19.11.2006 and on that day deceased died on collapse of bridge during load testing.

d. That after incident, respondent-State had constituted Inquiry Committee, consisting of Chief Engineer, PMGSY (Chairman), Superintending Engineer (Mechanical) HPPWD, (Member) and Additional District Magistrate-II (Member) to ascertain cause of fall of steel truss bridge over river Satluj. The committee submitted its inquiry report to the respondent-State copy whereof is on record as Annexure P-4.

(e) That according to inquiry report (Annexure P-4) submitted by Committee constituted by Respondent-State, various drawings submitted by respondent No. 5 were approved by Chief Engineer (Design) HPPWD, Shimla which are as under:- -

1	GAD showing structural steel details bearing Drg. No. BE/99/70/Satluj/RO	Approved vide CE(D) Shimla letter No. 15610-12 dt. 25.2.2000	With note that the Grg. is approved subject to the condition that firm takes full responsibility for the structural stability of the bridge since the bridge system being proposed by it is based on its standard Patent design.
2.	Details of R.C.C. Deck slab bearing Drg. No. BE/99/71/Satluj/RO	-do-	
3.	Detail of Rocker bearing plates bearing Drg. No. BE/99/70/Satluj/14/RI	Approved vide CE(D) Shimla letter no. 10622-64 dt. 29.7.2004.	With note that the firm shall be fully responsible for the safety of bearing as shear connector on bearing is patent of the firm.

4.	Details of Rocker roller plates bearing Drg. No. BE/99/70/Satluj/15/RI	-do-	-do-
5.	Splice Joint details of Intermediate Chord, Drg. No. BE/99/70/Satluj/1-A/RO	Approved vide CE(D) Shimla letter no. 22184-86 dt. 8.11.2004	

(f). That after receiving inquiry report, respondent-State had taken some decisions whereby respondent No. 5 Company was directed to reconstruct the bridge at its own cost and hand over the bridge after load testing by August 2007 and other bridges constructed by respondent No. 5 in the State were also directed to be inspected and with further direction to take remedial measures if required.

(g). That general instructions were also issued to all field officers to observe all safety measures and necessary standard procedures with respect to construction of bridges including technical guidance of senior officers, recording the same in the site inspection books.

(h) That it was also decided that respondent No. 5 would pay relief to the family members of person who lost their lives during load testing. Public Works Department was directed to process the case for DCRG, family pension and compassionate appointment immediately with respect to deceased Junior Engineer i.e. Rajinder Singh.

(i) That communication dated 12.1.2007 circulating these directions issued in pursuance to decision taken by the Government is on record as Annexure P-5.

7. As per inquiry report Annexure P-4, procuring of material was started by respondent No. 5 in March 2000 which continued till March 2001 and material was fabricated by respondent No. 5 at their Sholding khad bridge site and thereafter transported to the site of work at Tashigang and payments of transport of material were made in March, July and September 2004. The launching of the bridge and fixing of bearings was done in January 2005 and April 2005 and due to flash flood in river Parchhu on 26.6.2005, deck slab was laid in September 2006 whereafter on 19.11.2006, the bridge collapsed suddenly during load testing.

8. It has come in inquiry report that on 4.11.2006, respondent No. 5 requested concerned Executive Engineer to carry out load testing whereas drawing of load testing was prepared by respondent No. 5 on 10.11.2006 and the load testing was done on 19.11.2006 and as per reply submitted by respondent No. 5 to inquiry Committee vide letter dated 1.12.2006, probable reason for sudden collapse of the bridge was that during the course of load testing bolt cutting panel 7-8 were found missing which resulted to opening of uni shear joints at the said point, leading to collapse.

9. It has also come in inquiry report that respondent No. 5 had deputed Sh. Ram Morya, site incharge of the work for getting the work executed on its behalf. As per report, construction of bridge was responsibility of firm and as per contract agreement, safety measures, if any, were to be adopted by the firm in consultation with departmental officers. It has also come on record that respondent No. 5 had also not deputed any engineer to supervise the construction of bridge and entire work was being executed in the supervision of foreman

10. According to Inquiry Report, after satisfactory launching of the bridge in 2005, there was a gap of one year and nine months in laying the deck slab and respondent No. 5 and department were required to check camber of bridge, tightening of all nuts and bolts and functioning of bearings. Executive Engineer in his statement to Inquiry Committee claimed

regular supervision of work by the Department and inspection of shuttering work, nut and bolts, camber before locking the deck slab in the presence of site Incharge of contractor, JE and Assistant Engineer. As per claim of Executive Engineer, he inspected site on 11.11.2006 before date of load testing i.e. 19.11.2006 and as per him, everything was found in order. According to him, on 19.11.2006, site Incharge of firm had checked all nuts, bolts and bearings. He further claimed that bolts were visually seen by him before starting the load testing of bridge and Junior Engineer was also present and bearings and movement of rocker and roller bearing was also claimed to be in order.

11. Interestingly, Site Order Book was not produced before Inquiry Committee despite asking for the same. However, Assistant Engineer orally stated that no remarks had been given in Site Order Book. From the record of log books of vehicles of concerned officers, placed before Inquiry Committee, it was found that Chief Engineer(S) had never visited the site since 2002 till 2006 and Superintending Engineer had visited the site twice on 22.10.2003 and 25.6.2005 only. Executive Engineer had inspected site, but only in the year 2006, during September 2006 to November 2006. No other record of site inspection by the Departmental officers, except these inspections was found by Inquiry Committee. In the statements given to the Inquiry Committee Executive Engineer stated that he had inspected side on 11.11.2006 whereas in his tour diary no such inspection of the site on that day was found. Comments of Inquiry Committee regarding Inspection are as under:-

> ***"The bridge was being constructed in the remote area of Kinnaur District. The firm had not deputed any engineer to supervise the construction and the entire system was left to the foreman and his wisdom. The visits of the divisional staff and its supervision seems to be adequate though there seems to be laxity in checking the critical components before load testing viz. nuts and bolts, camber, bearings and approval of load testing drawing. The inspection by the Superintending Engineer have been there twice but not at the time of load testing. The Chief Engineer has not visited the sight nor seems to have given any technical guidance to his staff."***

12. General findings of Inquiry Committee are as under:-

> ***"The drawing of the superstructure approved by the Head Office does not any where mention about the camber to be provided in the bridge. The design calculation provided by the firm show a camber of 10.8 cm. The Assistant Engineer on verbal enquiry stated that camber of 4" was provided during erection. This fact cannot be verified as there is no reference from field office to head office to clarify this discrepancy in drawing, nor any authority available with field office for the same. The providing of camber therefore remains in doubt as the same was missing in approved drawings.***
>
> ***The load testing drawing was not sent by the firm or the field office to the office of Chief Engineer (Sought) for approval. The load testing has been done based on an un-approved drawing."***

13. On the basis of opinion of Design Wing of Public Works Department, Committee has also arrived at following conclusion:-

> ***"(a) As per IRC SP:51-1999, cl. 4.3-'the test load shall be applied in stages so that timely action such as stopping the test can be taken if any untoward distress is observed at any stage.' The suggested stages of test load phase are 30%, 50%, 70%, 80% 90% and 100/-. Unloading should be in the same stage. The next incremental loading should be added only after the deflection under the previous load have stabilized and all the stipulated observations are completed.***

b) As per IRC SP; 37-1991, cl. 6.4.2-'test vehicles will be placed at marked locations on the bridge so as to produce maximum movement effects on girder.' While placing the test vehicles at the desired location on the deck, these will preferably be move from both directions leading to their final positioning.

Both these procedures were not followed while doing load testing. Hence it is inferred that the procedure of load testing adopted was erratic and not as per codal requirements, thus leading to failure of the bridge."

14. Report of Inquiry is not disputed either by respondent-State or respondent No. 5. Respondent No. 5 had not chosen to file reply to rebut the contentions of petitioner or respondents No. 1 to 4 including findings of inquiry report.

15. It is submitted on behalf of respondent-State that it is duty and responsibility of respondent No. 5 to pay compensation to the family of deceased Rajinder Singh as per contractor liability provided in Clause 74.4 of contract agreement dealing with damage to a person and property which reads as under:-

"74.4 Before commencing execution of the work, the Contractor shall without in any way limiting his obligations and responsibilities under the conditions, insure against any damage, loss or inquiry which may occur to any property (excluding that the Department) or to any person (including any employee of Department) by or arising out of carrying out of the Contract."

16. Learned Sr. Advocate, Mr. J.S. Bhogal on behalf of respondent No. 5 submits that deceased was site incharge and he was also party to the negligence causing the accident and it was he only who was responsible for taking all necessary precautions and to check all codal formalities including the approval of test loading drawings prior to conducting load test. It is also contended that family of deceased has been duly compensated with all service benefits and petitioner has also been provided job on compassionate ground and therefore petitioner or legal heirs of deceased are not entitled for any compensation from respondents particularly from respondent No. 5. It is submitted that there are highly disputed questions of facts involved in present case and cause of accident and responsibility thereof is also in dispute between State and the respondent No. 5 and therefore, petitioner is not entitled for any compensation by invoking jurisdiction of this Court under Article 226 of Constitution of India. It is further submitted by learned Sr. Counsel for respondent no. 5 that criminal proceedings initiated against officers and officials of respondent No. 5 have also culminated into acquittal and no negligence on the part of officers and officials of respondent No. 5 has been established and therefore, respondent No. 5 is not liable to pay any compensation to petitioner or legal heirs of deceased and compensation, if any, in all eventualities is to be paid by respondents' department.

17. It is further submitted by Mr. Bhogal that in material testing report got conducted by Inquiry Committee, no fault was found and it was the concerned officers of Department who allowed load testing without approval of drawings and that too in unscientific manner which resulted the collapse of the bridge and therefore respondent No. 5 can not be burdened with responsibility to pay compensation for death of deceased Rajinder Singh or to indemnify the State for compensation to be paid on account of the collapse of bridge.

18. Learned counsel for petitioner has relied upon judgment dated 2.1.2006 rendered by the Division Bench of this Court passed in CWPIL No. 7 of 2014 wherein after discussing plethora of judgments of the Apex Court, it has been concluded that in appropriate case, exercising power under Article 226 of the Constitution, compensation can be awarded to legal heirs of deceased died in accident caused on account of negligence of State authorities or instrumentalities executing the work on behalf of State.

19. In present case, the bridge was being constructed on behalf of respondent No. 1 and the work was being executed on its behalf by respondent No. 5 and during load testing the bridge has collapsed which was not supposed to be collapsed in normal circumstances, in case construction of the same would have been in accordance with prescribed standards with due diligence and care required to be taken during construction of the bridge. Not only respondent No. 5 has failed to explain justifiable reasons for collapse of the bridge rather there is an undisputed inquiry report of the Committee duly constituted by the respondent-Sate which has not been assailed by either of the respondent indicating admission of negligence of concerned agencies.

20. The appointment and posting of deceased is not disputed and it is also undisputed that deceased was on the site under instructions of concerned Executive Engineer who in response to request of respondent No. 5 had allowed the load testing on 19.11.2006 without approving the drawings for the said purpose. Monthly income of deceased and his legal heirs mentioned in legal heirs certificate (Annexure P6) are also not disputed. So far as negligence is concerned that also stands proved by undisputed and accepted report of Inquiry Committee. Even otherwise, it is a case where the facts itself are speaking that it was a case of negligence. Whether negligence is on the part of respondent- Department or respondent No. 5, or both, it is a matter to be decided interse them for which family of deceased should not have been made to suffer. So far as grant of service benefit to the family are concerned, legal heirs of deceased would have been entitled for those benefits even in case of natural death and those benefits are not in lieu of the sudden accidental death of deceased caused due to negligence of respondents. The plea of respondents that petitioner has been provided compassionate appointment is also not of much help for them as it is policy of the State to provide compassionate appointment even in other cases of deaths of its employees caused not due to negligence of department, but for other reasons. Though, these facts may be taken into consideration for determining the amount of compensation.

21. Plea of respondent No. 5 that acquittal of its officers and officials in a criminal case leads to conclusion that there was no negligence on their part is also not tenable, because in criminal cases, proof of criminal negligence i.e. gross negligence beyond all reasonable doubts is required to be proved by prosecution whereas in civil cases only preponderance of probabilities is to be proved. In present case, as discussed above, negligence for the purpose of tortuous liability stands duly proved on the basis of material placed on record. Therefore, petitioner alongwith other legal heirs mentioned in legal heir Certificate (Annexure P-6) is entitled for just and fair compensation for death of deceased Rajinder Singh caused in the accident occurred at the time of load testing of bridge on 19.11.2006.

22. Division Bench of this Court in CWPIL No. 7 of 2014 referred supra has also considered various judgments and methods for calculating the amount of compensation to be paid in such cases and finally concluded that multiplier method is the best method to assess the compensation in accident cases.

23. In the given facts and circumstances of present case, there was no contributory negligence on the part of deceased as the bridge had already been launched prior to his joining i.e. in Jaunary 2005 and argument raised on behalf of respondent No. 5 that after laying down the deck, the bridge did not collapse even after removing shuttering which was heavier than the load of the vehicles brought on the bridge at the time of load testing, negates the plea of contributory negligence. So far as load testing without approving the drawings for the said purpose is concerned, respondent No. 5 had made request to Executive Engineer who was the superior officer of the deceased and responsible to ensure approval of drawings prior to allowing the load testing of the bridge and deceased, in natural course, was supposed to believe completion of all pre requisite requirement by its superior officers who had deputed him on the site for load testing. Therefore, negligence on the part of deceased Rajinder Singh can not be inferred from the material placed on record.

24. Article 21 provides right to life as fundamental right to citizen of India. In normal circumstances right to have family, father, husband and/or son is also a basic human right which is a part of life of citizen and it is the duty of State to protect the said right of citizen and then only, right to life guaranteed under constitution of India can be said to be protected by the State. Basic human rights are also considered as integral part of right to life and therefore, for infringement of such human right on account of negligence on the part of State or its instrumentalities amounts to violation of right to life guaranteed under Article 21 of the Constitution of India and on account of such violation victim is always entitled to be compensated and definitely this Court is empowered under Article 226 of the Constitution of India to award compensation to victims in such cases.

25. In present case, deceased was drawing salary of Rs. 12704/- per month. After deducting 1/3rd salary, loss to legal heirs comes to be 8470/- per month resulting into annual loss of Rs. 1,01,640/-. Age of deceased at the time of death was 41 years and therefore, multiplier of 15 will be appropriate. By applying this method, amount of compensation becomes Rs. 15,24,600/-.

26. In view of aforesaid calculation, legal heirs of deceased are held to be entitled for Rs. 15,00,000/- compensation amount in lump sum. Learned counsel for petitioner submits that in the year 2006, rate of interest was 9% per annum whereas counsel for respondents have submitted that present rate of interest should be considered at the time of awarding rate of interest which is less than 7% as of now. In my view rate of interest @ 7 ½ % per annum from the date of filing of the petition till full and final payment of awarded compensation. The amount of compensation alongwith proportionate interest shall be apportioned in following manner:-

Smt.Bhanu Devi	55%
Kumari Sonal	15%
Prateek	15%
Smt.Roshani Devi	15%

27. Respondents-State has itself taken decision to provide relief to the family of the deceased Rajinder Singh. Though, responsibility to pay compensation has been entrusted upon respondent No. 5, but it is disputing its responsibility stating that there was no negligence on its part and in any case there was contributory negligence on the part of official/officers of the respondent State whereas, by referring clause 74.4 of the contract agreement, it is contended on behalf of State that it was respondent no. 5 who has to pay compensation to the family of deceased. Be it as may be, it is dispute between respondent-State and the respondent No. 5 with regard to pay amount of compensation whereas it is undisputed fact that deceased was employee of the respondent-State and has expired due to collapse of bridge at the time of load testing, being constructed by respondent No. 5 on behalf of respondent State. Therefore, respondent-department and respondent No. 5 are held liable, jointly and severally, to pay amount of compensation to the legal representative of deceased Rajinder Singh. For dispute with regard to liability to pay compensation between respondent-State and respondent No. 5, victims i.e. family/ legal heirs of deceased should not suffer. Therefore, respondent-State is directed to pay the compensation to legal representatives of the deceased subject to its right to recover the said amount from respondent 5 in accordance with contract agreement signed between respondent department and respondent No. 5. The payment of compensation shall be made within three months after production of certified copy of judgment along with details of bank accounts of legal representatives of deceased Rajinder Singh.

28. Petition is allowed in the above term and is disposed of alongwith pending application, if any.

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

Milap Chand ....Petitioner
Versus
State of Himachal Pradesh ....Respondent

Cr. Revision No. 124 of 2007
Date of Decision 25th May, 2017

Indian Penal Code, 1860- Section 325, 323, 506, 147 and 149- Informant was present in his home when the accused came and abused him – they attacked him with fist blows and sticks- two teeth of the informant were broken- the accused were tried and convicted by the Trial Court- an appeal was filed - the Appellate Court convicted the petitioner/accused and acquitted rest of the accused – held in revision that name of PW-5 was not mentioned in the FIR – name of T was mentioned but he was not examined in the Court – there are discrepancies in the testimonies of PW-5 - the testimony of the informant was disbelieved regarding the other accused and cannot be relied upon to convict the petitioner/accused – the Appellate Court had wrongly relied upon the testimony of the informant to convict the petitioner/accused – appeal allowed – judgment of Appellate Court set aside and accused acquitted of the commission of offence punishable under Section 325 of I.P.C. (Para-6 to 11)

For the Petitioner: Shri Manohar Lal Sharma, Advocate.
For the Respondent: Mr.Rupinder Singh Thakur, Additional Advocate General with Mr.Pankaj Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (oral)

On lodging complaint by PW4 Puran Chand, FIR Ext.PW3/A was registered under Sections 147, 148, 149, 323, 506 IPC in P.S. Lamba Gaon, District Kangra on 3.5.2001 at about 2.05 PM, wherein it was stated that on 2.5.2001 at about 8/9 PM when PW4 Puran Chand was present in house of one Tarlok Singh, at that time, petitioner/accused Milap Chand along with Must Ram, Subhash Chand, Guddu, Ajju and Shambhu came and started abusing complainant, to which complainant did not respond, whereupon, after 10-15 minutes, all of them attacked complainant with fist blows and sticks (dandas) and when he was overpowered by Mast Ram and Shambhu, petitioner/accused Milap Chand gave a fist blow on his chin resulting into extraction of two teeth. It was also stated that assailants were intending to kill him (complainant) and he rushed inside the house of Tarlok Chand who witnessed entire episode and accused/petitioner and Shambhu beat him in house of Tarlok Chand whereupon Tarlok Chand and his family members saved him by pushing them outside the house. It was also alleged that during this scuffle, his golden chain and Rs.1000/- were lost and assailants had attacked him because of old enmity on account of property dispute.

2. After lodging complaint, police came into action and carried on investigation. During investigation, spot map Ext.PW7/A was prepared. Complainant was medically examined and weapons of offence were also taken into possession. On completion of investigation, finding prima facie complicity of all six accused, challan was presented in the Court. On conclusion of trial, learned Judicial Magistrate 1st Class convicted all accused under Sections 147, 323, 325 and 506 IPC read with Section 149 IPC and acquitted them under Section 148 read with Section 149 IPC vide judgment dated 4.8.2005 in criminal case No. 454-II/2004/02.

3. In appeal preferred against the trial Court's judgment, learned Sessions Judge, Kangra at Dharamshala vide judgment dated 22.8.2007 passed in criminal appeal No. 20-

P/X/2005 acquitted all accused except convicting present accused/petitioner Milap Chand under Section 325 IPC.

4. Present petition has been filed assailing conviction of petitioner/accused under Section 325 IPC upheld by learned Sessions Judge in appeal. No appeal against acquittal of other accused, passed by learned Sessions Judge, has been preferred.

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

6. Learned counsel for petitioner submits that for same set of evidence, which is inseparable with respect to offence allegdly committed by all accused persons, learned Sessions Judge has erred in convicting petitioner/accused despite the fact that the same evidence was disbelieved for upholding conviction of co-accused and further submits that grounds on which other co-accused have been acquitted, petitioner/accused is also entitled for acquittal. He also relied upon prouncement of the Supreme Court in ***Ram Laxman vs. State of Rajasthan, (2016)12 SCC 389*** wherein it is held:-

> ***"6. Strangely, the High Court disbelieved Ganesh qua the other co-accused and granted them acquittal but accepted his testimony in respect of the appellants by explaining that the maxim "falsus in uno, falsus in omnibus" stands disapproved since long as per the judgment of this Court in Ugar Ahir vs. State of Bihar AIR 1965 SC 277.***
>
> ***7.....No doubt, it is an established principle of criminal law in India that only on account of detecting some falsehood in the statement of a witness who is otherwise consistent and reliable, his entire testimony should not be discarded. It is equally settled law that if a witness is found undependable and unreliable his evidence cannot be split to grant benefit to some co-accused while maintaining conviction of another when in all respects he stands on the same footing and deserves parity."***
>
> ***(at p.392)***

7. Whereas, learned Deputy Advocate General has supported the impugned judgment stating that act of petitioner/accused i.e. giving fist blows to complainant Puran Chand is distinct, different and separable from other accused and therefore, learned Sessions Judge has committed no mistake in convicting the petitioner/accused on the basis of evidence which is separable qua petitioner/accused.

8. In FIR Ext.PW3/A Tarlok Chand and his family members have been mentioned as persons present on spot who saved complainant but there is no reference of presence of PW5 Jagdish Chand, whereas in Court Tarlok Chand was not examined, but PW5 Jagdish was examined as a witness claiming that he saved the complainant from clutches of accused persons. FIR was lodged after fourteen hours from alleged incident. It is not a case where statement of complainant was recorded on spot or immediately after incident, but the same was recorded on next day at 2.05 PM i.e. after fourteen hours of the incident. Therefore, omission to mention the name of PW5 Jagdish Chand is serious lapse. It appears that this witness was introduced at later stage to substantiate the story of prosecution as claimed by complainant. It also stands fortified from statement of complainant PW4 Puran Chand, as in FIR Ext.PW3/A and also in his statement in Court, he stated that accused persons gave beatings to him in courtyard of Tarlok Chand from where he ran into house of Tarlok Chand, where he was saved from clutches of petitioner/accused and Shambhu by Tarlok Chand and his family members by pushing those persons out of the house. But PW5 Jagdish Chand stated that when he reached on spot, PW4 complainant was being beaten outside the house where he intervened and saved PW4 from clutches of accused. There is no reference in his statement with respect to fact that Mast Ram, other accused and Shambhu were chasing complainant PW4 Puran Chand inside the house of Tarlok Chand. These discrepancies not only render testimony of PW5 unreliable but also caste doubt about veracity of complainant PW4. Presence of PW5 on spot is doubtful for absence of his

name in FIR and further in his deposition in Court he has given a different version about incident.

9. Now only statement of complainant remains to be assessed. It is true that it is quality of evidence which matters and conviction can be based upon sole evidence of complainant, more particularly when the same is corroborated by medical evidence or other evidence on record and for that reason learned Deputy Advocate General submits that in present case evidence of PW4 qua the fist blows given by petitioner/accused is corroborated by statements of PW1 Dr. Sunil Tiyari and PW6 Dr.Sandeep Rena and there is ample evidence to convict the petitioner/accused under Section 325 IPC. Had there been only the petitioner/accused impleaded as an accused in the case, the statement of complainant would have been sufficient to convict the petitioner/accused. But in present case there are six accused implicated for commission of one and the same offence in one episode and five out of six have been acquitted disbelieving the statement of complainant PW4 against them but petitioner/accused has been convicted on the basis of the same evidence. Pertinently, State or complainant has not assailed acquittal of other co-accused.

10. It is well settled that on the basis of acquittal of co-accused, acquittal of another accused cannot be claimed in case evidence qua each of them is distinct, different and separable. But in present case only statement of PW4 that Shambhu and Mast Ram caught hold and petitioner/accused gave fist blow to chin is the basis to convict the petitioner/accused but Mast Ram and Shambhu have been acquitted despite the fact that they had also been charged under Section 325 read with Section 149 IPC along with other accused. Statement of PW4 Puran Chand that all accused attacked him, gave beatings and Mast Ram and Shambhu overpowered him and petitioner/accused gave fist blows on his chin and he was beaten by all accused with fist blows and sticks is inseparable. It cannot be bisected for punishing the petitioner in isolation and statement that Milap Chand gave a blow to complainant Puran Chand can also not be taken into consideration in isolation. Therefore, learned Sessions Judge has committed a mistake by convicting petitioner/accused under Section 325 IPC while acquitting co-accused on the same set of evidence.

11. In present case statement of PW5 Jagdish was found to be undependable and unreliable and statement of complainant PW4 Puran Chand with respect to alleged involvement of all accused and their individual act in alleged incident is inseparable and has been discarded in case of other co-accused and once it has been considered unreliable qua co-petitioner, it cannot be relied upon to convict the petitioner/accused. Therefore, in view of above discussion, appeal is accepted and petitioner/accused is acquitted for offence under Section 325 IPC. His bail bonds stand discharged. Record of the Courts below be sent back forthwith. All pending miscellaneous application(s), if any, also stands disposed of in above terms.

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

Shri Jai Parkash and others …Petitioners

Versus

State of Himachal Pradesh and others …Respondents

CWP No. 2730 of 2010
Date of Decision: 30.6.2017

Constitution of India, 1950- Article 226- Road was constructed without acquiring the land and without consent of the owners/petitioners- land of other villagers was utilized for the construction of the road by acquiring the same –the petitioners filed the present petition seeking direction to pay the compensation to them- the respondents stated that there is delay on the part of the

petitioners – held that no express or implied consent of the owners has been proved- the State cannot discriminate between the citizens – a person has a constitutional right to the property – the State cannot deprive a person of the property except in accordance with law- the petition allowed- respondents directed to initiate acquisition proceedings for acquiring the land.

(Para-6 to 22)

Cases referred:

Jai Ram Vs. State of H.P. & others 2011 (3) Shim. LC 91

Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and others (2005) 7 SCC 627,

K.B. Ramchandra Raje Urs (dead) by legal representatives Vs. State of Karnataka and others (2016) 3 SCC 422,

Jeet Ram Vs. State of Himachal Pradesh and others, Latest HLJ 2016 (HP) 615

For the Petitioners: Ms.Shashi Kiran, Advocate.

For the Respondents: Mrr.V.S. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (oral)

This petition has been filed against omission of respondents to acquire the land of petitioners in accordance with law for utilization to construct Mari-Ka-Ghat Dingar-Kinnar-Mathana Road in Mauja Lana Chhabyul, Tehsil Pachhad, District Sirmaur, H.P., seeking directions to respondents to pay suitable compensation/damages on account of occupation and utilization of land including damage caused to trees etc. of petitioners for the said road from the date of actual taking over the possession of acquired land in accordance with law under the relevant provisions of relevant Act.

2. Petitioners' case is that aforesaid road was constructed without acquiring the land in accordance with law and also without consent of the owners. However, lands of other villagers of village Lana Chhubyal was utilized for construction of the same road was acquired by respondents vide award No. 14 of 2001, announced on 11th February, 2002 by Land Acquisition Collector, HPPWD South Zone, Winter Field, Shimla-3 (Annexure P-3) and also that land of adjacent villages utilized for the same road was also acquired by respondents by passing award No.4 of 2001 dated 5th October, 2001, wherein amount of compensation was enhanced by learned District Judge in Land References preferred by land owners therein and the said enhancement was upheld by this Court in RFA No. 187 of 2007, decided on 4.1.2008, titled State of Himachal Pradesh and Others Vs. Amar Singh and other connected matters (copy of which is on record as Annexure P-8).

3. Petitioners have also placed on record jamabandies (Annexure P-1) and spot tatima (map) (Annexure P-2) of village Lana Chhabyal on record, indicating the ownership of petitioners and construction of road thereupon including Khasra Nos. 270/1, 272/1, 273/1, 276/1 and 339/148/2, belonging to them.

4. Perusal of award No. 14 of 2001 (Annexure P-3), reveals that in notification dated 8.9.1998 issued under Section 4 of the Act, Khasra Nos. 270/1, 272/1, 273/1, 276/1 and 339/148/2 were also included in the list of Khasra numbers proposing to acquire the land comprised therein, utilized for construction of road. However, these Khasra numbers were excluded in notification under Sections 6 and 7 of the Act for the reasons best known to the respondents. Being aggrieved by omissions and commissions on the part of respondents, present petition has been filed.

5. In reply to the petition, utilization of lands of petitioner for construction of road, non-payment of compensation for the said utilization, acquisition of lands of co-villagers vide award No. 14 of 2001 (Annexure P-3), payment of compensation to the land owners for utilization

of their lands for the same road referred in RFA No. 187 of 2007, titled as State of Himachal Pradesh Vs. Amar Singh (annexure P-8), initiation of proceedings to acquire the land of petitioners and dropping thereof, is not disputed. However, relying upon pronouncement of the Apex Court in case State of Maharashtra Vs. Digamber (1995) 4 SCC 683 and decision of this Court rendered on 2.3.2013 in ***CWP No. 1966 of 2010, titled Shankar Vs. State of Himachal Pradesh***, dismissal of the petition has been prayed on the ground of delay and laches on the part of petitioners to approach the Court. It is further contended that petition is not maintainable for the reasons that there are highly disputed questions of law and fact, which can be adjudicated only in civil suit by leading evidence and as the petitioners have lost their remedy to file civil suit, because of expiry of limitation, the petition deserves to be dismissed.

6. Though it is stated in the reply that proceedings to acquire the land of petitioners were allowed to lapse for reasons explained in detail in preliminary submissions, but preliminary submissions finds no mention of any such reason. It is also contended that petitioners had never objected to construct the road through land in question, rather they voluntarily permitted to do so without raising any objection and therefore, they are not entitled to raise demand for compensation at this stage.

7. In a judgment of Full Bench of this Court, passed in *Shankar Das'* case supra, relied upon by the respondents, it was held as under:-

> *"As per the view of the majority, the reference is answered as follows:-*
>
> *"In cases where the State has not taken steps under the Land Acquisition Act for the purpose of construction of roads on the ground that the required land had been willingly surrendered either orally or otherwise or with implied or express consent by the owners at the relevant time, they can invoke the jurisdiction refuting such express or implied consent or the stand of the State on voluntary surrender, only within the time within which such a relief can be claimed in a Civil Suit. Once such a question is thus raised in a Writ Petition the same can be considered in the writ petition itself."*

Respondents have also referred judgments passed in ***CWP No. 649 of 2015, Ram Murti & others Vs. State of H.P. & others, decided on 29.4.2015, CWP Nos. 661 to 664 of 2015, Nikka Ram and others Vs. State of Himachal Pradesh and others, decided on 15.7.2015, RSA No. 6 of 2014 State of H.P. and others Vs. Baldev and others, decided on 14.10.2015 and CWP No. 6945 of 2013 Sant Ram & others Vs. State of H.P. & others, decided on 16.9.2013***, wherein, as per respondents, this Court had declined to issue directions to pay compensation to land owners in similar circumstances. It is also submitted that judgment in *Sant Ram's* case has attained finality as the Apex Court had also dismissed SLP (C) 215/2015 on 28.11.2006 preferred by land owner petitioner, with observation that no legal and valid ground for interference was found.

8. Petitioners have relied upon judgments passed by this High Court in ***Jai Ram Vs. State of H.P. & others 2011 (3) Shim. LC 91, CWP No. 5023 of 2010 Tek Chand and others Vs. State of Himachal Pradesh and another*** decided on 7.7.2016 ***and CWP No. 3467 of 2009 Shri Prakarti Bhushan Singh Vs. The State of H.P. and others***, decided on 11.8.2016, wherein as per petitioners, direction to acquire land has been issued in similar circumstances. Reliance has also been put on judgment dated 29.10.2015 passed by the Apex Court in Civil Appeal No. 9105 of 2015 (arising out of SLP (C) No. 2373 of 2014) titled ***Raj Kumar Vs. State of H.P.***, wherein it has been held as under:-

> *"There is in our opinion considerable merit in the submission made by Mr. Nag. It is true that the appellant had approached the High court rather belatedly inasmuch the land had been utilized for some time in the year 1985-86 while the writ petition was filed by the appellant in the year 2009. At the same time it is clear from the pleadings in the case at hand that the user of the land owned by the appellant is not denied by the State in the counter affidavit filed before the High Court or that*

filed before us. It is also evident from the averments made in the counter affidavit that the State has not sought any donation in its favour either by the appellant or his predecessor in interest during whose life time the road in question was constructed. All that is stated in the counter affidavit is that the erstwhile owner of the land "might have donated" the land to the State Government. In the absence of any specific assertion regarding any such donation or documentary evidence to support the same, we are not inclined to accept the ipsit disit suggesting any such donation. If that be so as it indeed is, we fail to appreciate why the State should have given up the land acquisition proceedings initiated by it in relation to the land of the appellant herein. The fact that the State Government had initiated such proceedings is not in dispute nor is it disputed that the same were allowed to lapse just because the road had in the meantime been taken under the Pradhan Mantri Gram Sadak Yojna. It is also not in dispute that for the very same road the land owned by Kanwar Singh another owner had not only been notified for acquisition but duly paid for in terms of Award No. 10 of 2008."

9. It is submitted on behalf of petitioners that in present case, there was no implied or express consent of the owners of land and for that reason only State had initiated process for acquisition of land in question by taking steps for issuing notification under Section 4 of Land Acquisition Act and also after acquiring land not only of adjoining villages, but also of co-villagers, used for the same road, compensation was paid to land owners and as there was no implied or express consent of owners in present case, it is not covered by law laid by the Full Bench of this High Court in *Shankar Das's* case supra, in which the owners had willingly surrendered their lands either orally or otherwise or with implied or express consent for construction of road but, later on, were asking for compensation.

10. The ratio of law laid down by Full Bench of this Court in *Shankar's case* supra is applicable to those cases where State not only has not initiated any steps for acquisition of land but also claims consent of land owners for construction of road. In present case Respondents have not placed on record any document to establish consent of owners at the time of construction of road or any point of time thereafter. Rather, State had initiated process for acquisition, termination whereof was for delay and laches on the part of State but not for consent of land owners. Therefore, judgment of *Shankar Das's* case (FB) supra is not applicable to present case.

11. Pronouncements in all other cases relied upon by respondents-State also do not deal with the issue where the road was constructed, compensation was paid to some of adjoining land owners and acquisition of land, utilized for construction of road, was proposed by undertaking process for issuing notification under Section 4 of the Land Acquisition Act, but allowed to lapse for uniformed reasons by excluding the land of the petitioners from notification under Sections 6 and 7 of the Act either for extraneous reasons or laxity on part of authorities/department concerned, despite having no consent of land owners to utilize the land for road construction. Therefore, on facts, case law cited by respondents is distinguishable and not applicable in the present case.

12. In *Sant Ram's* case, land of petitioners therein was utilized for construction of road, but without undertaking any process for its acquisition under the Act. Whereas, in present case, State itself had proposed acquisition of land in question by drafting and proposing notification under Section 4 of the Land Acquisition Act for publication. Therefore, ratio of law laid down in the said case is not applicable in present case. In *Ram Murti's* and *Nikka Ram's* case, road was construction under Pradhan Mantri Gramin Sarak Yojna (PMGSY) on popular demand of people of area, only after voluntarily surrender of possession of their lands by villagers, whereas in present case, road is not constructed under PMGSY and there is nothing on record to establish that road was constructed on popular demand of people of area only after surrender of possession by villagers. Rather, contrary to that, there was a proposal for acquisition of land in question which was deliberately allowed to be lapsed for inaction on part of

State, but payment of compensation to other land owners for utilization of their land for the same road has not been denied. Therefore, State cannot claim benefit on account of its own inaction as proposal of State has raised hope and legitimate expectation that sooner or later their land is going to be acquired.

13. In *Baldev Sing's* case (RSA No. 6 of 2014), relief of compensation or recovery of possession was declined by the Court for the reason that plaintiffs had not prayed for the said relief in their pleadings and no foundation was laid for that relief. Whereas in present case, petitioners have specifically prayed for direction to respondents to pay compensation after acquisition of land in question. Therefore, this judgment is also not relevant in present case.

14. In view of above discussion, pronouncements relied upon by respondents are not applicable in present case and cannot be made basis to reject the claim of petitioners.

15. In *Jai Ram's* case (2011(3) Sml.LC 91) supra, relied upon by petitioners, this Court has held that in absence of consent of land owners, the act of State or its agencies, to utilize private lands without payment of compensation to the land owners, is not permissible under law being contrary to mandate of Article 300A of the Constitution of India and not raising of objection by land owner, when his land is being encroached upon either by State or its agencies or even by private persons, does not disentitle him to seek his legal remedy.

16. Though Article 19 (f) of the Constitution of India, declaring right to acquire, hold and dispose of property a fundamental right, has been omitted by Constitution (44th Amendment) Act, 1978 w.e.f. 20.6.1979, however by the same Amendment Act, Chapter 4 in part XII of the Constitution, containing Article 300A declaring that no person shall be deprived of his property save by authority of law, has been inserted w.e.f. 20.6.1979.

17. In case ***Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and others (2005) 7 SCC 627***, the Apex Court, having regard to the provisions contained in Article 300A of the Constitution, has held it to be akin to a fundamental right and in view of these provisions, the State, in exercise of its power of eminent domain, can interfere with the right of property of a person by acquiring the same, only for a public purpose and paying reasonable compensation therefor.

18. The Constitution provides protection from depriving a person of his property except by due process of law. State cannot be permitted to practice and propagate principle of might is right, as "Rule of Law" is the basic essence of the Constitution and any arbitrary act is antitheses to rule of law. In present case, State has adopted pick and choose method and has acquired land of some of land owners utilized for construction of the same road, but has left petitioners without paying any compensation.

19. State is custodian of rights of citizens and life and property of citizens is to be protected, but not to be grabbed by the State. It is duty of State to establish and maintain "Rule of Law".

20. In ***K.B. Ramchandra Raje Urs (dead) by legal representatives Vs. State of Karnataka and others (2016) 3 SCC 422,*** the Apex Court has held that writ petitioners may not be entertained and any order thereon may not be passed for inordinately delayed in filing petition with further observation that this issue need not to detain the Court from entertaining such petition as time and again it has been held that while exercising jurisdiction under Article 226 of Constitution, the High Court is not bound by any strict rule of limitation and if substantial issue of public importance touching upon the fairness of governmental action is raised, the delayed approach to reach the Court, will not stand in the way of exercise of jurisdiction by the Court. In present case, it is undisputed that land owners of adjacent villagers were compensated for using their lands for construction of the same road for which land of petitioners was utilized, but despite initiating proposal for publication of Section 4 notification under Land Acquisition Act, intended acquisition of land of petitioners and other villagers, was dropped, depriving the petitioners from lawful compensation, for which they were and are entitled. State is supposed to

act impartially and fairly, but the facts in the present case establish that State has acted arbitrarily and unfairly, therefore, plea of delay and laches raised by respondents to oust petitioners, cannot be a ground to dismiss present petition.

21. Co-ordinate Bench of this Court almost in similar circumstances in ***Shankar Singh and others Vs. State of H.P. and another, CWP No. 3031 of 2009, decided on 7.7.2016 and Shri Prakarti Bhushan Singh Vs. The State of H.P. and others CWP No. 3467 of 2009, decided on 11.8.2016*** has directed respondent-State to acquire land, utilized for construction of road, in accordance with law. In *Tek Chand's* case (CWP No. 5023 of 2010) also coordinate Bench of this Court, relying upon ***Jeet Ram Vs. State of Himachal Pradesh and others, Latest HLJ 2016 (HP) 615 and Lal Chand Vs. State of H.P. and others, CWP No. 2540 of 2009, decided on 13.5.2016,*** wherein it is held that no person can be deprived of his property without following the due process of law, has restrained the respondents-State from utilizing the land of private owners under Pradhan Mantri Gram Sarak Yojna (PMGSY) for the purpose of construction/widening of road without express consent of land owners or without the said land being donated by land owners to the concerned Department or without acquiring the said land as per provisions of Land Acquisition Act.

22. In view ratio of law laid down by the Apex Court and in pronouncements of this High Court, in the given facts and circumstances of the case in hand, as discussed above, petition is allowed and respondents are directed to initiate acquisition process within three months from production/receipt of copy of this judgment, whichever is earlier, to acquire land of petitioners utilized without paying any compensation for construction of road and to ensure completion of process and payment of compensation as per entitlement of petitioners within time stipulated in the relevant provisions of law as applicable. The petition stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Sh. Gian Chand .....Petitioner.

Vs.

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

CWP No.: 175 of 2017
Date of Decision: 18.07.2017

Constitution of India, 1950- Article 226- Petitioner is a president of the school management committee and has been authorized to file the present writ petition by the Committee by passing a resolution – permission was given by respondent No. 2 to exchange the land in view of the land encroached by respondent No. 7 – a writ petition was filed for quashing the permission and to initiate the proceedings for encroachment – held that respondent No. 7 had agreed to exchange the land found to be have been encroached by him after demarcation – the permission was granted for the exchange by the Competent authority – the land exchanged by respondent No. 7 is more valuable and situated adjacent to the school which can be utilized by the school for its activities – the exchange was in the best interest of the school – petition dismissed. (Para-4 to 6)

For the petitioner: Mr. Neel Kamal Sharma, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals, for respondents No. 1 to 6.

Mr. Surinder Saklani, Advocate, for respondent No. 7.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

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

"(i) That the impugned communication dated 27.10.2016 issued by respondent No. 2 contained in Annexure P-8 may kindly be set aside and quashed.

(ii) That the other orders passed by the Education Department and by any other authority on the basis of Annexure P-8 may also kindly be quashed and set aside.

(iii) That the Education Department may very kindly be directed to initiate proceedings against respondent No. 7 for removing the encroachment which has been done by way of constructing a house over Khasra No. 645/413 and Khasra No. 419.

(iv) That the respondent No. 7 may kindly be directed to pay all the monetary benefits which he has received in the form of rent from Civil Supply Corporation to the Education Department alongwith upto date interest.

(v) That the Education Department may very kindly be directed to got demarcate the entire land of Government Senior Secondary School Baldwara and if encroachment is being found in that eventuality to start appropriate legal proceedings against the encroachers.

(vi) That the State of H.P. may kindly be directed to hold an enquiry and to fix the liability of the officers who are responsible for not taking action against the respondent No. 7 who is an encroacher.

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

(viii) That any other order, which this Hon'ble Court deems just and proper in the facts and circumstances of the case, may also kindly be passed in favour of the petitioner and against the respondents in the interest of justice."

2. Petitioner claims himself to be President of School Management Committee of Government Senior Secondary School Baldwara, District Mandi, H.P. and as per the averments made in the petition, the School Management Committee has duly authorized him by way of a resolution to approach this Court qua the dispute, which has arisen on account of respondent No. 2 granting permission in favour of the private respondents for exchange of land in lieu of land encroached upon by respondent No. 7 of the School concerned.

3. We have heard the learned counsel for the parties and have also carefully perused the pleadings.

4. Vide impugned Annexure P-8, which is a communication, dated 27th October, 2016, addressed by Under Secretary (Revenue) to Additional Chief Secretary (Revenue) to the Government of Himachal Pradesh, Under Secretary (Revenue) to the Government of Himachal Pradesh has communicated the approval of exchange of land referred therein in favour of respondent No. 7, on the conditions contemplated therein. Respondent No. 7 in his reply has explained that in the course of demarcation, which was carried out, it was found that the house of respondent No. 7 was constructed on Government land. Private respondent made a statement that as the said land on which he had constructed the house, was in his possession from the time of his forefathers and had come to his share during family settlement/partition, on which he had already constructed a *pucca* slab house, he was ready and willing to transfer the land in lieu of the same from his own land. Application to this effect was sent by the then Naib Tehsildar, Sub Tehsil Baldwara to Sub Divisional Officer (Civil), Sarkaghat. It is further mentioned in his reply that the land which is proposed to be transferred to the School is adjoining the School, over which the School is situated and can be best utilized for the School. It is also mentioned in the

reply that after the permission of exchange of land was accorded by the competent authority, mutation also stands attested in favour of the private respondent on 15.12.2016 (Annexure R-7/8). It is further mentioned in the reply that whereas the land which now has been granted to the said respondent by way of exchange belonging to Government is worth Rs.48,841/-, the value of the land of the private respondent, which stands transferred to the State, is more than Rs.10,00,000/-. It is further stated in the reply that the petitioner has filed the writ petition with the intent to create hurdles in the smooth exchange of land.

5. In our considered view, there appears to be merit in the contention of the private respondent that this petition has been filed by the petitioner just to harass respondent No. 7. Though as per the petitioner, he has been authorized by the School Management Committee to pursue the matter in this regard, however, the petition has not been filed in the name of the School Management Committee and the petitioner has filed this petition in his own name and in his individual capacity. During the course of arguments, learned counsel for the petitioner could not satisfy us that the land which now stands transferred to respondent No. 7 is more valuable than the land of respondent No. 7, which now stands transferred in the name of the School. He also could not deny the fact that the land of respondent No. 7 which now stands transferred in the name of School, is abutting the land of the School and can be better utilized for the School for its activities. In the present case, keeping in view the fact that respondent No. 7 had constructed a house over the land which belonged to the School and that he was willing to give his own land to the School in lieu of his having occupied the land of the School, the competent authority approved the exchange of land. Learned counsel for the petitioner was not able to demonstrate that exchange of land so permitted vide Annexure P-8, was either without authority or was an act of colourable exercise of powers. Further, in our considered view, what the authority has done vide Annexure P-8 is an equitable act keeping in view the peculiar facts and circumstances of the case. During the course of arguments, learned Advocate General has apprised the Court that exchange of the land has been permitted taking into consideration the best interest of the School and after the authority satisfied itself that the land being offered by way of exchange by respondent No. 7 to the School was not only abutting the land of the School but was such as could be best utilized for the School.

6. In view of the above discussion, as we do not find any merit in the writ petition, the same is dismissed, so also miscellaneous applications, if any. No order as to costs.

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

State of H.P. & Ors. ...Appellants

Versus

Dhani Ram & another ...Respondent

RFA Nos. 202 of 2011 alongwith RFA No. 171 to 181 of 2011, 197 to 201 of 2011, 251 and 252 of 2011 and Cross Objections No. 370 of 2011, 436 to 441 to 449 of 2011, 452, 455, 456 and 702 of 2011.
Judgment reserved on 28.06.2017.
Date of Decision: 31/07/2017

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of the road – Reference Court awarded uniform compensation of Rs. 7 lacs per bigha for all categories of land irrespective of classification – aggrieved from the award, the present appeal has been filed- held that land was acquired for the construction of the road – the purpose of acquisition was same and the classification loses its significance – no error was committed by the Reference Court while awarding uniform compensation – the sale deed produced by the State was executed in the year

2001 and pertained to village D – the land was acquired in the year 2005 in Village T – the sale deed did not have proximity in time – the exemplar land was also not similar to the acquired land – 30% amount was rightly deducted by Reference Court – no rent/damage was awarded for the use of the land from the date of possession till date of notification – appeal dismissed, cross objection allowed and additional interest allowed @ 15% per annum from the date of possession till the date of notification. (Para-5 to 29)

Cases referred:

HP Housing Board Versus Ram Lal, 2003 (3) Shim. LC (64)
Union of India Versus Harinder Pal Singh, 2005 (12) SCC 564
Gulabi Vs. State of H.P., 1998(1) Shim. L.C. 41
Executive Engineer & anr. Versus Dilla Ram, Latest HLJ (2008) (2) HP 1007)
Kaushlya Devi Bogra and others versus Land Acquisition Collector Aurangabad, AIR 1984 SC 812
State of Himachal Pradesh and another Versus Sanjeev Kumar and another, 2010 (2) S.L.J (HP) 1225
The Collector of Lakhimpur Versus Bhuban Chandra Dutta, AIR 1971 SCC 2015
Union of India Versus Joginder Singh and other connected matters Latest HLJ 2009 (HP) 416
GM, Northern Railway Versus Guzar Singh and others, 2014 (3) Shim. LC 1356
Indian Council of Medical Research Versus T.N. Sanikop and another, 2014 (16) SCC 274
Major General Kapil Mehra and others Versus Union of India and another, 2015 (2) SCC 262
Chandrashekar (Dead) by LRs. and others Versus Land Acquisition Officer, (2012) 1 SCC 390
Atma Singh (Dead) through LRs. and others Versus State of Haryana and another, (2008) 2 SCC 568
Balwan Singh and others Vs. Land Acquisition Collector and another, 2016 (13) SCC 412
R.L. Jain(D) By LRs. Versus DDA, 2004 (4) SCC 79
Madishetti Bala Ramul, Versus Land Acquisition Officer, 2007(9) SCC 650
Tahera Khotoon Versus Land Acquisition Officer, (2014) 13 SCC 613

For the appellants/respondents :	Mr. Rupinder Singh Thakur, Additional Advocate in cross objections General, in all cases
For the respondents/Cross-	Mr. J.L. Bhardwaj with Objectors Sanjay Bhardwaj, in all cases Advocates

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

These appeals and Cross Objections arising out of common award passed by learned District Judge, Bilaspur in Rent Reference Petitions Nos. 129 to 143 and 148 to 151 of 2008 involves common questions of law and facts and are being disposed of by a common judgment.

2. Brief facts of the case, necessary for deciding these appeals and cross-objections, are that land of respondents/cross-objectors, situated in village Tepra, Sub Tehsil Namhol, District Bilaspur was utilized for construction of 'Namhol Bahadurpur road' and Notification under Section 4 of the Land Acquisition Act (here-in-after referred to as 'the Act') issued, subsequent thereto, on 30.07.2005, was published in official gazette as well as in two daily newspapers on 13.08.2005, whereafter, completing codal formalities, Land Acquisition Collector passed a common award with respect to land of respondents/cross-objectors by assessing market value of acquired land on the basis of classification of land as under:-

	Classification of land	**Rate per Bigha**
1.	Andrali Aval	Rs.61,666.00

2.	Andrali Doem	Rs.51,666.00
3.	Baharli Aval	Rs.41,666.00
4.	Baharli Doem	Rs.20,000.00
5.	Khariyater & Banjer	Rs. 5,000.00

3. Respondents/Cross-Objectors had preferred land references under Section 18 of the Act mentioned supra, against the award of Land Acquisition Collector before learned District Judge, who on the basis of material before him, had enhanced the compensation by awarding uniform rate of Rs.7.00 lakhs per bigha for all categories of land, irrespective of its classification, alongwith other consequential benefits in accordance with provisions of the Act. The said award is under challenge in these appeals and cross objections.

4. I have heard learned Additional Advocate General as well as learned counsel for respondents/cross-objectors and have also gone through the entire record of the case.

5. All these reference petitions were clubbed together by learned District Judge and evidence has been led only in the lead case. Five witnesses have been examined on behalf of respondents/cross-objectors. PW-1 Babu Ram, Registration Clerk, Office of Sub-Registrar-cum-Naib Tehsildar, Sadar Bilaspur has proved execution and registration of sale deed of the land measuring 0-1 bigha (1 biswa), situated in Mauja Tepra, Tehsil Sadar, District Bilaspur by PW-2 Garja Ram in favour of PW-3 Kuldip for a consideration of Rs.50,000/-. In cross-examination, he has expressed his ignorance about the fact that PW-2 has sold his land for lesser consideration than amount of consideration shown in the sale deed. He has shown his inability to tell actual sale value of land in question at that time.

6. PW-2 Garja Ram, Vendor has endorsed the execution of sale deed Ex. PW-1/A on 24.11.2004 for the reason that he was in dire need of money on account of marriage of his daughter. He has denied the suggestion that sale consideration was lesser than that of shown in sale deed and higher sale consideration has been depicted in sale deed to claim higher compensation. PW-3 Vendee, in his statement, has also reiterated the version of PW-1 and PW-2 further stating that land in question was purchased by him as it was abutting to his land.

7. Land owners, PW-4 Kanshi Ram and PW-5 Lekh Raj, have also been examined on behalf of all land owners. Both of them, in their statements in the Court, have deposed that vehicular traffic on the 'Namhol-Bahudarpur road' constructed in the year 1986 was started in the year 1988 and for construction of the said road their land was utilized and the value of their land was about Rs.50,000/- per biswa at that time, various trees standing on their land were also uprooted and they were sowing cash vegetables in the said land and further that Cellular Companies are paying Rs.4,000/- per month for raising tower upon their land. They have prayed for compensation w.e.f 1988. They have alleged that stones excavated from their land were also utilized by the department for raising retaining walls during construction of road. In cross-examination, both of them have denied all suggestions including the suggestion that road was not constructed in the year 1986 and adequate compensation in accordance with law has been awarded keeping in view the nature and market value of the land. However, both of them admitted that towers by Cellular Companies were installed later on after construction of the road.

8. During the pendency of appeals and cross–objections in this Court, respondents/cross-objectors have also placed on record a certified copy of reply of the State filed in CWP No.735 of 2004 wherein it is stated by State that road 'Nomhol-Bahadurpur road' in question was constructed during in the year 1988 and was opened for vehicular traffic and it is also averred in the said reply that said road was constructed on public demand.

9. Appellants/respondents have not chosen to lead any oral or documentary evidence except tendering the sale deed Ex. 'RA' dated 04.05.2001 pertaining to the land situated in village Dabar Pargana Bahadurpur Tehsil Sadar District Bilaspur.

10. In the light of aforesaid oral and documentary evidence and also settled law of land, merits of rival contentions of parties are to be assessed.

11. For purpose of acquisition in present case i.e. construction of road, classification completely looses significance as the acquired land is to be used as a single unit for construction of road**.** It is well settled that at the time of determining of market value of land for acquisition, the purpose for which the land is acquired is relevant and not nature and classification of land and where nature and classification of the land has no relevance for purpose of acquisition, the market value of the land is to be determined as a single unit irrespective of nature and classification of the land. Therefore, award of uniform rate to all kind of lands under acquisition as a single unit irrespective of their nature and classification by learned District Judge does not warrant interference. (See HP Housing Board Versus Ram Lal, reported in ***2003 (3) Shim. LC (64),*** Union of India Versus Harinder Pal Singh, reported in ***2005 (12) SCC 564*** and in case Gulabi Vs. State of H.P., reported in ***1998(1) Shim. L.C. 41*** and Executive Engineer & anr. Versus Dilla Ram, Latest ***HLJ (2008) (2) HP 1007).***

12. The State of Himachal Pradesh has preferred these appeals on the ground that impugned award has not only been passed by ignoring sale deed Ex. 'RA' produced by the appellants pertaining to the same village but also taking into consideration the sale deed Ex. PW-1/A pertaining to small chunk i.e. one biswa of land, giving abnormal hike in the market value of the acquired land. During arguments, learned Additional Advocate General has contended that learned District Judge has deducted only 30% of the market value arrived at on the basis of Ex. PW-1/A whereas deduction of 40% to 50% was required to be made on the basis of pronouncements of the Court.

13. Plea of State that at the time of determining market value of land in question learned District Judge should have considered the sale deed Ex. 'RA' tendered in evidence by the State is not sustainable for the reasons; a) that the said sale deed was executed on 4th May 2001, whereas date of Notification under Section 4 of the Act is 30.07.2005 and sale deed produced by respondents/cross-objectors Ex. PW-1/A is dated 24.11.2004; (b) that the sale deed Ex. RA pertains to a different area i.e. village Dabar, whereas Ex. PW-1/A pertains to the same village Tepra, land of which village is in question for acquisition. The sale deed Ex. 'RA' has no proximity either in time with respect to Notification under Section 4 of the Act or in location with the land acquired by appellants/non-objectors. Ex. PW-1/A is proximate to the time and location as required under law for an exemplars' sale deed to be taken into consideration for determining of market value of the land to be acquired.

14. Learned District Judge has deducted 30% from the market value calculated on the basis of exemplar's sale deed Ex. PW-1/A by relying upon judgment of Apex Court in Kaushlya Devi Bogra and others versus Land Acquisition Collector Aurangabad, reported in ***AIR 1984 SC 812*** on the ground that when large tracks are acquired, the transaction in respect of small properties do not offer a proper guideline and valuation in transaction related to smaller property cannot be taken as real basis for determining the compensation for large tracks of property and therefore for determining market value of large property on the basis of sale transactions for smaller property, a deduction should be made. Learned District Judge has also placed reliance upon the judgment of Coordinate bench of this Court in case State of Himachal Pradesh and another Versus Sanjeev Kumar and another, reported in ***2010 (2) S.L.J (HP) 1225*** wherein after relying upon pronouncements of Apex Court in The Collector of Lakhimpur Versus Bhuban Chandra Dutta, reported in ***AIR 1971 SCC 2015*** and Kaushalya Devi Bogra's case supra, a deduction of 30% was permitted on the ground that the sale deed of smaller piece of land was relied upon for determining the price of large area in question under acquisition.

15. On contrary, on the basis of cross-objections filed on behalf of respondents/cross-objectors, learned counsel for them contended that learned District Judge has committed a mistake by deciding market value of the acquired land after deducting 30% from the rate of land proved on the basis of sale transactions Ex. PW-1/A as according to him, it is settled that exemplars' sale deed cannot be discarded on this ground that it is of small piece of

land and it also cannot be a ground to make deduction from the market value of land proved on the basis of such sale transaction.

16. Learned counsel for respondents/cross-objectors has relied upon judgment of this court in case Union of India Versus Joginder Singh and other connected matters reported in Latest ***HLJ 2009 (HP) 416***, wherein it is held that no deduction is required to be carried out in a exemplar's sale transactions pertaining to the very same village having proximity of the time of acquisition where it is proved that land in question is having the same advantage as the land in exampler's sale deed has and also that big chunk is not to be seen in relation to area of acquired land but in relation to the individual holdings. In the present case, there is no iota of evidence on this count. Therefore, 30% deduction from the market value of land proved by exemplars' sale deed has correctly been made by the learned District Judge. Judgment in Sanjeev Kumar's case supra, relied upon by learned District Judge for 30% deduction, is based on the pronouncement of the Apex Court and is also later in time and therefore learned District Judge has not committed any error in relying upon the said judgment.

17. Learned counsel for respondents/cross-objectors has also relied upon pronouncement in case GM, Northern Railway Versus Guzar Singh and others, reported in ***2014 (3) Shim. LC 1356,*** wherein no deduction was permitted for determining the market value of land under acquisition on the basis of exemplar sale deed of smaller plot. Perusal of this judgment shows that in that case, it was proved on record that land involved in exemplar's sale deed was in close proximity with the land under acquisition having the same potential, whereas in the present case, neither in reference petitions nor in deposition of the witnesses examined in the Court on behalf of respondents/cross-objectors, it has been averred that land under acquisition was having quality and potential equivalent to the land involved in exemplars' sale deed. Therefore ratio of law based on different facts as laid in Gujar Singh's case supra is not applicable in present case.

18. It is also contended on behalf of State that learned District Judge has committed mistake by allowing only 30% deduction whereas deduction upto 40-50% was required to be made for development. Heavy reliance has been placed on judgments passed in cases titled as Indian Council of Medical Research Versus T.N. Sanikop and another, reported in ***2014 (16) SCC 274*** and Major General Kapil Mehra and others Versus Union of India and another, reported in ***2015 (2) SCC 262*** wherein deduction upto 75% has been held to be permissible.

19. Plea of the State on this issue is misconceived. In present case, acquisition is not for the purpose of developing a Housing Colony, setting up a commercial unit or any other purpose of like nature which may have resulted development of area on the cost of the State. In the judgments relied upon by the appellant-State, the deductions were allowed for two purposes i.e. (a) deduction for providing development infrastructure and (b) deduction for developmental expenditure/expense and these deduction have been explained by the Apex Court in case titled Chandrashekar (Dead) by LRs. and others Versus Land Acquisition Officer, reported in **(2012) 1 SCC 390** which is as under :-

> "19. Based on the precedents on the issue referred to above it is seen, that as the legal proposition on the point crystallized, this Court divided the quantum of deductions (to be made from the market value determined on the basis of the developed exemplar transaction) on account of development into two components.
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> 19.1 Firstly, space/area which would have to be left out, for providing indispensable amenities like formation of roads and adjoining pavements, laying of sewers and rain/flood water drains, overhead water tanks and water lines, water and effluent treatment plants, electricity sub-stations, electricity lines and street lights, telecommunication towers etc. Besides the aforesaid, land has also to be kept apart for parks, gardens and playgrounds. Additionally, development includes provision of civic amenities like educational institutions, dispensaries and hospitals, police stations, petrol pumps etc. This "first component", may conveniently be referred to as deductions for keeping aside area/space for providing developmental infrastructure.

19.2 Secondly, deduction has to be made for the expenditure/expense which is likely to be incurred in providing and raising the infrastructure and civic amenities referred to above, including costs for levelling hillocks and filling up low lying lands and ditches, plotting out smaller plots and the like. This "second component" may conveniently be referred to as deductions for developmental expenditure/expense.

20. It is essential to earmark appropriate deductions, out of the market value of an exemplar land, for each of the two components referred to above. This would be the first step towards balancing the differential factors. This would pave the way for determining the market value of the undeveloped acquired land on the basis of market value of the developed exemplar land.

20. In the present case, acquisition is for the purpose of construction of road and therefore, deduction price of development on the basis of either of the aforesaid two components is not applicable.

21. Pronouncements of the Apex Court in case Atma Singh (Dead) through LRs. and others Versus State of Haryana and another, reported ***(2008) 2 SCC 568,*** relied upon by appellant-State is also not applicable in the present case as in that case land was acquired for setting up a Sugar Factory and deduction upto 10% for development of the site was permitted, keeping in view the substantial profit from the Sugar Factory to be earned by beneficiary of acquisition.

22. It is further contended that the land of respondents/cross-objectors was utilized for construction of road in the year 1988 but the same was not acquired at that time and it was only on the filing of Civil Writ Petition No. 735 of 2004, titled as Kanshi and others versus State of Himachal Pradesh, by and on behalf of respondents/cross-objectors in the year 2004, the State had initiated acquisition proceedings in the year 2005 and therefore, on the basis of pronouncements of the Apex Court, it is further contended that respondents/cross objectors are also entitled for rent/damages for use and occupation of their land by the State for road in question since 1988 till the date of Notification under Section 4 of the Act i.e. 30.07.2005.

23. In para-1 of reference petition preferred under Section 18 of the Act, it is specifically averred that State had acquired the land of respondents/cross-objectors in pursuance to direction dated 25.04.2005, passed by this Court in CWP No. 735 of 2004 titled as Kanshi Ram and others Versus State of Himachal Pradesh. In reply thereto, filed by the Land Acquisition Collector, this fact is not denied but stated that the contents of this para are admitted to the extent that land in question has been acquired for construction of road whereas in reply on behalf of the State, acquisition of land and determination of compensation by Land Acquisition Collector vide impugned award is admitted and rest of the contents of para are denied in general without specifically denying the fact related to CWP No. 735 of 2004.

24. In para 4 of the reference petition respondents/cross-objectors have categorically stated that possession of land was admittedly taken in the year 1988 but no interest on compensation amount from the actual date of taking over possession of the land was granted. In reply to that, Land Acquisition Collector has only stated that contents of said para are wrong and hence denied. Similarly, in reply to the said para by the State it is stated that contents of this para are denied being incorrect with further averments that compensation has been paid as per law. In rejoinder, respondents/cross-objectors have reiterated their claim set-up in the reference petition.

25. Plea of respondents/cross-objectors regarding taking possession of their land for construction of road in the year 1988 categorically averred in reference petition, has not been specifically denied nor replied in response to the reference petition. Respondents/cross-objectors have also substantiated their plea by leading oral evidence with respect to the said fact whereas appellants-State has chosen not to lead any oral or documentary evidence in this regard. It is contended on behalf of respondents/cross-objectors that the acquisition of land was initiated in pursuance to the directions of this Court in CWP No. 735 of 2004 wherein stand of State, as per

their reply, was specific and categorical that the land in question was utilized for construction of road in the year 1988 on public demand. To prove this fact though respondents/cross-objectors have also placed on record reply filed by the State as Mark 'X' during the pendency of present appeal/cross-objections to substantiate their plea by referring admission/stand of appellant-State in the said reply, but, for not proving the said document/reply on record in accordance with law, the same cannot be considered for want of admissibility thereof in evidence. However, specific plea of land owners, taken kin reference petition supported by their oral evidence, has not been rebutted by appellant-State either in reply or by leading oral or documentary evidence. It is settled that denial simplicitor of a fact is not sufficient to rebut the plea of either party. Denial must be specific and supported by evidence. In the present case, as discussed above, neither averment made in reference petition has been rebutted in reply thereto nor oral evidence of respondents/cross-objectors has been repelled by leading any cogent evidence on behalf of the State. Therefore, plea of respondents/cross-objectors taking of possession of land in question for construction of 'Namhol-Bahadurpur road' in the year 1988 is duly proved.

26. Admittedly, notification under Section 4 of the Act was issued on 30.7.2005 and Land Acquisition Collector or learned District Judge has not awarded any rent or damages for utilization of land of respondents/cross-objectors since 1988 till 30.07.2003. The said rent/damage was required to be determined by the Land Acquisition Collector at the time of announcing award for compensation.

27. Learned counsel for respondents/cross-objectors have also placed reliance upon the pronouncement of the Apex Court in case Balwan Singh and others Vs. Land Acquisition Collector and another, reported in ***2016 (13) SCC 412,*** wherein after considering and relying upon judgment passed in cases R.L. Jain(D) By LRs. Versus DDA, reported in ***2004 (4) SCC 79,*** Madishetti Bala Ramul, Versus Land Acquisition Officer, reported in ***2007(9) SCC 650*** and Tahera Khotoon Versus Land Acquisition Officer, (***2014) 13 SCC 613,*** land owners in the similar circumstances were awarded an additional interest by way of damages @ 15% per annum from taking the actual possession till the date of Notification under Section 4 of the Act.

28. In present case, there is no specific date on record with respect to taking of possession by the State in the year, 1988. Therefore, respondents/cross-objectors are awarded additional interest @ 15% per annum on the market value of land fixed by reference Court, since 1.1.1989 till the date of notification under Section 4 of the Act i.e. 30.07.2005 as damaged for utilization of land for road.

29. In view of the above discussion, appeals filed by the State are dismissed and the Cross Objections filed by respondents/cross-objectors are allowed in the above terms and impugned award is modified to that extent. The State is directed to calculate the damages accordingly by 31st December, 2017 and pay the same on or before 31st January, 2018 to the respondents/Cross-objectors.

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

Rajinder Mohan .... Petitioner
Versus
State of H.P. and others ... Respondents

CWP No. 3198 of 2009.
Date of decision: 03.08.2017.

H.P. Tenancy and Land Reforms Act, 1972- Section 104(8)(d)- Petitioner joined the armed forces on 21.8.1963 and was discharged on 1.2.1991 – his father was owner of land and got inheritable share of the petitioner reserved to the extent of five acre – a note was made to this

effect in jamabandi – the petitioner filed an application for resumption which was allowed and the petitioner was permitted to resume 1/8th share - an appeal was filed by the petitioner claiming 1/4th share, which was dismissed – the matter was remanded in further appeal – Financial Commissioner (Appeals) set aside the remand order and upheld the order of Land Reforms Officer – held that the property of the father of the petitioner was inherited by his four sons – only inheritable share of the member of armed forces on the date of joining can be reserved –when the petitioner joined armed forces, his father had four sons, three daughters and a wife- inheritable share of the petitioner was 1/8th – subsequently, the property was bequeathed to four sons but this would not have any effect on the inheritable share on the date of joining the armed forces - Financial Commissioner had rightly found that the petitioner was entitled to 1/8th share and there was no infirmity in the order passed by Land Reforms Officer who had ordered the resumption of inheritable share only –- Financial Commissioner had rightly passed the order – petition dismissed. (Para-7 to 9)

For the petitioner	Mr. Rajinder Thakur, Advocate.
For the respondents	Mr. Vikram Thakur and Ms. Parul Negi, Dy. AGs for respondents No. 1 and 2. Mr. Ajay Sharma, Advocate for respondents No. 3 to 5, 11 to 20 and 22 to 25.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (*Oral*)

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

"A) That this writ petition may kindly be allowed and the order passed by the ld. Financial Commissioner dated 24.07.2009 be set aside in the light of justice.

B) That petitioner may kindly be allowed to resume the whole land owned by the petitioner but is under tenancy, which was already reserved by the father of the petitioner under going LR-X proceeding and was ordered by the competent authority on 15.10.1976.

C) The entire record pertaining to the case may kindly be summoned for the kind perusal of this Hon'ble Court.

D) That the petition may kindly be allowed with cost.

E) Any such other or further orders which this Hon'ble Court may deems just and proper in the light of facts and circumstances of the case may also kindly be passed."

2. The case of the petitioner is that he joined Armed Force on 21st August, 1963 and was discharged from service on 1st of February, 1991. His father was owner of land when H.P. Tenancy and Land Reforms Act came into force, whereas the petitioner was serving in the Armed Forces at that time. According to the petitioner, during this period his father got his inheritable share reserved under the LR-X proceedings to the extent of five acres as per the provisions of H.P. Tenancy and Land Reforms Act (hereinafter referred to as the 'Act' for short) and order of reservation was made by the competent authority on 15.10.1976 in the Jamabandi for the year 2001-02 as is evident in the note in the jamabandi (Annexure P-1). After his retirement, he moved an application before the Land Reforms Officer, Palampur in form LR-V seeking resumption of the land which was reserved by his father but was under tenants. After holding an inquiry, Land Reforms Officer passed an order on 04.11.1991, vide which, he allowed the petitioner to resume the land measuring 0-03-39 hectares from Chikla, 0-04-64 hectares land from Ratto, 0-08-71 hectare land from Raghu and 0-08-29 hectares land from Keso Ram, Ishwar Dass, Hoshiar Singh, Jaru Ram, Bihari Lal and Dhani Ram sons of Bartu, who were tenants on the said land.

3. Appeal filed by him against the said order was dismissed by the Collector (ADM Kangra). On a further appeal filed by him before the Divisional Commissioner, Kangra, the said authority remanded the case back to the Land Reforms Officer. Order of remand so passed by the Divisional Commissioner, Kangra was challenged before learned Financial Commissioner (Appeals), who set aside the order passed by the Divisional Commissioner and upheld the order passed by the Land Reforms Officer.

4. Feeling aggrieved by the order so passed by the learned Financial Commissioner (Appeals), the petitioner has filed this writ petition.

5. In his reply filed to the writ petition by respondent No. 3, the said respondent while denying the averments made in the petition stated that the petitioner was entitled to succeed only to the extent of 1/8th share of estate of his father alongwith his three brothers, three sisters and mother and he was not entitled to 1/4th share as was being claimed by the petitioner. As per respondent No. 3, landlord can resume to the extent of inheritable share only and as such, there was no infirmity with the order passed by the Land Reforms Officer.

6. I have heard learned Counsel for the parties and also carefully gone through the pleadings of the parties.

7. A perusal of the impugned order so passed by the learned Financial Commissioner demonstrates that the property of father of the present petitioner, namely, Madan Mohan, was inherited by his four sons. Learned Financial Commissioner also took note of the fact that the petitioner's father had four sons, three daughters and a wife at the time of his death and he was suffering a disability and was entitled for protection provided under Sub Section 8 of Section 104 of the Act during his lifetime. Learned Financial Commissioner took note of Section 104 (8)(d) of the Act which provides that father of a person who is serving in the Armed Forces shall reserve land up to the extent of the inheritable share of such a member of the Armed Forces on the date of his joining the Armed Forces and same was to be declared by his father in the prescribed manner. Learned Financial Commissioner thereafter held that petitioner was entitled to succeed only 1/8th share alongwith his three brothers, three sisters and a mother. It was further held by the said Authority that protection could be granted to the extent of "inheritable share" as per Act as the protection was not to what actually could be inherited by the person concerned. On these bases, it was held by the learned Financial Commissioner that as the "inheritable share" of the petitioner was only 1/8th, therefore, there was no infirmity in the order passed by the Land Reforms Officer who had ordered resumption of the land of the petitioner to the extent of "inheritable share". The relevant extract of the order passed by the learned Financial Commissioner is quoted herein below.

> *"Section 104(8)(d) provides that the father of a person who is serving in the Armed Forces shall reserve land up to the extent of the inheritable share of such a member of the Armed Forces on the date of his joining the Armed Forces and is to be declared by his father in the prescribed manner. The respondent was entitled to succeed only to the extent of 1/8th share of the estate of his father alongwith histhree brothers, three sisters and mother. But later on in tis case he is alleged to have become entitled of 1/4th share as the land was bequeathed by the father to the four sons only. There is nothing on record when the father of the respondent expired. The father could indeed protect the respondent's share (when he was in armed forces). Such protection could be to the extent of "inheritable" share only as per the Act, which does not take into account as to what is actually inherited. For example, actual inheritance could have been more in case the other brother do not inherit for any reason. But the 'inheritable' share, which the Act provides for, would remain the same. The respondent can resume the land from his tenants to the extent of his 'inheritable' share only. The Land Reforms officer had rightly ordered resumption of half of the land from his tenants and in respect of the remaining half of the land, conferred proprietary rights to the tenants. It is also evident from the file of the Land Reforms Officer that*

both the petitioners as well the respondent agree to such a division. The respondent has acknowledged the tenants and stated that half the land may be resumed and the remaining half share may be given to the tenants as per the law. The respondent's statement is at page 19/20 of the Land Reforms Officer's file. The Land Reforms officer had ordered accordingly. In the appeal before the Collector (ADM) as well as before the Commissioner, the respondent has prayed for the resumption of the entire land, which is contrary to what the respondent himself agreed before the Land Reforms Officer. The Collector has rightly held that under Section 104 of the Act, the respondent is not entitled to resume more than half of the tenancy land as the respondent could not prove that tenancy was created within a period of six months before his joining the Armed Forces or during his service period. The Commissioner has apparently not taken into consideration all the provisions of the Act."

8. It could not be disputed by learned Counsel for the petitioner at the time of arguments that when petitioner joined Armed Forces and at the time when H.P. Tenancy and Land Reforms Act came into force, the inheritable share of petitioner was only 1/8th qua the property of his father as his father was having four sons, three daughters and a wife. In this view of the matter, when inheritable share of the petitioner, as is envisaged in Section 104(8)(d) of the Act was 1/8th, there cannot be said to be any infirmity with the order passed by the learned Financial Commissioner who has upheld the order passed by the Land Reforms Officer who has ordered the resumption of the land in favour of the petitioner to the extent of his inheritable share i.e. 1/8th share. The contention of learned Counsel for the petitioner that the petitioner was entitled to more share in view of the fact that his father had bequeathed the entire property only to his sons, in my considered view, does not renders the order passed by learned Financial Commissioner bad in law because protection as is envisaged in Section 104(8)(d) of the Act is only of "inheritable share" and not of "actually inherited share". The protection so envisaged is in favour of a person who is serving in armed forces at the relevant time. It could not be disputed by learned Counsel for the petitioner that inheritable share of the petitioner, as is envisaged in Section 104(d)(d) of the Act, stood resumed in his favour by the Land Reforms Officer.

9. Therefore, in view of above discussion, in my considered view, as there is no infirmity with the order passed by the learned Financial Commissioner and further as land of the petitioner duly stood resumed in his favour, as per his inheritable share, as is envisaged in Section 104(8)(d) of the H.P. Tenancy and Land Reforms Act, there is no merit in the present petition and the same is accordingly dismissed.

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

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

Kanthi Ram & others ...Appellants

Versus

State of H.P. ...Respondent

Cr. Appeal No. 206 of 2007
Decided on : 24.8.2017

Indian Penal Code, 1860- Section 147, 323, 353, 332, 325, 307 and 382 read with Section 149- FIR was registered at the instance of accused K for the commission of offence punishable under Section 436 of I.P.C. – police had gone to the Village to investigate the offence where the demarcation was to be carried out – before the demarcation, K handed over two letters signed by

Pardhan and BDC members stating that the demarcation be not carried out – brothers and father of K arrived and started pelting stones – other accused also arrived and pelted stones – K snatched the revenue papers from Patwari- accused gave beatings to T, who sustained multiple injuries- the accused were tried and convicted by the Trial Court for the commission of offences punishable under Sections 147, 323, 353, 332, 325 read with Section 149 of I.P.C- the Court acquitted the accused of the commission of offences punishable under Sections 307 and 382 read with Section 149- held in appeal that the prosecution witnesses had deposed consistently about the incident – nothing material could be elicited in their cross-examination – however, PW-5 did not support the prosecution version but that is not sufficient to doubt the prosecution version – blood stained clothes were not produced before the Court – the clothes were also not sent to FSL for examination – the conviction and sentence modified and the accused acquitted of the commission of offences punishable under Sections 323 and 325 read with Section 149 of I.P.C. - the conviction for the commission of offences punishable under Sections 332 and 353 read with Section 149 affirmed. (Para-9 to 12)

For the appellant: Mr. V.D. Khidta, Advocate, for the appellant.
For the respondent : Mr. R.S. Verma, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the judgment of the learned Additional Sessions Judge, Sirmour at Nahan rendered on 15.06.2007 in Sessions Trial 22-N/7 of 1997, whereby, he returned findings of conviction upon the accused/convicts, for their committing offences punishable under Sections 147, 323, 353, 332, 325 read with Section 149 of the IPC. The learned trial Court also proceeded to sentence them under Section 147 IPC to undergo simple imprisonment for a term of one year each and to pay a fine of Rs. 500/- and in default to further undergo simple imprisonment for a term of one month and similar punishment under Section 323 read with Section 149 of the IPC was imposed them. The learned trial Court further proceeded to under Section 325 read with Section 149 of the IPC sentenced them to undergo simple imprisonment for a term of two years each and to pay a fine of Rs.2,000/- and in default to further undergo simple imprisonment for a term of three months. They have also been sentenced under Section 332 read with Section 149 of the IPC to undergo simple imprisonment for a term of one year each and to pay a fine of Rs.1000/- each and in default to further undergo simple imprisonment for a term of two months. The learned trial Court further proceeded to under the provisions of Section 353 read with Section 149 IPC, sentence the convicts to simple imprisonment for a period of one year and to a fine of Rs. 1000/- and in default of payment of fine, to undergo imprisonment for a further period of one month

2. The facts relevant to decide the instant case are that An FIR No. 21/96 under Section 436 IPC had been caused to be registered at Police Station, Renukaji on 6.2.1996, in which accused Kanthi Ram was the complainant. During the investigation of that case, the complainant had gone to village Chulti-ka-Thach on 29.6.1996, along with LHC Hari Saran, Surjan Singh, Kannungo and Sher Singh Patwari in order to get the land demarcated in the said village. Local persons namely, Bansi Ram and Deep Ram were also joined. Allegedly at about 11 a.m. Kanthi Ram who was also present on the spot handed over two letters, one to the complainant and another to Surjan Singh, Kanungo, which were signed by Pradhan and BDC members stating therein that the demarcation of the land may not be carried out. Allegedly, while they were going through the aforesaid letters, in the meantime the other brothers of Kanthi Ram namely accused Tula Ram, accused Babu Ram and their father Roop Singh (since deceased) emerged from behind the bushes and started pelting stones on them. They were also accompanied by two wowen namely accused Rehno and accused Gulabo Devi. They also started pelting stones upon them, vis-à-vis Tula Ram, PW-1 LHC Hari Saran, PW-2, Sher Singh Patwari

PW-3, complainant and Deep Ram. Kanthi Ram snatched the revenue papers from Sher Singh Patwari. The accused persons also pushed on Tula Ram to the ground and gave him beatings. Kanthi Ram even caught hold of Tula Ram by his neck. Then Kanthi Ram had also pelted stones. As a result of pelting stones and beatings Tula Ram had sustained multiple injuries on his body on account of which he fell unconscious. Thereafter, all the accused ran away apprehending that Tula Ram was dead. As per prosecution story, the accused persons had deterred the police and revenue officials from carrying out the demarcation. Ruqua Ext. PB was drawn up by the complainant and got it sent to the Police Station for registration of the case. During investigation, all the injured were medically examined from Doctor Birbal Vij, BMO Pachhad. Tula Ram was referred to District Hospital for further treatment. Clothes of injured were taken into possession. Allegedly Kanthi Ram had made a disclosure statement and in consequence thereof, got recovered revenue record. After the completion of investigation, the Challan was put in the Court of law against the accused persons including Roop Singh who is said to have died during the pendency of Challan. Vide judgment of conviction dated 12.10.1998, all the accused persons were convicted under Sections 147, 323, 325 and 353 read with Section 149 IPC and acquitted under Section 307, 332 and 382 IPC. Against the judgment dated 12.10.1998, an appeal was preferred before this Court and vide judgment dated 16.7.2002 the case was sent back for retrial by framing fresh appropriate charges against the accused. Consequent upon the aforesaid order of the Hon'ble High Court, the accused persons were put fresh charges under Sections 147 and 149, 307, 353,332 and 382 read with Section 149 IPC on 23.8.2002.

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. In proof of prosecution case, the prosecution examined 12 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, recorded findings of conviction against the accused/appellant herein in respect of charges framed under Sections 147, 323, 353, 332, 325 read with Section 149 IPC. However, the learned trial Court acquitted the accused persons in respect of charges framed under Sections 307, and 382 read with Section 149 IPC.

6. The accused/appellant stood aggrieved by the judgment of conviction recorded by the learned trial Court. The learned Counsel appearing for the accused/appellants has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation by it of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, he contends qua the findings of conviction 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 of the findings of conviction recorded by the Court of learned Additional Sessions Judge, Sirmaur at Nahan standing based on a mature and balanced appreciation, by it, of the evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. In respect of proof of charges framed against the accused persons under the provisions of Section 323 and 325 IPC read with Section 149 of the IPC, the prosecution depended upon the testimonies of PWs 1,2,4 and 6. The aforesaid witnesses in their respective

deposition(s) comprised in their respective examination(s)-in-chief deposed with absolute interse corroboration in respect of the accused persons while forming an unlawful assembly, theirs pelting stones upon their respective person(s), in pursuance whereto Tula Ram, Deep Ram, Rattan Kumar and Bansi Ram sustained injuries on their respective person, injuries whereof are borne in MLCs respectively comprised in Ext. PW9/A, Ext. PW9/B, Ext. PW9/C and in Ext. PW9/D. Consequently, this Court is enjoined to impute sanctity to their respective deposition(s). All the aforesaid witnesses were subjected to an incisive cross-examination by the learned defence counsel, yet therein no elicitations emerged in portrayal of their respective deposition(s) comprised in their respective examination(s)-in-chief standing hence contradicted nor therein any elicitations emanate in portrayal of theirs mutually contradicting the genesis of the prosecution version comprised in their respective examination(s)-in-chief, moreso, when therein each aforesaid, omit to, either improve or embellish upon their respectively recorded previous statements in writing, rather enjoins the Court to impute credence thereto. The deposition(s) of the aforesaid prosecution witnesses also acquire sustenance from the Doctor concerned who prepared the MLCs concerned, thereupon the genesis of the prosecution version in respect of the charges framed against the accused stands efficaciously proven. However, though for all the reasons aforesaid, the deposition(s) of the victims/injured acquire vigour, yet the tenacity of their testification(s), is, eroded by one purported injured eye witness to the occurrence, while testifying as PW-5, proceeding to in his cross-examination conducted by the learned defence counsel, acquiesce, to the suggestion(s) thereat put to him, suggestion(s) whereof hold echoings therein qua none of the accused pelting stones at any of the injured victims including PW-5. The aforesaid witness on standing declared hostile, on an apposite request made to the learned trial Court by the Public Prosecutor concerned, stood subjected to cross-examination, by the Public Prosecutor concerned, yet therein no elicitations emerged in display of his supporting the genesis of the incident comprised in his examination-in-chief nor therein elicitations emerged in respect of his deposition comprised in his cross-examination conducted by the learned defence counsel, wherein he exculpates the guilt of the accused persons in respect of theirs pelting stones at the person of victims including him, standing hence contradicted, thereupon with PW-5 contradicting the versions qua the occurrence testified by PWs 1, 2 and 4 in respect of charges framed against the accused persons under Sections 323 and 325 IPC read with Section 149 IPC, hence bolsters an inference qua thereupon the depositions of the aforesaid injured interested witnesses losing their respective creditworthiness.

10. Immense momentum to the aforesaid inference is garnered by the factum, of , though respective recovery memo(s) standing prepared in respect of blood stained clothes respectively recovered thereunder, yet the blood stained clothes recovered under the relevant recovery memo(s), remained, unproduced by the Public Prosecutor concerned before the learned trial Court, nor obviously they stood shown either to PW-1 or to PW-5, thereupon with both the aforesaid witnesses standing precluded to co-relate their respectively purportedly recovered blood stained clothes, recovery(s) whereof stood effected under memo(s) Ext. PA and Ext. PW6/A, with, the ones produced in Court. As a corollary, absence of adduction in Court, of the blood stained clothes of PW-1 and of PW-5, renders all recovery memo(s) prepared in respect thereto, to beget the stain of fictitiousness besides invention, thereupon, the impugned conclusions recorded in respect of charges framed vis-à-vis accused under Section(s) 323 and 325 read with Section 149 of the IPC, lose vigour. The aforesaid omission of the Public Prosecutor concerned to, at the time of examination of PW-1, adduce before the learned trial Court, the blood stained clothes of PW-1 and PW-5 also precluded the learned trial Court to endorse thereon any exhibit mark, thereupon an inference is bolstered qua the genesis of the prosecution case in respect of the charges framed under Sections 323 and 325 read with Section 149 IPC being amenable to be construable, to, stand engendered by proactive contrivance employed by the Investigating Officer concerned. In addition, it appears that the Investigating Officer concerned, despite respectively under memo(s) Ext. PA and Ext. PW6/A, making effectuation of recovery(s) of blood stained clothes of PWs 1 and 5, yet his omitting to despatch the clothes of both PW 1 and PW5 to the FSL concerned, for the latter pronouncing thereon an opinion in respect of stains of blood gathered thereon belonging

respectively to the blood group of PW1 and of PW5. His omission in the aforesaid regard also stems an inference that all blood stains respectively borne on clothes recovered under the aforesaid memo(s), not, belonging to either PW-1 or to PW-5, rather it has to be with firm reiteration held that recovery memo(s) prepared in respect therewith being both invented besides being contrived. On coagulating the aforesaid inference with the aforesaid effect, of, PW-5 not supporting the testfications of PWs 1, 3, 4 and 6, hence nails an inference of the prosecution failing to prove the charge under Sections 323 and 325 IPC vis-à-vis the accused.

11. Be that as it may, the effect of the aforesaid inference, is, that the testification of the Doctor concerned in proof of the MLCs prepared in respect of the victims/injured, cannot, acquire any leverage for enhancing the prosecution case in support of the charges framed under Sections 323 and 325 read with Section 149 of the Indian Penal Code. All the aforesaid inferences garner enhanced strength from PW-5 voicing in his cross-examination in respect of 20-25 persons being available at the spot, at, the time contemporaneous to the alleged occurrence taking place thereat. The effect of the aforesaid inference is of its begeting an inference of all or one of the aforesaid persons pelting stones upon the victims/injured besides any arousal of the aforesaid inference hence shrouds with an aura of doubt any ascription of an incriminatory role visi-a-vis the accused, in respect of charges framed under Section 323 and under Section 325 read with Section 149 of the IPC, benefit whereof is enjoined to be conferred upon the accused. The upshot of the aforesaid discussion is that the findings of conviction recorded by learned Additional Sessions Judge, Sirmour at Nahan in respect of charges framed against the accused under Section 323 and under Section 325 read with Section 149 of the Indian Penal Code are quashed and set aside.

12. The prosecution witnesses PWs 1, 3, 4 and 6 deposed with absolute unequivocal unanimity in respect of accused Kanthi Ram, snatching, from the Patwari the revenue papers concerned. The testification(s) of the aforesaid prosecution witnesses in respect of the aforesaid penal misdemeanor of the accused also stands corroborated by the Investigating Officer concerned “prior” to his effecting, at the instance of the accused, recovery(s) thereof under memo Ext. PW6/A, his recording an apposite disclosure statement borne in Ext. PW5/A with articulation(s) thereon in respect of their place of keeping and hiding, by the accused besides when PW-5, a, witness to both Ext. PA and Ext. PW6/A testifies in respect of veracity(s) thereof nor when, he, in his cross-examination erodes his testification occurring in his examination-in-chief, thereupon it is to be concluded, of, the prosecution succeeding in proving the charges framed against the appellant under Section 332 IPC and also charge under Section 353 IPC, especially when unless without the public officer(s) being assaulted dehors no injury being inflicted upon them by the accused by his purportedly pelting stones upon them, “the” snatching(s) of the public records by the accused from public servant(s) could not have been occurred.

13. Consequently, for the foregoing reasons, the instant appeal is partly allowed. In aftermath, the judgment of the learned trial Court is modified to the extent that the conviction and sentence imposed upon the appellant(s) by the learned trial Court in respect of charges framed under Sections 323 and 325 read with Section 149 of the Indian Penal Code are quashed and set aside whereas the conviction and sentence imposed upon the appellant(s) by the learned trial Court in respect of charges framed against him under Sections 332 and 353 IPC read with Section 149 IPC are affirmed. Conviction and sentence imposed upon the appellant(s) herein by the learned Sessions Judge in respect of charge under Sections 332 and 353 IPC read with Section 149 IPC be forthwith carried into execution. The period of sentence undergone by them/him during investigation and trial is ordered to be set off under Section 428 of the Cr.P.C. from the sentence(s) finally imposed upon him. The records 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
Lohari Ram and others ...Respondents

Cr. Appeal No. 604 of 2008
Decided on : 29.8.2017

Indian Penal Code, 1860- Section 147, 323, 324 read with Section 149- Accused gave beatings to the complainant party and caused simple injuries by means of danda and Darat – accused were tried and acquitted by the Trial Court- held in appeal that independent witnesses were not associated, although they were present at the spot – this shows that investigation is not fair – the accused had sustained injuries which were not explained – the recovery of the weapon of offence was not made in accordance with law- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 13)

For the appellant: Mr. Vivek Singh Attri, Additional Advocate General.
For the respondent: Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the State of Himachal Pradesh against the judgment of acquittal rendered on 6.6.2008 by the learned Additional Chief Judicial Magistrate, Court No. 1, Mandi, District Mandi upon criminal case No. 42-II/2001.

2. The facts relevant to decide the instant case are that on 25.2.2001 at about 1:45 p.m. in village Thunda Thana within the jurisdiction of Police Station Balh, Mandi, all the accused have formed an unlawful assembly and in prosecution of common object of the said unlawful assembly the accused persons have given beatings to Oma Devi, Inder Dev, Padam Singh and Nirmala Devi and voluntarily caused simple injuries to them by means of Danda and Darat, which is sharp edged cutting instrument. At the relevant time, the accused Purnu, Lohari Ram and Indira Devi were armed with Darat and accused Amar Singh and Raju were armed with Danda. At the relevant time, the accused persons were lopping the trees in the Govt. land which was in possession of the complainant party.

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 stood charged by the learned trial Court, for their committing offences punishable under Sections 147, 323, 324 read with Section 149 IPC. In proof of the prosecution case, the prosecution examined 9 witnesses. On conclusion of recording of prosecution evidence, the statement(s) of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court, wherein each of the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of evidence existing on record, the learned trial Court, returned findings of acquittal upon the accused/respondents herein, for their committing offences punishable under Sections 147, 323, 324 read with Section 149 of the IPC.

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded upon the accused/respondents. The learned Additional Advocate General appearing for the State has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation "by it" of the evidence on record, rather, theirs

standing sequelled by gross-mis-appreciation “by it” of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondents herein has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Additional Sessions Judge, Mandi standing based on a mature and balanced appreciation by him of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. In the ill fated occurrence PW-1, PW-2, PW-3 and PW-4 sustained injuries on their respective person(s), injuries whereof find reflection in the apposite MLCs prepared by the Doctor concerned, MLCs whereof stand comprised in Ext. PW 9/A, Ext. PW9/B, PW 9/C and Mark-X. PW-9 who prepared the aforesaid MLCs made a categorical disclosure in his deposition that the injuries borne therein being causable by user of a sharp edged weapon being Darat bearing Ext. P-3, exhibits whereof stood shown to him in Court during the course of the recording of his deposition. Also he has made a firm disclosure in his testification qua the injuries occurring in the aforesaid MLCs, respectively exhibited as Exts. PW9/A, PW9/B, PW9/C and Mark-X, being also causable by user of danda, bearing Ext. P-5, exhibit whereof also stood shown to him in Court. The aforesaid deposition of PW-9, when stands combined with the deposition(s) of injured witnesses, who respectively deposed as PW-1, PW-2, PW-3 and PW-4, significantly with the latters’ testifications’ in respect of the ill-fated occurrence occurring in their respective examination(s)-in-chief are bereft of any critical taint(s) therein of, any gross contradiction(s) vis-à-vis their respective cross-examination(s), besides when their respective deposition(s) are also bereft of any taint(s) of any gross interse contradiction(s), thereupon begets a firm cumulative inference of theirs testification(s) acquiring vigour, also hence of the prosecution succeeding in establishing the charge framed against the accused. The testification(s) rendered by the aforesaid injured witnesses, even if they emanate from interested witnesses, hence would not perse render them to lose their sanctity unless evidence stood adduced in respect of availability of independent eye witnesses’, at the site whereat the alleged occurrence took place, witnesses, whereof, despite their evident availability thereat yet remained unjoined in the relevant investigation(s) conducted by the Investigating Officer. Besides, on the Investigating Officer concerned deliberately omitting to associate evidently available independent eye witnesses to the occurrence also would thereupon render his investigation(s) to acquire vice(s) of critical interestedness, besides would rear conclusion(s) of his holding slanted/skewed investigation(s) in respect of the offences charged. For making discernments in respect of evident availability of independent eye witnesses, at the site of occurrence, an allusion to the recitals borne in FIR comprised in Ext. PW1/A, unveils unfoldments occurring therein qua availability of independent witnesses namely Gambhri Devi, Sadhu Ram and Khem Singh at the site of occurrence, at the time contemporaneous to its taking place thereat, however the Investigating Officer, though, proceeded to record the statement in writing, of, one amongst them, namely Gambhri Devi, yet he omitted to record the statements of Sadhu Ram and of Khem Singh. Moreover, the prosecution omitted, to, lead into the witness box the aforesaid Gambhri Devi, whereas, thereupon she would have rendered an impartisan version qua the occurrence, bereft of any vice of interestedness. Insequel, omission of the prosecution to lead into the witness box, one, Gambhri Devi, an evident eye witness to the occurrence, constrains a conclusion that thereupon the truth qua the occurrence, was, concerted to be smothered by the Investigating Officer besides by the Public Prosecutor concerned. The aforesaid inference qua the Investigating Officer concerned smothering emergence of truth qua the genesis of the occurrence is also galvanized, from, the Investigating Officer omitting to record the previous statement(s) in writing respectively of Sadhu Ram and of Khem Singh, whereas both along with Gambhri Devi were evident eye witnesses to the occurrence. The effect of the aforesaid inference(s), is, of Investigating Officer holding slanted/skewed investigation(s) into the offences constituted in the FIR borne in Ext.PW1/A,

whereupon this Court is constrained, to, not impute sanctity to his Investigation nor the testimonies of the interested eye witnesses, even though their deposition(s) are bereft of any vice of any intrase or interse contradiction are amenable to imputation of any credence thereto.

10. Furthermore, investigation(s) were also held in respect of FIR No. 89 of 2001, FIR whereof stood lodged by the complainant/accused herein, in respect of the very occurrence in respect whereof, the instant FIR stood lodged. During the course of investigation(s) held qua FIR No. 89 of 2001, as, apparent on a reading of the cross-examination, of PW-7, the MLCs' of the accused therein/complainant hereat, stood prepared by the Doctor concerned, wherefrom the ensuing sequel is of the accused herein, also during the course of the relevant occurrence, hence receiving injuries upon their respective person(s), whereas with the injuries sustained by them remaining unexplained, when, stands coagulated with the effect of evidently available aforesaid eye witnesses, at the site of occurrence, hence remaining unexamined, thereupon, begets an inference, of, the Investigating Officer concerned holding ultra interested slanted investigation(s) in respect of the penal misdemeanor(s) ascribed to the accused. Consequently, this Court is constrained to not accept the version(s) propagated by the injured victims.

11. Under Ext.PW1/B, danda Ext. P 2 stood handed over by co-accused Manti Devi @ Parwati, to, the Investigating Officer besides under Ext. PW1/C and Ext. PW3/A, Danda Ext. P 1 and Ext. P-5 stood respectively handed over by Lahori Ram, Amru and Dev Raj @ Raju to the Investigating Officer concerned. All the aforesaid purported weapons, of offence with purported user whereof, injuries were inflicted by the accused upon the victims, hence came to be handed over, respectively, by them to the Investigating Officer concerned only during the course of theirs suffering custodial interrogation. The aforesaid incriminatory piece(s) of evidence constitute confessional incriminatory evidence(s) vis-à-vis the accused, thereupon, for, all the aforesaid purported weapons of offence being construable to be relevant piece(s) of inculpatory evidence(s) besides theirs being amenable to stand exhibited peremptorily enjoined the Investigating Officer, to, 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."

prior thereto record the respective custodial confessional disclosure statement(s), of, each of the accused, with, communication(s) therein, in respect of their respective place(s) of keeping and hiding, by each of them. However, in the Investigating Officer concerned, prior to his purportedly effectuating recovery(s) of purported weapon(s) of offence, at the instance of each of the accused, effectuation(s) whereof respectively occurred under memo(s) Ext. PW1/B and Ext. PW1/C and Ext. PW3/A, he openly departed from the aforesaid injunction(s) of law especially in respect of his eliciting the custodial confessional statement(s) of each of the accused, in respect of their respective place(s) of keeping and hiding by each of them, also in respect of his reducing into writing their relevant custodial confessional disclosures besides his thereon obtaining the signature(s) of the accused and of the witnesses thereto. The aforesaid departure(s) are grave, hence beget an open infraction of the peremptory mandate borne in Section 27 of the Indian Evidence Act, whereupon the apposite recoveries are rendered construable to be bald besides naked, with a concomitant effect of hence the user in the relevant incident, of all purported weapons of offence being fortifyingly dispelled, especially when in respect of their user by the accused, the independent eye witnesses to the occurrence remained unexamined. Cumulatively, all purported recovery(s), fall outside the precincts of Section 27 of the Indian Evidence Act, hence are to be construable to be un-amenable, to, any imputation of any credence thereon, rather the apt recovery(s) in proof of charges are neither admissible nor relevant piece(s) of evidence.

12. Be that as it may, the inefficacious manner of recovery of purported weapons of

offence, from, each of the accused by the Investigating Officer concerned, when is construed in conjunction with the aforesaid inference qua the Investigating Officer holding tainted investigation(s), thereupon, this Court is constrained to conclude that there is no merit in the instant appeal.

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 appellate Court does not suffer from any perversity or absurdity of mis-appreciation and non-appreciation of evidence on record.

14. Consequently, there is no merit in the instant appeal which is accordingly dismissed. The Judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

Sh. Bhagat Ram .....Petitioner.

Vs.

Tilak Raj and others .....Respondents.

C.R. No.: 65 of 2007
Reserved on: 15.06.2017
Date of Decision: 31.08.2017

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction was passed against the defendant, which was put to execution – the execution petition was dismissed by the Trial Court- held that it was stated in the reply that the original defendant was in possession since 1991 and after his death the judgment debtors came into possession – the interference was clearly established by the reply as the Trial Court had found the plaintiff to be in possession and had restrained the defendant from interference – the executing Court had wrongly dismissed the petition – case remanded with a direction to execute the decree in accordance with law. (Para-9 to 12)

For the petitioner: Mr. R.K. Gutam, Senior Advocate, with Ms. Megha Kapoor Gautam, Advocate.

For the respondents: Mr. Anand Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this revision petition, the petitioner has prayed for quashing of order, dated 20.03.2007, passed by the learned Executing Court in Execution No. 8 of 2001, vide which an application filed by the petitioner/judgment debtor under Order 21 Rule 32 of the Code of Civil Procedure was dismissed by the learned Executing Court.

2. Brief facts necessary for the adjudication of the present petition are that the petitioner before this Court filed a suit for permanent injunction against the father of present respondents, namely, Sh. Duni Chand on the ground that petitioner/plaintiff was owner in possession of land comprised in field Nos. 726 and 727, Khata Khatauni No. 105/122, situated in Pargana Sherpur, Tehsil Dalhousie, District Chamba, H.P., which suit was decreed on 25.11.1999 and defendant therein was restrained from interfering in any manner or raising any

sort of construction over the suit land. The judgment and decree so passed by the Court of learned Sub Judge 1st Class, Dalhousie, District Chamba in Civil Suit No. 03.1994, dated 25.11.1999 attained finality. Petitioner herein filed an application under Order 21 Rule 32 (*supra*) to the effect that he had filed a suit for permanent injunction and in the alternative for possession against Sh. Duni Chand, father of judgment debtor, which stood decreed on 25.11.1999. As per the petitioner, after passing of the judgment and decree, respondents had opportunity of obeying the decree, but they did not do so and on 30.04.2001, the judgment debtors/respondents again started interfering in the peaceful possession of the decree holder after the death of Duni Chand. In this background, the following prayer was made in the application so filed before the learned Executing Court:

> *"4. That in the interest of justice it is therefore respectfully prayed that judgment debtors/respondents may kindly be defamed in civil prison and their immovable property comprised in Khasra Nos.132,1261,1262 Khata Khatauni No. 33/33 situated in Mohal Sherpur, Pargna Sherpur Tehsil Dalhousie Distt. Chamba be ordered to be attached and sold and possession of disputed property comprised in Khasra Nos. 726, 727 Khata Khatauni No. 105/122 situated on Mohal Sherpur, Pargna Sherpur, Tehsil Dalhousie be restored to decree holder by issuing warrant of possession as ratio laid down by Hon'ble High Court Pubjab and Haryana u/o 21 Rule 32 CPC read with Section 151 CPC. An affidavit in support of application is attached herewith."*

3. The application was resisted by the present respondents, who by way of reply so filed to the application, took a preliminary objection that the application was not maintainable, as the decree stood passed against late Sh. Duni Chand, i.e., their predecessor-in-interest and hence no relief of possession could be given qua them in the execution proceedings. On merit, their stand was that the decree holder was not in possession of the suit land and in fact their father was in possession of the suit land since 1991 and had also constructed a house over the suit land and as decree holder was never in possession of the suit land, therefore, he was not entitled for any relief, as was prayed for in application under Order 21 Rule 32 of the Code of Civil Procedure.

4. On the basis of the respective pleadings of the parties, learned Executing Court framed the following issues:

> *"1. Whether respondents have willfully disobeyed the decree dated 25.11.1999 as alleged? OPA.*
>
> *2. Whether DH is entitled for possession of disputed property as alleged? OPA.*
>
> *3. Whether application is not maintainable in the present form as alleged? OPR.*
>
> *4. 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 Executing Court on the issues so framed:

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*Yes.*
Relief:	*Application is dismissed as per operative part of the order.*

6. While dismissing the application, it was held by the learned Executing Court that perusal of judgment Ex. A1 revealed that the decree holder had filed a suit for permanent injunction against Duni Chand with alternative plea for possession in case he was dispossessed during the pendency of the suit and though the suit for permanent injunction was decreed, however, no relief qua alternative plea for possession was granted. It was further held by the learned Executing Court that decree holder had filed a suit for possession against Duni Chand

and said suit for possession was withdrawn by the decree holder. Learned Executing Court also held that in the application, it was nowhere pleaded that the decree holder was dispossessed by the respondents after the passing of judgment and decree. Learned Executing Court observed that decree holder had pleaded that repeated interference by respondents over the suit land amounted to dispossession. Learned Executing Court further held that in the application, the decree holder had simply pleaded that respondents were causing interference in his peaceful possession, however, no details of said violation were given. It was further held by the learned Executing Court that in order to prove violation of order of injunction, the decree holder was required to prove details of violation strictly, which onus the decree holder had failed to discharge. On these bases, it was held by the learned Executing Court that the application was not maintainable and the same was dismissed.

7. Feeling aggrieved, the decree holder has filed the present petition.

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

9. A perusal of the judgment and decree, execution of which was sought by the present petitioner before the learned Executing Court, demonstrates that learned trial Court had decreed the suit of the plaintiff by restraining the defendant therein from interfering in any manner or raising any sort of construction over the suit land comprised in land measuring 1 bigha and 1 biswa, bearing Khata/Khatauni No. 105/122, Khasra Nos. 726 and 727, situated in village Sherpur, Tehsil Bhatiyat, District Chamba. Now, it is not in dispute that the judgment and decree so passed by the learned trial Court has attained finality. It is also not in dispute that Duni Chand, who was the defendant before the learned trial Court, is the father of the present respondents. Application so filed under Order 21 Rule 32 of the Code of Civil Procedure by the decree holder before the learned Executing Court was *inter alia* on the allegations that despite there being judgment and decree in his favour, the respondents were interfering in the peaceful possession of the decree holder after the death of their father, namely, Sh. Duni Chand.

10. Now interestingly, a perusal of the reply so filed by the present respondents to the said application demonstrates that they have not disputed the factum of their interfering over the suit land, as was alleged in the application by the decree holder. However, they have tried to justify their conduct on the ground that the suit land was never in possession of the decree holder, but was in possession of their father since 1991, over which one house also stood constructed in the year 1991. It is settled law that an Executing Court cannot go behind the decree. Decree passed in favour of the present petitioner by the learned trial Court was to the effect that defendant therein, who happened to be the father of the present respondents was restrained from interfering in any manner or raising any sort of construction over the suit land. The judgment and decree so passed by the learned trial Court was not challenged by the father of the present respondents. In other words, the findings returned by the learned trial Court to the effect that it was the petitioner/plaintiff, who was in possession over the suit land qua which the father of the present respondents was injuncted from causing interference were accepted by him. Further, it is not even the case of the present respondents that they have not entered into the footsteps of their father as far as the suit land is concerned and they are in possession of the same in their own capacity.

11. As already taken note of by me above, the respondents are not disputing the factum of their interfering over the suit land, but as per them, the suit land since 1991 was in possession of their father, i.e., the original judgment debtor and it is on this ground that they had prayed for rejection of the application so filed under Order 21 Rule 32 of the Code of Civil Procedure (*supra*) by the decree holder. In my considered view, learned Executing Court while dismissing the application so filed by the decree holder by holding that the decree holder had failed to discharge the onus of proving that the respondents were interfering in his peaceful possession, erred in not appreciating that the factum of respondents interfering in the suit land was not denied by the respondents themselves. Not only this, it is apparent from perusal of the impugned order that what weighed with the learned Executing Court was the fact that probably it

was not the decree holder who was in possession of the suit land, but the suit land was in fact in possession of the respondents. This is evident from a perusal of the findings so returned in para-11 of the impugned order by the learned Executing Court. In my considered view, while arriving at the findings as are contained in para-11 of the impugned order, learned Executing Court erred in not appreciating that once there was a decree passed by a competent Court of law in favour of the present petitioner restraining the predecessor-in-interest of the present respondents from causing any interference over the suit land, then respondents could not have had justified their act of interfering over the suit land by taking the plea that decree holder was not in possession of the suit land. Once it stood established before the learned Executing Court, especially in view of the stand so taken by the respondents themselves in their reply that interference was being caused by the respondents over the suit land, the Executing Court ought to have passed appropriate orders for execution of the decree, which was so passed by the learned trial Court in favour of the decree holder. Therefore, in my considered view, the impugned order is not sustainable in the eyes of law and the same is liable to be quashed and set aside.

12. Accordingly, the petition is allowed. Impugned order, dated 20.03.2007, passed by the Court of learned Civil Judge (Senior Division), Dalhousie in Execution No. 8 of 2001 is quashed and set aside. Matter accordingly stands remanded to the learned Executing Court with a further direction to proceed in the execution proceedings for having the decree dated 25.11.1999, so passed by the learned trial Court in Civil Suit No. 3/94, titled Bhagat Ram Vs. Sh. Duni Chand and another executed in accordance with law, after issuing notices to the parties concerned and hearing them. No order as to costs.

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

Devinder Kumar & Ors. ... Appellants

Versus

Girdhari Lal & Ors. ... Respondents

RSA No. 535 of 2005
Reserved on: 15.06.2017
Date of decision: 31.08.2017

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit pleading that they had purchased 1/5th share of B by way of registered sale deed – the defendants were co-owners and were interfering with their joint possession – the defendants pleaded that B was not in possession – she had demanded the possession after the death of her father but it was not delivered to her – the defendants had become the owners by way of adverse possession- mutation of sale was rejected on the ground that seller was not in possession- B had filed an application for partition but the same was rejected – the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that no issue regarding the adverse possession was framed but it was specifically asserted in the written statement that defendants had become owners by way of adverse possession- there was no surprise to the plaintiff and failure to frame the issue will not cause any prejudice to the parties- the possession of the plaintiffs was not proved and the Courts had rightly dismissed the suit- appeal dismissed. (Para-11 to 17)

Cases referred:

Nedunuri Kameswaramma Vs. Sampati Subba Rao, AIR 1963 Supreme Court 884 (V 50 C 133)
Moti Lal Vs. State of H.P., AIR 1996 Himachal Pradesh 90

For the appellants: Mr. G.R. Palsra, Advocate.

For the respondents: Mr. Virender Singh Rathour, Advocate, vice Mr. Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, appellants have challenged the judgment and decree passed by the Court of learned Presiding Officer, Fast Track Court, Mandi, District Mandi, in Civil Appeal No. 55/2000, 123/2004, decided on 15.03.2005, vide which learned Appellate Court while dismissing the appeal so filled by the present appellants upheld the judgment and decree passed by learned trial Court, whereby learned trial Court vide judgment and decree dated 25.04.2000 passed in Civil Suit No. 132/98 (96) had dismissed the suit filed by the present appellants for permanent prohibitory injunction.

2. Brief facts necessary for adjudication of the present case are that the appellants/plaintiffs, hereinafter referred to as the plaintiffs filed a suit for permanent prohibitory injunction against the respondents/defendants, hereinafter referred to as the defendants, inter alia on the ground that the plaintiffs had purchased 1/5th share of one Bresti Devi in the suit land by way of a registered sale deed No. 31, dated 08.06.1995, measuring 2-11-19 Bighas, situated at Muhal Balhari, No. H.B. 42, Tehsil Chachiot, District Mandi and defendants who were joint co-owners in possession with the plaintiffs were causing wrongful interference qua the joint possession of the plaintiffs and were adamant to occupy that portion of the suit land which had better potential and more market value. Accordingly, the plaintiffs prayed for a decree for permanent prohibitory injunction against the defendants.

3. The claim of the plaintiffs was denied by way of written statements by the defendants who took the stand that the sale deed dated 08.06.1995 was merely a paper transaction between Bresti Devi and the plaintiffs and in fact, Bresti Devi who had got the suit land by way of inheritance after the death of her father, never came into possession of the suit land. It was further the case put up by the defendants that in October, 1982 Bresti Devi had come to village Balhari and asked the defendants to deliver the possession qua her share but her title and interest over the suit land was emphatically denied by the defendants, who had refused to hand over the possession of the share of Bresti Devi to her and had asserted their hostile animus to Bresti Devi and denied her title. According to the defendants, they had ousted Bresti Devi from the suit land and thereafter, no action was taken by Bresti Devi against them and since then, they were in open, peaceful, continuous, uninterrupted and hostile possession of the suit land qua the share of Bresti Devi and had thus perfected their title by way of adverse possession. It was further mentioned in the written statement that taking undue advantage of wrong revenue entries, plaintiffs had wrongly and illegally purchased the suit land from Bresti Devi. It was also the stand of the defendants that the plaintiffs had tried to get the mutation of sale attested in their favour on the basis of said null and void sale deed, however, the said mutation of sale deed had been rejected by the Assistant Collector 2nd Grade, Tehsil Chachiot, District Mandi, vide order dated 04.07.1996, on the ground that the plaintiffs were not in possession of the suit land. It was also the case of the defendants that during consolidation operation Bresti Devi had also filed an application for the partition of the land of her share but her application was also rejected on the ground that she was not in possession of the suit land.

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

1. Whether the suit land is joint qua parties? OPP
2. Whether the plaintiffs are entitled for the relief of Permanent, Prohibitory injunction as prayed for? OPP
3. Whether the suit is not maintainable in the present form? OPD

4. Whether the plaintiffs have got no enforceable cause of action? OPD

5. Whether the suit is time barred? OPD

6. Whether the present court has got no jurisdiction to try the present suit? OPD

7. Relief.

5. On the basis of evidence led by the parties in support of their respective stands before learned trial Court, the following findings were returned to the issues so framed by it:-

Issue No. 1:	No
Issue No. 2:	No
Issue No. 3:	Yes
Issue No. 4:	Yes
Issue No. 5:	No
Issue No. 6:	No
Relief :	Suit dismissed as per operative portion of judgment.

6. Learned trial Court accordingly dismissed the suit filled by the plaintiffs by holding that there was nothing on record placed by the plaintiffs to prove that they were joint owners of the suit land with the defendants. Learned trial Court also held that the factum of the plaintiffs not being in possession also stood affirmed by the revenue authorities vide Ext. D-1 i.e. order vide which mutation of sale deed in favour of the plaintiffs was rejected by the revenue authorities. Learned trial Court also held that Ext. D-2 which was copy of order passed by the Consolidation Officer demonstrated that possession of the defendants on the suit land was found and not of the plaintiffs. Learned trial Court also held that since it stood proved that since the plaintiffs were not in possession of the suit land, therefore, they were not entitled to the relief of injunction as prayed for. Learned trial Court also returned the findings that as defendants No. 1 and 2 had remained in possession of the suit land for more than 12 years after 1982 and as the said possession of their was in the knowledge of Bresti Devi, they had perfected their title qua the share of Bresti Devi by way of adverse possession. While returning the said findings, learned trial Court took note of the fact that Bresti Devi while in the witness box, in her cross-examination had admitted that in the year 1982 she had demanded her share from the defendants in the suit land and the defendants did not give any share or possession of her share. Learned trial Court also took note of the fact that she did not file any suit for possession or partition against the defendants.

7. Feeling aggrieved by the judgment and decree so passed by learned trial Court, plaintiffs preferred an appeal which was dismissed by learned Appellate Court vide judgment and decree dated 15.03.2005. While affirming the findings returned by learned trial Court it was held by learned Appellate Court that the evidence demonstrated that in 1982 Bresti Devi demanded possession of her share from defendants No. 1 and 2 who had refused to do so. Learned Appellate Court also held that it stood proved from the record that the plaintiffs were not in possession of the suit land and the suit land was in fact in possession of defendants No. 1 and 2. Learned Appellate Court further held that denial of the share of Bresti Devi by defendants No. 1 and 2 in the year 1982 to her was indicative of an animus to exclude, thereby establishing the hostile animus of defendants No. 1 and 2 to oust Brest Devi from the suit land. Learned Appellate Court also held that it was an admitted fact that after 1982 no steps to recover possession of her share from defendants No. 1 and 2 were taken by Bresti Devi. On these basis, it was held by learned Appellate Court that the plaintiffs could not be held to be in joint possession of the suit land as the plaintiffs were neither owners nor in joint possession of the suit land and thus, learned Appellate Court upheld the findings to the effect that the suit for injunction as filed by the plaintiffs was not maintainable. Accordingly, while upholding the

judgment and decree passed by learned trial Court, learned Appellate Court dismissed the appeal so filed by the plaintiffs.

8. Feeling aggrieved, this appeal has been filed by the plaintiffs, which was admitted on 10.03.2017 on the following substantial questions of law:-

> "(i) Whether both the lower courts have misread, mis-interpreted and mis-construed the oral as well as documentary evidence of the parties as well as the provision relating to adverse possession, which has resulted into grave mis-carriage and failure of justice to the appellants?
>
> (ii) Whether both the lower courts have totally mis-read the provision relating to ouster of one co-sharer of the joint holding, which has caused great miscarriage of justice to the appellants?
>
> (iii) Whether without framing issue with regard to adverse possession, finding can be given about adverse possession in favour of the respondents, which has caused mis-carriage of justice to the appellants?"

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

10. As all the substantial questions of law are interrelated, I will deal with all of them together.

11. There are concurrent findings returned by learned trial Court against the plaintiffs and in favour of the defendants that defendants had perfected their title over the suit land i.e. qua the share belonging to Bresti Devi by way of adverse possession. Now, admittedly no issue was framed by learned trial Court to the effect that as to whether the defendants had perfected their title by way of adverse possession or not. However, it is also a matter of record that in the written statement so filed by the defendants in Para-2 of the same on merit, a specific stand was taken by them that Bresti Devi who was joint owner with defendants No. 1 and 2 in October, 1982, came to the said defendants at village Balhari and asked the defendants to deliver the possession of the suit land qua her share but defendants No. 1 and 2 emphatically denied her right, title or interest over the suit land and refused to give any share or to deliver the possession of the suit land to her. In this para of the written statement, it also stood averred by the defendants that they had perfected their title qua the share of Bresti Dvi i.e. suit land by way of adverse possession. In Para-3 of the written statement, it was mentioned by the defendants that the plaintiffs had tried to get the mutation of sale attested in their favour on the basis of the sale deed so entered between them and Bresti Devi but the said mutation of sale stood rejected by the Assistant Collector 2nd Grade, Tehsil Chachiot, District Mandi, vide order dated 04.07.1996 passed in Mutation No. 128 on the ground that the plaintiffs were not in possession of the suit land. It stands mentioned in the said Para of the written statement that the Assistant Collector 2nd Grade in his order had mentioned that neither the said Smt. Bresti Devi was in possession nor the plaintiffs were in possession of the suit land and in fact defendants No. 1 and 2 were in peaceful possession and enjoyment of the suit land. In Para-4 of the written statement, it stood mentioned by the defendants that Bresti Devi during consolidation operation in the said Muhal had also moved an application for the partition of the land of her share on the basis of wrong revenue entries in the revenue record, which application of her stood rejected by the Consolidation Officer vide his order dated 04.03.1994 on the ground that Bresti Devi was not in possession of the suit land.

12. When one peruses the replication so filed by the plaintiffs, one finds that the averments made in Paras 3 and 4 of the written statement have not been denied in so many words by the plaintiffs. Though there was no specific issue framed by learned trial Court to the effect that the defendants were in adverse possession of the suit land or not but it is apparent and evident from the pleadings of the parties that defendants No. 1 and 2 had taken this specific stand that they had perfected their title by way of adverse possession over the suit land and thus, this defence of the defendants was in the knowledge of the plaintiffs. Now, the suit

which was filed by the plaintiffs before learned trial Court was for grant of decree of permanent prohibitory injunction on the ground that the plaintiffs were in possession of the suit land and that the defendants were also joint co-owners in possession of the suit land, who since 15.08.1996 were causing wrongful interference with the joint possession of the plaintiffs. However, as has been held concurrently by both learned Courts below, the plaintiffs miserably failed to prove that they were in possession of the suit land. In my considered view, in order to have had succeeded before learned Courts below it was necessary for the plaintiffs to have had proved that they were either owners of the suit land or at least in possession of the suit land. However, the plaintiffs even failed to prove that they were in possession of the suit land.

13. I have carefully gone through the records of the case and a perusal of the records demonstrate that the findings returned by both learned Courts below to the effect that the suit land was not in possession of the plaintiffs are correct findings which was duly borne out from the records of the case. It is a matter of record that an application filed by the plaintiffs for having the suit land mutated in their favour stood rejected by the competent authority on the ground that the plaintiffs were not in possession of the suit land. It is also a matter of record that an application filed during the consolidation proceedings by Bresti Devi claiming partition of her share was also rejected by the Consolidation Officer on the ground that Bresti Devi was not in possession of the suit land. The factum of defendants No. 1 and 2 being in possession of the suit land stands established even from the statement of Bresti Devi itself who entered into the witness box as PW-2. A perusal of her statement demonstrates that she deposed in her cross-examination that in the year 1982 she had approached defendants No. 1 and 2 and had called upon them to deliver her the possession of her share and she also admitted it to be correct that defendants No. 1 and 2 did not hand over the possession of the suit land to her. This clearly demonstrates that the suit land in fact was never in possession of Bresti Devi and, therefore, the contention of the plaintiffs that they were in possession of the suit land alongwith defendants No. 1 and 2 was incorrect as has been held by both learned Courts below. Because both learned Courts below found plaintiffs not to be in possession of the suit land, therefore, they correctly denied the relief of permanent prohibitory injunction in favour of the plaintiffs.

14. Besides this, learned Courts below have not misread the provisions relating to ouster of one co-sharer of the holdings as has been argued by learned counsel for the appellants because the plaintiffs are not co-sharers of the joint holdings with defendants No. 1 and 2, as has been concurrently held by both learned Courts below.

15. Though, it is a matter of record that no issue was framed by learned trial Court as to whether defendants No. 1 and 2 had perfected their title over the suit land by way of adverse possession or not but this was a specific stand taken in the written statement by defendants No. 1 and 2 and evidence was also led in support of the said contention of their by the said defendants. Moreover, it is not a case wherein the plaintiffs were taken by surprise by the stand so taken by defendants and at the cost of repetition, I say that this was a specific stand by the defendants in the written statement itself. During the course of arguments, learned counsel for the appellants could not point out as to how findings to this effect returned by learned Courts below were either contrary to the records as the factum of defendants No. 1 and 2 having perfected their title by way of adverse possession stood proved by the said defendants by leading evidence in this respect.

16. A three Judge Bench of Hon'ble Supreme Court in ***Nedunuri Kameswaramma Vs. Sampati Subba Rao***, ***AIR 1963 Supreme Court 884 (V 50 C 133)***, has held:

> "No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the arties went to trial fully knowing the rival case and led all the evidence not only in support of the contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on

this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion."

17. In ***Moti Lal Vs. State of H.P.***, ***AIR 1996 Himachal Pradesh 90***, this Court has held that mere non-framing of issue will not prejudice any of the parties if both the parties were aware of their respective pleadings and have gone to the trial, being well aware of their respective cases as pleaded.

18. Substantial questions of law are answered accordingly.

19. In view of the above discussion, as there is no merit in the present appeal, the same is accordingly dismissed. No order as to costs. Miscellaneous application(s) pending, if any, stand disposed of. Interim order, if any, also stands disposed of.

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

Pritam Chand & anr. .....Petitioners.

Versus

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

Cr. MMO No. 302 of 2016.
Decided on: 1.9.2017

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 420, 467, 468, 471, 120-B, 201 IPC read with Section 13(2) of the Prevention of Corruption Act, 1988 stating that the accused No. 1 had got sponsored the name of his daughter and accused No. 2 had got sponsored the name of his son-in-law whereas they were not eligible – present petition was filed for quashing the FIR and the consequent proceedings on the ground that accused had no role to play in the selection of the candidates and the committee was constituted by the State Government – held that the FIR and consequential proceedings can only be quashed if the Court is satisfied that no conviction can be recorded against the accused on the basis of material collected by the prosecution – accused No. 1 was posted as clerk in sub-employment exchange- names of 10 candidates were sponsored – names of the daughter of accused No. 1 and son-in-law of accused No. 2 were not on the list – the accused prepared a forged and fictitious list in which their names were included – signature of the sub-employment officer was forged- there is sufficient material against the accused and the FIR cannot be quashed – petition dismissed. (Para-3 to 7)

For the petitioners Mr. D. Dadwal, Advocate.
For the Respondent Mr. Pramod Thakur, Addl. A.G. with Mr. Varun Chandel, Addl. AG.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Petitioners herein are accused in case registered against them and others under Sections 420, 467, 468, 471, 120-B, 201 IPC read with Section 13(2) of the Prevention of Corruption Act, 1988 vide FIR No. 5 of 2003 registered in Police Station SV & ACB, Dharamshala with the allegations that petitioner No. 1 (wrongly mentioned as petitioner No. 2 in this petition) being posted as Clerk in Sub Employment Exchange, Jawali at the relevant time despite being on leave managed to sponsor the name of his daughter Sushma Katoch and Kuldeep Singh, son-in-law of accused No. 2 (wrongly mentioned as petitioner No. 1 in the petition) in the list of the candidates sponsored, who were not eligible nor their names could have been sponsored, hence

forged the said list. Accused-petitioner No. 2 Gajay Singh Rana at the relevant time was posted as District Education Officer, Kangra District at Dharamshala whereas accused-petitioner No. 1 Pritam Chand as Clerk in Sub Employment Exchange, Jawali. Their co-accused Surjit Singh Atwal was posted as Superintendent in the Office of accused-petitioner No. 2. The said accused has also managed to get the name of his two sons, namely, Pankeshwar and Yogeshwar, who are also accused persons, in the list of candidates, sponsored from Sub Employment Exchange, Baijnath.

2. The prayer to quash the FIR and consequential criminal proceedings pending disposal in the Court of learned Sub Judge Kangra at Dharamshala has been sought on the grounds, inter alia, that the accused-petitioners have no role to play in the selection of the candidates who appeared for interview for the post of Laboratory Attendant. The Selection Committee to conduct the interview of the eligible candidates was constituted by the State Government. It is the Selection Committee which has conducted the entire process and on preparation of the merit list, issued appointment letters to successful candidates. Being so, the FIR and also the pending criminal proceedings against them are not legally sustainable. They neither participated in any conspiracy nor anything has come on record during the course of investigation. Also that, they being government servants, have discharged their duties honestly and with all sincerity. The FIR, as such, came to be registered against them falsely. The FIR having been registered against them in the year 2003 whereas challan presented in the Court in the year 2011. They being retired government servants have already suffered a lot on account of registration of this case falsely against them. Above all, a Division Bench of this Court vide judgment Annexure P-2 has directed the State Government to reinstate 5 selected candidates whose services were terminated consequent upon the registration of this case. Therefore, it is canvassed that there is no grain of truth in the allegations leveled against the accused-petitioners and as such, the FIR as well as consequential criminal proceedings pending against them deserves to be quashed and set aside.

3. On hearing learned counsel representing the parties on both sides and going through the record, at the outset, it is deemed appropriate to discuss the legal principles laid down by various High Courts and also the Apex Court in several judicial pronouncements, one of such judgment is that of this Court in ***Bhavak Prashar vs. State of H.P. & anr., Cr.MMO No. 200 of 2015, decided on 16th August, 2016.*** The relevant extract of the judgment reads as follows:

> "10. Otherwise also, as per the law laid down by the Apex Court inherent powers under Section 482 of the Code of Criminal procedure should not be exercised to defeat the legitimate prosecution and the High Court rather should refrain from exercising such powers in a case where on an information lodged at the police Station an offence is registered and the evidence collected during the course of investigation. I am drawing support in this regard from the judgment of this Court in ***Sanjeev Bhardwaj*** Versus ***State of H.P. and others***, ***2013(3) Him. L.R 1897***. I reproduce the relevant portion of this judgment which reads as follow:
>
> > "5. Having gone through the record and also analyzing the rival submissions, before coming to the merits of the case, it is desirable to take down the legal principles applicable to a case of this nature settled by the ***Apex Court in State of Haryana and others versus Ch. Bhajan Lal and others, AIR 1992 Supreme Court 604***. The relevant portion of this judgment reads as follow:
> >
> > > "108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which

we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to given an exhaustive list of myriad kind of cases wherein such power should be exercised.

> 1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> 2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> 3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> 4. Where, the allegations in the F.I.R do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
>
> 5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> 6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding in instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
>
> 7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

6. What, therefore, emerges from the law so laid down by the Apex Court is that the inherent powers under Section 482 Cr. P.C, should not be exercised to defeat the legitimate prosecution and the High Court rather should refrain itself from exercising such powers in a case where on an information lodged at the police Station an offence is registered and the evidence collected during the course of investigation. Such powers, however, can be exercised in those cases where the allegations in

the complaint, even if taken at its face value and accepted as true in its entirety, does not disclose even prima-facie the commission of an offence as it is that complaint which can be said to be the abuse of process of law and deserves to be quashed.

7. The apex Court has again held in ***State of Madhya Pradesh*** versus ***Surendra Kori, (2012) 10 SCC 155,*** as under:

> "14. The High Court in exercise of its power under Section 482 Cr.P.C. does not function as a court of appeal or revision. This Court has, in several judgments, held that the inherent jurisdiction under Section 482 Cr.P.C., though wide, has to be used sparingly, carefully and with caution. The High Court, under Section 482 Cr.P.C., should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of wide magnitude and cannot be seen in their true perspective without sufficient material."

4. The crux of the ratio of the judgment (supra) in which the judgments of the Apex Court have also been considered, therefore, is that the FIR registered against an offender and the consequential criminal proceedings can only be quashed and set aside where amongst others, the Court seized of the matter is satisfied that the evidence and other material collected by the Investigating Agency even if relied upon as it is, no findings of conviction against the accused can be recorded. The present, however, is not a case of this nature for the reason that admittedly, accused-petitioner No. 1 Pritam Chand in the year 2000 was appointed as Clerk in Sub Employment Exchange, Jawali. The Sub Employment Exchange has sponsored the names of 10 candidates for selection to the post of Laboratory Attendant vide letter No. 10A 6/2000-57-58 dated 22.1.2000. The names of Sushma Katoch, the daughter of accused-petitioner No. 1 and that of Kuldeep Singh, son-in-law of accused petitioner No. 2, was not in that list. Accused No. 1 though was on leave from 5.1.2000 to 7.2.2000, however, as per the investigation conducted, he prepared a forged and fictitious list of sponsored candidates under the same diary and dispatch number i.e. 10A/2000-29 dated 22.1.2000 and included the names of aforesaid Sushma Katoch and Kuldeep Singh therein. He himself signed the same as Sub Employment Officer, Jawali and passed on the same to his co-accused petitioner No. 2 herein. The investigation further reveals that aforesaid Sushma Katoch and Kuldeep Singh were not eligible for being considered against the post of Laboratory Attendant. However, both the accused in connivance with each other have prepared the forged and fictitious record and ensured their participation in the selection process. On the basis of such forged and fictitious record, they ultimately were selected and appointed as Laboratory Attendants.

5. During the course of scientific investigation got conducted in the matter, the list of sponsored candidates was found to be forged one because accused-petitioner No. 1 prepared the same and forged the signature of Sub-Employment Officer thereon. Kuldeep Singh was not at all enrolled in Sub Employment Exchange, Jawali, however, it is his father-in-law accused-petitioner No. 2 who forged his signature on the envelope X-1 maintained in the employment exchange at the time of registration of name. This fact was allegedly established during the course of scientific investigation got conducted by the prosecution.

6. Not only this, but as per further allegations against accused-petitioner No. 2, he never issued an Office Order deputing the staff to conduct the examination/interview for the post in question and rather deputed the staff of his choice telephonically. As per order of his office dated 15.2.2000, the then Principal Govt. Senior Secondary School, Kangra, the then Dy. District Education Officer, Dehra and the then Principal Govt. Senior Secondary School (Girls), Dharamshala were deputed to conduct the examination, however, when they were interrogated disclosed that they were not deputed to conduct the interview for the post of Laboratory

Attendant either by way of written order or on oral directions. Therefore, the selection of the Laboratory Attendant during the tenure of accused-petitioner No. 2 as District Education Officer, Kangra at Dharamshala was found to be illegal.

7. On the basis of the evidence discussed hereinabove, it cannot be said that both accused-petitioners have been implicated falsely by the police in the case in hand. True it is that vide judgment Annexure P-2, a Division Bench of this Court has held the appointment of few of the selected candidates, including Yogeshwar, Pankeshwar and Kuldeep Singh aforesaid as legal and valid, however, the judgment rendered in a writ petition or for that matter in Letters Patent Appeal cannot be made basis at this stage when prima-facie there is evidence to show that both accused-petitioners are involved in the commission of the alleged offence.

In view of what has been said hereinabove, there is no merit in this petition and the same is accordingly dismissed. The records of the case be returned to the trial Court at once so that the proceedings in the pending trial could proceed further. In view of the FIR was registered long back in the year 2003, it is expected from the learned trial Judge to proceed in the case expeditiously and dispose it of at the earliest.

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

State of Himachal Pradesh ...Appellant
Versus
Bhupinder @ Bhuppi ...Respondent

Cr. Appeal No. 280 of 2007
Decided on : 1.9.2017

Indian Penal Code, 1860- Section 451, 147, 148, 323, 325 read with Section 149- Informant was taking tea – he came outside for urinating – accused U met him and gave him beatings – subsequently, accused U came with 3-4 boys to the house of the informant and gave beatings to informant - when father of the informant tried to rescue him, the accused also gave him beatings – the accused were tried and acquitted by the Trial Court- held in appeal that the weapons of offence were not recovered- PW-6 and PW-7 did not support the prosecution version- the accused were not properly identified – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 13)

For the appellant: Mr. Vivek Singh Attri, Additional Advocate General.
For the respondent : Mr. Peeyush Verma, Advocate, for respondents No. 1, 4 and 6.
Mr. Vivek Sharma, Advocate, for respondents No. 2 and 5.
Mr. R.K. Bawa, Senior Advocate with Mr. M.S. Thakur, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the State of Himachal Pradesh against the judgment of acquittal rendered on 30.4.2007 by the learned Judicial Magistrate 1st Class (4), Shimla upon criminal case No. 31/2 of 2006/2000.

2. The facts relevant to decide the instant case are that on 16.12.1998 Vikas Bali, complainant got his statement under Section 154 Cr. P.C. Ext. PW1/A recorded with Sh. Prakash Chand at IGMC Shimla that on 16.12.1998 at 5:30 P.M. he along with his friends Ankush,

Kuljeet and Maasi Alpana was taking tea in Selitiyer Hotel. When he came out for toilet, one boy met him outside the room, who disclosed his name as Udit. That boy asked him not to do what he was doing in R.C.C. When the complainant Vikas Bali asked what he was doing, that boy gave two fist blows. The waiters and his companions also came there and rescued him from the clutches of said Udit. That boy also threatened the complainant to kill him and ran away from the spot. Thereafter, he along with his companions went to his house. At 9 P.M., when he along with his family members was present at his house, another boy named Rajesh came there and knocked at the door of his house. His sister opened the door. Rajesh inquired whether the house was belonging to J.N. Bali. In the meantime, their neighbour Saraswati came there and disclosed that the said boy was asking for the house of Bali and his other companions were standing outside. In the meanwhile, 3-4 boys along with Udit came inside and one of them was having rod, who was asked by Udit to kill him. He was attacked with the rod and thereafter all the accused started beating him with fist blows and with the rod. When his father tried to rescue him from the clutches of the accused, they also gave beatings to his father. When he alongwith his father came outside after rescuing themselves, those boys also came outside and 4-5 other boys joined them. All the accused persons again started beating them. On hearing their noise, their neighbours Kushal Kumar and Mukesh Kumar etc. came on the spot and rescued them. Udit was caught by him whereas Rajesh was apprehended by the other persons on the spot. The statement after endorsement was sent to Police Station through Daljit Singh on the basis of which formal FIR Ext. PW5/B was registered.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused persons, a report under Section 173 of the Code of Criminal Procedure was prepared and filed before the learned trial Court.

4. The accused stood charged by the learned trial Court, for their committing offences punishable under Sections 451, 147, 148, 323, 325 read with Section 149 IPC. In proof of the prosecution case, the prosecution examined 11 witnesses. On conclusion of recording of prosecution evidence, the statement(s) of each of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court, wherein each of the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of evidence existing on record, the learned trial Court, returned findings of acquittal upon the accused/respondents herein, for their committing offences punishable under Sections 451, 147, 148, 323, 325 read with Section 149 IPC.

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded upon the accused/respondents. The learned Additional Advocate General appearing for the State has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation “by it” of the evidence on record, rather, theirs standing sequelled by gross-mis-appreciation “by it” of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondents herein has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Judicial Magistrate, 1st Class, Shimla standing based on a mature and balanced appreciation, by him, of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. In proof of the charge(s), the prosecution has depended upon the testimony(s) of the injured/victims, who respectively testified as PW-1 and PW-2. Their testificatory ascription(s) of incriminatory role(s) vis-à-vis co-accused Rajesh and Udit, hold consonance with all recitals in respect thereto occurring in FIR borne in Ext.PW5/B. Consequently, with theirs’ concurrently testifying vis-a-vis the incriminatory role(s) of the aforesaid accused, also thereupon renders their

respective testification(s) to remain un-ingrained with any vice of any improvement or embellishment, vis-à-vis their respectively recorded previous statement(s) in writing. Also with PW-8 proving the apposite MLC(s) prepared in respect of the injuries suffered by PW-1 and PW-2, in the ill-fated occurrence, MLCs whereof are embodied respectively in Ext.PW8/A and Ext.PW8/B, besides with PW-8 testifying with categoricality in respect of the injuries reflected therein being causable by user thereon, of danda(s) and of iron rod(s), whereupon with his purveying corroboration vis-à-vis the testification(s) of victims, who respectively deposed as PW-1 and PW-2, thereupon it would be befitting to conclude that the prosecution has succeeded in proving the charges against the accused.

10. However, both the danda and the iron rod with user whereof, injuries were respectively inflicted by Udit and Rajesh, upon PW-1 and PW-2, remained un-recovered, at their respective instance(s) by the Investigating Officer concerned. The effect of the Investigating Officer concerned failing to, at the instance of the aforesaid, beget rercovery(s) of danda(s) and of iron rod(s), weapons whereof stood purportedly used by the co-accused in inflicting injuries upon the victims, fosters an inference that their purported user by co-accused being vulnerable to grave skeptism, thereupon it is befitting to conclude that the injuries marked in Ext.PW8/A and in Ext. PW8/B, hence befell upon PW-1 and upon PW-2, in a manner other than the one, as concurrently deposed by them. The ensuing inference therefrom is of the testification(s) of PW-1 and PW-2 in respect of theirs, in the relevant occurrence hence suffering injuries on their respective person(s), in sequel to co-accused Udit and Rajesh delivering blows upon them, with theirs' purportedly using iron rod(s) and danda(s), standing bereft of sanctity.

11. The testification(s) of PW-1 and PW-2 were concerted to be corroborated by PW-3, PW-6 and PW-7. However, the testimony of PW-3 vis-à-vis the occurrence is discardable his being evidently a hearsay witness. PW-6 and PW-7 both reneged from their respectively previously recorded statement(s) in writing, also in their respectively conducted cross-examination(s) by the Public Prosecutor concerned, on, theirs being declared hostile, both therein omitted to make any communication(s) in respect of theirs supporting the genesis of the occurrence, also omitted to make any articulations in respect of theirs supporting the factum of one Udit and one Rajesh, recording their participation in the ill fated occurrence. Even though, PW-1 and PW-2 in their respectively recorded previous statement(s) in writing, specifically attributed incriminatory role(s) vis-à-vis co-accused one Udit and one Rajesh, yet, purported eye witnesses to the occurrence who respectively deposed as PW-6 and PW-7, omitted to, therein disclose the name(s) and identity(s) of co-accused Udit and of Rajesh, hence thereupon for lack of corroboration thereto by independent witnesses, renders the deposition(s) of the victims to be bald hence uncreditworthy. Even though, PW-6 in his deposition, comprised in his examination-in-chief, makes echoing therein, of two boys being nabbed on the spot, whereupon the learned Additional Advocate General submits that hence he corroborates the participation of one Udit and of one Rajesh in the ill-fated occurrence, yet for the aforesaid contention warranting acceptance, it was also incumbent upon the Public Prosecutor concerned, to, in consonance with the further testification of PW-6, of the said two boys on theirs being nabbed at the site of occurrence, thereafter theirs being handed over to S.P. A.N. Sharma and SHO Pathania, hence adduced cogent evidence in respect thereto, comprised in the police Officers' aforesaid making testification(s) in concurrence therewith. However, the prosecution has failed to cogently prove the aforesaid factum, given its omitting to lead the aforesaid, into the witness box, whereas the examination(s) of the abovesaid Police Officer(s) was imperative, for clinching the factum of two boys, if any, nabbed at the site of occurrence being relatable to the identities of one Udit and one Rajesh. In sequel, their non-examination begets an inference that both aforesaid co-accused Udit and Rajesh, who purportedly stood nabbed at the site of occurrence, whereafter they were purportedly handed over to the Police Officers concerned, were neither nabbed at the site of occurrence nor were handed over to the aforesaid Police Officer(s), whereupon their implication in the occurrence, is construable to be engendered by a shrewd mechanism deployed by the Investigating Officer concerned.

12. Both the aforesaid co-accused, prior to their identification in Court by PW-1 and

by PW-2, though excepting the latter, hence evidently remained, unidentified by other eye witnesses also though the victims in their previously recorded statement(s) in writing described therein, the key characteristics/features of the aforesaid accused, nonetheless the effect of excepting the aforesaid, neither PW-6 nor other independent witnesses to the occurrence, in their respectively recorded previous statement(s) in writing, not, delineating therein the key characteristic features of the accused concerned, is of, the descriptions by the victims in their previously recorded statement(s) in writing of the key characteristic features of the accused concerned, also theirs identifying them in Court, being of no avail to the prosecution in establishing the incriminatory role of the accused concerned, especially, when obviously the necessary corroborative evidence in respect thereto stands not purveyed either by PW-6 or by other independent witnesses nor when the Police Officers concerned, who respectively purportedly took over the custody of the accused concerned, at the site of occurrence, came to be examined as PWs, for lending succor thereto.

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 appellate Court does not suffer from any perversity or absurdity of mis-appreciation and non-appreciation of evidence on record.

14. Consequently, there is no merit in the instant appeal which is accordingly dismissed. The Judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

Om Prakash Sahani & another ...Petitioners

Versus

State of H.P. ...Respondent

Cr. MMO No.190 of 2017
Decided on :6.9.2017

Code of Criminal Procedure, 1973- Section 92 and 311- An application for recalling PW to produce certain photographs was filed by the prosecution which was allowed by the Trial Court – held that the PW had tried to produce the photographs but it was not allowed in absence of any permission from the Court – the court has the power to recall a witness for just decision of the case – the production of photographs is necessary for determining the lis – the petition dismissed.

(Para -3 to 7)

For the petitioner : Mr. Neeraj Gupta, Advocate.

For the respondent : Mr. Vivek Singh Attri, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

During the course of the learned Chief Judicial Magistrate, Solan holding trial of the accused in respect of FIR No. 153 of 2013, an application, constituted under the provisions of Section 92 read with Section 311 of the Code of Criminal Procedure, was instituted by the prosecution. The prayer made in the aforesaid application, was, for recalling PW Ashwani Kumar. The reason set forth in the application, for hence the aforesaid PW being ordered to be recalled, is, embodied in his being hence facilitated to produce certain photographs, wherein the inculpatory role of the accused stands revealed.

2. The application was contested by the accused/petitioner herein. Upon hearing the respective counsel for the parties, the learned Chief Judicial Magistrate, Solan allowed the application. The petitioners/accused hence prefers the instant petition before this Court.

3. The learned counsel appearing for the petitioner has, with much vigour, made espousals in respect of frailty of the affirmative reasoning assigned by the learned Chief Judicial Magistrate, Solan, reasoning whereof occurs in paragraph-4 of the impugned orders, para whereof stands reproduced hereinafter:

> "Though, at the time of examination, Sh. Ashwani Kumar, in the Court, had tried to produce on record such photographs in clandestine manner without seeking permission of the Court and Court had straight away rejected the production of the photographs. Therefore, at this stage, same cannot be allowed to be produced on record. On these grounds, the accused persons have prayed for dismissal of the application".

wherein voicing(s) occur of the aforesaid prosecution witness at the time of his deposition being recorded by the learned Chief Judicial Magistrate, his, thereat concerting to, in a clandestine manner, adduce certain photographs in evidence, manner(s) whereof of theirs adduction in evidence, without, his prior thereto seeking permission of the Court concerned, hence constraining the learned Court concerned to reject the aforesaid endeavour(s). For testing the vigour of the aforesaid submission, it is imperative to allude to the reply filed by the petitioner/accused, to, the application cast under the provisions of Section 311 of Cr. P.C. The apt portion of the reply filed by the respondent, unveils an admission of the accused, of, the aforesaid PW Ashwani Kumar, attempting, during the course of recording of his deposition in Court, to, in a clandestine manner, without his prior thereto seeking permission of the Court concerned, hence adduce certain photographs in evidence, effort(s) whereof were objected to by the learned defence counsel, hence sequelling the learned Chief Judicial Magistrate, to reject their adduction in evidence. The aforesaid apposite acquiescence, does, contrarily purvey vigour to the reasons ascribed by the learned Chief Judicial Magistrate, for his hence proceeding to order for the aforesaid prosecution witness being permitted to be recalled, for his hence being facilitated, to produce certain photographs besides also, the APP concerned being facilitated to exhibit them as pieces of incriminatory evidence(s) against the accused.

4. Be that as it may, the learned counsel for the petitioners/accused has also with much vigour contended that with the aforesaid prosecution witness, not, in respect(s) thereof making any voicing(s) in his previous statement(s) recorded in writing by the Investigating Officer nor his making any apposite echoings in respect thereto in his testimony recorded by the learned Chief Judicial Magistrate, except during course thereof, his failingly attempting to, in a clandestine manner, produce/adduce certain photographs in evidence also his thereat attempting their exhibition by the learned APP concerned, thereupon the prosecution being subsequently barred to seek recall of the aforesaid prosecution witness. For appreciating the worth of aforesaid submission, it is imperative to extract the relevant provisions borne in Section 311 of Cr.P.C., provisions whereof stand extracted hereinafter:

> "311. Power to summon material witness, or examine person present._ Any Court may, at any stageof any inquiry, trial or other proceeding under this Code, summon any person as a witness, or recall and re-examine any person already examined; <u>and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.</u>"

5. The bestowal of jurisdiction upon the learned trial Court, to, in consonance with the relevant hereabove apt underlined portion thereof, hence order for recall of any PW, enjoins evident satiation surfacing vis-à-vis the trite statutory parameters (a) his evidence being of immense probative worth (b) his evidence being essential for a just decision of the case. Given the aforesaid connotation(s) vis-à-vis the apt above underlined portion(s) of Section 311 Cr.P.C., thereupon, the Chief Judicial Magistrate, concerned appears not to have detracted from subtle

nuance(s) thereof, visibly with certain photographs in respect of whose adduction into evidence, he, was directed to be recalled, prima-facie, appearing essential, for thereupon the learned Chief Judicial Magistrate concerned being facilitated to arrive at a just decision in respect of the charge(s) framed against the accused. The statutory discretion exercised by the learned Chief Judicial Magistrate, Solan, qua essentiality of re-examination of PW-4, for hence facilitating him to thereat adduce certain photographs into evidence, besides the subjective satisfaction made by him qua thereupon his being also hence leveraged to arrive at a just decision, in respect of the charge(s) framed against the accused, cannot, at this stage, be construed to be ingrained with any gross illegality, unless there was material before this Court in respect of his being not cited as a prosecution witness nor his eye witnessing the occurrence, whereupon alone the visibly bald attempt of the prosecution, to, through an application cast under the provisions of Section 311 Cr. P.C. hence ensure adduction through him into evidence, of certain photographs, would be construable to be an afterthought, also the purported pieces of incriminatory evidence(s) vis-à-vis the accused, would acquire vices of concoction and invention, whereupon the exercise of the apposite subjective satisfaction by the Magistrate concerned, would, also beget stains of concoction and invention. Contrarily when PW-4 stood cited as a prosecution witness, also when during the course of his examination-in-chief, he clandestinely/ disaffirmatively attempted, to, adduce certain photographs into evidence besides strived to enable the APP concerned to exhibit them. Consequently, thereupon even if, in his previous statement recorded under Section 161 Cr. P.C. by the Investigating Officer concerned, he, omitted to make any disclosure therein in respect of his possessing certain photographs', with depictions thereon vis-a-vis incriminatory role(s) of the accused, yet omission(s) aforesaid are not critical, nor the application cast under the provisions of Section 311 Cr.P.C. is either hence naked or bald, especially when on his re-testifying, as a prosecution witness, the learned defence counsel, holds all leverages to thereat make all attempt(s), to, by confronting him with his previous statement recorded in writing, hence impeach the creditworthiness of the re-testification(s) of the aforesaid prosecution witness.

6. In aftermath, on the re-examination PW-4, no apparent prejudice would be caused to the accused. Also when the probative worth of the documentary evidence proposed to be adduced by PW-4, on his being directed to be re-called and concomitantly re-examined, is yet to be gauged along with, other incriminatory evidence against the accused, thereupon also it appears that the aforesaid documentary evidence is not the singular incriminatory evidence(s) available with the prosecution, in respect of the charge, for thereupon the trial Court being enabled to pronounce a just decision upon the charge(s), rather its probative worth is to be assessed along with connected therewith incriminatory piece(s) of evidence, testified by other prosecution witness concerned. Sequel thereof is that the proposed piece(s) of documentary evidence while, not, comprising singular or solitary piece(s) of incriminatory evidence(s) against the accused, thereupon the application constituted under the provisions of Section 311 Cr. P.C. by the prosecution, though, is instituted subsequent to the examination of PW-4, with a prayer therein of his being directed to be re-called for his retestifying, is not infected with any vice(s), of, hence the prosecution creating fresh evidence or its nowat inventing evidence(s) vis-a-vis charge besides its through PW-4 introducing contrived evidence in proof of the charge(s), rather it appears that its introducing evidence corroborative of connected therewith evidence testified by other prosecution witnesses.

7. Consequently, there is no merit in the present petition and the same is dismissed. The learned Chief Judicial Magistrate, Solan is directed to, within two weeks, hereinafter ensure that PW-4 Ashwani Kumar appears before him for his recording his testification, also he be permitted to thereat adduce the aforesaid piece(s) of documentary evidence. Moreover, the learned Chief Judicial Magistrate, Solan is directed to enable the APP concerned to exhibit them. Needless to say that the learned defence counsel shall be afforded all opportunities, on all facets, to conduct an efficacious cross-examination of PW-4. He is also permitted to raise all objection(s) with regard to the admissibility and relevance of the apposite photographs. All pending application(s), if any are also disposed of. No costs. Copy dasti.

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

State of H.P. .....Appellant
Versus
Anish Mohammad .....Respondent.

Cr. Appeals No. 187 & 345 of 2009
Date of Decision: 06.09.2017

Punjab Excise Act, 1914- Section 61 (1)(a)- A vehicle was intercepted and searched by the police - accused A was driving the vehicle while accused I was sitting with him- 24 cartons of English Liquor bearing mark 'XXX Rum Black Jack' each containing 12 bottles and 45 cartons of country liquor bearing mark 'Lal Kila' each containing 12 bottles were found in the vehicle – accused could not produce any permit on demand- three bottles of XXX Rum and three bottles of Lal Kila were taken as samples for analysis – the accused were tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused were acquitted- held in appeal that there are contradictions in the testimonies of official witnesses – there is no evidence that seal impression was also deposited in CTL – link evidence is missing – only 6 bottles were analyzed and it is not proved that all the bottles were containing liquor in them – the Appellate Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 25)

Cases referred:
Surender Singh. V. State of H.P.", Latest HLJ 2013 (2) 865
State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919
State of Rajasthan v. Gopal, 1998 (8) SCC 499
Nanha v. State of H.P., Latest HLJ 2011 (HP) 1195

For the appellant(s): Mr. M.L. Chauhan, Additional Advocate General.
For the respondent(s): Mr. T.S. Chauhan Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Since in both the aforesaid criminal appeals, challenge has been laid to common judgment dated 06.1.2009, passed by the learned Sessions Judge, Hamirpur, HP, in Criminal Appeal Nos. 73 of 2008 and 84 of 2008, as such, they are being taken up together and disposed of by a common judgment.

2. Instant criminal appeals filed under Section 378 of the Cr.PC, are directed against the judgment of acquittal dated 06.1.2009, passed by the learned Sessions Judge, Hamirpur, H.P. in Appeal Nos. 73 of 2008 and 84 of 2008, reversing the judgment of conviction dated 20.9.2008, passed by learned Judicial Magistrate, Ist Class, Barsar, District Hamirpur, HP, in Excise Case No. 19-III-2006, whereby the respondents-accused were sentenced to undergo rigorous imprisonment for a period of one year each and fine of Rs. 5000/- each, for having committed offence punishable under Section 61(1) (a) of the Punjab Excise Act, as applicable to the State of Himachal Pradesh (in short "the Act").

3. In nutshell, case of the prosecution as emerge from the record is that on 28.2.2006, at around 1:20 am, when ASI Parkash Chand alongwith Constable Dhanbir Singh and HHG Kuldip Singh, were on Naka at place called Dandroo, one Mahindra Pick-up Jeep bearing No. HP-23B-4034 came from Padhar side towards Dandroo in a high speed. As per prosecution story, aforesaid vehicle was intercepted and on its search, accused namely Anish Mohammad was found driving the said Jeep, whereas another accused namely Inder Singh was sitting with him.

On search, police party recovered 24 cartons of English Liquor 'XXX Rum Black Jack' brand, each carton containing 12 bottles, whereas 45 cartons of country liquor 'Lal Kila' brand contained 12 bottles each (total 69 cartons). As per the story of prosecution, since accused failed to produce any valid permit/licence for carrying /transportation of the aforesaid liquor cartons, as mentioned above, same were taken into custody. As per its own story of the prosecution, three bottles out of Black Jack XXX Rum and three bottles out of country liquor Lal Quila brand were taken as sample for chemical analysis and thereafter, property was sealed with seal impression "P" and same were taken into possession vide recovery memo Ext.PW1/A. Police also took into possession vehicle along with its documents vide memo Ext.PW1/B. Separate seal impression of seal 'P' on a piece of cloth Ext.PW5/B was also taken. Subsequent to aforesaid recovery, rukka Ext.PW5/C was sent to the Police Station, on the basis of which, FIR Ext.PW3/A came to be registered against the accused persons. Police after investigation of case, presented challan in the competent court of law.

4. Learned Judicial Magistrate, 1st Class, Barsar, District Hamirpur, H.P., on being satisfied that prima-facie case exists against the accused, charged them under Section 61(1) (a) of the Act, to which they pleaded not guilty and claimed trial. Subsequently, the learned trial Court on the basis of material adduced on record by prosecution held the accused guilty of having committed offence punishable under Section 61(1) (a) of the Act and accordingly, convicted and sentenced them as per the description given supra. However fact remains that charge under aforesaid section was dropped against the co-accused namely Subhash Chand for want of evidence, as a result of which he came to be acquitted of aforesaid offence.

5. Being aggrieved and dis-satisfied with the judgment of conviction recorded by the learned trial Court, the petitioner-accused preferred an appeal under Section 374 Cr.PC before the learned Sessions Judge, Hamirpur, H.P. Learned Sessions Judge, vide judgment dated 6.1.2009, allowed the appeal preferred by the accused persons, as a result of which, the judgment of conviction passed by the learned trial Court, came to be set-aside. In the aforesaid background, present criminal appeal has been filed by the State before this Court against the acquittal of the respondents-accused, seeking therein conviction of the respondents-accused after setting aside the judgment of acquittal passed by the learned Sessions Judge.

6. Mr. M.L. Chauhan, learned Additional Advocate General vehemently argued that the impugned judgment of acquittal having been passed by the learned Sessions Judge is not sustainable in the eye of law as the same is not based upon the correct appreciation of the evidence adduced on record by the prosecution and as such, same deserves to be quashed and set-aside. While referring to the impugned judgment passed by the court below, Mr. Chauhan, contended that bare perusal of the impugned judgment suggests that the learned court below has not appreciated the evidence in its right perspective, as a result of which, erroneous findings have come on record. Mr. Chauhan, further contended that the court below has not discussed the evidence of the prosecution in its right perspective and gave no finding on merits of the case**.** He further contended that learned Sessions Judge, discarded the testimony of prosecution witnesses for untenable reasons in the absence of any proof of enmity and no reasons were assigned for not taking into consideration their versions. Mr. Chauhan, while inviting attention of this Court to the evidence led on record by the prosecution argued that prosecution proved its case beyond reasonable doubt that 69 cartons of liquor (24 cartons of Black Jack XXX Rum and 45 cartons of country liquor Lal Kila) were recovered from the conscious possession of the accused, who were admittedly sitting in the Mahindra pick-up jeep at the time of the recovery and as such, there was no scope left for the court below to upset the findings recorded by the learned trial Court. With the aforesaid submissions, Mr. Chauhan, contended that the respondents-accused deserve to be convicted after setting aside the judgment of acquittal recorded by the learned Sessions Judge.

7. Mr. Tara Singh Chauhan, learned counsel representing the respondents–accused supported the impugned judgment of acquittal passed by the learned Sessions Judge. He, while inviting attention of this Court to the impugned judgment of acquittal passed by the Court below strenuously argued that there is no illegality and infirmity in the same and same is based upon

the correct appreciation of the evidence available on record. With a view to refute the aforesaid contentions having been made by the learned Additional Advocate General, Mr. Tara Singh Chauhan, learned counsel, argued that none of the prosecution witness supported the case of the prosecution, rather all the so called witnesses stated nothing with regard to the alleged recovery effected from the conscious possession of the respondent–accused. Lastly, Mr. T.S. Chauhan, contended that if the story put forth by the prosecution is believed that 69 cartons of liquor were recovered, no conviction, if any, could be recorded against the accused persons, solely for the reason that only six bottles out of 69 cartons (three samples from XXX Rum and three from country liquor) were sent for the chemical examination. While placing reliance upon the judgments dated 29.5.2017, passed by this Court in Criminal Appeals No. 620 and 777 of 2008, learned counsel stated that since three bottles of XXX Rum and three bottles of country liquor 'Lal Kila', were sent for chemical analysis, only six bottles can be presumed to be recovered from the possession of the accused persons. In the aforesaid background, Mr. Tara Singh prayed for dismissal of the instant appeal being devoid of any merit.

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

9. While hearing the arguments having been made by the learned counsel for the parties, this Court had an occasion to peruse the impugned judgment as well as evidence led on record by the prosecution, perusal whereof certainly not suggests that prosecution was able to prove its case beyond reasonable doubt, rather, this Court after having gone through the statements having been made by the prosecution witnesses has no hesitation to conclude that recovery of liquor from the accused was not proved and as such, there is no illegality and infirmity in the judgment passed by the learned Sessions Judge.

10. In the case at hand, prosecution with a view to prove its case beyond reasonable doubt, examined as many as five witnesses, whereas respondents-accused in their statements recorded under Section 313 Cr.PC denied the case of the prosecution and claimed themselves to be innocent, however, they did not lead any evidence in their defence despite sufficient opportunities having been afforded to them.

11. PW1 Danvir Singh, while stating in his examination-in-chief that 'Tralla' was checked in his presence by the police party, wherein 29 cartons of liquor were recovered, categorically admitted in his cross-examination that he did not know for what purpose, he was deputed from the police station. He also stated in his examination-in-chief that 5-10 vehicles had passed/crossed before the interception of the offending 'tralla' at the spot. Aforesaid witness also stated that cartons of liquor allegedly recovered from the accused were taken into possession vide memo Ext.PW1/A. He also identified the cartons Ext.P1 to Ext.P69 in the Court.

12. PW2 HHC Ajit Singh stated that on March 7, 2006 MHC Raj Kumar handed over to him the sample bottles of this case, which he had deposited on the next date at CTL, Kandaghat in safe position. Importantly, aforesaid witness in his cross-examination specifically admitted that he had only taken the sample bottles to CTL and nothing else.

13. PW3 HC Raj Kumar, who happened to be MHC at Police station Barsar at that relevant time, also stated that case property of this case including six sample bottles were deposited with him on 28.2.2006 by the Investigating Officer and thereafter, he had sent the sample bottles on 7.3.2006 vide RC No. 30/2006 through HHC Ajit Singh to CTL, Kandaghat. He like PW2 also admitted in his cross-examination that only sample bottles were sent to CTL.

14. PW5 ASI Parkash Chand, who at that relevant time was heading the police party deposed before the court below that offending vehicle (Tralla) was checked in his presence, wherein 69 cartons of liquor without any licence or permit were recovered. He in statement categorically stated that six bottles were separated (three samples from XXX Rum and three from country liquor). Aforesaid witness further stated that aforesaid sample bottles were sealed with seal impression 'P' and thereafter seal impression 'P' was also taken separately on a piece of cloth. As per this witness, case property and 'Tralla' were taken into possession vide memo Ext.PW1/A

and Ext.PW1/B, respectively. He categorically admitted in his cross-examination that no independent witness was associated at the spot as it was not required. Interestingly, aforesaid witness (PW5) in his cross examination admitted that some bottles were empty when they were shown in the Court.

15. Conjoint reading of statements having been made by the aforesaid prosecution witness clearly suggests that vehicle being driven by the respondent-accused namely Anish Mohammad was intercepted on 27/28.2.2006 by police party headed by PW5 ASI Parkash Chand. Perusal of Rojnamcha Rapat Ext.PW5/A suggests that on 27.2.2006, ASI Karam Singh recorded in the Rapat Rojnamcha that information has been received on VHF Set that vehicle No. 4757, Marshal, was coming towards Barsar and accordingly, naka should be put to check it. After recording aforesaid Rapat in Rojnamacha, police party headed by PW5, Parkash Chand left the police station in vehicle No. HP-22-5642 towards Dandroo, Mehre and Jyoli.

16. In the case at hand, neither ASI Karam Singh, who was first person to receive information with regard to illegal transportation of liquor by the respondent-accused, was cited as prosecution witness nor any of the prosecution witnesses in their statements, as have been discussed above, disclosed/revealed factum, if any, with regard to the receipt of prior information on VHF, as recorded by the ASI Karam Singh in Rapat Rojnamacha, Ext.PW5/A.

17. Similarly, all the material prosecution witnesses, while deposing before the court below that 69 cartons of liquor were recovered, categorically stated that six bottles were separated out of 69 cartons allegedly recovered from the conscious possession of the respondents-accused. PW2, PW3 and PW5 stated before the court below that only six bottles, which were separated at the time of taking possession of the case property Ext.PW1/A, were sent to CTL Kandhaghat for chemical examination.

18. Though , this Court after having carefully perused the evidence led on record by the prosecution sees no reason to differ with the finding recorded by the learned Sessions Judge that prosecution failed to prove its case beyond reasonable doubt but even otherwise also, entire recovery allegedly effected by the police stands vitiated on account of the fact that only six bottles (three of XXX Rum and three of country liquor) out of the total alleged recovery from the accused were sent for chemical analysis and as such, there is recovery of only six bottles, which is admittedly within the permissible limits. At this stage, it would be profitable to refer to the judgment passed by this Court in case titled "***Surender Singh. V. State of H.P***.", Latest HLJ 2013 (2) 865, which reads as under:-

> ***"26. In the instant case, it be also noticed that there is yet another major flaw in the investigation by the police. Assuming that the contraband was actually recovered by the police party, police did not take samples from all the boxes. Samples only from few bottles out of some of the boxes, which they had opened, were taken. None of these witnesses have deposed that the remaining boxes were sealed; from outside appeared to be of the same make or brand; bearing serial numbers; the date of manufacture; or the place and the name of the manufacturer. All that these witnesses have deposed is that boxes of alcohol, as described above, were found in the vehicle. Inside the boxes could be anything. Police could not prove that the remaining boxes actually contained liquor. The samples cannot be said to be representative in character.***
>
> ***27. In similar circumstances, this Court in Mahajan versus State of Himachal Pradesh, 2003 Cr.L.J. 1346; State of H.P. versus Ramesh Chand, Latest HLJ 2007 (2) 1017; Dharam Pal and another versus State of Himachal Pradesh, 2009 (2) Shim. LC 208; and State of Himachal Pradesh versus Kuldeep Singh & others, 2010(2) Him.L.R. 825, acquitted the accused, as prosecution could not prove, beyond reasonable doubt, as to what was actually there in the remaining boxes.***

28. As per version of PW-1, outside the boxes 'Sirmour No.1' was printed which version stands denied by PW-7. In the instant case, there is nothing on record to show that the remaining boxes were in fact containing liquor. Quantity of the remaining bottles of the boxes from which samples were drawn has also not been proved to be liquor. These aspects have not been considered by the Courts below. The cumulative effect is that the prosecution has failed to prove the charge against the accused, beyond reasonable doubt and as such judgments of the Courts below are not sustainable in law.

19. Reliance is also placed on the judgment passed by this Court ***State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919,*** wherein this Court has observed in paras 6 and 7 as under:-

"6.At the very outset, I would like to say that neither the non-compliance of sub-section (6) of Section 100 of the Code of Criminal Procedure will render the search illegally nor the respondent can be acquitted on this sole ground. However, in the instant case the regrettable feature is that as per the case of the prosecution 72 pouches of country liquor of "Gulab" brand country liquor containing 180 ml. each were recovered from the possession of the respondent. Admittedly, one pouch of 180 ml. out of the recovered quantity was retained as a sample, which was of licit origin as opined by the Chemical Analyst.

7. There is nothing on record to show that the remaining 71 pouches alleged to have been recovered from the respondent also contain the country liquor more than the permissible quantity without the permit or licence. Before the respondent could be convicted for the offence charged, it was incumbent upon the prosecution to prove that the respondent was in actual and conscious possession of the licit liquor in excess of the prescribed limit."

20. Apart from above, it also emerge from the record that as per statement of Investigating officer, ASI Parkash Chand, seal impression used to seal the samples was taken separately on a piece of cloth and thereafter, such seal impression was sent to CTL Kandaghat, for its comparison with the sample bottles to avoid possibility of tempering. Aforesaid witness though stated that seal impression was taken on a piece of cloth but he nowhere stated that he deposited the seal impression with MHC Raj Kumar (PW3). PW3 also nowhere stated that seal impressions were deposited with him by the I.O. Similarly HHC PW2 Ajit Singh, who had allegedly taken the samples to the CTL Kandaghat, did not state something specific with regard to the taking of seal impressions to the CTL Kandaghat, for comparison with seal on the samples. PW, HHC, Ajit Singh, in his cross examination, categorically admitted that save and except sample parts, he was not handed over anything else by the HHC Raj Kumar to be deposited in CTL Kandaghat and as such, this Court sees no illegality and infirmity in the finding recorded by the learned Sessions Judge, that there is no link evidence on the file to suggest that seal, if any, was sent to CTL Kandaghat alongwith samples to compare the seals on the samples sent for chemical examination. Though in the dockets, Ext.PX and Ext.PY, it is mentioned that seal impressions were being sent separately to the laboratory, but none of the PWs, especially Ajit Singh, who had taken samples to CTL stated that he had taken seal impressions to the CTL Kandaghat for comparison of seal on the sample parts.

21. At the cost of repetition, it may be stated that HHC Ajit Singh (PW2) categorically admitted in his cross-examination that save and except samples, he was not handed over anything else by PW3 to be deposited at CTL Kandaghat. In the instant case, there appears to be no evidence with regard to handing over of seal impressions separately to CTL Kandaghat and as such, possibility of samples having been tempered cannot be ruled out.

22. Similarly, this Court after perusing the evidence available on record is compelled to conclude that prosecution has failed to prove recovery of liquor from the conscious possession of the accused. As clearly emerge from the record, neither there is any seal nor any tag of FIR on the case property coupled with the fact that seal was not produced before Court below, as a result of which, story of prosecution has rendered unreliable and untrustworthy.

23. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in ***State of Rajasthan v. Gopal, 1998 (8) SCC 499,*** relevant paras of the aforesaid judgments is reproduced herein below:

> ***"2. In passing the order of acquittal, the High Court has noted that the seizure of the narcotic substance was doubtful because the seal on the sample sent for chemical analysis could not be compared with the seal on the seized article kept in the Police Malkhana because the seal on the sample sent to analyst could not be produced in the Court for verification. Even the seal which was put on the seized article kept in the Police Malkhana could not be ascertained excepting the word "Ajmer". It may be stated here that since the said article had been seized on the railway platform according to the prosecution case, the seal of the Stationmaster had been used, but the Stationmaster was not examined to prove whether the seal put on the sized article and kept in the Police Malkhana really contained the seal of the Stationmaster."***

24. Reliance is also placed on judgment passed by our own High Court in ***Nanha v. State of H.P., Latest HLJ 2011 (HP) 1195.*** Paras No. 7 to 9 are extracted herein below:-

> ***"7. Adverting to the points urged by learned counsel appearing for the appellant that the seal used has not been produced in court, we note that this Court in Criminal Appeal No. 308 of 1996, decided on October 21, 2009, State of H.P V. Tek Chand, reported in Latest HLJ 2010(HP)497,Holds-***
>
> > ***"9 PW1 Hukam Chand , MHC, with whom the case property was deposited by PW 4 Ravinder Singh, also did not say that any specimen seal impression has been deposited along with parcel containing the samples and the bulk Charas. It is only PW2 HC Raj Sigh , who took over the charge of MHC from PW1 Hukam Chand, who stated that he sent one of the two samples along with sample seals to the Chemical Examiner, through Constable Mani Ram. Mani Ram who was examined as PW3, did not say that any specimen seal impressions were also carried by him along with the sample. He simply stated that he carried one sealed parcel which was handed over to him PW2 HC Raj Singh. On the docket with which the sample was sent to the Chemical Examiner i.e. Ext.PC, facsimiles of the seals used in sealing the parcels are not there. That means specimen impressions of the seals used in sealing the sample parcels, which was sent to the laboratory, were not available with the Chemical Examiner, for comparison with the seal impressions on the parcel containing sample . Therefore , the report Ext. PC cannot be said to have been sufficiently linked with the samples allegedly separated from the recovered stuff.***
>
> ***8. Adverting to the facts on record, we find from Ext. PW-8 /A that the facsimile of the seal not having been affixed on this document. Further we also note that PW-5 Constable Yoginder Singh states;***
>
> > ***".....All the parcels were sealed with seal 'D' initially. The seal 'S' was made of some metal. The seal has not been brought by me***

today as the same has been lost. No report qua missing of the seal was lodged by me with anyone.

9. The seal was in possession of the prosecution as established form the evidence of PW-7 Constable Ramesh Kumar, who says that he had deposited this in the Kandaghat Laboratory. What happened to the seal after that is not clear neither it is clear as to why the facsimile is not affixed on the NCB form."

25. Consequently, in view of the detailed discussion made herein above as well as law referred herein above, this court sees no illegality and infirmity in the judgment passed by the learned Sessions Judge, which appears to be based upon the proper appreciation of evidence adduced on record and as such, same is upheld. Accordingly, the present appeals are dismissed being devoid of any merits.

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

Narcotic Control Bureau ...Appellant.
Versus
Ghambir Dass and others ...Respondents.

Cr. Appeal No. 260 of 2013
Decided on: 7th September, 2017.

N.D.P.S. Act. 1985- Section 43- An information was received that some persons were involved in smuggling of charas- the information was reduced into writing and was sent to Superintendent of Police- however, it was not mentioned that search warrant or authorization cannot be obtained without affording opportunity for concealment of evidence or facility for escape for offender – the recovery was effected after the sunset – there was non-compliance of Section 42 and the accused are entitled to acquittal on this ground – trial court had rightly acquitted the accused - appeal dismissed. (Para-6 to 13)

Cases referred:
Navin Sood vs. Narcotic Central Bureau (2010) 1 Latest HLJ 449
State vs. Parkash Chand, (2010) 1 HLR 598
State vs. Mehboob Khan, (2014) Cr.L.J 705
Chhunna alias Mehtab vs. State of Madhya Pradesh (2002) 9 SCC 363
Ramesh Chand alias Nikka vs. State of H.P. 2007 (3) Shim.L.C. 139
State of Punjab vs. Baldev Singh, (1999) 6 SCC 172
State of Rajasthan vs. Jagraj Singh alias Hansa (2016) 11 SCC 687

For the Appellant : Mr. Ashwani Pathak, Senior Advocate, with Mr. Sandeep K. Sharma, Advocate.
For the Respondents : Mr. G. R. Palsra, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (Oral)

The Narcotic Control Bureau has filed the instant appeal under Section 378 of the Code of Criminal Procedure read with Section 36-B of the NDPS Act against the judgment

passed by learned Special Judge, Mandi, H.P. in Sessions Trial No.20 of 2012 whereby the respondents have been acquitted from the charge framed under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act (for short NDPS Act).

2. The learned Special Judge has acquitted all the accused on the grounds; firstly, that the independent witness had clearly stated that he had been taken to the office of NCB by his friend Harish where his signature had been obtained by the NCB team. Secondly, the statements of the respondents recorded under Section 67 of the Act, while they were in custody of NCB team have no evidentiary value and reliance in this regards has been placed on the Division Bench judgment ***Navin Sood vs. Narcotic Central Bureau (2010) 1 Latest HLJ 449***. Thirdly, the non-association of independent witness of locality and the manner in which such witnesses came to be so-called 'associated' was also held to be a circumstance which made the entire case of the NCB highly doubtful. Lastly, the learned Special Judge after placing reliance on the judgment of this Court in ***State vs. Parkash Chand, (2010) 1 HLR 598***, discarded the report of the Chemical Examiner on the ground that the same was not in accordance with law laid down by this Court in ***Parkash Chand's case*** (supra).

3. At the outset, it may be observed that the judgment rendered in ***Parkash Chand's case*** (supra) does not hold good as has been overruled by the Full Bench of this Court in ***State vs. Mehboob Khan, (2014) Cr.L.J 705***.

4. It is argued by learned counsel for the respondents that even if the grounds on which the respondents have been acquitted by the Court below are ignored even then the respondents are entitled to be acquitted in view of the search being in violation of the provisions of Section 42 of the Act.

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

5. Section 42 of the NDPS Act, reads as under:

> ***"42. Power of entry, search, seizure and arrest without warrant or authorization*** – *(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-*
>
> *(a) enter into and search any such building conveyance or place;*
>
> *(b) in case of resistance, break open any door and remove any obstacle to such entry;*
>
> *(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence*

punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act;

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

2. Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

6. The factual position as pleaded in the complaint is that on 28.1.2012, secret information was received by the I.O. Shri Arvind Sharma, who was posted as Intelligence Officer in NCB, Sub Zone, Mandi. As per the secret information, some persons stated to be involved in smuggling of charas, were carrying charas in the vehicle bearing registration No. HP-23-0087. This information was reduced in writing and conveyed to the Superintendent, NCB. Upon which, he directed the I.O. to constitute a team to nab the culprits.

7. Now, in case the information regarding drug trafficking Ext.PW-4/A, which is alleged to have been sent to the Superintendent, NCB is perused, the same reads as under:

"To

The Superintendent,

Narcotics Control Bureau,

Chandigarh.

Sub:- ***Information regarding Drug Trafficking.***

Sir,

It is submitted that a specific secret information is received that on 28.01.2012 at around 1700 hrs some persons who are involved in drug trafficking, will be carrying a consignment of Charas in a HP regd. No.Car bearing No.0087 (Dark Green colour Maruti Van) towards Ner Chowk, Mandi (HP).

If approved, Naka/Surveillance may be conducted at Bhangrotu Pul, near Ner Chowk, Mandi, (HP) to intercept the vehicle and to apprehend the Drug Trafficker.

Yours faithfully,

Sd/-

Dated:28.01.2012 *(Arvind Sharma)*

Time:- 1500 hrs. *Intelligence Officer*

Place:- Mandi. *NCB, Mandi (HP).*

Shri Arvind Sharma, I.O.

Please constitute a team of IOs and Sepoys under my supervision to place surveillance/Naka in the aforesaid place to apprehend the traffickers and

act under provisions of NDPS Act. Outcome of the case be intimated to me on disposal.

Sd/-
Ganesh Balooni
Supdt./NCB
28.01.12."

8. It would be evidently clear from the perusal of Ext.PW-4/A that there is no whisper much less satisfaction recorded therein that the search warrant or authorization cannot be obtained without affording opportunity for concealment of evidence or facility for the escape of an offender. The Intelligence Officer has only recorded the information in writing about the contraband being transported but has not mentioned that if delay is caused, there are chances of escape of the offender, therefore, the same cannot be said to be the compliance of proviso to sub-section (1) of Section 42 of NDPS Act and the same also cannot be considered to be recording of reasons under sub-section (2) of Section 42 as the noting does not mention reason for not obtaining warrant or authorization.

9. The compliance of Section 42 assumes importance as the recovery admittedly has been effected after the sunset at 18:50 i.e. 6:50 p.m. on 28.1.2012 as is evident from the recovery cum seizure memo Ex.PW-4/E.

10. What would be the consequences of search was a subject matter of a decision rendered by three judges Bench of Hon'ble Supreme Court in ***Chhunna alias Mehtab vs. State of Madhya Pradesh (2002) 9 SCC 363*****,** wherein it was held that non-compliance of proviso to sub section (1) of Section 42 of the Act vitiates the trial. In that case the Hon'ble Supreme Court observed that neither any search warrant or authorization was obtained nor were the grounds for possible plea that if opportunity for obtaining search warrant or authorization is accorded the evidence will escape. The Hon'ble Supreme Court held that there was clear non-compliance with the provisions of the proviso to sub section (1) of Section 42 of the NDPS Act. It would be apt to refer to the relevant observations as contained in paras 1 & 2 of the judgment, which reads thus:

"1. The case of the prosecution was that at 3.00 a.m. a police party saw opium being prepared inside a room and they entered the premises and apprehended the accused who was stated to be making opium and mixing it with chocolate.

2. It is not in dispute that the entry in search of the premises in question took place between sunset and sunrise at 3.00 a.m. This being the position, the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act was applicable and it is admitted that before the entry for effecting search of the building neither any search warrant or authorization was obtained nor were the grounds for possible plea that if opportunity for obtaining search warrant or authorization is accorded the evidence will escape indicated. In other words, there has been a non-compliance with the provisions of the proviso to Section 42 and therefore, the trial stood vitiated."

11. While dealing with a case where the search had been conducted after sunset, a learned Single Judge of this Court in ***Ramesh Chand alias Nikka vs. State of H.P. 2007 (3) Shim.L.C. 139*** after relying upon the Constitution Bench decision of the Hon'ble Supreme Court in ***State of Punjab vs. Baldev Singh, (1999) 6 SCC 172*** wherein the compliance of proviso to sub-section (1) of Section 42 of the Act was held to be mandatory, observed as under:

"8. It has come in the evidence that the search was conducted at 5.45 p.m. Reference in this behalf may be made to the search and seizure memo Ex.PW-11/C. The date of search is 15.12.2003. In mid December, sun sets around 5.25 p.m. In any case, the sunset takes place in mid December, before 5.30 p.m. That means the search was conducted after sunset. However, no reasons for the belief

that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of the offender were recorded by PW-12 Sarbjeet Singh to meet the mandatory requirement of proviso to sub-section (1) of Section 42 of the Act. Thus, there is violation of mandatory provision of proviso to sub-section (1) of Section 42 of the Act. Not only that no reasons for such belief were recorded but even while leading evidence the prosecution made no effort to show that in fact there was possibility of concealment of evidence or facility for the escape of the offender if time was spent on obtaining search warrant or authorization for carrying out the search after sunset. A Constitution Bench of the Hon'ble Supreme Court in State of Punjab vs. Baldev Singh, (1999) 6 SCC, 172, has held that compliance of proviso to sub-section (1) of Section 42 of the Act is mandatory and non-compliance renders the entire prosecution case suspect and causes prejudice to the accused. In State of W.B. and others vs. Babu Chakraborthy (2004) 12 SCC, 201, where search was conducted after sunset and before sunrise without complying with the requirement of proviso to sub-section (1) of Section 42 of the Act, regarding the recording of reasons for the belief that obtaining of search warrant or authorization would afford an opportunity for the concealment of the evidence or facility for the escape of the offender, it was held that proviso to sub-section (1) of Section 42 of the Act is mandatory and its non-compliance causes prejudice to the accused.

9. In view of the above discussed evidence of the prosecution coupled with the fact that the proviso to sub-section (1) of Section 42 of the Act had not been complied with, it is held that the sole testimony of PW-12 Sarbjeet Singh is not sufficient to hold that opium, in question, was recovered in the course of the search of the house of the appellant. Consequently, the appeal is accepted. The judgment of the trial Court convicting and sentencing the appellant for an offence under Section 18 (c) of the Act is set-aside. The appellant, being in jail, is ordered to be released immediately in case his detention is not required in connection with any other case."

12. We may refer to the judgment of the Hon'ble Supreme Court in ***State of Rajasthan vs. Jagraj Singh alias Hansa (2016) 11 SCC 687*** wherein like in the instant case the search was of a private vehicle and it was held that compliance of Section 42 was mandatory in such a case, where Section 43 was not attracted. It was further held that Section 42 was found in two parts – First, that there is presence of difference between secret information recorded by SHO and information sent to CO, his immediate superior. Section 42 (2) requires, that where an officer takes down information in writing under Section 42 (1), he shall send a copy thereof to his superior. Whereas, under Section 42(1) proviso it is clearly provided that in the event search has to be made between sunset and sunrise, the warrant would be necessary unless the officer has reasons to believe that a search warrant or authorization cannot be obtained without affording the opportunity for escape of the offender, which grounds of his belief have to be recorded. Since there was non-compliance of both the provisions i.e. Section 42 (1) proviso and Section 42(2), the Hon'ble Supreme Court affirmed the acquittal order passed by the High Court.

13. Once it is established on record that the appellant has not complied with the provisions of Section 42 (1) as also Section 42 (2) of the Act, therefore, the respondents are entitled to be acquitted on this ground alone and we need not to go into the other questions raised in the present appeal including the ground on which the respondents have been acquitted by learned Special Judge.

14. For the forging reasons, the appeal is sans merit and is accordingly dismissed. Pending application(s), if any also stands dismissed. Bail bonds are discharged.

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

Sh. Ajay Kumar & ors. .....Petitioners.

Versus

State of H.P. & anr. .....Respondents.

Cr.MMO No. 239 of 2017.
Date of decision: September 08, 2017.

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offence punishable under Section 498-A read with Section 34 of I.P.C- the matter has been compromised by the parties- informant stated that she is not interested in pursuing the matter after the compromise – held that the offence punishable under Section 498-A is not compoundable – however, the High Court can quash the FIR and the consequent proceedings while exercising its inherent powers – the parties are residing under the same roof and no useful purpose would be served by allowing the criminal proceedings to continue – petition allowed, FIR and the consequent proceedings ordered to be quashed. (Para-5 to 8)

For the petitioners : Mr. Ashok Kumar Thakur, Advocate.
For the respondents : Mr. M.A. Khan, Addl. AG, for respondent No. 1.
Respondent No. 2 in person.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Accused-Petitioner Smt. Sapna Devi alias Swadesh Rani is not present due to she delivered a baby recently two months back. Accused-petitioner No. 1 and 3 are, however, present in person. The complainant-respondent No.2 Seema Kumari is present in person.

As a matter of fact it is at her instance a case under Section 498-A read with Section 34 IPC has been registered in Police Station, Kangra district Kangra H.P. vide FIR Annexure P-4 against the accused-petitioners. Now the police has filed the challan in the Court of learned Additional Chief Judicial Magistrate, Kangra which has been registered as case No. 154-II/2014, titled State versus Ajay Kumar and others. The complainant-respondent No. 2 and accused-petitioners have now patched-up all differences amongst them and arrived at compromise during the course of proceedings in the pending criminal case in the Court of learned Additional Chief Judicial Magistrate, Kangra. The terms and conditions of the compromise Annexure P-5 are reflected in the order dated 25.6.2016 passed by learned Additional Chief Judicial Magistrate.

2. As a matter of fact, learned trial Court has made an endeavour to settle the dispute through mediated settlement. Since the offence punishable under Section 498-A IPC is not compoundable under Section 320 Cr.P.C., therefore, no effective order could have been passed by learned trial Court. This has led in filing the present petition in the changed circumstances with a prayer to quash the FIR and impending criminal proceedings.

3. The accused-petitioners and complainant-respondent No. 2 are closely related with each other because while the accused-petitioners No. 1 and 2 are 'Dever' and 'Devrani' of the complainant, accused-petitioner No. 3 is her mother-in-law. The parties on both sides are happily residing in the company of each other in their house. The respondent-complainant submits that in view of the amicable settlement already arrived at she is no more interested to prosecute the pending criminal case against the accused-petitioners. She, therefore, has no objection in case the FIR and also the criminal proceedings are ordered to be quashed. Statement to this effect has been recorded separately.

4. On the other hand, the accused-petitioners No. 1 and 3 present in person have also undertaken to make the stay of respondent-complainant in the matrimonial home comfortable. Their joint statement to this effect has also been recorded separately.

5. True it is that certain differences having cropped-up between the parties in the recent past now stand settled amicably. The present petition is in the form of a joint petition as is apparent from the statement of the parties recorded separately. It is in this backdrop learned Counsel representing the petitioners has urged that allowing the criminal proceedings to continue against accused-petitioners would be nothing but an abuse of process of law. The offence punishable under Section 498-A IPC is not compoundable. It is for this reason that the parties could not set in motion the machinery provided under Section 320 of the Code of Criminal Procedure. The complainant and the accused-petitioners, as such, have been invoked the inherent jurisdiction of this Court in the changed circumstances.

6. As per legal position settled at this stage even in a case where compounding of an offence is not permissible the parties, viz the victim of an occurrence and the accused, if compromised the disputes between them in an amicable settlement may approach the High Court for quashing the FIR. The support in this regard can be drawn from the judgment of the apex Court in ***Gian Singh*** versus ***State of Punjab and another, (2012) 10 SCC 303.*** The relevant text of this judgment reads as follows:-

> *"58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed."*

7. In view of the law laid down by the apex Court in the judgment supra, the High Court in exercise of the inherent powers vested in it under Section 482 of the Code of Criminal Procedure may quash the FIR in a case where the offence allegedly committed by the accused though is not compoundable; however, the victim and accused have settled the disputes amicably. Such power, of course, has to be exercised sparingly and only in appropriate cases, having arisen out of civil mercantile, commercial, financial, partnership or any other transactions of like nature including matrimonial or the cases relating to dowry etc., in which the wrong

basically is done to the victim. The compounding of offence, however, is not permissible in the cases of serious nature like rape, dacoity, and corruption cases having serious impact in the society as a whole.

8. If applying the ratio of judgment supra, in the given facts and circumstances of this case, the complainant and accused persons have now settled all disputes amicably. They are residing under the same roof with peace and in complete harmony. The respondent-complainant is no more interested to prosecute the accused-petitioners any further in the pending criminal case. Therefore, no useful purpose is likely to be served by allowing the criminal proceedings to continue against the accused-petitioners. Being so, this petition is allowed. Consequently, FIR No. 177 of 2014, Annexure P-14 and the proceedings in Criminal Case No. 154-II/2014, Annexure P-4 in the Court of learned Additional Chief Judicial Magistrate, Kangra, District Kangra, H.P. are ordered to be quashed and set aside. The petition is accordingly disposed of.

9. An authenticated copy of this judgment be sent to learned Additional Judicial Magistrate, Kangra, District Kangra, H.P. for compliance.

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

Shiv Ram ....Appellant
Versus
State of H.P. ....Respondent

Cr. Appeal No. 359 of 2017
Decided on : 8.9.2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 950 grams charas – he was tried and convicted by the Trial Court- held in appeal that recovery was effected from the bag and there was no requirement to comply with Section 50 of N.D.P.S. Act – the prosecution witnesses supported the prosecution version regarding recovery – no material was elicited in the cross-examination to shake their testimonies – the case property was duly exhibited in the Court – sample seals bear the signatures of the accused and the witnesses – lack of association of independent witnesses will not make prosecution case doubtful – the Trial Court had rightly convicted the accused- appeal dismissed. (Para-9 to 19)

For the appellant: Mr. Naresh Kaul, Advocate.
For the respondent : Mr. Vivek Singh Attri, Additional Advocate General, for the respondent-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the accused/convict against the judgment rendered by the learned Special Judge-II, Chamba, District Chamba, H.P. in Sessions Trial NDPS/555/2014, whereby, he returned findings of conviction against the accused/convict in respect of charges framed under Section 20 of the Narcotic Drugs and Psychotropic Substances Act. The learned trial Court proceeded to hence sentence him to undergo rigorous imprisonment for four years and to pay a fine of Rs. 50,000/- and indefault of payment of fine, to undergo further simple imprisonment for a period of one year.

2. The facts relevant to decide the instant case are that on 2.11.2014, HC Virender Singh (PW-13) along with C. Yog Raj (PW-1) C. Sanjay Kumar No. 327 along with drug detection

kit IO bag, Camera, meta light and private vehicle bearing registration No. HP 73-4214 were proceeded towards Banikhet, Tunuhatti and Katoribangla around 1:30 PM from SIU, Chamba. The aforesaid police officials reached at place Katoribangla around 3 PM. They laid the nakka at Katoribangla from 3 PM to 6 PM and checked 35-40 vehicles. Around 6 PM they proceeded from Katoribangla towards Banikhet. They reached near to place Belly at about 6:40 P.M. They checked 15-20 vehicles at Belly from 6:40 PM to 7:30 PM. Around 7:30 PM the accused came from the side of Banikhet having a bag on you left shoulder. On seeing the police party accused tried to run away from the spot, on whicha suspicion was raised and the accused was nabbed alongwith bag by HC Virender Singh (PW-13) with the help of the police party present at the spot. On inquiry the accused disclosed his name Shiv Ram son of Sh. Bhagat Ram, resident of village Kandeua, Tehsil Churah, Distt. Chamba, HP aged about 52 years. The accused was carrying a black coloured bag on which "Parco" was written. Thereafter the bag of the accused was checked by opening the first zip of the bag on which one note book alongwith some papers was found. On opening the second zip one transparent polythene bag was found in which some black coloured hard substance was seen On opening the polythene bag black coloured hard substance in the shape of sticks and bundle of the sticks was found. The black coloured hard substance was checked with the jhelp of drug detection kit which was found to be charas/cannabis. To that effect the identification memo Ext. PW1/A was prepared. Thereafter the recovered cannabis/charas was weighed with the electronic scale. On weighment it was found to be 950 grams. Thereafter the recovered cannabis/charas was put in the same polythene bag and the polythene bag was put inside the bad along with other contents of the bag. The bag was sealed in a white piece of cloth with five seal impression of seal 'N' Columns No. 1 to 8 of the NCB forms in triplicate Ext. PW12/C were filled by HC Virender Singh (PW-13). The seal 'N' was embossed on the NCB forms in triplicate. Sample seal Ext. PW1/B was drawn on a separate piece of cloth. The seal after use was handed over to C. Yog Raj (PW-1). The recovered cannabis/charas NCB forms and sample seal were taken into possession vide recovery and seizure memo Ext. PW1/C. The copy of Ext. PW1/C was given to the accused free of costs. Thereafter HC Virender Singh (PW-13) prepared the rukka Ext.PW13/A and sent the same to the Police Station, Dalhousie through C. Sanjay Kumar No. 327 (PW-2) for lodging the FIR. The copy of ruqua Ext. PW5/A was sent to S.P. Chamba for his information through C. Sanjay No. 145 (PW-3) HC Virender Singh prepared the spot map Ext. PW13/B as per the factual position. He recorded the statements of the witnesses. The accused was interrogated and after interrogation he was arrested vide arrest memo Ext. PW1/D and the information of the arrest was given to his wife. After arrest, Jamatalashi of the accused was conducted vide memo Ext. PW1/E. Accused was medically examined at CHC Dalhousie. The case file was received by HC Virender Singh (PW-13) through C. Sanjay Kumar No. 327 (PW-2). Thereafter, FIR No. was written on the relevant documents prepared at the spot. Case property was handed over to SHO,P.S. Dalhousie for resealing along with case file and accused. The Jamatalashi articles were handed over to MHC P.S. Dalhousie. Thereafter, the case property was released with five seal impressions of "A". The sample seal was drawn on the back side of Ext. PW1/B which is Ext. PW4/A. Inspector Bhupinder Singh (PW-12) embossed the seal impression "A" on the NCB forms in triplicate. He filled the relevant columns of NCB forms in triplicate Ext. PW12/C. The seal after use was handed over to C. Suneel Kumar (PW-4). Thereafter reseal memo was prepared on which Inspector Bhupinder Singh and C. Sunil Kumar appended their signatures. After releasing the case property it was handed over to MHC, P.S. Dalhousie. On 2.11.2014 around 11:55 PM HC Virender Singh (PW-13) got recorded rapat No. 34 Ext. PW6/A pertaining to arrival of the police party at police station, Dalhousie. On 3.11.2014 SI Bhupinder Singh also got recorded the rapat No. 2 Ext. PW6/B pertaining to the resealing and handing over the case property to MHC in the present case. He also filled column No. 12 of the NCB forms in triplicate Mark-A. The extract of the Mallkhana register is Ext. PW9/B. On 4.11.2014 he sent the case property to FSL Junga vide RC No. 97/14. On 5.11.2014 S.P. Chamba Dr. D.K. Chaudhary handed over special report WExt. PW5/B to HC Devanand PW-5. He entered the special report in the receipt register at serial No. 15127/VD, dated 5.11.2014. On 25.11.2014, HC Deepak Kumar received the case property along with result from SFSL, Junga through C. Rajinder Kumar PW-10. He made an entry to that effect in Malkhana Register Ext. PW9/B. The

Chemical Examiner on analysis of the Charas/cannabis opined per report Ext. PX that the substance examined was extract of cannabis and sample of charas and quantity of resin found therein was 21.3% w/w. After the completion of the investigation and the receipt of the result of the FSL Ext. PX, Inspector Bhupinder Singh prepared the challan and the same was presented in the Court.

3. On conclusion of investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court concerned.

4. The accused was charged by the learned trial Court for his committing an offence punishable under Section 20 of the NDPS Act. In proof of the charge, the prosecution examined 13 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, wherein the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

6. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned Counsel appearing for the accused/appellant has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation by it of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the material on record. Hence, he contends qua the findings of conviction being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended that the findings of conviction recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. Under memo(s) borne in Exts.PW1/A and in Ext. PW1/C, recovery of contraband weighing 950 grams, stood effectuated from a black coloured bag bearing Ext. P2. The aforesaid Exhibit(s) bear the signature(s) of witnesses thereto and of the accused/convict. Also, subsequent to the aforesaid apposite recovery(s) being effectuated under Ext. PW1/A and Ext. PW1/C, thereafter upon a personal search of the accused/convict, recovery(s) of items delineated in Ext. PW1/E stood hence effectuated.

10. Since all the relevant recoveries stood effected from a bag slung on the shoulder of the accused, thereupon with the aforesaid mode of recovery, not, being on a personal search of the accused/convict, in sequel, thereupon was no imperative enjoined necessity cast upon the Investigating Officer concerned, to, adhere to the statutory mandate borne in Section 50 of the ND & PS Act.

11. Subsequent to the preparation of the aforesaid exhibits, the Investigating Officer concerned proceeded to, in consonance with all the apposite recitals borne in Ext. PW1/A and in Ext. PW1/C, hence emboss upon the relevant sealed cloth parcels, 5 seal impressions bearing English alphabet “N”, display(s) whereof also occur in the relevant NCB form borne in Ext. PW12/C. Upon the item(s) of contraband carried in the relevant cloth parcels, hence standing transmitted to the Police Station concerned, thereat the SHO concerned, as unraveled by PW12/C, embossed upon the relevant cloth parcel(s), 5 re-seal seal impression(s) of English alphabet “A”. The MHC concerned under Road Certificate borne in Ext. PW9/C transmitted Ext. P-1 to the FSL concerned. The FSL on receiving the relevant cloth parcel for examination, proceeded to under Ext.PX, hence record an affirmative opinion of its contents being Charas.

12. All the prosecution witnesses, who, are official witnesses deposed with interse besides intrase concurrence in respect of the relevant recoveries being effected from a black coloured bag bearing Ext.P2, bag whereof, was at the relevant time, slung on the shoulder of the accused/convict, hence was in his conscious and exclusive possession. All the prosecution witnesses were subjected, to, a thorough, besides inexorable cross-examination by the learned defence counsel, however, during course thereof, no, elicitations emanated from each of them, for constraining any conclusion of each either contradicting or embellishing upon their previously recorded statement(s) in writing or theirs proceeding to make gross intrase contradiction(s) or theirs with rife interse contradiction rendering unreliable their version(s) qua the prosecution case. Consequently, it is deemed fit to impute sanctity to their respective testification(s).

13. Be that as it may, the relevant cloth parcel bearing Ext. P-1, wherewithin Charas is held, was, during the course of recording of examinations-in-chief, of PWs concerned, after seals affixed thereon being ordered to be broken, hence shown to each of them. However, as unveiled on a reading of the respective testification(s) of the PWs concerned, that upon, Ext. P-1 standing thereat shown to them, it therein being visibly recorded of Ext. P-1 holding interse concurrence(s) with Ext. PW1/A and with Ext. PW1/C, in, respect of occurrence of embossing(s) thereon, of 5 seal impressions of English Alphabet "N" and Ext.P-1 also holding interse concurrence vis-à-vis occurrence thereon, of, re-embossed thereon, reseal seal impression(s) of English alphabet "A" besides all seals appended thereon being evidently intact also theirs being evidently unspoiled. Importantly, though at the stage of production of Ext. P1 in Court, it, stood scribed as Ext. P-1, given its also holding consonance with apposite recitals borne in NCB form besides vis-à-vis Ext.PW12/C, yet the learned defence counsel permitted "its" exhibition in Court, without, his thereat visibly attempting to make any decipherments, in respect of any interse incongruity, interse "it" vis-à-vis Ext. PW1/A and Ext. PW1/C besides with NCB form(s) borne in Ext.PW12/C and with the report of FSL borne in Ext. PX. Omission of aforesaid endeavour(s) by the learned defence counsel, begets inference(s) of (a) his conceding that Exhibit P-1 being validly exhibited, (b) it being relevant and an admissible piece of incriminatory evidence against the accused,(c) at the stage of production of Ext. P1 in Court, its, holding connectivity with its recovery effectuated under Exhibits PW1/A and under Ext. PW1/C, (d) its holding connectivity with the report of the FSL borne in Ext. PX.

14. Furthermore, the sample seal taken, on piece(s) of cloth, bearing Ext. P-1, holds the signatures of the accused, as also of witnesses thereto, even Exhibits PW1/A and PW1/C respectively hold the signatures of the accused, as well as of all the witnesses thereto, besides sample seal cloth parcel Ext. P-1 holds the signatures of the accused and of the witnesses thereto. With occurrence of all aforesaid signatures thereon, especially when the learned defence counsel, has not, made any attempt for ripping apart authenticity(s) thereof also his failing to make attempts in respect of the signatures, of the accused being obtained under compulsion or under duress, also, boosts an inference of his conceding vis-à-vis the truth of all the recitals occurring therein. Conspicuously, therefrom, it is to be concluded of his omitting to, make endeavour(s) in respect of the relevant item(s) of contraband respectively recovered under Ext. PW1/A and under Ext. PW1/C being unrelated to bag Ext.P-2. Omission of aforesaid endeavour(s) also negates the submission of the learned counsel for the appellant that the relevant recoveries are bereft of any sanctity, theirs being sequelled by sheer contrivance deployed by the Investigating Officer concerned, for thereupon falsely implicating the accused.

15. Importantly also, the MHC concerned had recorded his deposition before the Court, an incisive reading whereof, omits to, make any unfoldments of the learned defence counsel thereat, putting any apt suggestions to him whereupon he concerted to belie the authenticity(s) of Ext. PW1/A and of Ext.PW1/C, besides he omitted to put apposite suggestion(s) in respect of the contents borne in the relevant cloth parcel(s), whereon, an affirmative opinion was pronounced by the FSL, being not, connected with recovery(s) thereof effected under Ext. PW1/A and under Ext. PW1/C, rather the apposite recoveries being relatable or connected with recovery(s) thereof standing effectuated from the conscious and exclusive possession of some other person. The omissions aforesaid also, do not, purvey any leverage to the learned counsel for

the accused, to, contend before this Court, that, for absence of production of the relevant abstract of the apposite Mallkhana Register, by its Incharge, with, revelations therein that upon his at all apposite stages of transmitting Ext. P1, to the learned trial Court, for, its, thereat being shown to, the prosecution witnesses concerned, by the APP concerned, his thereat in compatibility(s) thereof making corresponding apposite entries in the relevant register, tritely in respect of retrieving it, from the Mallkhana besides upon Ext. P-1 standing retransmitted to him, his thereat making compatible corresponding entries in the apposite register, thereupon rendering the charge to capsize "significantly" when at the relevant stage of production, of, Ext. P-1 in Court, all, seal impression(s) borne therein, were, found intact, besides when for all the aforesaid reasons, the effect of non production thereof in Court, is inconsequential.

16. The learned counsel for the accused has contended with vigour, that with occurrence of discrepancies interse the items recovered under Ext. PW1/E, a memo of jamatalashi, upon a personal search of the accused/convict being carried by the Investigating Officer concerned vis-à-vis the items borne in Ext.PX, significantly in respect of two condoms, medicines and a pension card, hence the sealed cloth parcel borne in Ext. P-1, wherein Charas is held, is perse unconnected vis-à-vis its recovery(s) effected under Ext.PW1/A and under Ext. PW1/C. The aforesaid argument would succeed in case the predominant incriminatory item(s), not, visibly occurring in Ext. PW1/A and Ext. PW1/C, whereas, its, standing displayed in Ex. PX, contrarily with the significant inculpatory item(s) displayed in Ext. PW1/A and in Ext. PW1/C also occurring in Ext. PX, thereupon the mere fact of some items, not, being reflected in Ext. PW1/E yet coming to be enclosed in Ext.PX, wherein contents of Charas are held, does not, belie the prosecution version in respect, of, the predominant recovery(s) being effected under Ext. PW1/A and under Ext. PW1/C, whereafter "it" stood enclosed in sealed cloth parcels. Importantly also when at the time of production of Ext.P-1, in Court, whereby it stood shown to each of the prosecution witnesses, the learned defence counsel, omitted to, put any apposite suggestion(s), to, the prosecution witnesses qua lack of interse inter-relatability in respect of the items occurring in Ext P-1, vis-à-vis those reflected in Ext. PW1/A and in Ext. PW1/C, hence arising from their(s), not, finding their occurrence in the bag, wherefrom, each(s) of the item(s) stood, retrieved for their being enclosed in the relevant signatured cloth parcel(s). Consequently, omission(s) of aforesaid effort(s) also fillips an inference that the relevant signatured cloth parcel, bearing Ext.P-1, also holding therein all the items held in the black coloured bag slung on the shoulder of the accused, wherefrom the dominant inculpatory recovery(s) stood effected, even though, some of the items borne therein remaining un-recited in Ext. PW1/A and in Ext. PW1/C, "whereas" they found reflections in Ext.PX. Nor even any frail endeavour, was, made by the learned defence counsel, to hence override besides disconnect the recitals borne in Ext.PX vis-à-vis recitals borne in Ext. PW1/A and in Ext. PW1/C. Concomitantly also for disconnecting the apposite recitals occurring in Ext.PX, vis-à-vis the production of case property in Court, no best apposite endeavour(s) comprised in his putting suggestion(s) to the prosecution witnesses concerned, with echoings therein of all the items recovered upon a personal search of the accused, besides upon search of bag Ext. P-2, all thereof(s) being, not, held in the black bag/Ext. P-2, thereupon theirs, not, finding explicit reflections in the relevant memos. In aftermath, evident absence of the aforesaid best suggestion(s), cannot, give any strength to the aforesaid submission addressed before this Court, rather the mere apt minimal interse discrepancy(s) vis-à-vis Ext.PW1/A and vis-a-vis Ext. PW1/C and vis-à-vis Ext. PX besides Ext. PW1/E, in respect of all the items reflected therein, yet theirs finding occurrence in Ext. PX, is, not critical rather is construable to arise from, though all the items reflected in Ext.PX also finding occurrence in the black coloured bag, Ext.P-2, theirs yet by sheer inadvertence, at the time of preparation of Ext.PW1/E, hence standing un-incorporated in the latter exhibit(s). Conspicuously, when, no best apposite suggestion(s) in respect of the accused, not, owning them rather theirs being owned by some other person, also were omitted to be put, by the learned defence counsel upon his holding each of the prosecution witness, to cross-examination, thereupon, it is to be concluded of the accused acquiescing to his owing them.

17. When the aforesaid inference, is, entwined with the learned defence counsel also

failing to put suggestion(s) to the Investigating Officer, that, the recoveries were not effected from the bag, besides when the accused also failing subsequent thereto, while answering the questions put to him during the court proceedings conducted under Section 313 Cr. P.C., hence attribute any inculpatory role to a person other than him, also constrains this Court, to, conclude that the aforesaid minimal discrepancies, may, have arisen by sheer inadvertence, also engender an inference of the bag also containing all item(s) disclosed in Ext. PX and that the mere omission of their reflection in the relevant exhibits, whereas their standing reflected in Ext. PX, not, hence undermining the strength of the prosecution case.

18. The lack of association of independent witnesses despite their evident availability also does not sap the vigour of the prosecution case, "unless" firm evidence erupted in respect of the association of independent eye witnesses in the relevant proceedings being a dire necessity, necessity(s) whereof would spur, only, upon the accused canvassing that recovery(s) of relevant item(s), were not effectuated from his person rather from some other person and also his making endeavours that the apposite recovery(s), were sequel of a contrivance besides an invention, deployed by the Investigating Officer, yet when the aforesaid endeavour(s) is not made, thereupon there was, no, necessity cast upon the Investigating Officer, for his joining or associating independent witnesses in the relevant investigation(s), even despite their evident availability in proximity, to the site of occurrence.

19. 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 appellate Court, does not, suffer from any perversity or absurdity of mis-appreciation and non-appreciation of evidence on record.

20. Consequently, there is no merit in the instant appeal which is accordingly dismissed. The Judgment impugned before this Court is maintained and affirmed. It be forthwith implemented. Records be sent back forthwith.

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

Parkash Chand ...Petitioner

Versus

Teja Singh and others ...Respondents

CMPMO No. 419 of 2016
Decided on :11.9.2017

Code of Civil Procedure, 1908- Section 151- Matter was compromised before Lok Adalat on the basis of compromise deed executed by general power of attorney – subsequently an application was filed pleading that general power of attorney was not authorized to settle the matter and the compromise decree be recalled – the application was allowed by the Court- held that the award passed by Lok Adalat is final and the Court could not have recalled the same – a civil suit would lie against the award – the order passed by the Court set aside. (Para-2 to 5)

For the petitioner : Mr. Sudhir Thakur, Advocate.

For the respondent : Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate, for respondent No. 1.
Mr. Arun Kumar Verma, Advocate, for respondent No. 2.
Mr. Vivek Kalia, Advocate, for respondents No. 3 and 4.
Mr. Naveen Awasthi, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Civil Suit No. 161/1 of 2014 came up before the National Lok Adalat, in its, sitting convened on 11.7.2015. On the aforesaid date, a compromise borne in Ext. CA, as stood recorded interse the parties in respect of this lis, whereupon they stood engaged, was, tendered by the General Power of Attorney of the plaintiff, before a Bench of the National Lok Adalat. Ext. CA was accepted by both the contesting parties, whereupon, on anvil thereof, the Bench of the National Lok Adalat proceeded to decree the plaintiffs' suit. Subsequently, an application cast under the provisions of 151, CPC was filed before the learned Civil Judge(Junior Division), Solan. The application aforesaid held averments, that the purported executant of the General Power of Attorney, not, constituting one Shri Gaurav Thakur as his attorney, for his making any settlement, in respect of the lis, before the Bench of the National Lok Adalat. Hence, a prayer was made that the award/decree pronounced by the Lok Adalat be quashed and set aside.

2. The aforesaid averment is founded upon the award/decree of the National Lok Adalat, being obtained by fraud exercised by the purported GPA, of, one Teja Singh, thereupon both the compromise deed, besides the decree anvilled thereon, as recorded by the Bench of the National Lok Adalat, were, strived to be set aside. Under a pronouncement borne in Ext. P-1, the aforesaid endeavour was accepted by the learned Civil Judge (Junior Division). The aggrieved therefrom rear a challenge thereto, before this Court.

3. Any decree/award pronounced by "Lok Adalat", is, made under the provisions of the Legal Services Authority Act, the relevant provision whereof are extracted hereinafter:-

> " Award of Lok Adalat-(1) Every award of the Lok Adalat shall be deemed to be a decree of a Civil Court or, as the case may be, an order of any other Court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-Section (1) of Section 20 of the Court-fee paid in such cases shall be refunded in the manner provided under the Court-Fees Act, 1870.
>
> (2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and not appeal shall lie to any Court against the award.

Therein conclusivity is imputed to award(s) pronounced, by the Lok Adalat concerned, also they are rendered unamenable to any challenge before any Court, thereupon it was not judicially sagacious for the Civil Judge (Junior Division), to, under Ext. P1 hence proceed to quash and set aside the impugned award pronounced by a Bench of the National Lok Adalat. Consequently, the order pronounced in Ext.P-1, is vitiated by an apparent taint of its falling outside the jurisdiction/domain of the Civil Judge (Junior Division).

4. Be that as it may, since, an onslaught was laid to the validity(s) of the decree rendered by the Bench of the National Lok Adalat, visibly on the trite ground(s) of its emanating, from, the reasons set forth in the application cast under Section 151 CPC, hence fraud being practiced upon it, thereupon despite statutory imputation of conclusivity to the awards recorded by Bench(s) of Lok Adalat(s), the aforesaid onslaught when impinges upon the vires of the decree, rather was hence espousable through a Civil suit constituted before the Court concerned, than through an inapt concert, for its reversal being made vis-à-vis an application cast before the trial Court under the provisions of Section 151 CPC. Even though, the aggrieved had filed an apposite civil Suit No. 161/1 of 2014 before the Civil Court concerned, yet given the pendency of the application, cast under the provisions of Section 151 of CPC, application whereof begot recording of an affirmative decision thereon, thereupon the learned counsel proceeded to make a statement seeking permission to withdraw the civil suit, permission whereof stood accorded. However, the learned counsel for the plaintiff appears to be apparently misled, to, believe that the civil suit was, not, the appropriate remedy, rather the appropriate remedy for impugning the pronouncement made by a Bench of the National Lok Adalat, being through an application cast under Section 151 CPC, thereupon he proceeded to withdraw the apposite proceedings

challenging the award of the National Lok Adalat, However, lack of sagacity of the learned counsel for the plaintiff, cannot, encumber the latter with all its ill-consequences. Consequently, it is open to the plaintiff to re-institute the apposite suit before the Court concerned.

5. Since the civil suit was the appropriate remedy, for, seeking reversal of the compromise decree pronounced by the National Lok Adalat, yet when it has been in a most perfunctory manner, withdrawn by the counsel, merely, on anvil of pendency of an application cast under Section 151 CPC. Also when all the ill-effects thereof, ought not, to entail upon the plaintiff, especially when the vires of the compromise decree is attacked, on anchor of its emanating from fraud practiced upon the Bench of the National Lok Adalat, thereupon for facilitating the cause of justice, the plaintiff is permitted to re-institute a fresh suit. Also it is hence deemed fit that in view of all peculiar facts and circumstances prevailing hereat, that the simplicitor withdrawal of the previous suit, may not, subject to all the objections raised by the defendants/petitioners, be construable to attract the mandate of Order 23 Rule 3 CPC also may be a freshly instituted suit may also not be hence barred. Consequently, the impugned order is quashed and set aside.

6. Consequently, the present petition stands disposed of. Records be sent back forthwith. All pending application(s), if any, are also disposed of. No costs.

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

Baldev Singh ...Petitioner
Versus
High Court of H.P. ...Respondent

CWP No. 1602 of 2014
Decided on :12.9.2017

Constitution of India, 1950- Article 226- Petitioner applied for the post of clerk but failed to qualify the written test – he filed the present writ petition seeking direction to display the key answer sheet of the test – held that no allegations of mala fide were made against the respondents – the petitioner approached the court when the vacancies were already filled and selected candidates had received their appointment orders – the Rules do not provide that the answer key shall be displayed – writ petition dismissed. (Para-2 to 4)

For the petitioner : Ms. Salochna Rana, Advocate.
For the respondent : Mr. B.C. Negi, Senior Advocate with Mr. Pranay Prapat Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

In pursuance to an advertisement borne in Anexure P-1, the writ petitioner, applied for the post of a Clerk. However, he failed to qualify the written test. Subsequent to his failing to qualify the written test conducted by the respondent, for hence filling up the advertised vacancies, he proceeded to, through the instant petition, seek an order for quashing of the process(s) initiated for filling up the advertised posts.

2. Be that as it may, he has prayed that the respondent be directed to display the key answer sheets in respect of the relevant test conducted by the respondent. The initial relief

aforesaid canvassed in the instant writ petition, does not warrant its being countenanced, tritely for the reason (a) given the writ petitioner apparently, not, making any ascription of any active malafides vis-à-vis the respondents, nor his making ascription of proactive malafides vis-à-vis the evaluator(s) of the apposite answer sheet, (b) Predominantly also his not imputing any active specific malafides vis-à-vis the evaluators concerned, comprised in theirs proceeding to not assess the petitioner vis-à-vis his correctly ticked choices of multiple choice question(s), nor obviously theirs' awarding marks with respect to correctly ticked choices, vis-a-vis respective specific queries, thereupon the evaluator(s) concerned mis-assessing his answer sheets. Moreover, at this belated stage, given the vacancies being filled up, also all the selected candidates receiving appointment letters, besides theirs joining the relevant posts, thereupon it would be insagacious to hence proceed to nullify the entire exercise.

3. Moreover, the relevant Rules do not hold any prescription(s) vis-à-vis the respondent being peremptorily enjoined to display the key answers in contemporanity to display of result(s) of written test(s). Even if the aforesaid Rules do not exist, may be, the canon(s) of transparency(s) may yet enjoin the respondent concerned, to, make display(s) thereof especially in contemporanity with the display of result(s) of written test, nonetheless, for this Court being enjoined to hold that hence there was no visible infraction vis-à-vis canon(s) of transparency(s), yetenjoined erection of the apt relevant evidentiary strata, comprised in attribution of aforesaid active specific malafides, vis-à-vis the evaluators. However, the aforesaid ascriptions with specific contours, are not ventilated in the writ petition, corollary whereof is that non-display of key answers significantly in contemporanity with display of result(s) of written test, not negating validity(s) of the apt recruitment process(s) initiated by the respondent.

4. Even though, there is a solitary averment qua questions No. 16, 29 and 39, not, holding their apposite choices, for hence theirs being ticked, thereupon miskickings, if any thereof be discarded for all purposes, however, the aforesaid averment is denied, on, an affidavit furnished by the respondent concerned. Consequently, it is inferred that the aforesaid questions also held correct choices, for theirs' being appositely ticked by all the examinees, including the petitioner. Since, thereafter the petitioner, does not, aver that despite his correctly ticking, one, amongst multiple choices thereof, his being neither evaluated nor his being awarded marks in respect thereof, thereupon the aforesaid bald averment, does not, constitute erection of the apt evidentiary strata by the petitioner, for hence this Court firmly holding that in the respondent, in, contemporanity with the display of result(s) of written tests), not thereat displaying the key answer(s), thereupon for lack of transparency the recruitment process(s) being vitiated.

5. Consequently, there is no merit in the present petition and the same is dismissed. All pending application(s), if any, are disposed of. No costs.

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

M/s Gautam Sales Corporation and another ...Petitioners

Versus

Usha Rani ...Respondent

Cr. MMO No. 178 of 2016
Decided on : 13.9.2017

Negotiable Instruments Act, 1881- Section 138- Accused was convicted of the commission of an offence punishable under Section 138 of N.I. Act – an appeal was filed, which was dismissed- held that the plea of the accused that he was not served with the statutory notice is falsified by his admission made under Section 313 Cr.P.C. regarding the service of notice – no other infirmity was shown in the judgments of the Courts- petition dismissed. (Para- 3 to 5)

For the petitioner : Ms. Megha Kapur Gautam, Adv.
For the respondent : Mr. Dalip K. Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petition is directed against the concurrently recorded verdicts by both the learned Courts below, whereby the Courts below convicted besides concomitantly sentenced the accused/convict for theirs committing offence(s) punishable under Section 138 of the Negotiable Instrument(s) Act. The convicts are aggrieved therefrom, whereupon they are led to institute the instant petition before this Court, for hence striving for its reversal.

2. At the outset, the learned counsel for the petitioners/convicts has fairly submitted before this Court that her espousal before this Court, for ripping apart the validity(s) of the impugned verdicts would, remain confined to theirs being ridden with an inherent infirmity, arising, from the indispensable statutory pre condition for empowering the Magistrate concerned, to, take a valid cognizance upon the offences arising from the dishonour of Negotiable Instrument, condition precedent(s) whereof, is embodied in the trite factum of the mandatory statutory notice, standing evidently served upon the petitioner/convict, remaining hereat not meted compliance. She contends that hence no valid cognizance could be taken upon the apposite complaint, also all further proceedings and ultimately the verdict(s) of conviction concurrently pronounced by both the learned Courts below are thereupon concomitantly vitiated.

3. However, for determining the vigor of the aforesaid submission, it is imperative to allude to the relevant paragraph-17 of the verdict recorded by the learned trial Magistrate, para whereof is extracted hereinafter:

> "No doubt, the accused have tried to dispute the service of Notice dated 31.7.2007, Ex. C4, but the cross-examination done by him in that regard is of no succor, moreso when the accused had admitted very specifically while answering question No. 6 that the complainant had served Regd. AD Notice dated 31.7.2007, upon them, asking them to discharge debt within 15 days, but despite that, they did not discharge the debt Ext. C4 is Regd. AD Notice dated 31.7.2007 and Ext. C5, is its postal receipt. Ex. C6 is acknowledgement due and it bears signatures of the accused and it goes to show that the aforesaid notice was served upon the accused on 2.8.2007, but despite that the accused did not discharge the debt. Even the law has gone to the extent that even if the notice is not received by the accused, he can absolve the liability by making payment of cheque amount within 15 days of the receipt of summons from the court on a complaint instituted against him."

4. A perusal of apt portion of the aforesaid paragraph unveils that though there was a visible frail attempt, on the part of the petitioner/accused, to deny its, his being served with a statutory notice, notice whereof is borne in Ext. C4, yet with the accused/convicts during the course of proceedings undertaken under the provisions of Section 313 Cr. P.C., rendering affirmative answer(s) to the apposite affirmative question No. 6, query whereof appertained to his, its being served on 31.7.2007, with the statutory notice borne in Ext. C4, thereupon the aforesaid contention addressed before this Court by the learned counsel for the petitioners/convicts, is rendered emaciated.

5. Consequently, there is no merit in the instant petition and the same is dismissed. The impugned verdicts of both the Courts below are affirmed and maintained. The sentence of imprisonment imposed upon the convicts be forthwith put to execution by the learned trial Magistrate. All pending application(s) if any, are also disposed of. No costs.

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

Ms. Ranjana Trehan ...Petitioner
Versus
Pankaj Sood and others ...Respondents

CMPMO No. 148 of 2014
Decided on : 14.9.2017

Code of Civil Procedure, 1908- Order 11 Rule 1- A civil suit for claiming easementary right was filed – an application for interrogatories was filed, which was dismissed by the Trial Court- aggrieved from the order, present petition has been filed- held that the interrogatories sought to be delivered were essential for pronouncing a just decision in the case – the order passed by the Trial Court set aside and plaintiffs directed to answer the interrogatories within one week- liberty granted to the parties to seek appointment of the Local Commissioner. (Para-4 to 6)

For the petitioner : Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashishta, Advocate.
For the respondent : Mr. Rahul Mahajan, Advocate, for respondents No. 1 and 2.
Mr. Hamender Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The plaintiffs/respondents instituted a suit against the defendants/petitioners, wherein one Pranay Kumar is impleaded as a proforma defendant. The relief, which stands ventilated herein, is, for pronouncement of a decree of permanent prohibitory and of mandatory injunction upon defendants No. 1 and 2 against theirs raising construction upon suit Khasra No. 119 and 147, wherefrom the plaintiffs access the ground floor of their house, comprised in Khasra No. 129. The claim for easementry right of passage vis-à-vis the plaintiff(s) besides its being exercisable upon the servient heritage borne in Khasra Nos 119 and 147, is, anvilled upon apposite entries, in respect of the aforesaid suit Khasra Nos., occurring in the public records, entries whereof display of the suit Khasra Nos. being reflected as a "*gair mumkin gali.* The suit is resisted by the defendants, on, the ground that access(s) alternative, to, the aforesaid purported access(s) being also available, to, the plaintiffs being besides vis-à-vis tenants of the plaintiffs, alternative access(s) whereof exist in the vicinity of Sanitorium Hospital. The factum of the validity(s)/tenacities of the apt reflection(s) occurring in the revenue records, in, respect of suit Khasra Nos.119 and Khasra No. 147 being depicted therein, to, be a gair mumkin gali, also, thereupon the plaintiffs' establishing their right to trudge thereon, for theirs' accessing their abodes located upon Khasra No. 129, is, awaiting adjudication by the learned trial Court. Consequently, even if the plaintiffs hold any easementary right to trudge upon Khasra Nos. 119 and upon 147, yet the defendants' by casting an application under the provisions of Order 11 Rule 1,2 and 14 read with Section 151 CPC, have, concerted to prima-facie de-establish the aforesaid facets. Also averment(s) apposite thereto stand also cast in paragraph-3 of the written statement. The aforesaid application was dismissed by the learned trial Court. The defendants are aggrieved, therefrom, hence motioned this Court.

2. The relevant statutory provisions stand borne in Order 11 Rule 1, 2 and 14, provisions whereof stand extracted hereinafter:-

> **"1. Discovery by interrogatories**-In any suit the plaintiff or defendant byleave of the Court may deliver interrogatories in writing for the examination of the apposite parties or any one or more of such parties and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such person is

required to answer:

2. Particular interrogatories to be submitted- On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court and that Court shall decide within seven days from the day of filing of the said application. In deciding upon such application, the Court shall take into account any offer,which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

14. Production of documents- It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

Provisions whereof enjoin prima facie substantiation, of, the trite ingredients' "of" the interrogatory(s) concerted to be delivered by the litigant concerned upon his adversary being relevant vis-à-vis the lis or appertaining to the subject matter in dispute, besides being essential for pronouncing a just decision upon the controversy engaging the litigating parties.

3. The learned counsel for the plaintiff/non-applicant contend that the aforesaid ingredient(s) is, prima-facie, not, substantiated thereupon the order pronounced by the learned trial Court warrants vindication. However, the aforesaid submission is rejected, as averment(s) compatible vis-à-vis apposite besides congruous therewith recitals borne in the application at hand, also visibly occurring, in the written statement, especially in paragraph-3 thereof.

4. Consequently, with the interrogatories appertaining to the subject matter of the lis, hence being not irrelevant, rather being relevant vis-à-vis the lis, thereupon obviously they may be essential for enabling the learned trial court, to, pronounce a just decision upon the controversy(s) whereupon they stand engaged. Even though certain suggestion(s) apposite, to, the interrogatory(s), may be, put by the counsel for defendants while holding the plaintiffs' witnesses, to cross-examination, theirs hence being put thereat would not bar relief upon the extant application. Conspicuously vis-à-vis a specific averment in the apposite application of a compromise decree standing recorded in respect of a dispute erupting between the plaintiff and one Pranay Kumar, with a display therein of access(s) alternative vis-a-vis the suit Khasra No. being available, for the relevant access(s) by the plaintiffs, thereupon with possession thereof being prima-facie held by the plaintiffs', it is imperative for the plaintiffs, to mete answer(s) in, respect(s) thereof, significantly, when may be thereupon the defendants may prima-facie establish the apposite averment occurring at serial No. 3 of their written statement. Even if, the aforesaid fact is not initially pleaded in the written statement, nonetheless, given its occurrence taking place subsequent to the institution of the suit, thereupon obviously, with the interrogatory(s) appertaining therewith, are enjoined to be answered by the plaintiffs.

5. In view of above, the impugned order is quashed and set aside. The plaintiffs are directed, to, on theirs being purveyed the apposite interrogatories mete answers thereto within a week thereafter. It is clarified that the learned trial Court, shall, alongwith the answers meted by the plaintiffs to the interrogatories purveyed to them by the defendants assess, test probative vigor thereof along with other connected therewith best documentary evidence. Also, it is open to all the contesting parties to, through an appropriate application, seek appointment of a Local Commissioner, for his making a report in respect of user of "paths" by the plaintiffs, alternative, to user by them of a path existing upon Khasra Nos 119 and Khasra No.147.

6. Consequently, the present petition is disposed of. Liberty is reserved to both the contesting litigants, to, file an appropriate application before the learned trial Court. The parties

are directed to appear before the trial Court on 13.10.2017. All pending application(s), if any, are also disposed of. No costs.

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

Harbhajan Singh ...Petitioner
Versus
Seema ...Respondent

CMPMO No. 209 of 2017
Decided on : 15.9.2017

Code of Civil Procedure, 1908- Order 32 Rule 3- A rent petition was filed seeking the eviction of H - when the matter was listed for evidence of H, an application was filed pleading that H had developed severe mental ailment and was unable to step into the witness box – the application was dismissed by the Rent Controller on the ground that medical certificate was not filed in support of the application- held that the photocopy of the certificate was on record and the Trial Court could have asked the party to examine the Doctor- the order set aside – the Trial Court directed to allow the party to examine the doctor to prove the contents of the certificate.

(Para- 3 to 4)

For the petitioner : Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.
For the respondent : Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Rent petition No. 12/2/2010 was instituted before the Rent Controller concerned wherein the land-lord sought eviction of one Harbhajan Singh from the demised premises. Apparently, the aforesaid rent petition was instituted in the year 2010. The aforesaid Harbhajan Singh instituted reply thereto, on 10.8.2010.

2. On the pleadings of the parties, the learned Rent Controller had struck apposite issues for evidence being respectively adduced thereon, by the petitioner/landlord and by aforesaid Harbhajan Singh. The landlord has adduced his evidence upon the relevant issues. However, when the case was taken up for adduction of evidence by one Harbhajan Singh upon the relevant issues, an application cast under the provisions of Order 32, Rule 3 read with Section 151 CPC, was, instituted on 23.7.2015 before the learned Rent Controller, wherein a prayer was made that given the aforesaid Harbhajan Singh, developing severe mental ailment(s), hence his being incapacitated, besides his being rendered incompetent, to, step into the witness box, for his testifying in support of the contentions reared by him in his reply. The aforesaid application was dismissed by the learned Rent Controller on the ground that no best documentary evidence comprised ina Medico Legal Certificate issued by the competent medical practitioner, with a pronouncement thereon qua the criticality of the mental ailment besetting the aforesaid Harbhajan Singh, remaining un-adduced, thereupon, reiteratedly he was constrained to dismiss the application aforesaid. However, the aforesaid reasons assigned by the learned Rent Controller, is, perse vitiated, especially when a photo copy of the apposite medical certificate issued by the competent medical practitioner, visibly pronounces of the aforesaid Harbhajan Singh, being beset with a severe memory disturbance and his being thereupon precluded from taking part in all the legal matters.

3. The discarding of the aforesaid material, by the learned Rent Controller,

whereupon he proceeded to dismiss the application, ingrains it was a vice of impropriety. Since evidently the aforesaid pronouncement(s), stand, in a photo copy of the apt Medico Legal Certificate issued by the competent medical practitioner, thereupon for want of proof thereof from its original by its author, thereupon though rendered it unamenable for imputation of credence thereto, yet the learned Rent Controller, was, enjoined to seek legal proof thereof, by his directing the applicant, to, summon the Doctor concerned, who issued it for his/her proceeding, to, from original thereof hence adduce legally admissible proof in respect thereof. However, the learned Rent Controller, has, omitted to make the aforesaid endeavour also rather has proceeded to wholly ignore its existence on his file. If the recitals borne therein are truthful, thereupon the aforesaid Harbhajan Singh would, not, be a competent witness to testify in Court, in proof of the contentions reared in his reply to the rent petition. Any insistence made upon him to testify as a witness would be both unjust and improper.

4. Mr. Suneet Goel, Advocate submits that he has no objection in case the application cast under the provisions of Order 32 Rule 3 CPC is allowed, subject to the next friend of the aforesaid Harbhajan Singh, one Ajit Kaur testifying on his behalf as a witness, in respect of the contentions reared by him in his reply furnished to the rent petition, however, the aforesaid submission is rejected, for the reasons of the learned Rent Controller being legally enjoined to ensure proof, in accordance with law, of, a photo copy of the apt Medico Legal Certificate.

5. Consequently, the impugned order is quashed and set aside and the learned Rent Controller, is, directed to, after ensuring legal proof, of, photo copy of the apt Medico Legal Certificate, with portrayals therein of, one, Harbhajan Singh being beset with Dementia, whereupon his being precluded to testify as a witness, thereafter, within three weeks, record a decision upon the application cast under the provisions of Order 32 Rule 3 CPC. Also the learned Rent Controller shall pronounce a verdict upon an application cast under the provisions of Order 9 Rule 7 CPC, filed on behalf of Harbhajan Singh, for recalling of order rendered on 27.6.2015, whereby the aforesaid Harbhajan Singh was ordered to be proceeded against exparte. It is evident from a perusal of the file maintained by the learned Rent Controller, that on 7.5.2016 he closed any further opportunity to the landlord to resist it, thereupon orders, in accordance with law, be pronounced thereon by the learned Rent Controller, cumulatively alongwith his proceeding to pass appropriate orders in accordance with law, upon, an application cast, under, the provisions of Order 32 Rule 3 CPC. After decision(s) standing recorded upon the aforesaid application(s), by the learned Rent Controller, he is directed to record his verdict upon the apposite rent petition, within three weeks, thereafter.

6. Accordingly, the present petition stands disposed of. All pending application(s) if any are also disposed of. No costs.

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

Attar Singh ……Appellant/Complainant
Versus
Sarup Singh and Ors. …..Respondents/accused

Criminal Appeal No. 84 of 2009
Decided on :19.09.2017

Indian Penal Code, 1860- Section 447 and 379- Accused armed with the sticks entered into the land possessed by the complainant and damaged the crop sown by him- complainant suffered loss of Rs. 1500/-- the complaint was dismissed by the Trial Court – held in appeal that there are material contradictions in the testimonies of CW-1 and CW-2 – CW-3 did not support the

complainant's version – independent witness was present but was not examined – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 19)

Case referred:
C. Magesh and others versus State of Karnataka (2010) 5 Supreme Court Cases 645

For the appellant : Mr. Naresh Kaul, Advocate.
For the respondents : Mr. Ashok Sharma and Mr. Bhuvnesh Sharma, Advocates.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(Oral)*

Instant appeal filed under Section 378 of the Code of Criminal Procedure is directed against the judgment dated 05.02.2009 passed by the learned Judicial Magistrate, Ist Class, Indora, District Kangra, H.P. in Criminal Case No. 9-II/2007 whereby private complaint under Section 156(3) filed on behalf of the appellant-complainant, came to be dismissed, as a result of which respondents-accused were acquitted of charges under Sections 447 and 323 of the Indian Penal Code (hereinafter referred to as IPC) read with Section 149 of IPC.

2. Briefly stated facts as emerged from the record are that appellant (hereinafter referred to as complainant) preferred a complaint under Section 156(3) Cr. PC in the Court of learned JMIC, Indora, District Kangra, HP, which came to be registered as criminal case No. 9-II/2007, alleging therein that on 7.7.2003 accused persons carrying sticks in their hands forcibly entered the land possessed by the complainant comprised in Khasra No. 293 situate in village Gangwal Behri. As per complainant, he was in possession over the suit land, which had fallen to his share during partition. He further alleged that he had sown 'Til' and 'Mash' crop over the land. He further stated that appeal against the partition order is still pending in the competent Court of law. As per complainant, accused persons in furtherance of their common intention to kill the complainant and his wife, forcibly entered the suit land and started causing damage to the crop sown by the complainant, ploughed the land forcibly and caused loss to the tune of Rs. 1500/-. The complainant further alleged that when he tired to prevent/stop the accused from their act, they abused and gave beatings to him and his wife. The complainant further alleged that accused while leaving site of occurrence threatened them with dire consequences and also assaulted and gave beatings to him. The complainant further alleged that his wife, who made an attempt to rescue him was also given beatings by the accused persons, as a result of which he alongwith his wife sustained injuries. Though, the matter was reported to the police at Police Station, Indora and the complainant and his wife were got medically examined, but no action was taken by the police and as such he was compelled to lodge a private complaint under Section 156(3) Cr. P.C.

3. Complainant with a view to prove his complaint examined as many as four witnesses, whereas, accused in his statement under Section 313 Cr. P.C denied the case of the complainant in toto. Accused persons in their defence also tendered documents Ext. D1 to Ext. D-4.

4. Learned Trial Court being satisfied that prima facie case exists against the accused, framed charges against them for commission of offences punishable under Sections 447, 323 of IPC read with Section 149 of IPC, to which they pleaded not guilty and claimed trial.

5. The learned JMIC, vide judgment dated 5.2.2009 dismissed the complaint filed by the complainant, as a result of which, respondents/accused came to be acquitted of charges framed against them under Sections 447, 323 of the IPC read with Section 149 of IPC.

6. Being aggrieved and dissatisfied with the aforesaid judgment of acquittal recorded by learned JMIC, the complainant approached this Court by way of instant proceedings, seeking therein conviction of accused after setting aside the judgment of acquittal recorded by

learned JMIC. Learned counsel representing the complainant vehemently contended that the impugned judgment recorded by the Court below is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence and as such, the same deserves to be quashed and set aside. Learned counsel representing complainant strenuously argued that bare perusal of impugned judgment suggests that evidence led on record was not read and appreciated in right perspective as a result of which erroneous findings have come on record. While substantiating his aforesaid arguments Mr. Naresh Kaul, Advocate, made this Court to travel through evidence led on record by the complainant to demonstrate that it was successfully proved on record that on 7.7.2003, accused persons, who were armed with sticks in their hands forcibly entered into the land owned and possessed by the complainant and thereafter gave beatings to complainant as well as his wife. While concluding his arguments, Mr. Naresh Kaul, Advocte contended that Court below misread, misconstrued and mis-appreciated evidence collected on record by the prosecution and as such respondents/accused be convicted for the offences punishable under Sections 447 and 323 of IPC read with Section 149 of IPC after setting aside the judgment of acquittal recorded by the Court below.

7. Mr. Ashok Sharma, learned counsel representing respondents-accused supported the impugned judgment of acquittal and stated that there is no illegality and infirmity in the same and the same is based upon correct appreciation of evidence adduced on record by the respective parties. Learned counsel representing respondents/accused with a view to substantiate his arguments invited the attention of this Court to the documentary evidence tendered on behalf of the respondents in the shape of Ext. D1 to D4 to demonstrate that land on which respondents-accused allegedly trespassed had fallen in the share of the respondents/accused and not in the share of the complainant. Learned counsel for respondents further contended that none of the complainant witnesses supported the version put forth by CW-1 i.e. complainant that he as well as his wife were given beatings by the respondents-accused and as such learned Court below rightly held them not guilty of having committed offence punishable under Sections 447 and 323 of IPC. While concluding his arguments, learned counsel representing respondents-accused contended that except CW-1 and CW-2, who happened to be husband and wife, none of prosecution witnesses stated that they saw respondents-accused giving beatings to the complainant as well as his wife and as such, judgment of acquittal being based upon correct appreciation of evidence deserves to be upheld.

8. I have heard learned counsel representing the parties and have gone through the records.

9. This Court solely with a view to ascertain the correctness of submissions having been made by learned counsel representing complainant that there is misreading, misinterpretation and misconstruction of evidence, carefully perused the evidence led on record by the respective parties vis-à-vis impugned judgment of acquittal recorded by the Court below, perusal whereof certainly does not persuade to this Court to agree with the aforesaid contention of learned counsel representing complainant, rather this Court after having carefully analyzed the evidence adduced on record by the complainant, has no hesitation to conclude that complainant was not able to prove beyond reasonable doubt that on 7.7.2003 respondents-accused forcibly entered into the land owned and possessed by him and thereafter he and his wife were given beatings and as such, there appears no illegality and infirmity in the findings returned by the Court below.

10. Complainant Atar Singh, while appearing as CW-1 reiterated the contents of the complainant and stated that on 7.7.2003, accused persons carrying sticks in their hands entered Khasra No. 293/128 possessed and owned by him and started uprooting the 'til' and 'mash' crop sown by him. He further stated that when he tried to prevent them, respondent/accused namely Saroop Singh gave a stick blow on his head, whereas the other accused also started beating him. He further stated that his wife, who was coming to their fields, tried to rescue him, but the accused also gave beatings to her. He also stated that he suffered loss to the tune of Rs. 1500/- and the accused while leaving the spot of incident threatened them with

dire consequences. In his cross-examination, he admitted Ext. A-1 copy of the complaint made to the police, wherein he had specifically stated that he was given beatings by Jyoti Devi and Shakuntala Devi. Though, he denied that land in Khasra No. 293/128 was not partitioned, but he categorically admitted that stay order was passed against him regarding the said land.

11. CW-2 Salochan Devi, who happened to be the wife of complainant also stated that on 7.7.2003, at about 7.30 a.m. at Gangwal when she was in her house, she heard noises from the fields and on reaching the spot, she saw the accused armed with sticks giving beating to the complainant. She further stated that when she tried to rescue the complainant, accused persons also gave beatings to her. She also stated that accused uprooted the crop and caused loss to the tune of Rs. 1500/-. She further stated that the land, where the incident occurred had fallen into the share of the complainant in the partition proceedings. In her cross-examination, CW-2 admitted that only Soma Devi witnessed the incident from a distance and Chain Singh, CW-3 came later.

12. Conjoint reading of aforesaid statements having been made by CW-1 and CW-2, who are husband and wife, clearly suggests that there are/were material contradictions in the statements with regard to presence of CW-2 Salochna Devi on the site of occurrence. As per CW-1 when he was being given beating by respondent accused, CW-2 Salochana Devi was coming to the field, whereas CW-2 categorically stated that on 7.7.2003, at about 7.30, she was in the house when she heard noises from the fields and on reaching the spot she saw the accused armed with sticks giving beatings to CW-1. Similarly, CW-2 in her statement stated that incident was witnessed by Soma Devi, but unfortunately there appears to be no attempt on the part of prosecution to cite Soma Devi as a spot witness to lend support to the story put forth by the complainant.

13. CW-3, Chain Singh stated that he does not remember the date. He further stated that in July, 2003, he was working in his fields, when he heard noises, but when he reached there, nothing happened in his presence and the complainant had suffered injuries on his head. He feigned ignorance with regard to the incident. Though, this witness admitted that when he reached spot of occurrence, complainant had suffered injuries, but he specifically stated that nothing happened in his presence.

14. CW-4 Dr. Randhir Thakur stated that complainant as well as her wife suffered injuries, but in cross-examination, he admitted that injuries could be caused by fall at a hard surface.

15. In the case at hand, there is only one so called independent witness CW-3 Chain Singh, who did not support the case of the complainant as has been discussed hereinabove, CW-3 though admitted that complainant had suffered injuries, but categorically stated before Court below that nothing happened in his presence and feigned his ignorance with regard to the alleged incident. Similarly, though medical evidence adduced on record suggests that complainant and his wife had suffered injuries but that may not be sufficient to conclude that injuries as mentioned in Ext. PW4/A and Ext. PW4/B were inflicted by respondents/accused because none of the independent witnesses supported the version put forth by the complainant CW-1 and his wife CW-2.

16. True it is, that version put forth by interested witnesses can not be brushed aside on account of non association of independent witnesses, rather version put forth by interested witnesses can also be considered by the Court while ascertaining the correctness of case put forth by prosecution/complainant. But in the instant case, as has been noticed above Soma Devi witnessed the incident as stated by CW-2, but she was not cited as complainant's witness, whereas another so called independent witness CW-3 Chain Singh nowhere supported the case of the prosecution. Since respondent-accused successfully proved on record by placing document Ext. D1, i.e. order passed by Collector, Nurpur dated 2.8.2004, that partition order was set aside, wherein land in question had fallen to the share of complainant, version put forth by the complainant and his wife that respondents-accused forcefully entered and trespassed into the

land owned and possessed by the complainant was rightly not accepted by the Court below. It appears that after partition land had fallen into the share of the complainant and respondent-accused being aggrieved and dissatisfied with the same, preferred an appeal which is/was pending before competent authority. Though, it emerged from record that at first instance complainant had lodged complaint with police at police station Indora and thereafter one of Head Constable namely Desh Raj had taken the complainant and his wife to Dr. Randhir, Medical Officer, Indora, who also proved MLCs Ext. PW4/A and Ext. PW4/B, but interestingly, there appears to be no attempt on the part of complainant to associate aforesaid Head Constable as a witness to prove that immediately after alleged incident, matter was reported to the police and police got the complainant and his wife medically examined from Doctor Randhir Thakur, CW-4.

17. Leaving everything aside, as has been taken note above, there are material contradictions in the statements of CW-1 and CW-2 with regard to presence of CW-2 on the spot of occurrence and as such learned Court below rightly not placed any reliance upon statement made by CW-2.

18. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
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> > " 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
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> 46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.

19. Consequently, in view of above, this Court sees no reason to interfere with the judgment passed by learned Judicial Magistrate, Ist Class, Indora, District Kangra, H.P. in Criminal Case No. 9-II/2007, as such, the same is upheld and present appeal is dismissed being devoid of merits.

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

HP Agro Industries Corporation Ltd. ....Appellant.
Versus
Shri B.M. Dutt ....Respondent

Letters Patent Appeal No. 142 of 2009
Date of Decision 19th September, 2017

Constitution of India, 1950- Article 226- Respondent/applicant filed an application for seeking various reliefs after he was allowed to voluntarily retire from service – the application was transferred to the High Court on abolition of the Tribunal – the Writ Court allowed the petition and directed the corporation to grant the benefit under FR 22 (c) as well as proficiency step up – aggrieved by the order, the present appeal has been filed pleading that after seeking voluntary retirement, the respondent/applicant cannot seek the benefit of past services – held that an offer of voluntary retirement gives rise to a concluded contract between employer and employee- once the benefits have been given to the employee, the matter cannot be re-opened by the employee – the writ Court had ignored this position of law – appeal allowed- judgment of writ Court set aside. (Para-5)

Cases referred:
ITI Limited vs. ITI Ex/VR Employees/Officers Welfare Association and others (2010)12 SCC 347
HEC Voluntary Retd. Employees Welfare Society vs. Heavy Enginnering Corporation Ltd. (2006)3 SCC 708

For the Appellant: Mr. Atul Jhingan, Advocate.
For the Respondent: Mr. Sameer Thakur, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (Oral)

Judgment dated 27.7.2009 passed by learned Single Judge in CWP (T) No. 2817 of 2008 is under challenge in this appeal. The writ petition (initially OA No. 2306 of 1995 filed in the H.P. Administrative Tribunal) was filed by the respondent herein after he was allowed to retire voluntarily from service with the following prayers:-

(a) Quash the inquiry report dated 7.12.1993 and the order dated 18.4.1991 (Annexures A-3 and A4).

(b) Expunge the adverse remarks in the ACRs for the period 1.4.1989 to 31.3.1990.

(c) Quash the decision of Sub-Committee of the Board of Directors held on 6.5.1995 (Annexure A9) rejecting the representation and appeals of the applicant.

(d) Quash the order dated 6.8.1991 (Annexure A17).

(e) Quash the order dated 25.4.1990 (Annexure A23).

(f) Quash the decision of the Board of Directors dated 10.5.1990 (Annexure A24)

(g) Direct the respondents to fix the pay of the applicant at Rs.1040/- w.e.f. 25/28.11.1991 on his promotion as Branch Manager in the scale of Rs.850-1700, after giving him benefit of FR 22C and consequently fix his pay in the revised scale w.e.f. 1.6.1982.

(h) Direct the respondents to pay to the applicant the conveyance allowance @ Rs.75/- per month w.e.f. 14-7-81/28-11-1981 till the date of his retirement.

(i) Direct the respondents to pay all consequential benefits, monetary and otherwise to the applicant along with interest @ 18% per annum.

(j) Direct the respondents to grant proficiency step-up to the applicant w.e.f. 1.6.1990.

(k) Direct the respondents to re-fix the retiral benefits of the applicant in pursuance to the orders of this Hon'ble Tribunal.

2. Learned Single Judge, on having taken into consideration the pleadings of parties and hearing learned counsel on both sides, has allowed the writ petition and directed the appellant i.e. respondent Corporation to grant the petitioner benefit under FR 22 (c) w.e.f. 28.11.1981 and also the proficiency step up w.e.f. 1.6.1990 within four weeks.

3. The respondent Corporation, being aggrieved by such directions, has preferred the present appeal on the grounds inter alia that on acceptance of the request for voluntary retirement from service made by the respondent/writ petitioner and settlement of retiral benefits vide order, Annexure A-2 to the present appeal, no claim qua past service benefits of the writ petitioner could have been entertained nor any relief granted to him.

4. Mr. Atul Jhingan, learned counsel representing the appellant Corportion, has vehemently argued that the offer to retire from service voluntarily and acceptance of such offer by the employer ultimately culminated into a concluded contract and now the petitioner cannot turn around and claim the past service benefits on the ground that the same were withheld wrongly and in an unlawful manner. Mr. Sameer Thakur, learned Advocate, however, submits that irrespective of the writ petitioner has sought voluntary retirement, he is competent to claim the past service benefits, which according to him were illegally withheld.

5. The Apex Court in ***ITI Limited vs. ITI Ex/VR Employees/Officers Welfare Association and others (2010)12 SCC 347*** by placing reliance on judgment again that of the Apex Court in ***HEC Voluntary Retd. Employees Welfare Society vs. Heavy Enginnering Corporation Ltd. (2006)3 SCC 708*** has held that an offer for voluntary retirement, in terms of a scheme, when accepted, leads to a concluded contract between the employer and employee. Also that consequent upon an offer made by the employee and the same is accepted by the employer, gives rise to a contract. It is further held in the same judgment that if an employee has got the benefits under voluntary retirement scheme whether right or wrong, the matter cannot be re-opened and an employee cannot claim any higher amount on account of subsequent revision in the wages retrospectively. If applying the ratio of the judgments cited supra, in the given facts and circumstances of this case, the same is on better footing as the petitioner availed certain benefits which were withheld on account of departmental action taken against the petitioner and by way of penalty imposed well before having sought voluntary retirement from service. Therefore, the petitioner who had sought voluntary retirement seeking benefits under notified voluntary retirement scheme cannot turn around and persue his other grievances with regard to the period he was in service. As has been held by the Apex Court in judgments cited supra, the pre-condition of applying for voluntary retirement and acceptance thereof by the respondent department, the petitioner cannot persue any grievance with regard to service benefits for service already rendered by him. To make the offer to seek voluntary retirement was conditional. The application he made to this effect forms the part of record of this appeal which is Annexure A-1 to the application, CMP No. 8699 of 2016. The employer i.e. appellant/respondent however has conveyed its acceptance in the manner as detailed in Annexure A-2 and the due and admissible benefits have also been indicated in this document. The petitioner after having accepted the same has filed writ petition with the grievances as discussed hereinabove, which is not permissible. We, therefore, are not in agreement with the findings recorded by learned Single Judge. The impugned judgment as such is quashed and set aside. Consequently, the writ petition is dismissed. The

appeal is allowed and stands accordingly disposed of. Pending miscellaneous application shall also stand disposed of.

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

Bhag Singh .....Petitioner/Defendant.
Versus
Prem Singh and another .....Respondents/Plaintiffs.

CMPMO No. 213 of 2017.
Reserved on : 31st August, 2017.
Date of Decision: 21st September, 2017.

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment was filed by the plaintiff/applicant pleading that defendant and his family members broke the lock of the house and dispossessed the plaintiffs forcibly- plaintiffs sought relief of possession and damages- application was allowed by the Trial Court- aggrieved from the order, the present petition has been filed- held that the proposed amendment will not change the nature, complexion, and structure of the suit – the amendment was necessary and was rightly allowed- petition dismissed. (Para-5)

For the Petitioner: Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.
For the Respondents : Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Plaintiffs/respondents herein instituted a suit against the sole defendant/petitioner herein, claiming therein, a declaratory relief that they along with the sole defendant, are, joint owners in possession of land measuring 07-00 bighas, borne upon khasra No.744/514/58, Khata Khatauni No. 180/199 min and khasra No.745/514/58/1, Khata Khatauni No.227/256 situated in Village Har Kukhar (Barota), near IPH Colony, Pargna Tiun, Tehsil Ghumarwin, District Bilaspur, H.P., besides a relief that preparation of a tatima wherein an area of 00-03 biswa is encompassed and is comprised in Khasra No.745/514/58/1, Khatauni No.227/256, as stood separated from khasra No. 744/514/58, Khata Khatauni No.180/199 min being declared as wrong and illegal also possession thereof of the sole defendant being declared wrong and illegal, was, also claimed therein. Moreover, the relief of permanent prohibitory injunction for restraining the sole defendant from dispossessing the plaintiff from the suit land and from two rooms situated over the suit land, was, also claimed.

2. The sole defendant/petitioner herein instituted a written statement to the plaint and claimed that carving of 0-3 biswas of land borne on khasra No.745/514/58/1, khata Khatauni No. 227/256, from, land borne on khasra No. 744/514/58, khata Khatauni No. 180/199, being, legitimate also it was claimed that upon the aforesaid land, in pursuance to valid approvals, for, construction(s) being raised thereon, thereupon, the defendants subjecting, to, construction the aforesaid khasra number. Consequently, therein it was concerted by the sole defendant, that, the separation of three biswas of land, in, respect whereof tatima reflecting it to be bearing Khasra No. 745/514/58/1, Khata Khatauni No. 227/256, also stood prepared besides issued being valid besides legal, besides it was averred that the plaintiffs holding no right, to

belatedly make any challenge in respect thereof nor theirs being entitled to claim possession, of, any construction raised thereon by the sole defendant.

3. However, during the pendency of the suit before the learned trial Court, an application cast under the provisions of Order 6, Rule 17 of the CPC, stood, instituted therebefore by the plaintiffs, wherein, they with the leave of the Court concerted incorporation of Para-7-A in the plaint, after, para 7, para whereof stands extracted hereinafter:

> "7-A. That on dated 13.06.2015, the defendant along with his family members broke the lock of three storey house, ground floor, 1st floor and 2nd Floor consisting two shops in the ground floor and the same construction of the 1st and 2nd floor and dispossessed the plaintiff forcibly from the said shops including the 1st and 2nd floor. The plaintiff is entitled to the possession of the said two shops along with the 1st and 2nd floor from the defendant after evicting the defendant. The plaintiff is also entitle to the damages @ Rs.2,000/- per month from 13.06.2015 till the realization of the amount for the illegal occupation of the said house cum shop."

4. The application was resisted by the sole defendant by his filing reply thereto. The resistance to the application by the sole defendant, is, grooved, on grounds para materia vis-a-vis the grounds embodied in his written statement instituted to the plaint. The application was allowed by the learned trial Court. The defendant is aggrieved therefrom, hence, has instituted the instant petition before this Court.

5. The learned counsel appearing for the petitioner/defendant, has contended with vigour that the amendment was, not, amenable for its being allowed, given the plaintiffs holding no right, title or interest upon the suit land. Also he contended with vigour, that denotations in the apt tatima in respect of trite khasra No. 745/514/58/1, being in accordance with law besides constructions raised thereon by the sole defendant, being, in pursuance to validly sanctioned building plans. The aforesaid endeavour made by the learned counsel appearing for the defendant/petitioner herein, to, strip the validity(ies) of the impugned order pronounced by the learned trial Court, does ultimately impinge upon the competing rights of the contesting parties in respect of constructions raised upon khasra No.745/514/58/1 also does ultimately devolves, upon, the validity(ies) of carving of khasra No.745/514/58/1, from, a larger chunk of land borne upon khasra No.744/514/58. Apart therefrom, the learned counsel appearing, for the petitioner herein/defendant has, not, been able to demonstrate that "upon" the amendment being allowed, it would beget a change in the nature, complexion and structure of the suit, nor he has been able to demonstrate that in the garb of the proposed amendment, the plaintiffs striving to rear new cause(s) of action, which otherwise was/were available to be reared along with cause(s) of action initially reared in the plaint, nor obviously he has been able to demonstrate that the causes of action, in respect of incorporation whereof, the apt leave of the Court is sought, hence, subject to just exceptions, standing barred by the principle of estopple constituted in Order 2, Rule 2 of the CPC. Apparently, prima facie with causes of action, in respect of incorporation whereof, in the plaint, the leave of the Court is sought, arising, subsequent to the institution of the suit rather precisely on 30.06.2015, whereas, the suit standing instituted in the year 2013. Therefrom, the apt sequitur, is, with the plaintiff, for want of apt accrual(s) thereat, hence, being initially barred to rear all the averments in respect(s) thereof, whereas, in contemporaneity of their accrual, he has with the leave of the Court, sought their incorporation in the plaint, therefrom it is befitting to conclude that the bar of estopple, subject to just exceptions, constituted in Order 2, Rule 2 of the CPC, whereby, all causes of action arising in contemporaneity, of, the institution of the suit are enjoined to be included initially in the plaint, being squarely not attracted hereat. Nor ill interdicting effect(s) thereof against averments in respect of incorporation(s) thereof, with the leave of the Court in the plaint, is also not attracted hereat.

6. For the foregoing reasons, the instant petition is dismissed and the impugned orders are maintained and affirmed. No order as to costs. All pending applications also stand disposed of .

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

Gurdev Singh .....Appellant/defendant.

Versus

Om Prakash (since deceased) through his legal hiers & ors. .....Respondents/Plaintiffs.

RSA No. 95 of 2004.
Reserved on : 31st August, 2017.
Decided on :21st September, 2017.

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit pleading that suit land is jointly owned and possessed by them- revenue entry showing the defendant to be non-occupancy tenant and mutation regarding the conferment of proprietary rights is wrong, illegal and void- defendant pleaded that he was coming in possession for the last 30 years as tenant on the payment of Chakauta to the plaintiffs- defendant has become owner by operation of Law- suit was partly decreed by the Trial Court- appeal was filed, which was dismissed- held in second appeal that Civil Court has jurisdiction where the Revenue Officer had violated the principle of natural justice or acted without jurisdiction- the proprietary rights were conferred by A.C. 2nd Grade who had no jurisdiction- earlier order conferring the status of gair maurusi was set aside by the Settlement Collector and the case was remanded for recording the fresh decision- order of Settlement Collector was not complied by the Naib Tehsildar- hence, status of the defendant is under a cloud- Trial Court and Appellate Court had rightly held that Civil Court has jurisdiction- appeal dismissed. (Para-8 to 12)

Case referred:
Chuhniya Devi versus Jindhu Ram, 1991(2) S.L.J. 1082

For the Appellants: Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate

For the Respondents: Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs/landowners' suit was partly decreed qua relief of declaration besides qua relief of possession. However, relief of injunction was refused. In an appeal carried therefrom by the aggrieved tenant/defendant, before, the learned First Appellate Court, the latter Court dismissed the appeal of the defendant/tenant. Being aggrieved therefrom, the defendant/tenant has instituted the instant appeal before this Court, whereby, he concerts to beget its reversal.

2. Briefly stated the facts of the case are that the plaintiffs filed a suit for declaration to the effect that land measuring 0-38-39 hects, bearing Khewat No.2, Khatauni No.2. Khasra No.328/2, as entered in the missal Haquiat Bandobast Jadid Sani for the year 1985-86, situate in village Basooni, Tehsil Amb, District Una, H.P. is owned and possessed by the plaintiffs and defendant has no right, title or interest over the same. The entires in the revenue record in the name of defendant as non-occupancy tenant and mutation No.4 regarding conferment of

Proprietary rights sanctioned by the AC 2nd Grade, Amb on 29.9.1993 in favour of the defendant is contrary to the statutory provisions as envisaged under the Act and also order of Collector, Amb dated 23.9.1996 is wrong, illegal, void with a decree for permanent injunction restraining the defendant from interfering in any manner over the suit land or cutting, removing any tress, grass extracting resin and selling the resin and in the alternative decree for possession. It has been pleaded that the suit land is jointly owned and possessed by the plaintiffs and defendant who is very clever and shrewed person, in connivance with the Settlement Naib Tehsildar, Panjoa has wrongly and illegally procured entries in his favour in respect of the suit land at the back of the plaintiffs. The defendant was never inducted as tenant nor ever he came in possession of the suit land. The suit land is still in possession of the plaintiffs and after knowing about the order of the Naib Tehsildar, Panjoa, the plaintiffs have filed an appeal before the Collector, Una, who accepted the appeal and set aside the order of Naib Tehsildar, Panjoa dated 22.2.1987 and further remanded the case for fresh inquiry to Tehsildar, Amb, which is still pending. The defendant during the pendency of the suit, in connivance with the revenue field staff wrongly and illegally got entered mutation No.4 on 29.9.1993 at the back of the plaintiffs without issuance of any notice from AC 2nd Grade, Amb. The said order is illegal, without jurisdiction and contrary to the provisions of the Act as well as principles of natural justice. The defendant have no right, title or interest over the suit land, hence, the present suit.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections inter alia cause of action, maintainability, estoppel, jurisdiction, suit being bad for non joinder of necessary parties, suit being barred under Section 41(h) of H.P. Specific Relief Act and limitation. On merits, it was alleged that the suit land was coming in possession of the defendant for the last 30 years as tenant on payment of Chakuta rent to the plaintiffs. Now after coming into force of H.P. Tenancy and Land Reforms Act, 1972, the defendant has become owner of the same. The plaintiffs are big landlord and their land is situated in various villages. During settlement operation, the revenue entries in respect of suit land were correct in the name of defendant by the revenue officer as non-occupancy tenant. The entries have been made in accordance with factual possession on the spot and plaintiffs have also admitted possession of the defendant. The defendant have denied other averments made in the plaint. It has been admitted that mutation No.4 in respect of proprietary rights was sanctioned in favour of the defendant who is now owner of the suit land.

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

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

1. Whether plaintiffs and proforma defendants No.2 to 4 are owners in possession of suit land, as alleged? OPP.

2. Whether order of N.T. Settlement Panjoa dated 28.2.1987 is illegal, void as alleged? OPP.

3. Whether entry of suit land in favour of defendant No.1 qua tenancy is wrong, as alleged? OPP.

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

5. If plaintiffs are proved out of possession, whether they are entitled to the relief of possession in the alternative, as claimed? OPP

6. Whether the suit is within time? OPP

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

8. Whether act and conduct of plaintiffs is bar to the suit, as alleged? OPD

9. Whether Civil Court has no jurisdiction to entertain and decide the suit, as alleged? OPD.

10. Whether suit is bad for non joinder of necessary parties, as alleged? OPD

11. Relief.

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

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal, before this Court wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 14.07.2004, this Court, admitted the appeal instituted by the defendant/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

c) Whether the learned first appellate Court erred in holding that civil courts have jurisidction to try the suit?

Substantial question of Law No.1.

8. The learned trial Court while affording vis-a-vis the plaintiff, the apposite declaratory relief claimed in respect of the suit khasra numbers, relied upon a judgment rendered by the Full Bench of this Court in case titled as ***Chuhniya Devi versus Jindhu Ram, 1991 SLC 223,*** as also it relied upon various other judgments reported in AIR 1979, S.C., 653, AIR 1979, S.C. 871 and AIR 1971 S.C. 2320, wherein, it stands propounded, of, Civil Courts being empowered to test the legality of mutation(s) attested or orders made by Revenue Officer(s) concerned, whereunder, proprietary rights stand conferred upon the tenant, especially when the order attesting mutation(s), is, visibly gripped with an infirmity of jurisdictional dis-empowerment(s) besides is infected with a vice of its infracting the principle of *audi alteram partem*, whereupon, with the aforesaid tenets being evidently satiated, it hence concluded that the impugned order rendered by the Revenue Officer(s) concerned, whereby, he attested mutation(s) in respect of the conferment of proprietary rights vis-a-vis the defendant/tenant, standing hence stained with the aforesaid vices. In sequel, it concluded, of, Civil Court(s) holdings) jurisdiction for testing the legality(ies) of the impugned mutation(s).

9. The learned First Appellate Court also proceeded to affirm the findings recorded qua the aforesaid facet, by the learned trial Court. Since, this Court is enjoined to answer the hereinabove extracted substantial question of law, directly impinging upon the jurisdiction of Civil Court(s), to try suit(s) in respect of legality(ies) of the apposite impugned order(s), whereunder, proprietary rights under the mandate embodied in Section 104 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (hereinafter referred to as the Act), stood hence conferred upon the tenant/defendant, by, the Revenue Officer concerned, thereupon, the relevant record is enjoined to be delved into, for making discernment(s) therefrom, whether the Revenue Officer concerned, in recording the impugned mutation(s), hence, infracted the principles of natural justice or was jurisdictionally dis-empowered to make the impugned orders. Significantly, with evident surfacing, of, the aforesaid vices, thereupon, Civil Courts would stand vested with jurisdiction to try the apposite Civil Suit, in exception(s) besides in derogation(s), of, the general rule of any order rendered by Revenue Officer(s) exercising jurisdiction under the Act, being unamenable for impeachment before Civil Courts.

10. The defendant/tenant would be foisted with a tenacious leverage, to, validate the order recorded by the Naib Tehsildar, order whereof is borne in Ex.P-10, whereby proprietary rights stood conferred upon him, “only” when he was able to establish the imperative statutory condition(s) precedent, comprised in his evidently prior thereto holding the status of a “gair maurusi” upon the suit khasra number(s). The revenue records, apposite to the suit khasra number(s), do not, display that at any time prior to or in years immediately subsequent to the coming into force of the provisions of the Act, the status of the defendant/tenant being borne therein to be of a “gair maurusi” upon the suit khasra numbers. However, only when under

order, borne in Ex. P-5, recorded on 28.2.1987, by the Naib Tehsildar Resettlement, Panjowa, a direction was rendered therein, for, correction of revenue records with respect to the suit khasra numbers, qua thereupon the defendant/tenant coming to be reflected therein, as a tenant, upon the suit land, on payment of rent of Rs.40/-. Entries in consonance therewith found occurrence in Ex.P-1, exhibit whereof is a copy of jamabandi for the year 1985-1986. However, the order of the Naib Tehsildar borne in Ex. P-5, stood, challenged by the plaintiff before the Settlement Collector, who under orders recorded on 16.12.1993, orders whereof are borne in Ex. P-3, set aside the orders occurring in Ex. P-5 also he remanded the matter to the Naib Tehsildar concerned for enabling the latter to record afresh decision thereon. A perusal of the records, discloses that the orders borne in Ex.P-3, stood not, challenged by the defendant before the Appellate Authority, thereupon, it attained finality also the order borne in Ex.P-3 has not been demonstrated to be complied by the Naib Tehsildar concerned, hence, effect(s) thereof is of the status of the defendant, as a "gair maurusi" under the plaintiffs/landowners upon the suit land is still under cloud also effect thereof is that there is no uncontroverted clinching material, yet, on record in respect of the defendant/tenant being hence entitled to seek apposite automatic conferment of proprietary rights or his being entitled, to, in respect of suit khasra numbers, hence, seek validation of the impugned orders, conspicuously when the imperative statutory condition precedent is not yet clinchingly established. Plaintiff Narinder Parkash in his deposition comprised in his cross-examination, has testified in respect of all the aforesaid facets, deposition whereof remains unrebutted. Moreover, with Ex. P-3 also acquiring finality, thereupon, reverence was enjoined to be meted thereto. Conspicuously, the order of mutation comprised in Ex. P-10, whereunder proprietary rights in respect of the suit khasra numbers, stood, conferred upon the tenant/defendant, stood recorded on 29.9.1993, hence, subsequent to the institution of an appeal by the plaintiffs against the orders made by the Naib Tehsildar concerned, order whereof is borne in Ex.P-5, whereby the relevant revenue records were directed to be corrected by the concerned in respect of the defendant/tenant being reflected as a "gair maurusi" in respect of the suit land, orders whereof stood reversed by the Settlement Collector under orders, borne in Ex. P-5. A perusal of the impugned order, borne in Ex.P-10 discloses that there is, no, allusion therein qua the pendency of an appeal against the orders borne in Ex.P-5, in appeal whereof orders borne in Ex.P-3 stood pronounced. The effect thereof is of, in the Revenue Officer concerned proceeding to record Ex.P-10, his not eliciting the presence before him of the landowners, conspicuously, when on theirs being summoned besides theirs recording their participation before him, thereupon they would have been assuredly facilitated to reveal to him, the trite factum of an appeal preferred against the orders borne in Ex.P-5, remaining unadjudicated, whereupon, hence with the status thereat of the defendant as a "gair maurusi" vis-a-vis the suit land, hence, coming under a cloud also may have hence interdicted the Revenue Officer concerned to omit to record the impugned orders. The inevitable sequel therefrom, is, that the impugned order borne in Ex.P-10, is infected with a pervasive vice of its infracting the tenet of audi alteram partem, corollary whereof, is, that with the mandate rendered by the Full Bench of this Court in a case titled ***Chuhniya Devi versus Jindhu Ram, 1991(2) S.L.J. 1082***, holding therewithin certain exceptions vis-a-vis the ouster of jurisdiction of civil Courts, in, respect of matters falling within the domain of Section 112 of the Himachal Pradesh Tenancy and Land Reforms Act, exceptions whereof stand extracted hereinafter:-

> "64. .....
>
> (a) that an order made by the competent authority under the H.P. Land Revenue Act, 1954, is open to challenge before a civil court to the extent that it relates to matters falling within the ambit of section 37(3) and section 46 of the Act; and
>
> (b) the civil court has no jurisdiction to go into any question connected with the conferment of proprietary rights under section 104 of the H.P. Tenancy and Land Reforms Act, 1972, except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with."

(p...1098)

One of exception(s) whereof, is, of Civil Courts being empowered to try any civil suit, as constituted before it, wherein, aspersions are cast qua legality of orders pronounced by Revenue Officers, aspersions whereof make evident display of Revenue Officers begetting infraction of the principles of natural justice. Hence, when Ex.P10, for reasons aforestated makes, a visible display of infraction being meted by the Revenue Officer(s) concerned vis-a-vis the principle(s) of natural justice, thereupon the civil court has jurisdiction to try the suit.

11. Be that as it may, the impugned order borne in Ex.P10, stood assailed by the landowners in an appeal constituted before the Collector, Amb Sub Division, appeal whereof sequeled a decision borne in Ex. P-4, whereby the plaintiffs/landowners' appeal against the impugned order(s) borne in Ex. P-10, stood dismissed. Amongst other grounds agitated by the plaintiffs/landowners before the Collector, Amb Sub Division, for imeaching the validity of Ex.P10, one, was of the order of the Naib Tehsildar recorded on 28.2.1987, borne in Ex.P-5, whereby the defendant/tenant was ordered to be recorded as a "gair maurusi" in respect of the suit khasra number(s), being, reversed by the Settlement Collector, under, the latter's orders comprised in Ex.P-3, also, he therein directed, that the issue with respect to the disputed status of the tenant, as a gair maurusi upon the suit land, be re-determined by the Naib Tehsildar concerned. However, the Collector, Amb Sub Division, in rendering EX.P-4, wherein he affirmed the impugned order, borne in Ex.P10, has therein neither alluded to the aforesaid ground raised by the plaintiffs/landowners in their appeal instituted before him nor has alluded to effect(s) thereof. Contrarily, he has in a slip shod mechanical manner besides his inaptly irrevering the mandate borne in Ex.P-3, dismissed the appeal, whereby, he affirmed the orders occurring in Ex.P10. The slip shod mechanical manner of rendition of order borne in Ex.P-4 by the Appellate Authority, whereby, it affirmed the impugned order borne in Ex.P10, sequeled the plaintiffs/landowners, to assail it before the learned Divisional Commissioner, availment of remedy whereof is not demonstrated to achieve culmination. The effects of the aforesaid discussion, is, of the status of the defendants/tenant as a "gair maurusi" upon the suit land, yet remaining under a cloud also concomitantly his being not entitled to validate the orders pronounced in Ex.P-10 or in Ex.P-5. Since the tenant/defendant was enjoined to adduce clinching conclusive evidence in respect of his holding the status of a gair maurusi, upon the suit land under the plaintiffs/landowners also when his settled indefeasible rights in the aforesaid capacity upon the suit land, alone, would validate the pronouncement(s) occurring in Ex.P10 and in Ex.P-5, whereas, his failing to adduce evidence in respect(s) thereof besides his failing to prove that the Naib Tehsildar concerned on remand to him under Ex.P-3, of, his apposite application, whereunder correction of revenue entries were sought in respect of his hence being ordered to be reflected as a gair maurusi upon the suit khasra number, thereafter, hence, proceeding to record an affirmative decision thereon, whereupon, alone the cloud enveloping upon his status, as a gair maurusi upon suit khasra number, would hence, disappear. Effect(s) whereof is with Ex.P10 standing rendered in the absence of participation of the landowners/plaintiffs, in the apt proceedings occurring prior thereto, thereupon, it is evidently infected with a vice of infraction of the principles of natural justice, also it stands rendered dehors any inquiry from all quarters concerned in respect of the settled indefeasible status of the defendant/tenant, as, a gair maurusi upon the suit kahsra number(s), thereupon, any validation vis-a-vis the impugned orders would beget the ill fate, of the defendant/tenant being vested with proprietary rights upon the suit khasra numbers, even, when the indispensable statutory condition precedent, of, his evidently holding an indefeasible status, of, a gair maurusie upon the suit khasra numbers, remains yet not clinched, nor stands finally put to rest. The befitting sequel therefrom is that the Revenue Officer concerned in making Ex.P10, has, made it in a most mechanical perfunctory manner also as is borne from a reading of Ex.P-3, of the defendant/tenant refusing to accept summon(s) in respect of appeal bearing No.4/93, factum whereof remains uncontroverted, besides his failing to adduce material that he remained unaware, from, 22.01.1993, whereat, an appeal against the orders borne in Ex.P-5 stood preferred before the Settlement Officer, upto 25.09.1993, when subsequent thereto Ex.P10 was recorded, about pendency(ies) thereof, effect(s) whereof is with his omitting to adduce cogent evidence in display of his ignorance in respect of pendency of an appeal before the Settlement Collector concerned, against, orders borne in Ex.P-5, whereby, the

status of a gair maurusi upon the suit khasra number stood conferred upon him, thereupon, the apt corollary thereof, is that despite his awareness qua the preferment of an appeal before the Settlement Collector concerned, against, the orders borne in Ex. P-5, his hence at the time contemporaneous to the recording of Ex.P10, camouflaging, from, the revenue officer concerned, the factum of pendency(ies) thereof. In aftermath, it has to be concluded that hence Ex.P10, is, a sequel of the defendant/tenant actively indulging in *suggestio falsi and suppressio veri* also it appears that hence the Revenue Officer(s) concerned, in theirs proceeding to record impugned orders occurring in Ex. P-5 and Ex.P-10, hence colluding besides conniving with him. The drawing of the aforesaid inference(s) stains Ex.P10 with a vitiating vice of pervasive fraud and malafide(s). The attraction of the aforesaid vices vis-a-vis Ex.P-10, renders, it, to be jurisdictionally nonest, thereupon, the jurisdictional disempowerment of the Revenue Officer(s) concerned, arising from the aforesaid inference(s) also constrains this Court to conclude of civil courts holding jurisdiction to entertain the plaintiffs' suit for setting aside the impugned orders.

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

13. In view of the above discussion, there is no merit in the instant appeal, which is accordingly dismissed. The impugned judgments and decrees are maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Jai Singh .....Petitioner.

Versus

Manisha ....Respondent.

Criminal Revision No. 343 of 2016.
Reserved on : 05.09.2017.
Date of Decision: 21st September, 2017.

Code of Criminal Procedure, 1973- Section 125- An interim order awarding maintenance was passed- the amount of Rs. 42,000/- became payable for the period w.e.f. 3.10.2013 to 3.12.2014- husband failed to make payment and was ordered to be sent to imprisonment – held that order was pronounced on 7.7.2014 and the application was filed within a period of one year- Magistrate had ordered the attachment of the property- it was reported that husband has no property/assets, which can be attached- this shows that husband did not possess the means to satisfy the order and it cannot be concluded that he was not paying maintenance intentionally – Court had wrongly ordered the imprisonment – petition allowed and order of Magistrate set aside.

(Para- 2 to 5)

For the Petitioners: Mr. Ajay Sharma, Advocate.
For the Respondent : Mr. Dheeraj K. Vashishat, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through the instant Criminal Revision Petition, the petitioner makes a prayer for setting aside the orders pronounced respectively on 7.10.2016 and on 18.10.2016 by the learned Addl. Chief Judicial Magistrate, Amb in Cr.MA No. 8-IV/15, whereunder, for non compliance(s) by

the petitioner with the orders pronounced under the provisions of Section 125 of the Cr.P.C., he was successively committed to judicial custody.

2. Evidently, orders stood pronounced by the Addl. Chief Judicial Magistrate concerned, in respect of interim maintenance vis-a-vis the respondent herein, interim maintenance(s) whereof were quantified in a sum of Rs.42,000/-, and were assessed w.e.f. 3.10.2013 to 3.12.2014. Before proceeding to adjudicate upon the legality of the impugned orders pronounced by the learned Addl. Chief Judicial Magistrate concerned , this Court deems it fit to extract the relevant provisions of sub section (3) of Section 125 of the Cr.P.C., alongwith its proviso(s):-

> 125. Order for maintenance of wives, children and parents.
>
> 1. .....
>
> 2.....
>
> 3.If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:
>
> Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:
>
> Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

3. Initially, it is to be determined whether within the ambit of the first proviso to sub section (3) of Section 125 of the Cr.P.C., the beneficiary of the order, of interim maintenance, did, within a period of one year from the date it fell due, hence make an application for its enforcement, whereupon, alone the mandate of sub-section (3) of Section 125 of the Cr.P.C. would beget attraction also hence the orders impugned before this Court would, not, beget any stain of any illegality. However, with the orders sought to be enforced by the respondent herein, through, hers availing the provisions of sub-section (3) of Section 125 of the Cr.P.C., being evidently pronounced on 7.7.2014, whereas, within less than one year elapsing therefrom, hers hence concerting for their enforcement, thereupon, the mandate of the first proviso, is, satisfied, rendering the extant application to be maintainable before the learned trial Magistrate. Moreover, “any orders” pronounced, within, the domain of sub-section (3) of Section 125 of the Cr.P.C., whereby, the evident violator of orders of interim maintenance, is, ordered to be committed to civil imprisonment, for a period extending upto one month or until payment, if sooner made, “for theirs” hence attaining any aura of legal solemnity, enjoin, the Magistrate concerned, to prior thereto draw subjective satisfaction(s), of, the purported violation(s) being without any sufficient cause, rather, hence, being intentional besides to objectively make discernments (b) vis-a-vis the purported violator patently making open breach(es) of the apposite orders. Needless to say that the signification borne by the statutory coinage embodied in sub-section (3) of Section 125 of the Cr.P.C., “issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceedings, as the case may be remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month of until payment if sooner made” is none other than of evident intentional breaches by the litigant concerned, of each months' allowance of maintenance or interim maintenance, thereupon, empowering the Magistrate concerned, to, in respect(s) thereof or in

respect of each successive months' breach(es), hence order for the litigant concerned undergoing detention “upto” one month in civil prison, or thereunder empowerment is bestowed upon him/her to, for each successive breach of each month's allowance, pronounce an order for committing the violator concerned to one month's civil imprisonment, conspicuously, for each months' breach(es). In sequel, in the learned Additional Chief Judicial Magistrate for each breach or successive breach(es) by the petitioner herein, of the order of interim maintenance, upon the entire sums, being equivalently split upto 12 months, hence, attracting its statutory clout vis-a-vis the violator concerned also his ordering for the evident violator being committed to civil prison upto a period of one month, for, each breach(es), does not, prima facie suffer from any apparent illegality, it reiteratedly being within the domain and ambit, of, the signification borne by the aforesaid statutory coinage.

4. Be that as it may, the learned trial Magistrate when proceeding to commit the violator concerned, to civil prison, was also, prior thereto enjoined, to objectively draw satisfaction from the material existing before him, with vivid portrayal(s) therein, of, the violator concerned, not, intentionally breaching the relevant orders also was enjoined to from material(s) existing before him, hence, make discernment(s) therefrom qua the apt breach(es), emanating or not emanating from any sufficient cause besetting the purported violator. In case, the material on record is demonstrative of the violator concerned, holding any sufficient cause, for his not complying with the orders concerted to be enforced, concomitantly, his purported breaches would be rendered bereft of any stains of his intentionally or openly infracting the apposite orders, thereupon, his being ordered to be subjected to civil prison, for realization of amount(s) of interim maintenance, would be ridden with a vice of legal infirmity.

5. For determining, whether the learned Magistrate had delved into the relevant material, for hers/his, therefrom, objectively drawing a conclusion with respect, to, the purported derelicting litigant holding or not holding a sufficient cause, to omit to beget compliance vis-a-vis the apposite orders, it is imperative to make an immediate advertence to the orders pronounced on 14.09.2016. A perusal thereof makes a disclosure, of, despite the Magistrate concerned, proceeding to order for the attachment of the movable or immovable property(ies) of the violator concerned, hers being seized with a report qua his holding no attachable movable or immovable property/assets. In aftermath, the aforesaid apposite report constituted sufficient material, in respect of the violator concerned, not, intentionally making breaches of the apposite orders, concerted to be enforced rather his holding a sufficient cause, for not, meteing compliance therewith, thereupon, when the opening phrase of sub-section (3) of Section 125 of the Cr.P.C. “ if any person so ordered fails without sufficient cause to comply with the order” constitutes the statutory indispensable *sine qua non,* for thereafter the Magistrate concerned, proceeding to make a valid pronouncement for the violator concerned, suffering civil imprisonment, whereas, with the aforesaid apposite report, unveiled in the orders recorded on 14.09.2016, making echoings in respect of the violator concerned, not, holding any attachable movable or immovable assets, thereupon, he obviously, cannot, be construed to be intentionally violating the apposite orders rather he is to be construed to be possessing a sufficient cause for, not, meteing compliance(s) therewith. In aftermath, the efforts made by the learned trial Magistrate concerned, to realise the amount of interim maintenance, from, the respondent by hers ordering the latter to suffer one month's civil imprisonment, for his each months' successive breaches, of, the orders of interim maintenance, thereupon, patently arises from hers' irrevering the trite statutory indispensable sine qua non embodied in the initial sentence of sub section (3) of Section 125 of the Cr.P.C., hence, remaining not satiated, thereupon, her order(s) acquire vitiation(s), given theirs being rendered in a slipshod manner also without application of mind.

6. Consequently, the instant petition is allowed and the impugned orders are quashed and set aside.

7. Be that as it may, even if this Court, has made the aforesaid pronouncement, yet in case any further recalcitrances, surfaces, on the part of the violator concerned vis-a-vis his

defraying the amounts of interim maintenance upon the respondent herein, thereupon, it is open for the respondent herein, to, cast an apposite petition before the Magistrate concerned, for seeking enforcement of the apposite orders, whereupon, the learned Magistrate shall order, that the during the period when the violator concerned, is, ordered to undergo civil imprisonment, the Superintendent Jail concerned, shall, ensure of his thereat being gainfully employed also his by remitting in Court the wages earned by the violator concerned, hence ensuring that the order of interim maintenance begetting compliance. Also prior thereto, the learned Magistrate shall apply his/her mind to the mandate of the apposite second proviso, proviso whereof remained upto now irrevered by her, and, make efforts for the respondent herein rejoining the marital company of the petitioner herein besides if the Magistrate arrives at a decision that the respondent, despite her husband genuinely offering to retrieve her to his company, holds no sufficient cause, to spurn the conciliatory effort(s) of the petitioner herein, he shall within the domain of the apposite proviso pass an affirmative order. Conspicuously, when the mandate borne therein enjoins satiation thereof being begotten along with satiation(s) being meted vis-a-vis the prior thereto proviso(s), given its salutary beneficent effects, when put to work, can yet mitigate the hardship besetting the violator arising from his being ordered to be committed to judicial custody. In aftermath, the salutary mechanism(s) borne in both the apposite proviso(s) of sub-section 3 of Section 125, of, the Cr.P.C., enjoin peremptory compliance therewith besides all statutory mechanism(s) enshrined therein warrant precursory conjoint workability, for imputing validation to any subsequent order, directing the derelicting litigant, to, undergo civil imprisonment. All pending application(s) also standing disposed of.

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

Joginder Prashad .....Appellant/Petitioner.

Versus

Smt. Shreshta Devi .....Respondent.

FAO No. 4067 of 2013.
Reserved on : 25th August, 2017.
Decided on : 21st September, 2017.

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized as per Hindu rites and custom- one daughter was born - wife started misbehaving with the husband and his parents- she used to leave her matrimonial home without knowledge and consent of the petitioner as well as his parents and used to return after 5-6 days - wife left 5-6 days prior to filing of the petition and when the husband went to bring her, she declined and demanded maintenance of Rs. 500/-- husband arranged separate accommodation and started giving Rs. 500/- per month to her- she filed a false complaint against the husband- husband sought divorce on this ground- wife denied the allegation of the husband- Trial Court dismissed the petition- held in appeal that plea of the husband was duly supported by the evidence- Trial Court had discarded the evidence on the admission of PW-2 and PW-3 that wife was residing in a portion of building where her matrimonial home is located- however, this fact cannot be read in isolation- she had not visited the matrimonial home despite the persuasion of the husband- these facts clearly established cruelty on the part of the wife- appeal allowed – judgment of the Trial Court set aside and the marriage between the parties ordered to be dissolved. (Para-9 to 11)

For the Appellant: Mr. Surinder Saklani, Advocate.
For the Respondent : Mr. Arvind Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered by the learned District Judge, Kangra Division at Dharamshala, H.P. on 28.05.2013 in Hindu Marriage Petition No. 41-D/III/2010/2006, whereby, the petition aforesaid constituted therebefore, by the petitioner/appellant herein stood dismissed.

2. The brief facts of the case are that the marriage inter se the contesting parties hereat stood solemnized on 15.06.1999 at village Asan Pat, Mouza Lahla, Tehsil Palampur, District Kangra. The marriage was also consummated and out of the wedlock, one daughter was born. It is averred that the petitioner is serving in veterinary Department as pharmacist and posted at village & post office Kaned, District Kangra since 13.12.2004. After the marriage, the parties lived together happily for about one year and thereafter, the respondent started misbehaving with the petitioner as well as his parents. She was in a habit to leave the matrimonial home to her parental house without the knowledge and consent of the petitioner. She voluntarily came back after 5-6 days. It is also averred that requests of the petitioner fell on the deaf ears of the respondent and she did not change her behaviour, instead of she started quarreling and abusing the petitioner. When the petitioner requested the respondent to live with him at Bharmour, the respondent flatly refused by saying that she is not interested to live with him. The respondent left the matrimonial home without informing the petitioner as well as his parents, about six months prior to the filing of petition. When the respondent did not come back after 5-6 days, then the petitioner had gone to his in-laws' house in order to bring back the respondent in the matrimonial home but she flatly refused to accompany the petitioner. It is also averred that when the respondent was living in the matrimonial home she expressed her intention to live separately and also demanded Rs. 500/- from him as personal expenses. Upon this, the petitioner arranged the separate accommodation and started giving Rs.500/- per month to her. Apart from this the petitioner also pleaded about the facts that the respondent lodged a false and frivolous complaint against him in women-cell at Dharamshala and the matter was also reported to women-commission, Shimla, who called the petitioner at various places. It is the case of the petitioner that due to cruel behaviour of the respondent, the petitioner has lost his mental peace and prayed that his married with respondent my kindly be dissolved by way of decree of divorce.

3. The petition for divorce instituted by the petitioner/appellant herein before the learned District Judge, concerned stood contested by the respondent herein by hers instituting reply thereto wherein she controverted all the allegations constituted against him in the apposite petition by the appellant herein in the petition. However, it is averred by the respondent that the petitioner proclaimed that he will get divorce from her and will remarry with a lady Chhuma Devi.

4. The petitioner/appellant herein filed rejoinder to the reply of the respondent, wherein, he denied the contents of the reply and re-affirmed and re-asserted the averments, made in the petition.

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

1. Whether the respondent has treated the petitioner with cruelty, if so, its effect, as alleged? OPP.
2. Whether the petition is not maintainable, as alleged? OPR.
3. Relief.

6. On an appraisal of evidence adduced before the learned District Judge, he proceeded to dismiss the apposite petition constituted before him by the petitioner.

7. The averred, trite cruelty beset upon him, by the respondent, is, grooved in the factum of the respondent leaving for her parental home, without, the knowledge and consent of

the petitioner and after hers staying there for 5 to 6 days, hers returning to her matrimonial home. The aforesaid errant behaviour of his spouse, was protested by the petitioner but to no avail, rather its sequelling his spouse quarreling and abusing him. It is also averred that six months prior to the petitioner instituting the apposite petition, his spouse, as usual, proceeded to her parental home yet she did not within 5-6 days thereafter, as she earlier did, return thereto, whereupon, the petitioner proceeded to the parental home, of his spouse, for beseeching her to rejoin his company, yet his spouse spurning his conciliatory overtures. From January, 2005, the respondent is averred to be staying separately from the company of the petitioner, stays whereof of his spouse being in a room located in the upper storey of the building, in portion whereof the petitioner is also residing, rental(s) whereof borne in a sum of Rs.500/- per mensem, from, January, 2005 upto May, 2006, stand averred to be paid by the petitioner. Furthermore, the petitioner has averred, of, his spouse making frivolous complaint(s) against him before the women cell, Dharamshala and before the Women Commission, Shimla. The respondent in her reply has, not, denied factum of hers making complaint(s) against the petitioner before the women cell, Dharamshala and before the Women Commission, Shimla. However, the gravamen of her refusal to co-habit with the petitioner, is, grooved in a proclamation made by the petitioner, of, his after annulling his marital ties with her, his aspiring to re-marry one Chhuma Devi. Also thereon, it appears that the respondent is concerting to validate the factum of hers alienating from the marital company of her husband also she is striving to exculpate herself from hers thereupon besetting mental cruelty vis-a-vis her husband.

8. In support of the respective averments reared in the apposite petition and in the reply thereto furnished by the respondent, each respectively adduced their evidence upon issues in respect thereto struck by the learned District Judge. The learned District Judge had side lined the gravity of the evidence adduced by the petitioner in support of the apposite averments, of, the respondent departing from her matrimonial home also undermined the testifications of the witnesses concerned, of, upon the petitioner along with them, visiting the parental home of the respondent, the latter declining the conciliatory overtures made upon her by the petitioner, "merely", on the ground, of, with both PW-2 and PW-3 in the opening lines of their respective cross-examination(s), making, echoings of the respondent residing in a room located in the upper storey of a building, in portion of building whereof her matrimonial home is also located, thereupon, hers neither alienating herself from the matrimonial company of the petitioner nor hence there being any occasion for the petitioner or for PW-2 and PW-3, to, along with the petitioner, make any visit upon the respondent at her parental home. However, the learned District Judge has overemphasized the aforesaid facet, besides has thereupon made an attempt to both miscolour also to bely the veracity of averments in consonance therewith cast in the apposite petition, of the respondent alienating herself from his marital company "despite" testificatory evidence holding absolute consonance with all the apposite averments cast in the apposite petition, rather also despite the petitioner not making any active suppression of the vital factum probandum, whereas, thereupon the learned District Judge being enjoined, to therefrom and in entwinement with the admission(s) in respect(s) thereto made by the respondent in her testification, make apt conclusion(s) of the respondent, even if, staying in a room occurring in the upper storey of the building, in portion whereof her matrimonial home is located, hers obviously, not, cohabiting with the petitioner rather hers alienating herself from the marital company of the petitioner. Contrarily, the learned District Judge, has not, made the aforesaid conclusion therefrom rather has on anvil of aforesaid admissions proceeded, to, dispel the testifications of the petitioner and of PW-2 and of PW-3, who, along with the petitioner evidently visited the respondent at her parental home, especially when the latter PWs lend corroboration thereto besides when their apt disclosures occurring in their respective affidavits, tendered, during the course of their examination(s)-in-chief, were not, concerted to be ridden with any vice of falsity, whereas, with evidence on record making potent vigorous reflections, of, the respondent taking to stay in a room located in the upper storey of the building, whereat, her matrimonial home is also located, for ensuring that her minor daughter prosecutes her studies in a school located at Jadrangal also when she has, not, proven that she throughout stood lodged in the aforesaid premises, nor hers never proceeding therefrom to her parental home, thereupon, corollory thereof,

is, of the testifications of PW-2 and PW-3 in respect of theirs along with the petitioner visiting the respondent at her parental home, for beseeching her to return to her matrimonial home, conciliatory overtures of the petitioners stood spurned by the respondent, hence, remaining unerodded of their efficacy. The further derivation therefrom is, of, at the time of the petitioner along with PW-2 and PW-3 visiting the respondent at her parental home, she thereat residing at her parental home dehors hers merely for ensuring her daughter prosecuting studies in a school located at Jadrangal, hers individually/singularly staying above the room of the petitioner.

9. The aforesaid conclusion of the respondent, not affirmatively responding to the conciliatory overtures, of her husband besides hers staying apart from the company, of the petitioner, trite factum of separateness of her stay from the company of her husband, is evidently borne from her admission qua hers staying in a room located above the room of the petitioner, per se yields a further concomitant conclusion of the respondent hence refusing to cohabit with her husband also, thereupon, hers entailing upon him severe mental cruelty. The aforesaid alienation, of, the respondent from the marital company of the her husband, would acquire an aura of validation also would hold a tinge of exculpation only when she had led cogent proof that her alienation from the marital company of her husband stood engendered by the petitioner herein contriving a false ground, for annulling his marital ties, merely for his satiating his aspiration of his thereafter remarrying one Chhuma Devi. However, proof qua the aforesaid facet is abysmally wanting. Consequently, the prolonged departure of the respondent herein from the marital company of her husband, is, preeminently without any just and reasonable cause also is without the consent and is against the wishes of the petitioner rather is a sequel, to an order borne in Ex. P-1, order whereof stood pronounced in proceedings instituted by the respondent herein under Section 3 of the Himachal Pradesh Maintenance of Parents and Dependents Act, 1986-2001, institution whereof is also ingrained with an element of its besetting the petitioner with mental cruelty.

10. The prolonged matrimonial acrimony inter se the petitioner and the respondent also the prolonged alienation of the respondent from the marital company of her husband, apparently, without any justifiable cause, nurses, an inference of their marital ties being irretrievably broken down, thereupon, also with their emotional ties coming under severe stress and strain, any refusal by this Court, to annul their marital ties would be worthless. Consequently, the findings rendered by the learned District Judge are not anvilled upon proper and mature appreciation of evidence on record rather they are sequelled by his mis-appreciating the germane and apt material avialable on record.

11. For the foregoing reasons, it is apt to clinchingly conclude of with the marital ties of the petitioner/appellant herein with the respondent herein standing broken down irretrievably hence, rendition of a decree qua severance of their marital ties would be both just and expedient. Consequently, the instant appeal is allowed. Accordingly, the marriage inter se the petitioner/appellant and the respondent herein is ordered to be dissolved. In sequel, the judgment and decree impugned before this Court is quashed and set aside. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Kripu Ram (since deceased) through his legal heirs .....Appellant/Plaintiff.

Versus

Purshottam Lal & another .....Respondents/defendants.

RSA No. 391 of 2005.
Reserved on: 30th August, 2017.
Decided on : 21st September, 2017.

Specific Relief Act, 1963- Section 34 and 38- Plaintiff pleaded that he is owner in possession of the suit land, which was granted to him by way of nautor- suit land could not be transferred for a period of 20 years as per Rules- defendant No. 1 expressed his willingness to purchase the grass of his orchard- plaintiff agreed to sell the grass for a consideration of Rs. 5,000/- for two years- defendant No. 1 started interfering with the suit land and told on inquiry that two bighas of land had been sold to him- defendants pleaded that suit land was sold by the plaintiff for a consideration of Rs. 21,500/- - plants and house have been raised by defendant No. 1- a sum of Rs. 15,000/- was taken from defendant No. 2 by mortgaging the suit land- suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that nautor was granted in the year 1976 but sale deed was executed in the year 1994- there is prohibition against the alienation for a period of 15 years from the date of grant- period of 15 years was enhanced to 20 years but this would have no effect on the nautor granted earlier- sale deed was executed after the period of 15 years and cannot be said to be bad- appeal dismissed.

(Para-9 to 12)

For the Appellants:	Mr. Neeraj Gupta, Advocate.
For Respondent No.1:	Mr. Karan Singh Kanwar, Advocate.
For Respondent No.2:	Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the appellant/plaintiff against the concurrently recorded verdicts of the learned Courts below, whereby, they dismissed the suit of the plaintiff wherein he claimed relief of declaration besides relief of permanent prohibitory injunction.

2. Briefly stated the facts of the case are that original plaintiff Kripu Ram has filed the suit for declaration and injunction, in the alternative for possession against the defendants. It has been pleaded that the plaintiff is owner in possession of the land comprised in khata khatauni No.327/423, khasra No.952, measuring 4-2-0 bighas, situated in phati Bari, Kothi Baragarh, Tehsil and District Kullu, H.P. vide jamabandi for the year 1992-93. The claim of the plaintiff is that he obtained the suit land by way of grant of nautor from the State of H.P., in the year 1976. That as per Rules, the suit land could not be transferred for a period of twenty years from the date of its grant. It is further the case of the plaintiff that in the month of Jesth, 1994, defendant No.1 came to him and expressed his willingness to purchase grass of his orchard. The plaintiff agreed to sell the grass of his orchard for a sum of Rs.5,000/- for two years i.e. 1994 and 1995. On 7.6.1994, an agreement with regard to sale of the grass was executed. A sum of Rs.1,000/- was paid to him and the remaining amount of Rs.4,000/- was to be paid lateron. It has been further alleged that defendant No.1 told the plaintiff that as he (plaintiff) intended to construct a house over the suit land, therefore, the plaintiff should supply him the material and the labour expenses will adjusted in the payment of balance amount of Rs.4,000/- due from him on account of price of grass. The plaintiff agreed to it and supplied construction material to raise a house on the suit land. It has been pleaded that in the second week of December, 1996, defendant No.1 started interfering with the ownership and possession of the plaintiff over the suit land. On inquiry, defendant No.1 told that two bighas of land had been sold by the plaintiff to him. It is further averred that such sale deed, if any, had been obtained by exercising fraud upon the plaintiff, hence, the suit for declaration and injunction against defendant No.1 and in the alternative for possession of the suit land.

3. The defendants contested the suit and filed separate written statements. Defendant No.1 in his written statement has taken preliminary objections qua particulars of fraud and mis-representation have not been pleaded, locus standi and estoppel. On merits, replying defendant has denied that the suit land could not be sold for twenty years. He has explained that the plaintiff produced the patta of the land containing a condition that the suit

land could not be sold within fifteen years. He has denied with regard to playing of fraud and mis-representation. He has also submitted that he never purchased grass from the plaintiff for Rs.5,000/-. It has been further submitted that the plaintiff has sold the suit land out of his free will and received consideration amount of Rs.21,500/-. The plants and the house over the suit land has been raised by the replying defendant. He has submitted that he raised a loan of Rs.15,000/- from defendant No.2, being the owner of the suit land, therefore, he had every legal right to mortgage the suit land with defendant No.2.

4. Defendant No.2 in his written statement has denied the allegations for want of knowledge. The fact of raising of loan and creation of mortgage by defendant No.1 was admitted. It has been submitted that the replying defendant advanced loan of Rs.15,000/- in favour of defendant No.1 against security.

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

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

1. Whether the sale deed dated 7.6.1994 is the result of fraud and mis-representation as alleged, if so, its effect? OPP

2. Whether the plaintiff is in possession of the suit land? OPP.

3. If issue No.1 and 2 are proved in affirmative, whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for? OPP.

4. In case plaintiff is found out of possession of the suit land, whether he is entitled for the relief of possession? OPP

5. Whether the suit land being a nautor land was not transferable by the plaintiff as alleged? OPP

6. If issue No.5 is proved in affirmative, whether the mortgage executed by defendant No.1 in favour of the defendant No.2 is void as alleged? OPP.

7. Whether the plaintiff has got no locus standi to file the present suit? OPD 1&2

8. Whether the plaintiff is estopped by his act and conduct from filing the instant suit? OPD.

9. Whether the suit in the present form is not maintainable, if so, its effect? OPD-1

10. Whether the instant suit against defendant No.2 is not maintainable as alleged? OPD-2.

11. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff(s)/appellant(s) herein. In an appeal, preferred therefrom by the plaintiff(s)/appellant(s) herein before the learned First Appellate Court, the first Appellate Court also dismissed the appeal and affirmed the findings recorded by the learned trial Court.

8. Now the plaintiff(s)/appellant(s) herein have instituted the instant Regular Second Appeal before this Court wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 12.08.2005, this Court, admitted the appeal instituted by the plaintiff(s)/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the findings, as arrived at by the Courts below, are against the provisions of the H.P. Grant of Nautor Land to Landless and Other Eligible Persons Scheme, 1975?

Substantial question of Law No.1.

9. The suit land was granted to the plaintiff, by way of nautor, by the competent authority. The grant of the suit land, by way of nautor, to the plaintiff, was, in pursuance to the apposite provisions borne in Himachal Pradesh Nautor Land Rules, 1968. Uncontrovertedly, the apposite grant vis-a-vis the plaintiff, occurred in the year 1976. The execution of the apposite sale deed, comprised in Ex.DW2/A, occurred on 7.6.1994. Since, the apposite grant in respect of the suit land was made upon the deceased plaintiff in the year 1976, hence, the apposite provisions of the Himachal Pradesh Nautor Land Rules, 1968 borne in clause (f) of Rule 12, warrant extraction hereinafter:-

> "12. Resumption.- The grant of nautor land shall be cancelled and the land granted resumed by the State Government without payment of any compensation in the following events:-
>
> (a).....
>
> (b).....
>
> (c).....
>
> (d).....
>
> (e).....
>
> (f) If, the grantee of his legal representative successor alienates the land granted in nautor, within 15 years from the date of the patta, or if he alienates, it, at any time for a purpose other than the one for which the land was granted to him. In the event of other kind of alienation the power of the State Government to cancel the grant and to resume the land shall govern the alience also; and"

From the aforesaid extracted provisions enshrined in clause (f) of Rule 12 of the Himachal Pradesh Nautor Land Rules, 1968, it is to be gauged that whether the prohibition cast therein against the suit land being inalienable within 15 years commencing from the year 1976, stood, infringed in respect of the apposite alienation recorded in the year 1994. The relevant afore extracted apposite provisions enjoy force, significantly when their diktat and command holds prevalence, at the time contemporaneous to the grant of the suit land by way of nautor vis-a-vis the plaintiff. Since, the apposite alienation has apparently occurred beyond 15 years thereafter, hence, after completion of the prohibited period constituted in clause (f) of Rule 12 of the Himachal Pradesh Nautor Land Rules, 1968, provisions whereof holding sway besides clout vis-a-vis the apposite grant, thereupon, the alienation of the suit land under Ex.DW2/A, does not, attract the mandate of clause(f) of Rule 12 of the Himachal Pradesh Nautor Land Rules, 1968 nor the sale deed borne in Ex.DW2/A begets any stain of invalidation.

10. However, the learned counsel appearing for the appellant(s), has, on anvil of the provisions borne in Rule 11 of the Himachal Pradesh Grant of Nautor Land to Landless Persons and other Eligible Persons Scheme, 1975, wherein, in substitution of the earlier prohibited tenure of 15 years "against" the grantee therewithin being interdicted to make any alienation of the land granted to him, as nautor, by the competent authority, rather a period of 20 years stood inserted, also on anvil of the apt phraseology occurring therein of "the grantee shall not transfer the land granted under this scheme to any person within a period of 20 years from the date of taking over possession of land by him" has thereupon espoused that mandate(s) thereof being attractable vis-a-vis the sale deed borne in Ex.DW2/A. However, for his submission to hold vigour, it was imperative for the plaintiff, to adduce cogent evidence in respect, of, from the year 1976 upto 11.9.1980, the plaintiff "not" taking possession of the suit land, whereas, his taking possession thereof after 11.9.1980. However, evidence in respect of the plaintiff taking possession of the suit land "not" upto 11.9.1980 rather his taking its possession thereafter, is abysmally amiss. Since,

for attraction hereat of the mandate, of, the apposite clause borne Rule 11 of the Himachal Pradesh Grant of Nautor Land to Landless Persons and other Eligible Persons Scheme, 1975, rendered the aforesaid trite factum being enjoined to be proven by cogent clinching evidence, whereas, evidence in respect thereof, being, abysmally amiss hereat. In sequel, the computation of the prohibited period, is, to be made from the provisions occurring in clause(f) of Rule 12 of the Himachal Pradesh Nautor Land Rules, 1968, wherein, there is a display that the reckoning of the apposite prohibited period of 15 years, is to commence from the date of issuance of patta, thereupon with the alienation of the suit land occurring more 15 years elapsing since the making of the apposite grant vis-a-vis the plaintiff, hence, renders sale deed borne in Ex.DW2/A to be not gripped with any vice of any invalidation(s).

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the defendants/respondents and against the plaintiffs/appellants.

12. In view of above discussion, the present Regular Second Appeal is dismissed and the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be drawn 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.

Krishan Dutt Premi .....Appellant.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 666 of 2008.
Reserved on : 30th August, 2017.
Date of Decision: 21st September, 2017.

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3- **Indian Penal Code, 1860-** Section 354 and 509- Accused was posted as Tehsildar and had gone to the house of the informant in connection with the partition proceedings - however, proceedings could not be carried out – accused stayed in the house of the informant and directed him to massage his body - he demanded liquor and asked the informant and his wife to take liquor with him- accused caught hold of the wife of the informant and asked her to sleep with him- she shouted for help and was rescued by her husband- accused was tried and convicted by the Trial Court for the commission of offences punishable under Sections 354 and 509 of I.P.C and he was acquitted of the commission of offence punishable under Section 3 of SC and ST (Prevention of Atrocities) Act- held that testimonies of the informant and his wife were contradictory to each other – they had improved upon their previous version – wife of the informant did not understand Hindi and her statement was recorded in the Court with the help of a translator, however, Investigating Officer has not mentioned that her statement under Section 161 Cr.P.C was recorded with the help of Translator- matter was reported belatedly and no explanation for delay was given- prosecution version was not proved beyond reasonable doubt- appeal allowed and judgment of Trial Court set aside. (Para- 9 to 15)

For the Appellant: Mr. S.R. Pandiyar, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered on 23.10.2008/30.10.2008 by the learned Special Judge, Kullu, H.P. in Sessions trial No.45 of 2006, whereby, the learned trial Court acquitted the accused/appellant herein, for his committing an offence punishable under Section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, however, he convicted the accused/appellant herein for his committing offences punishable under Sections 354 and 509 of the IPC and sentenced him as under:-

Sections	Imprisonment imposed
354, IPC	To undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo further imprisonment for a period of one month.
509, IPC	To undergo rigorous imprisonment for a period of six months and to pay fine of Rs.2,000/- and in default of payment of fine amount to undergo further imprisonment for a period of one month

All the sentences were ordered to run concurrently.

2. Briefly stated the facts of the case are that accused, who was posted as Tehsildar at Keylong during the year 2005/2006 had gone to the house of Tulsi Ram Complainant on 9.03.2006 in connection with some partition proceedings. However,the proceedings could not be carried out on that day as it started snowing. The staff i.e. Kanungo Prem Singh and Patwari Ram Lal, who were accompanying him returned to Udaipur but he accused stayed back in the house of complainant. As per the prosecution case, during his stay in the house of the complainant in the night accused directed the complainant to massage his body and also demanded liquor and asked him to arrange a woman for him for the night. He also asked the complainant and his wife to take liquor with him which they refused. He also insisted on sleeping in their bed room. Lastly, while the complainant left the room for leaving the utensils outside after the meals the accused caught hold of the wife of the complainant by her arms and asked her to sleep with him. She was, however, rescued by her husband on hearing her cries for help. The FIR was lodged by the complainant on 14.03.2006 and the matter was investigated. Since the complainant and his wife belonged to scheduled tribe the case was also registered under Section 3 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act.

3. On conclusion of investigation(s), into the offence, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed before the learned trial Court.

4. The accused stood charged by the learned trial Court, for his committing offences punishable under Sections 354 and 509 of the IPC read with Section 3 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act. In proof of its case, the prosecution examined 10 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court, wherein, he claimed innocence and pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

6. The appellant/convict stands aggrieved by the judgment of conviction recorded against him by the learned trial Court. The learned counsel appearing for the appellant/convict has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing, being not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court standing based on a mature and balanced appreciation, by it, of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The alleged penal misdemeanors were purportedly committed by the accused on 09.03.2006. On the date aforesaid the accused was lodged in the house of the prosecutrix. He had on 09.03.2006, in his capacity as Tehsildar, Udaypur proceeded to the spot, whereat, the abode of the prosecutrix is located, for his carrying into effect, the mode of partition prepared by the Naib Tehsildar. The penal misdemeanors ascribed to the accused are borne in the testification of PW-1, the husband of the prosecutrix. PW-1 has testified, of, the accused after taking off his clothes, his beseeching his wife to massage his back. He has also testified of the accused querying his wife qua the number of illicit relations she has established besides communicating to her of his establishing illicit relations with 95 ladies. The aforesaid queries put by the accused to the prosecutrix, are, testified by PW-1, to put the prosecutrix to shame. In addition, he has testified, of, the accused insisting upon them to permit him to sleep with them on the bed, which, both share as husband and wife, insistences whereof were successfully resisted by PW-1. However, the accused asked him to arrange for a girl, for sleeping with him during the night, request(s) whereof was also spurned by PW-1. Thereafter, PW-1 testifies that after the accused had taken meals, he (i.e. PW-1) had proceeded to "Chala" for removing utensils, whereupon, he heard out bursts of his wife, leading him to discover, of, accused nabbing her from her arm(s) and forcing her to sleep with him. Also his noticing, of, his wife weeping and upon his intervening(s), his successfully separating them. However, during his cross-examination, he was confronted with his previous statement recorded in writing, comprised in Ex.PW1/A, wherein the aforestated testificatory communication(s) borne in his examination-in-chief, of, the prosecutrix massaging the body of the accused, are wholly amiss, whereupon, the aforesaid testification is hence rendered ingrained with a vice of falsehood.

10. The testification of PW-1 is supported by PW-2, the prosecutrix. However, with the prosecutrix knowing neither English or Hindi rather hers being fit to comprehended only the local dialect of the area concerned, hence, the trial Court appointed her daughter for translating into the local dialect, all the apposite queries put to her in the Court language. Consequently, with the intervention of the translator appointed by the Court, the prosecutrix, was, in the local dialect, hence explained, by her daughter, all apposite queries put to her in the Court language, whereafter, on the translator receiving answer(s) thereto, of the prosecutrix, made translation(s) thereof in Hindi, all whereof hold articulation(s) corroborative, of, the prior thereto rendered testification by PW-1. The testification of PW-2 in corroboration to the testification of PW-1, was, also permitted to be recorded by the learned defence counsel, given his being well conversant with the local dialect, as, understood and spoken by the prosecutrix. However, in her cross-examination, she has deposed that she had massaged the back and arm of the accused with oil, whereas, she has omitted to therein disclose, of, the accused prior thereto taking off his clothes, thereupon, she contradicts the testification of PW-1, of, the accused taking off, his clothes, whereafter, his wife massaging his back with oil. The aforesaid inter se contradictions vis-a-vis

the testifications of PW-1 and of PW-2, does cast a spell of prevarication with respect to a pivotal aspect, hence, undermining the prosecution version, crucially when in respect thereof, the testification of PW-1, has been hereinabove concluded to be devoid of vigour. The entire conversation(s) occurring, inter se the accused and the prosecutrix, conversation(s) whereof, held disparaging over tones vis-a-vis the modesty of PW-2, comprised in his striving to elicit from her, the number of illicit relations she has enjoyed also of the accused disclosing to her of his holding illicit relations with 95 ladies, stands, in her cross-examination testified, by PW-2 to be held directly amongst her husband and the accused, whereafter, her husband translating in the local dialect the contents of the conversation(s) held inter se them. The aforesaid fact of PW-1 conveying to her in the local dialect, the contents of the apt conversation(s), purported conversation(s) whereof hold disparaging overtones of modesty vis-a-vis PW-2, does not apparently occur in the testification of PW-1. Consequently, conversation, if any, with purported disparaging overtones vis-a-vis the modesty of the prosecutrix, appear(s) to purportedly occur only inter se the accused and PW-1 also it then naturally remained unconveyed in the local dialect, by, PW-1 to PW-2. In aftermath, the purported disparaging conversation(s) with tinge(s) of its outraging the modesty of the prosecutrix, given its remaining neither in the local dialect, hence, conveyed by PW-1 to PW-2 nor understood by her, rather its purportedly taking place directly inter se PW-1 and the accused, it, hence cannot be said to encumber shame upon the prosecutrix also it appears, of, the testification of PW-1 in respect thereof being a result of concoctions or contrivances, merely, for falsely implicating the accused.

11. Be that as it may, the previous statement in writing of the prosecutrix, is recorded in Hindi, yet beneath thereto, no, apposite noting(s) occur with echoings of the Investigating Officer appointing a translator, for, explicating in the local dialect, its contents to the prosecutrix, whereafter his assuring of its contents being comprehended besides understood by the prosecutrix. Non occurrence of the aforesaid apposite note, beneath her previous statement recorded in writing by the Investigating Officer, with an echoing, of, its contents standing explicated in the local dialect to her by a translator appointed by the Investigating officer, also contents thereof being understood besides comprehended by the prosecutrix, renders it unamenable for any imputation of any solemnity thereto, rather it appears, of, the Investigating Officer concerned suo moto inventing the previous statement recorded in Hindi of the prosecutrix. Consequently, when the prosecutrix stepped into the witness box, to depose in respect of the contents borne therein, her testification is belittled, given hers not being joined in the investigation(s) nor hers making any previous statement before the Investigating Officer concerned, whereas, the recording of her previous statement in writing was peremptory for hers being cited as a witness also for hers thereafter stepping into the witness box, for proving contents thereof. The apt sequitur therefrom is that the testification of the prosecutrix in corroboration to the testification of PW-2 loses its vigour. Further apt sequitur(s) therefrom, is of the testification of PW-1, for lack of corroborative vigour thereto being lent by PW-2 (the victim), is, hence, rendered frail besides even the prosecution version is rendered ingrained with vice(s) of concoctions and inventions.

12. Be that as it may, the predominant penal misdemeanor of the accused nabbing the prosecutrix also his coercing her to sleep with him, whereupon, the prosecutrix was taken to raise hue(s) and cry(ies), leading her husband to intervene, is testified by PW-1. However, PW-1 has in respect thereof deposed, that it occurred after the accused had taken meals. Apparently, PW-1 served meals to the accused in the kitchen. Since, the aforesaid predominant penal misdemeanor occurred immediately after the accused taking meals also upon the purported absence of PW-1, given his proceeding to remove utensils from the “chala”, “chala” whereof purportedly occurs at a place other than the kitchen, yet when there is no firm evidence qua the “chala” and the kitchen being located in contradistinct places also when hence adduction of firm evidence qua contradistinctivity(ies) in the location(s) of the “chala” and of kitchen, was, imperative, for hence enabling the accused to seize, an opportune moment, given PW-1 proceeding from the kitchen to “Chala”, located elsewhere, for, his perpetrating upon the prosecutrix, the purported penal misdemeanor. Consequently, absence of the aforesaid firm

evidence rather begets a conclusion of both, the "chala" and kitchen being located at the same place, hence the accused holding no opportune moment for grabbing the prosecutrix, especially given the presence thereat of PW-1, her husband. In aftermath, it appears that ascription(s) by PW-1 vis-a-vis the accused, of, all the purported penal misdemeanors, being both engineered besides contrived, conspicuously, with the purported corroboration thereto purveyed by the prosecutrix, being, for all the reasons aforestated hence bereft of any credibility.

13. Moreover, the alleged incident occurred in the night of 9.3.2006 and a report qua the occurrence stood lodged on 14.03.2006, with the police station concerned, hence, there is an inordinate delay of five days in the lodging of the FIR. The aforesaid delay of five days in the lodging of the FIR has remained unexplicated, despite PW-1 holding telephone facility(ies) at his house also when they could well have been availed, for his/theirs promptly lodging a report in respect of the occurrence either with the police or with the Panchayat concerned. Consequently, with PW-1, not, making any prompt reporting of the occurrence either to the police or to the panchayat concerned nor with the delay in the lodging of the FIR holding any tinge of any sound explication, renders it to be gripped with a vice of concoction besides with a vice of afterthought, rendering it to be unamenable to credence.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has not, appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

15. Consequently, the instant appeal is allowed and the impugned judgment is quashed and set aside. The accused is acquitted of the offences charged. Fine amount, if any, deposited by the accused before the learned trial Court be forthwith refunded to him. Records be sent back henceforth.

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

Smt. Madhu Bala & another .....Appellants/plaintiffs.

Versus

State of H.P. .....Respondent/Defendant.

RSA No. 90 of 2005.
Reserved on : 28.08.2017.
Decided on :21st September, 2017.

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit pleading that suit land was purchased by R and it was succeeded by B and P on his death - R had partitioned the property into two parcels- P executed a gift deed in favour of D- encroachment proceedings were initiated against the plaintiffs which are wrong- defendants denied the case of the plaintiffs and pleaded that plaintiffs have encroached on the suit land and proceedings were rightly initiated against them- suit was decreed by the Trial Court- appeal was filed, which was partly allowed- held in the second appeal that plea of adverse possession taken in the alternative was not proved- Appellate Court had rightly set aside the decree of the Trial Court to this extent- appeal dismissed. (Para-8 to 10)

For the Appellants: Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.

For the Respondent: Mr. V.S. Chauhan & Mr. Vivek Singh Attri, Addl. Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs instituted a suit claiming therein a decree of declaration and of permanent prohibitory injunction being pronounced in respect to the suit land vis-a-vis the defendants. The learned trial Court decreed the suit of the plaintiff in respect of relief(s) claimed therein. The defendant being aggrieved therefrom, instituted an appeal before the learned First Appellate Court, the latter Court partly allowed the appeal, to the extent that the declaratory decree qua the plaintiffs acquiring prescriptive title to the suit land, by elapse of the statutorily mandatory period of limitation, warranting its being quashed and set aside, however, relief of injunction was affirmed. Being aggrieved therefrom, the plaintiffs instituted the instant appeal before this Court, wherein, reversal of the verdict pronounced by the learned First Appellate Court, is strived.

2. Briefly stated the facts of the case are that the land along with a building comprising in Kh. No.997 and 998 which appear to have been carved out of old Kh. No.326, measuring 67.45 sq. meters, situate in revenue village Sarahan Kalan, Tehsil Pachad, District Sirmaur, H.P. It is averred that earlier Kh. No.326 measuring 19 biswas was recorded in the ownership of His Highness Sirmaur. It was in possession of Mahkama District Board as per copy of Misal Hakiyat, 1987-88 Samvat. Thereafter, by an oral sale, Rulia Ram purchased the suit property. He having died was succeeded by his legal representatives Bagwati and Parvati, being daughters. During his life time, Ruila Ram partitioned his purchased suit property in two parcels. Thereafter, Parwati gifted the suit property in favour of Devinder Parkash on 20.05.1957. Devinder Parkash having died, the plaintiffs are his successor-in-interest being widow and minor son respectively. Plaintiffs' further case is that on 14.8.1978, the predecessors-in-interest of the plaintiffs denied the title of the defendant and declared that they are owners in possession of the suit property. The plaintiffs thus claim their title on the basis of gift and in the alternative by adverse possession. The plaintiffs also averred that the encroachment proceedings passed by Settlement Officer, Shimla against them are illegal. The revenue entries in favour of the appellant are wrong and illegal. As such, they preferred the present suit for declaration seeking to impugn the revenue entries as also order of the Settlement Officer, Shimla dated 6.4.2002 and also for permanent injunction seeking to restrain the defendant from dispossessing the plaintiffs from the suit property.

3. The defendants contested the suit and filed written statement it has taken preliminary objection inter alia maintainability, jurisdiction, estoppel and want of notice. The sale of the suit property by Rulia Ram as also the gift deed by Parwati in favour of Devinder Parkash, predecessor-in-interest of the plaintiffs are denied in toto. It is also denied that the plaintiffs have become owners either on the basis of title or by way of adverse possession. The defendant's case is that, in fact, the predecessor-in-interest of the plaintiffs encroached upon the suit land, therefore, the ejectment proceedings against him were initiated and finalised.

4. The plaintiffs/appellants herein filed replication to the written statement of the defendant/respondent, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the suit land was earlier in the ownership of Sarkar Daulatmandar i.e. His Highness Sirmaur and possession of Mehkama District Board, as alleged? OPP
2. Whether Shri Rulia Ram, the predecessor-in-interest of plaintiff has purchased the suit land through oral sale from his Highness Sirmaur, as alleged, if so, its effect? OPP.

3. Whether Smt. Parwati D/o Sh. Rulia Ram had gifted the property in favour of Devinder Parkash, as alleged? OPP.

4. Whether the plaintiffs are entitled to the alternative of adverse possession, as alleged? OPP.

5. Whether the revenue entry in favour of defendant as owner in possession of suit land is illegal, as alleged? OPP

6. Whether order passed by Settlement Collector, Shimla dated 6.4.2002 is illegal, void and without jurisdiction, as alleged? OPP

7. Whether the plaintiffs are entitled to the relief of permanent injunction, as alleged? OPP.

8. Whether the suit is not maintainable? OPD.

9. Whether this Court has no jurisdiction to try the present suit, as alleged? OPD.

10. Whether the plaintiffs are estopped to file the present suit by their own act and conduct, as alleged?OPD.

11. Whether the suit is bad for want of notice U/s 80 CPC, as alleged? OPD

12. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the defendant/respondent herein before the learned First Appellate Court, the latter Court partly allowed the appeal whereby, it set aside the declaratory decree rendered by the learned trial Court.

7. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission, on 18.08.2005, this Court, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the Lower Appellate Court has acted with material illegality and irregularity in reversing the judgment and decree of trial Court which upheld the claim of the plaintiffs-appellants to have acquired title to the suit property by adverse possession, merely on the ground of non-specifying the precise time of the commencement of the adverse possession? Has not the Lower Appellate Court committed grave error of jurisdiction in ignoring from consideration the registered Gift deed dated 20th May, 1957 on the basis of which the plaintiff-appellants were claiming title to the suit property and possession also?

b) When the plaintiffs-appellants staked their claim of title qua the suit property on the basis of the registered gift deed which remained unchallenged for more than 30 years, has not the lower Appellate Court committed grave error of jurisdiction in rejecting the claim of adverse possession put forth by the plaintiffs-appellants? Since the validity of the said document was not assailed has not the Lower Appellate Court failed to exercise the jurisdiction in not upholding the claim of the plaintiffs-appellants claiming themselves to be in possession of the suit land as absolute owner?

c) When the possession of the plaintiffs-appellants was duly entered in the revenue records in the capacity of “Mukhtlif Kabjan Najayaj” and admission made by DW-2 that the structure standing on the land in suit was very old, was not it a sufficient proof of the claim of adverse possession? Has not the

Lower Appellate Court committed grave error of law in putting unnecessary reliance on the entires in revenue record, presumption of truth attached to which stood duly rebutted, especially when during the course of settlement the old possession of the plaintiffs-appellants was duly acknowledged by the officials of the defendant-respondent?

d) Whether the Lower Appellate Court has further committed an error of law in failing to take into consideration correct proposition of law that the long possession on the basis of an invalid document ripens into adverse possession?

e) Whether the Lower Appellate Court has erred in law in holding the order of ejectment valid when the revenue officials lacked jurisdiction to entertain the proceedings under Section 163 of the H.P. Land Revenue Act on account of the question of title being involved in such proceedings.

Substantial questions of Law No.1 to 5:

8. The declaratory decree rendered by the learned trial Court in respect of the plaintiffs, acquiring prescriptive title vis-a-vis the suit khasra numbers, arising from theirs with the requisite *animus possidendi,* since their predecessors-in-interest upto the date of the institution of the suit, hence holding, possession thereof, tritely beyond the statutorily mandated period of time, for thereupon their hostile possession ripening into absolute title, is, wanting in legal vigour, for, the reason(s)- (a) the Hon'ble Apex Court in a catena of decision, emphatically declaring, of any plaintiff being barred from rearing a plea in respect of his acquiring prescriptive title qua the suit property arising from his, with, the requisite *animus possidendi,* unintermittently holding possessing thereof for and beyond the statutorily mandated period of time, whereafter, a ripened prescriptive absolute title of ownership, warranting its being declared bestowable upon him.

9. Be that as it may, the verdict pronounced by the learned trial Court upon the aforesaid facet, of, the plaintiff, being entitled for rendition of a decree, for declaration qua his acquiring absolute title qua the suit land by statutory prescription, is not founded upon an appropriate appreciation of the verdict(s) rendered by the Hon'ble Apex Court besides the verdict in reversal thereto rendered by the learned First Appellate Court, does not, warrant any interference, it being in consonance with the catena of apposite verdicts pronounced by the Hon'ble Apex Court. Reiteratedly, the rearing of the plea of adverse possession by the plaintiffs, hence a declaratory decree of statutory prescriptive title vis-a-vis them, being pronounced, with respect to the suit land also theirs endevouring to prove that by elapse of the statutorily prescribed period, commencing, from 1957 upto the date of institution of the suit, hence, their prolonged possession thereof with the requisite animus possidendi, ripening into prescriptive title vis-a-vis the suit land, is a plea which has been pronounced in a catena of verdicts rendered by the Hon'ble Apex Court, to be unavailable for espousal by the plaintiff rather it being a plea available for espousal only by the defendant. Consequently, with the plaintiffs standing interdicted by a catena of judicial verdicts, to, rear a plea qua theirs acquiring title by adverse possession upon the suit land, hence, thereupon, also the suit of the plaintiff warrants dismissal.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, all the substantial questions are answered in favour of the respondents/defendants and against the appellant.

11. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the impugned judgment and decree rendered by the learned District Judge, Sirmaur District at Nahan, H.P. in Civil Appeal No. 10-CA/13 of 2004, on 03.01.2005, is maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

National Insurance Company Ltd. .....Appellant.
Versus
Gorkhu Ram and others. .....Respondents.

FAO No. 457 of 2012.
Reserved on : 25th August, 2017.
Decided on : 21st September, 2017.

Motor Vehicles Act, 1988- Section 149- MACT awarded compensation of Rs. 3,51,000/- and directed the Insurance Company to satisfy the award- aggrieved from the award, the present appeal has been filed pleading that the Insurance Company was not liable to cover the risk of gratuitous passengers – held that it was pleaded in the petition that deceased was travelling as a gratuitous passenger- the evidence that deceased was travelling with the goods cannot be accepted beyond pleading- Insured had committed breach of the terms and conditions of the policy and Insurance Company is not liable to indemnify the insured- appeal allowed - judgment of the MACT modified and insured held liable to pay the compensation. (Para-2 to 4)

For the Appellant: Ms. Devyani Sharma, Advocate.
For Respondents No.1 to 3: Ms. Anjali Soni Verma, Advocate.
For Respondent No.4 & 5: Mr. Rajesh Mandhotra, Advocate,

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The learned Motor Accident Claims Tribunal (II), Kangra at Dharmshala, H.P. (hereinafter referred to as the learned tribunal), adjudged upon the successors-in-interest of deceased one Payare Lal, compensation amount comprised in a sum of Rs.3,51,000/-, apposite indemnificatory liability whereof stood fastened upon the insurer of the offending vehicle. The insurer of the offending vehicle is aggrieved therefrom, hence, it has preferred the instant appeal before this Court.

2. The learned counsel appearing for the appellant has not contested the validity of the findings recorded upon trite issue No.1. Consequently, it is to be concluded that the demise of one Payre Lal, evidently the predecessor-in-interest of the claimants, arose from the rash and negligent manner of driving of the offending vehicle by its driver, who is impleaded as respondent No.4 in the instant appeal. The solitary contention addressed before this Court by the learned counsel appearing for the appellant for invalidating the fastening of the apposite indemnificatory liability upon the insurer, is anvilled upon the factum of the learned tribunal, irrevering the trite factum of the apposite registration certificate borne in Ex.R-3, making a vivid enunciation therein, of the offending vehicle standing registered as a goods vehicle. Also with the owner of the offending vehicle, RW-2, in his testification borne in his cross-examination making an articulation in consonance therewith, thereafter, also with RW-3 echoing in his testification borne in his examination-in-chief, of, the apposite insurance cover borne in Ex. Rx, not, covering risk of gratuitous passenger carried in the offending vehicle, especially with evidently, the passenger premium for covering the risk of gratuitous passenger(s) carried in the offending vehicle, remaining untendered by its owner, thereupon the fastening of the apposite indemnificatory liability upon the Insurance company/appellant herein, being hence legally infirm. However, the aforesaid contention would hold vigour, in case, there exists palpable vivid evidence in display of the deceased, not, traveling in the offending vehicle along with his goods, rather his being carried therein as a gratuitous passenger.

3. For unearthing the trite evidence in respect thereof, initially an allusion is warranted vis-a-vis the trite pleadings constituted in the claim petition, in respect of the manner of occupation of the offending vehicle by deceased Payare Lal. In case, the pleadings constituted in the claim petition, unveil, of, deceased Payare Lal gratuitously occupying the offending vehicle, thereupon, testificatory evidence contrary thereto would be discardable, emphatically with the aforesaid apposite averments embodied in the claim petition, hence, attracting thereon the principle of estopple of pleadings, with all concomitant effects, of, the claimants being barred to lead evidence in rebuttal thereto. Now when an allusion to the trite apposite averments embodied in the claim petition, in respect of the manner of occupation of the offending vehicle by deceased Payare Lal, makes an unambiguous display of deceased Payare Lal along with his friend(s) traveling in the offending vehicle, for all visiting "Ghar Mata Mandir". Concomitantly, the aforesaid averment cast in the claim petition, yields a conclusion of the deceased hence being explicitly averred to gratuitously occupy the offending vehicle, thereupon, the aforesaid averment, hence, attracts vis-a-vis it besides vis-a-vis the claimants, the interdictory principle of estoppel, whereupon the claimants stood defacilitated to adduce testificatory evidence contrary thereto. However, the owner of the offending vehicle, while stepping into the witness box, has beyond the aforesaid pleadings constituted in the claim petition, proceeded to testify, of, deceased Payare Lal hiring the offending vehicle, for his therein carrying his goods, thereupon, he has concerted to propagate of the deceased along with his goods traveling in the offending vehicle. The aforesaid espousals, when obviously are in rife discordance with the apposite pleadings in respect thereto cast in the apposite claim petition, thereupon, they are discardable rather are construable to be a sequel of an afterthought deployed stratagem by the owner, for his contriving to beget exculpation of his apposite indemnificatory liability. In aftermath, with the deceased evidently traveling as a gratuitous passenger, in the offending vehicle, also with RW-3 in his testification making a disclosure that the relevant insurance cover borne in Ex. Rx, not, thereunder encompassing the risk of a gratuitous passenger traveling therein, given the insured, not, defraying any extra premium for covering the apposite risk of gratuitous passenger(s), thereupon, it was unbefitting for the learned tribunal, to, fasten the apposite indemnificatory liability upon the insurer.

4. For the reasons recorded hereinabove, the instant appeal is partly allowed. Accordingly, the award rendered by the learned tribunal is modified to the extent that the indemnificatory liability(ies) vis-a-vis the amounts of compensation assessed by the learned tribunal being ordered to be borne by the owner of the offending vehicle, namely, Jitender Oberia, respondent No.5 herein. All pending applications also stand disposed of. No order as to costs.

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

Oriental Insurance Company .....Appellant.

Versus

Sushma Devi and others .....Respondents.

FAO No. 47 of 2009.
Reserved on : 5th September, 2017.
Decided on : 21st September, 2017.

Employees Compensation Act, 1923- Section 4- Deceased was murdered by his co-employee who was convicted for the commission of offence punishable under Section 302 of I.P.C- it is not disputed that they were engaged on a vehicle- claim petition was allowed by the Court- held in appeal that the murder of the employee by co-employee during the course of employment will fall within the purview of Employees Compensation Act- deceased and convict were employed by the respondent No. 6- insurance was not taken by respondent No. 6, therefore, Insurance Company

cannot be fastened with liability- appeal partly allowed and the liability fastened upon the respondent No. 6. (Para-5 to 10)

Cases referred:
Oriental Insurance Co. Ltd. Versus Sheela Bai Jain and another, 2007 ACJ 1126
United India Insurance Co. Ltd. Versus Kanshi Ram and others, 2006 ACJ 492

For the Appellant:	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Jeevan Kumar, Advocate.
For Respondents No.1 to 4:	Mr. Sandeep Chauhan, Advocate.
For Respondent No.6:	Mr. Lokender Paul Thakur, Advocate.
	Respondent No. 7 already proceed against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal arises from the impugned verdict recorded by the learned Commissioner exercising powers under the Employee's Compensation Act, 1923, (for short the "Commissioner"), whereby, he allowed the application preferred therebefore, by the claimants herein and proceeded to assess vis-a-vis the successors-in-interest/claimants, of, deceased Dilbag Singh, compensation amount comprised in a sum of Rs. 2,52,075.50 paisa along with all statutory benefits, indemnificatory liability(ies) whereof was fastened upon the Oriental Insurance Company, appellant herein also a sum of Rs.50,000/- was ordered to be paid by respondents No.1 and 2, namely, Rajinder Kumar and Amit Kumar. He also directed that the aforesaid quantified compensation amount shall be equally shared by all the claimants.

2. The Insurance company-appellant herein, standing aggrieved by the rendition, recorded by the learned Commissioner, hence, concert(s) to assail it, by preferring an appeal therefrom, before this Court.

3. When the appeal came up for admission, on 03.01.2011, this Court, admitted the appeal, instituted herebefore by the Insurance Company-appellants herein, on the hereinafter extracted substantial questions of law:-

a) Whether the death of deceased resultant of his murder (cause of death Asphyxia due to strangulation) by the driver of vehicle, who was also convicted for the offence under Section 302, IPC, by the learned Addl. Sessions Judge, New Delhi and was sentenced to undergo life imprisonment, had not arisen out of an "accident" during the course of his employment and therefore, the claim set up by claimants under the provisions of \Workmen's Compensation Act was not tenable and claim petition was liable to be dismissed?

b) Whether deceased Dilbag Singh, who at the relevant time was under the employment of respondent No.6 with whom there was no privity of contract as the policy of insurance effect from 23.10.2000 to 22.10.2001 was issued by the insurer in the name of respondent No.7 and since respondents No.6 and 7 had mutually entered into a lease agreement dated 23.10.2000, whereunder vehicle in question was being plied by respondent NO.6, on account of respondent No.6 having no insurable interest, the liability for payment of compensation money to the claimants could be legally and validly foisted on insurance company?

c) Whether the claim petition which was filed by claimnts on 25.07.2003 for claiming compensation on account of death of late Sh. Dilbag Singh who

was murdered on or about 26/27-01-2001 was beyond the prescribed period of limitation of two years and thus being time barred, deserved to be dismissed?

Substantial questions of law No.1.

4. Uncontrovertedly, the aforesaid Dilbag Singh, was, murdered by his co-employee, one Rajesh alias Gutka. The aforesaid, as is apparent, on, a perusal of Ex.P-4, was convicted and sentenced for a charge under Section 302 of the IPC. The employer of both deceased Dilbag Singh and of Rajesh alias Gutka, does not, contest the factum of his engaging the aforesaid upon vehicle bearing No. HR-55A-1536, TATA 407, respectively as a helper/cleaner and as a driver thereon also there is uncontroverted evidence on record in respect of convict Rajesh alias Gutka, murdering, one Dilbag Singh, during the course, when both were performing the relevant calls of their avocation upon truck bearing No. HR-55A-1536, respectively in their employed capacity as a cleaner and as a driver thereon.

5. However, the learned counsel appearing for the Insurance Company-appellant herein has contended with vigour, that the signification borne by the hereafter underlined apt portion of sub-section (1) of Section 3 of the Employee's Compensation Act, 1923 (hereinafter referred to as the Act), "If personal injury is caused to [an employee] by accident arising out of and in the course of his employment", is, limited besides trammeled only within the domain of a *stricto sensu,* fortuitous event or a fortuitous mishap, whereas the ill event of any deceased employee, being murdered by his co-employee, falling outside its purview. The aforesaid narrow ascription vis-a-vis the connotation(s) borne by the apt underlined portion of sub-section (1) of Section 3 of the Act, is, palpably, outside, the true nuance, innate spirit and the intent of the legislature, inasmuch as, the true signification or scope besides parlance borne by the aforesaid statutory coinage, is, of its encompassing, befallment upon a workman all fortuitous events or mishaps, conspicuously, "if all" evidently arise out of and in the course of employment. The aforesaid broad ascription vis-a-vis the signification borne by the relevant statutory coinage occurring in sub-section (1) of Section 3 of the Act, rather hence takes within its field or ambit, even the fortuitous misfortune of an employee being murdered by his co-employee "unless" there exists no casual connection inter se the fortuitous event or mishap vis-a-vis the callings of his avocation, also especially when its befalment upon the workman concerned neither arise(s) out of nor is in the course of his performing employment under his employer. However, as aforestated, there is undisputed besides clinching evidence in respect of the deceased workman, being murdered by his co-employee also there is firm evidence in respect of the aforesaid tragic event being fortuitous besides of its evidently arising out of or its befalment upon the deceased, occurring, during the course of his performing his employment under his employer. Consequently, this Court, does not, accept the submission of the learned counsel appearing for the Insurance Company, that the murder of deceased workman by his co-employee, dehors, even when it has occurred during the course of his performing employment under his employer or it has arisen during the course of his performing the callings of his avocation, rather falling outside the innate spirit besides subtle nuance carried by the apt aforesaid statutory coinage borne in sub-section (1) of Section 3 of the Act.

6. The aforesaid legal expostulation garner(s) immense strength, from a decision of the Madhya Pradesh High Court reported in a case titled as ***Oriental Insurance Co. Ltd. Versus Sheela Bai Jain and another, 2007 ACJ 1126***, the relevant paragraphs No. 12 and 13 whereof stand extracted hereinafter:-

> "12. In Oriental Insurance Co. Ltd. v. Veena Sethi, 2002 ACJ 843 (Orissa), it was held that murder arose out of and in the course of employment, murder took place while driver had taken the vehicle for delivering goods and was returning when he was killed by someone, it was held that driver was discharging his duties on behalf of the employer and very nature of his employment made it imperative for him to drive the vehicle and put it at the spot where he was killed. It was held that accident arose out of and in the course of employment. The Supreme Court in Employees'

State Insurance Corporation v. Francis De Costa, 1996 ACJ 1281 (SC) , has laid down that while interpreting the meaning of the expression 'arising out of and in course of employment', there has to be causal connection between the accident and employment. The Apex Court has observed:

> "(29) ...In order to succeed, it has to be proved by the employee that (1) there was an accident, (2) the accident had a causal connection with the employment and (3) the accident must have been suffered in course of employment...."

13. The Supreme Court in Mackinnon Mackenzie & Co. Pvt. Ltd. v. Ibrahim Mahmmod Issak, 1969 ACJ 422 (SC), has held that the words 'in the course of employment' mean 'in the course of the work which the workman is employed to do and which is incidental to it'. The words 'arising out of employment' are understood to mean that 'during the course of the employment', injury has resulted from some risk incidental to the duties of the service. The Apex Court held:

> "(5) To come within the Act the injury by accident must arise both out of and in the course of employment. The words 'in the course of the employment' mean 'in the course of the work which the workman is employed to do and which is incidental to it'. The words 'arising out of employment' are understood to mean that 'during the course of employment, injury has resulted from some risk incidental to the duties of the service which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered'. In other words, there must be causal relationship between the accident and employment. The expression 'arising out of employment' is again not confined to the mere nature of employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger, the injury would be one which arises 'out of employment'. To put it differently, if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act...."""

(..p.1128P

Wherein, the Hon'ble High Court of Madhya Pradesh, has, held that even when the demise of the workman concerned, is, a sequel to his being murdered by an unknown person, his successor-in-interest(s), yet holding a leverage to file a petition under the Workmen's Compensation Act also hence the tragic event befalling upon the deceased workman being within the ambit of the apt statutory coinage, importantly when evidence exists in display of the deceased workman concerned at the relevant time, discharging the callings of his avocation, thereupon, his demise being amenable to be construable to arise out of and in the course of his performing his employment under his employer.

7. A similar, view has been expostulated by the High Court of Delhi in a case titled as ***United India Insurance Co. Ltd. Versus Kanshi Ram and others, 2006 ACJ 492***, the relevant paragraph No.20 whereof stands extracted hereinafter:

> "20. Finally, learned counsel for the Appellant relied upon the following passage in Rita Devi, 2000 ACJ 801 (SC):
>
> > "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."" (p.496)

Even though, in the aforesaid judgment rendered by the Delhi High Court, a, distinction has been drawn between murder simplicitor and murder committed in furtherance of any other felonious act also therein a further concomitant distinction, is, carved, of, murder simplicitor, not, falling within the ambit of the apt statutory coinage, occurring, sub-section (1) of Section 3 of the Act, whereas, murder committed in furtherance of a felonious act, being, encompassed within the ambit of the apt statutory coinage, occurring, in sub-section(1) of Section 3 of the Act. Nonetheless, with no evidence standing adduced by the Insurance company in display of the murder of the deceased by convict Rajesh alis Gutka being merely a murder simplicitor, thereupon, hence, it is concluded that the commission of murder of deceased Dilbag Singh, by his co-employee on Rajesh alias Gutka, was, in furtherance of a felonious act, concomitant effect(s) whereof is thereupon "it" falling within the ambit of the apt statutory coinage. Consequently, substantial question No.1 is answered in favour of the respondents and against the appellant.

Substantial question of law No.2.

8. The owner of vehicle, respondent No.7 herein, had executed a lease agreement borne in Ex.R-1 with respondent No.6, namley, Amit Kumar, in pursuance thereof, he had employed both deceased Dilbag Singh and convict Rajesh alias Gutka upon vehicle bearing No.HR-55A-1536. However, there is no valid contract of insurance executed inter se Amit Kumar vis-a-vis Oriental Insurance Company Ltd., whereby, the fortuitous event which befell upon one Dilbag Singh, was insured. Want of adduction into evidence, of, a validly executed contract of insurance inter se the appellant herein vis-a-vis Amit Kumar, in respect of the risks befalling upon workman employed by him upon the relevant vehicle leased to him by its owner, impleaded, herein as respondent No.7, cannot constrain this Court, to, fasten the apposite indemnificatory liability upon the insurance company-appellant herein. Contrarily, the indemnificatory liability is fastened upon the employer of Dilbag Singh, namely, Amit Kumar, respondent No.6 herein. Consequently, substantial question of law No.2 is answered in favour of the appellants herein and against the respondents.

Substantial question No.3.

9. The learned counsel appearing for the appellant herein-insurance company has contended before this Court that he does not press for an adjudication being rendered on substantial question No.3. Hence, answered accordingly.

10. For the reasons recorded hereinabove, the instant appeal is partly allowed. Accordingly, the award by passed by the learned Commissioner is modified to the extent that the amounts of compensation as stand assessed by the learned Commissioner along with all statutory benefits, are, amenable to defrayment in equal share vis-a-vis all the co-claimants by respondent No.6 herein, namely, Amit Kumar. The employer shall forthwith deposit the compensation amount in the Registry of this Court. Further disbursements therefrom vis-a-vis the claimants be made subject to the amounts previously disbursed vis-a-vis the claimants being deposited by the latter in the Registry. All pending applications also stand disposed of. No order as to costs.

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

Prema .....Appellant/plaintiff.
Versus
Surat Ram & others .....Respondents/Defendants.

RSA No. 14 of 2006.
Reserved on : 25.08.2017.
Decided on: 21st September, 2017.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land- defendants have no right, title or interest in the suit land- they threatened to dispossess the plaintiff from the suit land- defendants pleaded that they had become the owners of land measuring 0-2 biswa and 0-9 biswa by way of adverse possession- suit was decreed by the Trial Court for permanent injunction- appeal was filed, which was allowed- held in second appeal that trial Court had relied upon the demarcation report but the Appellate Court held that demarcation report was not proved- Appellate Court appointed a Local Commissioner to conduct the demarcation who found that defendants had not encroached upon any portion of the suit land- no objection was filed to this report- Appellate Court had rightly placed reliance upon the report- appeal dismissed. (Para-8 to 11)

For the Appellant: Mr. Gaurav Gautam, Advocate.
For Respondents No.1, 2 ,6 to 8 & 10: Mr. Dinesh Thakur, Advocate vice to Mr. N.S. Chandel, Advocate.
Nemo for remaining respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs instituted a suit claiming therein a decree for permanent prohibitory injunction besides a decree for possession being pronounced in respect of the suit land vis-a-vis the defendants. The learned trial Court declined relief of possession to the plaintiff, whereas, it proceeded to decree the suit of the plaintiff in respect of relief of permanent prohibitory injunction. The defendants being aggrieved therefrom, instituted an appeal before the learned First Appellate Court, the latter Court allowed the appeal, whereupon, it reversed the judgment and decree pronounced by the learned trial Court. Being aggrieved therefrom, the plaintiff instituted the instant appeal before this Court, wherein, reversal of the verdict pronounced by the learned First Appellate Court, is strived.

2. Briefly stated the facts of the case are that the plaintiff is owner in possession of the land measuring 1-10 bighas bearing Khasra No. 110/10, Khata/Khatauni No.34/45, situated in Village Kurnwari, Pargana Tiun, Tehsil Ghumarwin, District Bilaspur, H.P. (hereinafter called as the suit land). The defendants had no right, title or interest in the suit land. On 8.2.1994, the defendants had started digging the suit land and cutting trees therefrom and thereby threatened to dispossess the plaintiff from the suit land. The plaintiff had requested them to stop interference with his possession over the suit land, but to of no avail. Hence, he had brought the suit against them.

3. The defendants contested the suit and filed written statement as well counter claim against the plaintiff for declaration that they had become owners of land measuring 0.2 biswa bearing Khasra No.110/10/1 and 0.9 biswas bearing khasra No.110/10/2, by way of adverse possession. The defendants have assailed the suit of the plaintiff on preliminary objection such as non joinder of necessary parties, locus standi, estoppel, valuation of suit and limitation. On merits, they had pleaded that the dispute between the parties had arisen on the basis of demarcation carried out by Tehsildar Ghumarwin, who had shown khasra No.110/10/1,

measuring 0.2 biswas and Khasra No.110/10/2, measuring 0.9 biswas in possession of the defendants. Second demarcation was again conducted on 20.06.1984 and the said land was not found in possession of the plaintiff. It is also alleged that the aforementioned area of 0.11 biswas is part of land of defendants bearing khasra No.15, situated adjoining the suit land thus the defendants were owners in possession of the same. It is also alleged that in case the defendants are not held to be owners of land measuring 0.2 biswas and 0.9 biswas bearing khasra No. 110/10/1 and 110/10/2 respectively, then they had become owners thereof by adverse possession. In nutshell the defendants refuted case of the plaintiff and claimed themselves to be owners of land measuring 0-11 biswas shown by khasra NO.110/10/1 and 110/10/2 and they had prayed that their counter claim be decreed and the suit of the plaintiff be dismissed.

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

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

1. Whether the plaintiff is entitled for the relief of permanent injunction, as alleged? OPP
2. Whether the plaintiff is entitled for the relief of possession in alternative? OPP.
3. Whether the suit is bad for non joinder of necessary parties?OPD.
4. Whether the plaintiff has no locus standi to file the present suit?OPD.
5. Whether the plaintiff is estopped to file the present suit?OPD.
6. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction?OPD.
7. Whether the suit is barred by limitation?OPD.
8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/appellant herein for permanent prohibitory injunction. In an appeal, preferred therefrom by the defendants/respondents herein before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission, on 23.01.2006, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the impugned judgment and decree passed by the lower appellate Court is not sustainable in the eyes of law being passed totally perverse to the evidence oral as well as documentary on the record?

b) Whether the findings of the lower appellate Court are not legally sustainable specially when the defendants have taken specific plea that they have become owner in possession of the suit land by way of adverse possession. Therefore, the findings of the lower appellate court that the factum of interference on behalf of the defendants have not been proved are totally wrong and illegal?

Substantial questions of Law No.1 and 2:

8. The learned trial Court had meted deference, to the admissions borne in the pleadings comprised in the written statement of the defendants, admissions whereof unveils qua, demarcation, in respect of the suit land being conducted by the Tehsildar concerned, in sequel whereto, the apposite report being prepared by him, with displays therein of Khasra No.110/10/1,measuring 0.2 biswas and Khasra No.110/10/2 measuring 0.9 biswas, being, possessed by the defendants. However, the effect of the aforesaid admissions, occurring in the pleadings constituted in the written statement of the defendants, was, scuttled by the learned First Appellate Court, on, anvil of the demarcation report(s) prepared by the demarcating Officer(s) concerned, remaining not proven in Court. Even though, the aforesaid reason(s) assigned by the learned First Appellate Court, for scuttling the effect of the aforesaid admission(s) constituted in the written statement, of, the defendant(s) qua validity of the previous demarcation conducted by the Tehsildar concerned, besides with respect to a pronouncement therein, of the defendants holding possession of khasra Nos. 110/10/1 and 110/10/2, also holding veracity, may beget, detraction of the trite principle of admissions in pleadings constituting estoppel vis-a-vis the litigants concerned. However, the tenacity of the further reason assigned by the learned first Appellate Court, for, imputing solemnity to the report of the demarcating Officer, tendered before the learned First Appellate Court, tendering(s) whereof occurred in pursuance, to an order recorded on 5.4.2005 by the learned First Appellate Court, whereby, Tehsildar, Ghumarwin was appointed as a Local Commissioner, for his thereafter holding demarcation(s) of the contiguous estates of the litigating parties, is, to be gagued from the trite factum of whether the aggrieved thereupon rearing objections in respect thereto or seeking cross-examination of the Tehsildar concerned. In case, the Tehsildar, Ghumarwin concerned, who, after holding demarcation of the contiguous estates of the litigating parties, through the ADA concerned, hence, produced his apposite report before the learned First Appellate Court, yet when thereat no objections in respect thereto, stood reared by the aggrieved therefrom, thereupon the inevitable conclusion warranting an apt derivation, would be, of all the litigating parties accepting the veracity of all the recitals borne in the apposite report.

9. For gauging, whether subsequent to 29.06.2005, whereat, the demarcating officer enabled the tendering of his demarcation report before the learned First Appellate Court, the aggrieved therefrom made any protest or raised objections in writing before the learned First Appellate Court, an advertence to the order sheets recorded subsequent thereto, is imperative. An allusion to the order sheets recorded subsequent to 29.06.2005, whereat the demarcating officer enabled tendering of his report before the learned First Appellate Court, unveils, of the aggrieved therefrom neither rearing any objections in respect of the recitals borne therein nor his making submissions before the learned First Appellate Court in respect of elicitation of the presence of the demarcating officer concerned being ordered by the learned First Appellate Court, for his hence proving its contents also for the aggrieved thereupon being facilitated to hold him to cross-examination, for his thereupon testing the trite factum of his conducting the demarcation in accordance with law also for his testing the veracity(ies) of all recitals borne therein. Consequently, want of the aforesaid apposite endeavours by the aggrieved, constrains this Court to record with aplomb, a firm conclusion, that both the contesting parties accepted all the recitals borne therein, wherefrom, it is befitting to conclude that the trite factum borne therein of the defendants, not, encroaching upon any portion of the suit land, concomitantly, acquiring firm vigour. Corollary of the aforesaid inference is that hence the effect of the admissions of the defendants constituted in their written statement, wherein, they accept the factum of a valid demarcation being conducted in respect of the suit property also the further admission of the defendants being found in possession of the suit kahsra numbers, not, operating as estoppel vis-a-vis them, nor thereupon, the plaintiffs being entitled to a decree for permanent prohibitory injunction nor for a decree of possession. Importantly, when the effect thereof, for all the aforestated reasons, is shred of its tenacity, by, the uncontroverted apposite report tendered besides enabled to be tendered by the Tehsildar Gumarwin, who stood appointed as a Local Commissioner under orders recorded by the learned First Appellate Court on 5.4.2005.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, both the substantial questions are answered in favour of the respondents/defendants and against the appellant.

11. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the impugned judgment and decree rendered by the learned Additional District Judge, Ghumarwin, District Bilaspur, H.P., in Civil Appeal No. 263/13 of 2004/2000, on 24.10.2005, are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Ravinder Mehta (since deceased) through his legal hiers
....Decree holders/Non-objectors.

Versus

Shri Ajay Singh Chauhan **....Judgement Debtor/Objector.**
Smt. Promila Chauhan **....Objector**

OMP No. 252 of 2017 and OMP No.212 of 2016. in
Execution Petition No. 2 of 2014.
Reserved on: 07.09.2017.
Date of Decision: 21st September, 2017.

Code of Civil Procedure, 1908- Section 47- An exparte decree of specific performance was put to execution- objections were filed to the execution, which were dismissed in default – order was passed to execute the registered deed- registered deed of conveyance was executed and sale consideration was deposited in the registry of the court- Court ordered the delivery of possession - in the meantime, objections were restored- held that objections have been filed by the mother of the J.D. and she does not hold any paramount title vis-à-vis her son- she has no independent right of possession- objections are without any basis and are dismissed- direction issued to ensure the delivery of possession by breaking open the locks. (Para-4 to 8)

For the Decree holders: Mr. Y.P. Sood, Advocate.
For Judgement Debtor/Objectors: Ms. Renuka Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

An ex-parte decree, for specific performance of agreement of sale entered inter se the deceased plaintiff and the defendant, agreement of sale whereof is borne in Ex.PW1/A, was, pronounced on 14.08.2013. The ex-parte decree was not concerted to tbe set aside. The ex-parte decree in respect of specific performance of agreement of sale, agreement whereof is borne in Ex.PW1/A, was put to execution before this Court by the original decree holder, now substituted by his legal hiers.

2. The judgment debtor instituted objections thereto, objections whereof are borne in OMP No.212 of 2016. However, the aforesaid OMP, stood, under orders recorded on 22.06.2016, hence dismissed in default. Subsequently, this Court on 30.11.2016, had proceeded to pronounce an order, whereby, the Registrar (Judicial) of this Court was directed to, in accordance with Order XXI, Rule 32 of the CPC, execute a registered deed of conveyance in

respect of the suit property vis-a-vis the decree holder(s). In compliance therewith, the registered deed of conveyance hence stood executed, a copy whereof is on record also sale consideration of Rs.10 lacs is deposited in the Registry of this Court. Subsequently, on 13.01.2017, this Court had ordered, of physical possession of the suit property, which remained undelivered to the decree holder(s) in contemporaneity with execution of a registered deed of conveyance, being ensured by the learned Civil Judge (Senior Division), Shimla, to be hence delivered vis-av-vis the decree holder(s), by his directing the bailiff concerned to make its delivery upon the decree holder(s). However, the bailiff concerned reported to this Court, of, physical possession of the suit property being not delivered by him, to the decree holder, given at the relevant time of his visiting the suit premises, his finding them locked.

3. Subsequently, this Court had under a pronouncement recorded on 24th May, 2017 upon OMPs No. 20 and 146 of 2017, ordered, for restoration of objections borne on OMP No. 212 of 2016 and had also recalled the orders recorded on 22.6.2016. This Court has heard the learned counsel appearing for the JDs, upon, the validity of the objections preferred by the principal JD as borne in OMP No. 212 of 2016 along therewith the espousals vis-a-vis the validity of objections preferred vis-a-vis the coercive executability of the ex-parte decree, by the mother of the principal JD, also have been considered.

4. The principal judgment debtor in his objections embodied in OMP No. 212 of 2016, has, therein espoused, of, the decree put to execution being amenable to interference, its being rendered ex-parte despite his evidently, not, being served in accordance with law. He has also espoused therein that for lack of identification of the suit property, the decree put to execution being unamenable to execution. However, the aforesaid objections, even if, they were ordered to be taken on record, are rendered nugatory, in the evident face of the decree for specific performance of agreement of sale, being, put to part execution, comprised in the Registrar (Judicial), in compliance with the orders recorded by this Court on 30.11.2016, executing the relevant registered deed of conveyance with the decree holders. Moreover with the relevant record(s), making loud bespeakings in respect of the principal JD being properly served in the apposite civil suit, thereupon, with no evidence being adduced for belying the signatures of the principal JD, occurring on the reverse of the summonses, hence, garner an inference of the aforesaid espousal being rudderless besides uncreditworthy.

5. Be that as it may, the objections reared by Smt. Promila Chauhan, evidently the mother of the principal judgment debtor, objections whereof are cast under the provisions of Order XXI, Rules 97-101, of the CPC, enjoin rendition of a pronouncement thereon. The substratum of the objection(s) reared by the mother of the principal judmgent debtor, is hinged upon the decree pronounced in Civil Suit No. 25 of 012 emanating from collusion inter the predecessor-in-interest of the decree holders vis-a-vis the principal judgment debtor herein. She canvasses therein, of, the principal judgment debtor holding no authority to execute any agreement to sell in respect of th suit property with the predecessor-in-interest of the decree holders, emphatically when the suit property was purchased by her from her savings. However, the aforesaid objections do not undermine the legality of the title of the principal judgment debtor vis-a-vis the suit property, given the validity(ies) of the registered deed of conveyance executed inter se the principal judgment debtor with the authorised official(s) of the H.P. Housing Board, remaining unassailed, on the trite crucial besides pivotal aspect of it not holding the authentic signature(s) of the principal JD or of the principal JD forging her signatures. Contrarily, the registered deed of conveyance executed inter se the principal judgment debtor vis-a-vis the competent officer of the Housing Board, makes, a display of it standing executed inter se them. The aforesaid emanation borne in the apposite deed of conveyance executed inter se Ajay Singh Chauhan, the principal judgment debtor vis-a-vis the competent official of the H.P. Housing Board, did impute, empowerment to the principal JD, to, thereafter proceed to execute an apposite agreement for sale in respect, of, property (ies) borne therein vis-a-vis the predecessor-in-interest of the decree holders. Tritely, there is no articulation in the objections reared by the mother of the principal judgment debtor qua hers being unaware of execution of the relevant agreement of sale nor there is any communication therein that even at the time of the principal

JD executing, a deed of conveyance, in respect of the suit premises, with the competent officer of the H.P. Housing Board, she thereat being also unaware in respect of its execution. Lack of hers rearing the aforesaid apposite echoings, does fillip an inference of the mother of the principal judgment debtor, merely, for barring a complete efficacious execution of the ex-parte decree, hers conniving besides colluding with the principal judgment debtor, yet her belated attempts are to be halted, significantly when any vindication(s) thereof would interfere with valid process(es) of law.

6. Be that as it may, the objections in respect of hers vis-a-vis the suit property, purportedly liquidating, the sale consideration vis-a-vis the initial owner of the suit property or vis-a-vis her son, for, his further transmitting it to the original title holder, contrarily bespeaks her knowledge in respect of execution of deed of conveyance inter se her son vis-a-vis the competent official of the H.P. Housing Board, wherefrom, an aggravated conclusion is fomented, of, hers manipulating besides conniving with her son for, pretextuary concerting to baulk the decree holders besides to halt this Court, from, efficaciously completing all the legal process(es). Moreover, the incompetence or lack of empowerment of her son, the principal JD, to, execute the deed of conveyance with the prior owner, of, the suit property is anchored upon a plea, palpably unveiling of hers, being a benamidar, plea whereof is unespousable by her, for hers thereupon assaying to invalidate the ex-parte decree nor is a plea which foists in her any indefeasible vested title vis-a-vis the suit property,nor thereupon she can make a concert for barring this Court, from, completing all the legal process(es), for meteing the fullest satisfaction to the decree put to execution.

7. Even otherwise, the application instituted by the mother of the principal judgment debtor, is cast under the provisions of Order 21, Rules 97 to 101 of the CPC. She within the ambit of Rule 97 of Order 21 of the CPC, claims validation for her contemplated concert(s), of, resisting or obstructing the delivery of physical possession vis-a-vis the decree holders, by the bailiff concerned, under validly issued warrants of possession, orders whereof are evidently preceded by a validly executed instrument of sale, whereby, part satisfaction of the ex-parte decree of specific performance stands begotten. Sub rule (2) of Rule 97 of Order 21 enjoins this Court to adjudicate upon the validity(ies) of the contemplated obstruction(s) nursed by the mother of the principal JD, for thwarting delivery(ies) of valid possession(s) of the suit property vis-a-vis the decree holders. All the provisions occurring in succession to Rule 97, especially therefrom upto Rule 101 of Order 21 enjoin apposite cumulative conjoint reading. Provisions of Rules 97 to 101 or Order 21 read as under:-

> **97. Resistance or obstruction to possession of immovable property.-** (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed "by any person" in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.
>
> (2) Where any application is made under sub-rule (1), the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.
>
> **98. Orders after adjudication.-** (1) Upon the determination of the questions referred to in rule 101, the court shall, in accordance with such determination and subject to the provisions of sub-rule (2),—
>
> (a) make an Order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or
>
> (b) pass such other Order as, in the circumstances of the case, ft may deem fit.
>
> (2) Where, upon such determination, the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the court may also,

at the instance of the applicant, Order the judgment debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

99. Dispossession by decree holder or purchaser.- (1) Where "any person" other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.

(2) Where any such application is made, the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

100. Order to be passed upon application complaining of dispossession.- Upon the determination of the questions referred to in rule 101, the court shall, in accordance with such determination,—

(a) make an Order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other Order as, iii the circumstances of the case, it may deem fit.

101. Question to be determined.- All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the court dealing with the application, and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

The trite satiatory cannon embodied in Rule 99 of Order 21 of the CPC, is comprised in one Promila Devi, the mother of the principal judgment debtor, within its ambit, significantly with hers provenly being the mother of the principal JD, being enjoined to establish, of, her dispossession *in futuro* from the suit property, upon, validly issued warrants of possession being executed, suffering from, an inherent legal defect, defect whereof arising from hers holding a paramount title or a title superior to the one her son, the principal JD, holds vis-a-vis the suit property. However, for the reasons aforesaid, when she evidently holds no title paramount vis-a-vis her son, the principal JD besides with this Court, concluding, of hers conniving with her son, for baulking all valid process(es), whereupon, complete execution of a valid executable decree, would stand begotten, preeminently also when she is not dispossessed from the suit property nor when she is dispossessed, therefrom, she yet thereat would hold no valid claim of possession thereof, being restored to her, by hers thereat casting an application under the provisions of Order 21, Rule 97 to 101 of the CPC, thereupon, at this stage, she cannot, when she has not suffered any invalid dispossession from the suit property, hence, prematurely strive to obtain any succor from mandate(s) thereof. Conspicuously, even the aforesaid endeavour of one Promila Chahan, is also premature besides infected with malafide(s), given this Court rejecting her objection(s), of, hers upon the suit property holding a superior title vis-a-vis her son. Concomitantly, her conniving conjured endeavour(s), for baulking the complete execution of a valid ex-parte decree, for specific performance, cannot be validated, emphatically with nowat the decree begetting part satisfaction, comprised in the deed of conveyance standing executed by the Registrar (Judicial) of this Court with the decree holders. In aftermath, her resistance is invalid and bereft of any force.

7. For reasons recorded hereinabove, there is no merit in the objections preferred hereat by the principal JD and by his mother, hence, both the OMPs are devoid of any merit(s) and are dismissed accordingly.

8. The learned Civil Judge(Senior Division), Shimla is directed to ensure a complete and efficacious execution of the apposite decree, by, his issuing warrants of possession vis-a-vis the suit property, upon the bailiff concerned, whereafter the latter shall ensure delivery of

possession of the suit property by the judgment debtor(s) vis-a-vis the decree holder and in the event of his visiting the suit property, his discovering of it being locked, thereupon, the learned Civil Judge (Senior Division), Shimla, for, avoiding his being remotioned for rendering further appropriate orders, shall, in the initial pronouncement, make, an order, of, hence with the help of the police, the bailiff breaking open the locks of the suit property. The aforesaid directions be forthwith besides with utmost dispatch carried into effect by dealing hand(s) concerned. List after four weeks.

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

Sanjeev Kumar ....Petitioner.
Versus
State of H.P. and others ....Respondents.

CWP No. 5053 of 2012.
Reserved on :30th August, 2017.
Decided on : 21st September, 2017.

Constitution of India, 1950- Article 226- Applications were invited for filling up the posts of Water Guard- petitioner applied for the post – Interview Committee awarded highest marks to respondent No. 6- held that no allegation of malafide was made against the members of selection committee- respondent No. 6 had secured highest marks in matriculation examination- he had not annexed any experience certificate or BPL Certificate, whereas certificates were annexed by respondent No. 6- Selection Committee had correctly held the respondent No. 6 is entitled to the job- petition dismissed. (Para-2 to 4)

For the Petitioner: Mr. Praneet Gupta, Advocate.
For Respondents No.1, 2 & 4: Mr. Vivek Singh Attri, Addl. A.G.
For Respondent No.5: Mr. Ashwani Kaundal,Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Respondent No.3 proceeded, to, display a notice on its notice board, whereunder applications were invited from all interested persons, for filling up posts of Water Guard (Jal Rakshak). The apposite notice held a communication, of, all aspirants concerned submitting their applications' on or before 23.03.2012, in the office of respondent No.3 besides theirs remaining available on 23.03.2012 in the office of respondent No.3. The petitioner herein also applied for the said post(s) and his application was purportedly accompanied by all the requisite qualification certificates. The duly constituted interviewing committee, as apparent, from a perusal of Annexure P-12, proceeded to assign the highest marks to one Som Dutt, respondent No.6 herein and also proceeded to recommend him for appointment to the advertised post. The petitioner is aggrieved by the duly constituted committee concerned ignoring his candidature rather its proceeding to recommend, one, Som Dutt for appointment to the advertised post.

2. A thorough traversing of the averment(s) comprised in the writ petition, unveil of non occurrence of any echoings therein vis-a-vis ascriptions of any malafides vis-a-vis any of the member(s) of the duly constituted committee, which proceeded to interview the aspirants concerned nor any specific malafide(s) anchored upon theirs being related to respondent No.6, is enunciated in the writ petition. Tritely also none of the members of the duly constituted committee stand arrayed as parties in the array of respondents, non arraying(s) whereof also does

spur an inference of the petitioner raising surmisal and illusory ascriptions vis-a-vis each of them qua theirs awarding in-discriminate marks vis-a-vis respondent No.6. Bald averments in respect of indiscriminate marks being meted by member(s) of the selection committee vis-a-vis respondent No.6, averments whereof obviously are evidently unsupported by any tangible evidence, hence, are rendered bereft of any sustenance. Also any acceptance of any bald averments made in the petition, would result in this Court insagaciously proceeding, to, without tangible evidence on record also without hearing the members of the selection committee concerned hence proceeding them to condemn them unheard. The respondent(s) concerned meted reply(ies) to the writ petition, wherein they explicated the reasons which prevailed upon the interviewing committee, for assigning the highest marks to respondent No.6. A perusal of the reply(ies), unveil, of respondent No.6 holding in the matriculation examination, marks higher than the petitioner. Also, on a reading of reply(ies) furnished by the respondent(s) concerned, it is evident, of, the petitioner only appending matriculation certificate(s) with his application, whereas, his not appending therewith, any experience certificate(s) or BPL certificate(s). Even, the BPL certificate, as tendered by the petitioner, bespeaks, of, its, only after the date of selection hence standing issued by the competent authority, thereupon, it being of no worth vis-a-vis the BPL certificate, of, respondent No.6, given his appending it with his application. Consequently, with respondent No.6 possessing in the apt matriculation examination, marks higher than the petitioner also his possessing the BPL certificate, thereupon, rendered him a more suitable befitting candidate than the petitioner. Also when the marks awarded by the members of the selection committee are in consonance with all the aforesaid, thereupon, it can not be held that there was any indiscriminatoriness on part of the members of the interviewing committee, in awarding the highest marks to respondent No.6 nor it can be concluded that the members of the interviewing committee in awarding lesser marks to the petitioner, theirs, arbitrarily meteing them qua him.

3. Lastly, the learned counsel appearing for the petitioner, on anvil of Annexure P-12, submits that amongst the members of the selection committee, there being no expert and with the members of the selection committee concerned, holding, no technical professional knowledge in respect of the aspirants concerned possessing the requisite technical skills, for theirs proficiently performing the skilled task(s) of water guard (Jal Rakshak), concomitantly, also rendered them ill equipped to select a suitable candidate. However, the aforesaid submission, cannot, be accepted. A perusal of the material on records reveals that vide Annexure R-I, the government constituted a committee comprising of the Sub Divisional Magistrate (Civil), as its Chairman, Assistant Engineer of IPH Sub Division concerned and the Panchayat President concerned as members thereof, for theirs conducting interview(s) of the aspirants. However, lateron vide letter of 15.03.2012, a, validly reconstituted Committee comprising of the Assistant Engineer concerned, as its Chairman, Panchayat President concerned and Junior Engineer (IPH) of the section concerned, as members thereof, proceeded to interview the aspirants concerned on 12.04.2012. A perusal of Annexure R-V reveals, of, all the aspirants being interviewed by a validly constituted interviewing committee consisting, of, the Assistant Engineer, I&PH, Sub Division Hamirpur as Chairman, Junior Engineer, I&PH, Chowki and President, G.P. Tibbi, as members thereof, hence, it can be safely concluded that the members of the interviewing committee being possessed with sound technical professional knowledge, for theirs adjudging the proficiencies/capability(ies) of all the aspirants, both in respect of their skill(s) also in in respect of theirs proficiently performing the skilled task(s) of water guard.

4. For the foregoing reasons, there is no merit in the instant petition which is accordingly dismissed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Smt. Shipra Saklani .....Petitioner.

Versus

Arun Mishra .....Respondent.

Civil Revision No.78 of 2016.
Reserved on: 7th September, 2017.
Decided on : 21st September, 2017.

Hindu Marriage Act, 1955- Section 24- Wife filed a petition seeking maintenance @ Rs. 30,000/- per month- Court granted the maintenance @ Rs. 10,000/- per month- aggrieved from the order, present revision has been filed- held that the Court has to take into consideration the income of husband and wife while awarding the maintenance- wife was working as a dietitian and was getting salary of Rs. 80,000/- per month but she has resigned from her job- hence, the inference that wife was unable to maintain herself was properly drawn by the Court- respondent is drawing salary of Rs. 91,000/- per month- he is also getting special allowance of Rs. 57,000/- per month- Trial Court had not awarded proper amount of maintenance- revision allowed and maintenance enhanced to Rs. 22,000/- per month. (Para-3 to 5)

For the Petitioners : Mr. S.C. Sharma, Advocate.

For the Respondent: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashishat, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

During the pendency of the apposite petition for dissolution of marital ties, one, Shipra Saklani Mishra, impleaded as respondent therein, instituted an application before the learned District Judge, Kangra at Dharamshala, application whereof was cast under the provisions of Section 24 of the Hindu Marriage Act, (hereinafter referred to as the Act), wherein, she reared a claim, for liability(ies) qua maintenance pendente lite quantified in a sum of Rs.30,000/- per mensem, being fastened upon the respondent herein.

2. The learned District Judge, Kangra at Dharmashala assessed liability(ies) qua maintenance pendente lite against the respondent herein, comprised in a sum of Rs.10,000/- per mensem. His wife/petitioner herein is aggrieved therefrom, hence, has instituted the instant petition before this Court. She has in the instant petition claimed that maintenance pendente lite comprised in a sum of Rs.30,000/- per mensem, be, assessed vis-a-vis her, indemnificatory liability(ies) whereof be fastened upon her husband/respondent herein.

3. For gauging the competing claim(s) of the parties at contest herebefore, it is imperative to extract the provisions borne in Section 24 of the Act:-

> "24 **Maintenance pendente lite and expenses of proceedings**.____Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as,

having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:"

A careful reading of the afore extracted provisions, unravels that rendition of any order quantifying per mensem maintenance pendente lite, to hence hold validation, enjoins Courts of law, to, make discernments from the relevant material in respect of the claimant(s) concerned holding, no, independent income sufficient for her or his support also his/her holding no sufficient income for bearing the expenses of the proceedings. Also a cannon is embodied therein, that the claimant's income besides the respondent's income, both being amenable to be borne in mind by the Court concerned, whereafter, the Court exercising jurisdiction vested under the provisions of Section 24 of the Act, is bestowed with a discretion to assess a reasonable amount of pendente lite maintenance per mensem. Even though, the respondent had contended that the applicant/petitioner herein was rearing a handsome salary comprised in a sum of Rs.80,000/-, from her avocation as a Senior Dietician in Fortis La Femme Hospital, located at Greater Kailash, New Delhi . Also on anvil thereof, he contended that she was possessed of income sufficient to maintain herself besides sufficient for bearing the expenses of the litigation, yet with existence thereat of a letter of 5th January, 2015 and its making a disclosure of hers resigning from the aforesaid avocation besides her resignation being accepted, does validate, the reasoning afforded by the learned District Judge concerned, that, on anvil thereof no conclusion being drawable of hence hers holding income sufficient, to, maintain herself besides, it being sufficient to enable her to bear the expenses of the litigation also concomitantly, thereupon, her application not meriting dismissal.

4. The apparent impropriety, which appears to be visibly committed by the learned District Judge, Kangra at Dharamshala, in, assessing reasonable amount of per mensem maintenance pendente lite vis-a-vis the petitioner, is grooved in the factum of his grossly mis-appraising the relevant displays borne in pay slip(s) of the respondent herein, wherein occur a reflection of the total carry home salary of the respondent herein being comprised in a sum of Rs.91,000/-, whereas, he contrarily construed of the carry home salary of the respondent herein being comprised in a sum of Rs.30,810/-. Reflections also occur in an affidavit filed before this Court by the respondent herein qua his carry home per mensem salary being comprised in a sum of Rs.1,03,000/-. However, the respondent herein has explained, that he is entailed with expenditure towards house rent besides other expenses. Also he has explicated therein that a sum of Rs.57,000/-, detailed therein, as Special Allowance being amenable to volatilities and fluctuation(s). However, since the special allowance is a part of salary, it is not acceptable that the sum(s) in respect thereto borne in the apposite pay slip being amenable to apposite fluctuation(s). Even if, the respondent herein is entailed with expenditure in respect of all facets/heads detailed in his affidavit, nonetheless, given his being exaggerative in respect thereto also being niggardly vis-a-vis his wife, thereupon, bearing in mind that the petitioner herein has, no, independent income sufficient to support herself besides for enabling her to bear the expenditure of legal proceedings, also given her status, in sequel, it is deemed just, fit and appropriate to assess vis-a-vis her, a sum of Rs.22,000/- as maintenance pendente lite per mensem, indemnificatory liability(ies) whereof, is, fastened upon the respondent herein.

5. In view of the above, the instant petition is allowed and the order impugned herebefore is modified. The respondent is directed to pay a sum of Rs.22,000/- per mensem to the petitioner herein towards maintenance pendente lite, from, the date of application till a decision is made upon the main petition. No costs. Record be sent back forthwith. All pending applications also stand disposed of. The learned trial Court is directed to conclude the trial of the Hindu Marriage Petition within six months from the date of receipt of copy of this order.

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

State of Himachal Pradesh .....Appellant.
Versus
Suresh Kumar .....Respondent.

Cr. Appeal No. 264 of 2008
Reserved on: 31.08.2017
Decided on: 21.09.2017

Indian Penal Code, 1860- Section 452, 376 and 511- Prosecutrix aged 4 years was alone in the house- her family members had gone to field to harvest the maize crop- the father of the prosecutrix heard cries and went towards the room- he saw the accused running from the room- prosecutrix was inside the room without salwar and was weeping – she informed on inquiries that accused had tried to rape her – accused was tried and acquitted by the Trial Court- held in appeal that Medical Officer has ruled out the possibility of sexual intercourse- no abrasion, laceration or inflammation was found by her- the testimony of prosecutrix is in contrast to the prosecution story as she deposed that her mother had arrived at first instance and thereafter her uncle came to the spot, whereas, prosecution story is that father of the prosecutrix reached the spot and thereafter her mother had arrived- prosecutrix did not state that accused had tried to rape her - grand-mother of the prosecutrix was at the spot but it is not explained as to why she had not arrived on hearing the cries of the prosecutrix- testimony of the prosecutrix does not inspire confidence and the Court had rightly rejected the prosecution version- appeal dismissed.

(Para-7 to 28)

Cases referred:

Caetano Piedade Fernandes and nother vs. Union territory of Goa, Daman & Diu Panaji, Goa, (1977) 1 Supreme Court Cases 707

State of Madhya Pradesh vs. Ramesh and another, (2011) 4 SCC 786

Radhey Shyam vs. State of Rajasthan, (2014) 5 SCC 389

Chandrappa vs. State of Karnataka, (2007) 4 SCC 415

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

For the respondent: Mr. Amit Kumar Dhumal, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal has been preferred by the appellant/State (hereinafter referred to as "the appellant") laying challenge to judgment, dated 20.12.2007, passed by learned Sessions Judge, Bilaspur, H.P., in Sessions Trial No. 1 of 2007, whereby the accused/respondent (hereinafter referred to as "the accused") was acquitted of the offences punishable under Sections 452 and 376 read with Section 511 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

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

On 29.09.2006, complainant, Shri Ramesh Kumar, lodged a complaint with the police alleging that he is employed in Public Works Department and was on leave. He has two children, son and daughter. As per the complainant, on 29.09.2006, he alongwith his family members had gone to fields to harvest the maize crop and when he alongwith his brother

returned from the fields at about 04:30 p.m., they heard cries of his daughter, who was four years of age (hereinafter referred to as "the victim"). The complainant, after throwing the maize crop, rushed towards the room and he saw the accused running from the room. He also saw the victim inside the room without *salwar* and she was weeping. On asking, the victim disclosed that the person running took off her *salwar* and his pants, thereafter he applied sputum (thook) on her private part as well as on his penis. The victim further disclosed that the person who ran outside also started inserting his penis in her private organ due to which she felt pain. The complainant put the *salwar* of the victim and in the meantime his brother and villagers also came there and he disclosed them about the incidence. It was unearthed that the accused had been guest in the house of one Bhuri Singh of village Dagsech when he attempted to commit rape on the victim. Police machinery was set into motion and investigation ensued. During the course of investigation site plan of the spot of occurrence was prepared and the victim was medically examined. The room, where the occurrence took place, was photographed and the bed sheet was taken into possession. The accused, after his arrest, was medically examined and documents qua the age of the victim were also obtained. Radiological age of the victim was opined to be below eight years and more than four years. The clothes of the victim, which she was wearing at the time of her medical examination, were sent to the forensic laboratory for analysis and report was obtained. Police found involvement of the accused in the commission of the offence. After completion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as twenty witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he admitted that the complainant works as Peon in Public Works Department, Mandi. He also admitted that on 30.09.2006 he was medically examined, however, the doctor did not take into possession his pants. He denied the rest of the prosecution case and claimed innocence. He, in his statement, has further stated that a false case has been foisted on him as the complainant is inimical with his relative, Bhuri Singh and his family members. However, the accused did not examine any defence witness.

4. The learned Trial Court, vide impugned judgment dated 20.12.2007, acquitted the accused of the offences punishable under Sections 454 and 376 read with Section 511 IPC, hence the present appeal.

5. The learned Additional Advocate General has argued that the learned Court below has failed to appreciate the evidence to its correct perspective. He has further argued that the judgment of acquittal, passed by the learned Trial Court, is the result of wrong appreciation of evidence. He has argued that accused was seen by the complainant running from the room of the victim and the victim has also identified the accused in the Court, so the presence of the accused on the spot stands fully proved. He has argued that there are no major discrepancies in the statements of the prosecution witnesses, thus in these circumstances, the accused is liable to be convicted for the offence punishable under Sections 452 and 376 read with Section 511 IPC. In contrast to the arguments of the learned Additional Advocate General, the learned counsel for the accused/respondent has argued that statements of the prosecution witnesses are full of contradictions and discrepancies. He has further argued that statement of the victim, who at the time of her examination was only five years old, has to be appreciated with great caution. It emanates from the prosecution evidence that at the time of occurrence other children and grand mother of the victim were also present in the house, so the happening of such type of incident in itself doubtful, especially in presence of other children and elderly person of the house. In order to draw support to his arguments, the learned counsel for the respondent has relied upon the following judicial pronouncements:

1. ***Caetano Piedade Fernandes and nother vs. Union territory of Goa, Daman & Diu Panaji, Goa, (1977) 1 Supreme Court Cases 707;***
2. ***State of Madhya Pradesh vs. Ramesh and another, (2011) 4 SCC 786; &***
3. ***Radhey Shyam vs. State of Rajasthan, (2014) 5 SCC 389.***

6. In order to appreciate the rival contentions of the parties, we have gone through the record carefully and in detail.

7. The case of the prosecution rests on three legs of evidence, viz., medical evidence, evidence of non-official witnesses and that of official witness. At the first place, medical evidence is being discussed. PW-1, Dr. Santosh Dhindra, Medical Officer, Zonal Hospital, Bilaspur, deposed that on 29.09.2006, at about 11:45 p.m., the victim was brought by her father, Shri Ramesh (PW-2) and Lady Constable, Peela Devi with the alleged history of sexual assault. This witness ruled out the possibility of sexual intercourse. She issued medico legal certificate, Ex. PA, qua the victim. However, she, after perusal of report of the Chemical Analyst, which is Ex. PB, opined that possibility of attempt to sexual intercourse on the victim cannot be ruled out. She found no abrasion laceration or inflammation over thigs or perineum. As per this witness, she referred the victim for X-ray examination for ascertaining her age. She, in her cross-examination, has deposed that she did not notice any violence signs on the person of the victim. The hymen was not ruptured and she did not find any blood stains on the body of the victim as also on her wearable. Second in the line of medical evidence is the statement of Dr. Mrs. D. Bhangal, Medical Officer, Zonal Hospital, Bilaspur. The victim was referred to her by Dr. Santosh Dhindra (PW-1) for ascertaining her skeletal age. After taking skiagrams, Ex. P-7 to P-11, she prepared and submitted her report, Ex. PW-12/A. As per the opinion of this witness, the age of the victim was between four to eight years, i.e., less than eight years and more than four years.

8. PW-13, Dr. Poojan Jaswal, Medical Officer, Zonal Hospital, Bilaspur, deposed that on 30.09.2006 he medically examined the accused and opined that there is nothing suggestive that the accused is not capable of performing sexual intercourse. He issued medico legal certificate, Ex. PW-13/A, qua the accused. Last in the series of medical evidence is the statement of PW-6, Shri Ram Tirath, Radiographer, Zonal Hospital, Bilaspur. He deposed that victim was referred to Dr. Santosh Dindra (PW-1) for determination of her age. She X-rayed the victim and handed over X-ray films Ex. P-7 to P-11 to Dr. D. Dhangal for giving opinion qua age.

9. The second leg of evidence relates to the statements of non-official witnesses. The most important witness in this segment is complainant, PW-2 Shri Ramesh Kumar, who is father of the victim. He, in his statement, has deposed that he works as Peon in Public Works Department, Mandi, and on the day of occurrence, i.e., 29.09.2006, he was on leave. As per this witness, on the day of occurrence he along with his wife, Shyma, brother, Ram Pal, and Rameshwari, was working in the maize field. Around 04:30 p.m. when he came to his house, he saw the accused running from a room of his house, where the victim was weeping. He further deposed that he took the victim in his lap and found her *pajama* (lower) opened and lying on the bed. The victim weepingly disclosed to him that the person who ran away, after opening her *pajama* and his pants, was doing mischief with her. The victim further disclosed that the accused applied his sputum on her private part and on his penis and started forcible intercourse due to which she started weeping. PW-2 has further deposed that subsequently his brother, wife and *bhabhi* also came on the spot and villagers also gathered there. Thereafter, a report was lodged and the victim was medically examined. Police visited the spot on 30.09.2006. As per this witness, police photographed the spot and bed sheet was taken into possession, vide memo Ex. PE, which bears his signatures. Shirt, Ex. P-2, and *pajama,* Ex. P-3, were also taken into possession by the doctor in the hospital. This witness, in his cross-examination, has deposed that his brother has two children and he also has two children, however, on the day of occurrence the other children were in the school and only child of 1½ years was sleeping in the room. He further deposed that his mother, who is around 50 years of age, also resides with him. He has denied that the accused had come to the house of one Bhuri Singh (PW-15). They were not in talking terms with the accused.

10. PW-3, Shri Ram Pal, brother of the complainant, deposed that on 29.09.2006 he alongwith the complainant, his wife, Rameshwari Devi and *bhabhi,* Shyama Devi, was working in the maize field. As per this witness, the complainant went to the house for keeping the maize and he also went to the house. His brother told him that the accused ran away from the room around

04:30 p.m. and the victim was weeping, as the accused attempted to sexually assault the victim. Thereafter, a report was lodged and the victim was referred for medical examination. On the subsequent day police visited and clicked photographs of the spot. Bed sheet, Ex. P-6, was also taken into possession. This witness, in his cross-examination, has deposed that his mother also resides in the same house and she raised hue and cry. He admitted that they are not in talking terms with Bhuri Singh (PW-15). PW-4, Smt. Kanta Devi, who is aunt of Shri Ramesh Kumar (PW-2), deposed that on 29.09.2006, around 04:30 p.m., a boy was running from the house of the complainant. She identified the accused in the Court as the same boy who was found running on that day from the house of the complainant. This witness is a hearsay witness and has portrayed the occurrence in the same manner as that of PW-2. She has also deposed that she was informed about the occurrence by PW-2, Ramesh Kumar. She feigned ignorance as to who has disclosed to PW-2, Ramesh Kumar, qua the attempt of sexual assault by the accused on the victim. Ex. P-6, bed sheet was taken into possession by the police, vide memo Ex. PE, which bears her signatures. This witness, in her cross-examination, has deposed that she reached the spot within two minutes and at that time only Ramesh Kumar (PW-2), his mother and the victim were there.

11. PW-5, Smt. Shyama Devi, who is mother of the victim, deposed that on the day of occurrence she alongwith her husband (PW-2), *jaith,* Dharam Pal and his wife, Rameshwari, was working in the maize field. She has supported the version of PW-2, Ramesh Kumar and narrated the occurrence in the same manner as that of PW-2. In fact, this witness is also a hearsay witness, as she herself deposed that when she reached the house, the occurrence was disclosed to her by PW-4, Smt. Kanta Devi. This witness, in her cross-examination, has deposed that on that day her mother-in-law was present in the house. She also deposed that they are not in talking terms with Shri Bhuri Singh (PW-15). PW-14, Shri Devia, deposed that on 07.10.2006, the police, vide memo Ex. PW-14/A, which bears his signatures, procured date of birth certificate of the victim from the Panchayat Secretary. PW-15, Shri Bhuri Singh, deposed that on 28.09.2006 the accused had come to his house for harvesting. As per this witness, the accused stayed for a night and on 29.09.2006, around 10/11 a.m., he left his house. This witness, in his cross-examination, deposed that complainant party is not in talking terms with them and they have inimical relations. He has further deposed that the complainant party can go upto any extent due to enmity. PW-16, Shri Raj Kumar, deposed that on 30.09.2006 police had come to their village and seized a bed sheet, vide memo, Ex. PE, which bears his signatures. The bed sheet was handed over by Shri Ramesh Kumar (PW-2) to the police. This witness, in his cross-examination, has deposed that he has good relations with the complainant party.

12. PW-17, Shri Ram Lal, Assistant Secretary Panchayat, Gram Panchayat Namhol, deposed that he, on application, Ex. PJ, moved by the police, issued date of birth certificate of the victim, which is Ex. PK, as per which her date of birth is 25.03.2002. He has also issued copy of *pariwar* register, Ex. PL, which was taken into possession vide memo, Ex. PW-14/A, which bears his signatures.

13. The victim was examined as PW-20. The only eye witness to the occurrence, as portrayed by the complainant and other non-official witnesses, is the victim, but she, at the time of her examination, was only five years of age, so after testifying her competence, as a child witness, her testimony was recorded. As per the victim, her parents had gone to extract *kukrian* (maize crop) and she did not know the date, month and year when they had gone to fields. She was present in the room of her house. The testimony of the victim, in the case in hand is very material, so the same is extracted in verbatim as under:

"Que. When you were in the room, who came there?
Ans. The witness could not give any answer despite sufficient time was given to her.

Que. What was done with you?
Ans. I feel shame.

Que. Is that person present in the Court who had done shameful act?
Ans. Yes.

Que. Can you point out that person in the Court?
Ans. Yes. The witness pointed towards the accused present in the Court.

Que. What the accused present in the Court had done with you?
Ans. He had applied saliva (Thook).

Que. Where the saliva had been applied?
Ans. The witness did not answer despite having been afforded sufficient time.

Que. What happened thereafter?
Ans. Accused went away.

Que. Who came in the room later on?
Ans. My parents.

Que. What you had told to your parents?
Ans. No answer given despite sufficient time.

Que. Where you were taken?
Ans. I do not know."

The victim, in her cross-examination, has deposed that her *taya* has two children and they were present in the house on that day. As per the victim, her younger brother and her grand-mother were also present. Her mother was the first to arrive and subsequently *taya* arrived.

14. The last leg of evidence in the case in hand is testimonies of official witnesses, though much weight cannot be attached to official witness, as witness to the occurrence, i.e, the victim and other non-official witnesses gave evidence which is shabby and slippery.

15. PW-7, HHC Raj Kumar, deposed that Constable Vipin Kumar gave him *rukka* mark 'X', and he has taken the same to Police Station, Barmana, which he had handed over to MHC Jai Devi. On the basis of *rukka,* mark 'X', FIR was registered and MHC handed over to him the case file and he gave the same to Incharge Ram Dass, Police Post, Namhol. PW-8, HC Vipin Kumar, deposed that on 29.09.2006, around 07:15 p.m., complainant, Shri Ramesh Kumar, came with the victim to Police Post, Namhol and a report was lodged. He recorded the statement of the complainant in daily diary register. PW-9, HC Jagdish Chand, deposed that on 05.10.2006 HHC Amar Singh deposited the case property, i.e., a sealed parcel said to have contained a bed sheet, a parcel said to have contained wearables of the victim, a parcel said to have contained pants of the accused and two envelopes. On 06.10.2006 the entire case property was sent to FSL, Junga, vide RC No. 115/06, through Constable Sanjay Kumar and the receipt, after depositing of the case property in FSL, Junga, was handed over to him. As per this witness, the case property remained intact under his custody.

16. PW-10, SI Mool Raj, deposed that on 29.09.2006 Constable Raj Kumar (PW-7) brought *rukka,* Ex. PF, in Police Station Barmana, for registration of a case. After receipt of the same, FIR, Ex. PG, was registered, which bears his signatures. His endorsement on *rukka,* is Ex. PH. After registration of the case, the investigation was entrusted to Constable Raj Kumar by Incharge, Police Post, Namhol. PW-11, Shri Bhupidner Singh, Deputy Superintendent of Police,

B.B.M.B., Sundernagar, deposed that docket of the case property was signed by him and on completion of investigation ASI Ram Dass handed over to him the case file for preparation of *challan.* Thereafter, *challan* was prepared and presented in the Court. PW-18, Constable Sanjay Kumar, deposed that on 06.10.2006, MHC Jagdish Chand handed over to him three parcels, vide RC No. 115/06, sealed with seal impression 'A' and he deposited the same in FSL, Junga, on the same day and receipt was handed over to MHC Jagdish Chand on 07.10.2006.

17. PW-20, ASI Ram Dass, Investigating Officer, deposed that on 29.09.2006, complainant (PW-2) alongwith his brother, Ram Pal, and his daughter (victim) lodged a report, which was entered in daily diary No. 17, Ex. PF, whereupon FIR, Ex. PG, was registered in Police Station Barmana. As per this witness, the victim was medically examined and her medico legal certificate, Ex. PA, was obtained. He visited the spot on 30.09.2006 and the place of occurrence was identified by Shri Ramesh Kumar (PW-2) and Shri Ram Pal (PW-3). He prepared spot map, Ex. PN, and bed sheet on the bed was photographed. The bed sheet was seized, vide memo Ex. PE, and sealed with three seals having impression 'A', in presence of witnesses Shri Raj Kumar (PW-16) and Smt. Kanta Devi (PW-4). He recorded the statements of the witnesses. The accused was arrested and medically examined. Medico legal certificate of the accused, is Ex.PW-13/A. He has further deposed that clothes of the victim and the pants of the accused were also taken into possession by the Medical Officer and were sealed separately in parcels and these parcels were deposited with MHC, Police Station Barmana. Date of birth certificate of the victim, Ex. PK, was procured from the concerned Panchayat by moving application, Ex. PJ. On 18.11.2006, forensic analysis report, Ex. PB, was received, thereafter, the case file was handed over to SHO, Barmana, for preparing *challan.* This witness, in his cross-examination, has deposed that at the time of occurrence the children of the brother of the complainant (PW-2) were present in the house alongwith their mother. He has further deposed that accused is close relative of Shri Bhuri Singh (PW-15).

18. After exhaustively discussing the evidence, which has come on record, and after its analysis on the parameter of veracity some major loopholes can easily be identified. PW-20 (victim) deposed that at the time of alleged occurrence two children of her *taya,* her younger brother and her grand mother were present in the house. The victim has categorically stated that her mother arrived at the first instance and thereafter her *taya,* Ram Pal, came. This fact is in contrast to the prosecution story, as in the prosecution story it has come that firstly father of the prosecutrix reached on the spot and later on, on hearing hue and cry from the house, her mother reached there. FIR, Ex. PG, reveals that accused tried to do sexual intercourse by putting his penis into the vagina of the victim and due to this reason the victim started weeping. The versions of PW-2, Shri Ramesh Kumar (complainant), PW-4, Smt. Kanta Devi, and PW-5, Smt. Shyama Devi, are akin to the prosecution story, but the statements of these witnesses do not match with the statement of PW-20 (victim), as the prosecutrix only deposed that accused has put his sputum on her. She did not say anything that the accused tried to put his male organ into her private part. The statement of the victim further draws strength from statement of Dr. Santosh Dindra (PW-1), who has ruled out any possibility of sexual intercourse. PW-1 did not find any signs of violence on the person of the victim. Had there been any attempt to do forcible sexual intercourse with the victim, injuries were bound to have occurred. The statement of PW-1, ruling out possibility of any sexual intercourse, is further fortified by report of Chemical Analysis, Ex. PB, which clearly ruled out any attempt of committing rape on the victim.

19. The case of the prosecution is not that the accused ran away from the spot as the witnesses or the complainant have reached there, but it is the case of the prosecution that the acused had otherwise left the spot. Thus, it remains unexplained facet of the prosecution story that why the accused only after applying sputum, as stated by the victim, left the place. Had there been any hue and cry, the grand-mother of the victim, who was in the house, which is a small house, could have come to the room where the victim was, but strangely there is nothing on record why the grand-mother, whose presence in the house now stands established, did not come to the spot of occurrence. Thus, the presence of other children and grand-mother in the house at the time of occurrence and for unexplained reason of grand-mother's not coming to the spot of

occurrence, which is inside the same small house, goes to the root of the prosecution case and also shakes the whole tree of the prosecution story.

20. In an attempt to commit rape, the accused in the entire sequence tries to extinguish his lust upon the victim despite the intensity of resistance, but from the statements of the victim (PW-20), Dr. Santosh Dhindra (PW-1) and from the Chemical Analysis Report, Ex. PB, it cannot, by any stretch of imagination, be said that the accused was compulsive to have sexual intercourse with the victim and furthermore it remains inexplicable that what prevented him to commit rape on the victim.

21. The evidence in the case in hand further establishes that the relationship between the complainant party and Shri Bhuri Singh (PW-15) was strained. PW-15, Shri Bhuri Singh, categorically deposed that on 28.09.2006 the accused stayed in his house and on 29.09.2006, around 10/11 a.m. he left his house. Admittedly, the occurrence took place on 29.09.2006, around 04:30 p.m. and no plausible explanation is coming forth that in the interregnum the accused remained where. The evidence further demonstrates that the complainant party and Shri Bhuri Singh (PW-15), in whose house the accused had come, had bitter and inimical relations, thus, there is strong presumption of foisting a false case against the accused by the complainant party just to feed their hunger of animosity. The evidence which has come on record clearly demonstrates that the accused came out running from the house of the complainant and at that time other children and grand mother of the victim were present in the same house. Had there been entry of the accused in the house of the complainant on the day of occurrence and upon hearing the cries of the victim firstly the grand-mother and other children, who were present in the house, would have come to see the victim. Thus, there is strong possibility of victim's being tutored. Apparently, testimony of the victim does not inspire confidence and her statement is not of such a quality which alone could be termed sufficient for holding the accused guilty. Likewise statements of other key prosecution witnesses also do not inspire confidence. Thus, the prosecution has failed to prove beyond reasonable doubt the guilt of the accused and in these circumstances, the benefit of doubt goes to the accused and he cannot be held guilty.

22. The learned counsel for the respondent has placed reliance upon the following judicial pronouncements:

1. ***Caetano Piedade Fernandes & another vs. Union Territory of Goa, Daman & Diu Panaji, Goa, (1977) 1 SCC 707;***
2. ***State of Madhya Pradesh vs.Ramesh and another, (2011) 4 SCC 786; &***
3. ***Radhey Shyam vs. State of Rajasthan, (2014) 5 SCC 389.***

23. The Hon'ble Supreme Court in ***Caetano Piedade Fernandes and another vs. Union Territory of Goa, Daman & Diu Panaji, Goa, (1977) 1 SCC 707,*** held that testimony of a child witness aged six years should be approached with great caution. Apt para of the judgment (supra) is extracted hereunder for ready reference:

> ***"5. Turning first to the evidence of Xavier, it may be pointed out straightway that he was a child witness aged only 6 years at the time when he gave evidence. His evidence is, therefore, to be approached with great caution. He was, according to the prosecution, the only eye-witness to the crime. We have carefully gone through his evidence, but we are constrained to observe that even after making the outmost allowance in his favour in view of the fact that he is a child witness, we find it difficult to accept his testimony. There are several contradictions from which his evidence suffers, such as who had which weapon, but it is not merely on account of these contradictions of a minor character that we are inclined to reject his evidence. There are serious infirmities affecting his evidence and of them, the most important is that he is supposed to have given the***

name of appellant No. 2 as the assailant of the deceased even though he had never seen him before the date of the incident. He stated in his evidence that when on seeing the appellants dragging the body of the deceased after attacking him, he ran towards the village, he met his father Antonio on the way and on being questioned by Antioni, he said that the deceased had been cut be Lundi and Jacki Chaddo, that is appellants Nos. 1 and 2. However, in cross-examination, he admitted that he had not seen appellant No. 2 earlier and it was only at the time when appellant No. 2 attacked the deceased that he saw appellant No. 2 for the first time. Apprehending that the answer given by him in cross cross-examination may be the result of some confusion or misunderstanding, the learned Sessions Judge gave another opportunity and asked him whether he was knowing appellant No. 2 from before, to which he answered by saying that he had not seen appellant No. 2 at any earlier point of time. Now, if this witness had never seen appellant No. 2 before, it is impossible to understand how he could give his name as the assailant of the deceased when he met Antonio on the way to the village. How could he say that Jacki Chaddo had participated in the attack on the deceased when he had never seen Jacki Chaddo before. This answer given by Xavier clearly impairs the value of his evidence and casts a serious doubt on his veracity. It shows that he had been prevailed upon by the prosecution to falsely implicate appellant No. 2 and if his evidence in regard to the presence of appellant No. 2 cannot be accepted, it must react adversely against his evidence in regard also to appellant No. 1. There is also one other contradiction of a serious nature in the evidence of Xavier. He stated in his evidence that each of the two appellants dealt one blow: appellant No. 2 cut the throat of the deceased first with the coita and then appellant No. 2 cut his neck with the knife. Now, if only one blow was delivered by each of the appellants, there would be two injuries on the deceased, but the medical evidence shows that the deceased had received as many as nine injuries, which would mean that more than two blows were given to him. Then again, according to Xavier, his father Antonio sent him back home with Santana Costs and alone proceeded to the place where the body of the deceased was lying. That was also the evidence of Antonio. But it is difficult to believe that Antonio would send Xavier home with Santana Costa and proceed alone to find out the dead body of the deceased when he did not know the place where the offence was committed nor was he informed by Xavier as to where the dead body of the deceased was lying. Would he not take xavier with him in order that Xavier may show him the place where the deceased had been killed, instead of going on a chase for hunting out the dead body of the deceased in the forest? Would he also not prefer to take Santana Costa with him rather than go alone to the spot where his father had been done to death? The only explanation given by Antonio for not taking Santana Costa with him was that Santana Costa was afraid of going with him, but that is hardly an explanation which can carry conviction. Santana Costa was his servant and it is difficult to believe that he would refuse to go with his master. However, turning back to the evidence of Xavier, we find that in the committal court Xavier narrated an entirely different story. There he stated that he accompanied his father Antonio back to the scene of offence and showed him the place where the deceased had been assaulted and then Antonio walked to the place where the dead body of the deceased was lying. When Xavier was confronted with this statement made by him in the committal court, he first refused to admit that he had made such a statement, but then he

accepted it. This contradiction is again of a very serious nature and we do not think it would be safe at all to rely on the testimony of Xavier.

The judgment (supra) is fully applicable to the present case and we are also of the opinion that testimony of a child witness of tender age is to be sieved with great caution.

24. The Hon'ble Supreme Court in ***State of Madhya Pradesh vs. Ramesh and another, (2011) 4 SCC 786,*** has held as under:

> ***"7. In Rameshwar S/o Kalyan Singh v. The State of Rajasthan, 1952 AIR(SC) 54, this Court examined the provisions of Section 5 of Indian Oaths Act, 1873 and Section 118 of Evidence Act, 1872 and held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the Court considers otherwise. The Court further held as under:***
>
> > ***"11. ...it is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate."***
>
> ***8. In Mangoo & Anr. v. State of Madhya Pradesh, 1995 AIR(SC) 959, this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.***
>
> ***9. In Panchhi & Ors. v. State of U.P., 1998 AIR(SC) 2726, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that***
>
> > ***"the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."***
>
> ***10. In Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra, 2008 AIR(SC) 1460, this Court dealing with the child witness has observed as under:***
>
> > ***"10. '... 7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may***

resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

11. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: Himmat Sukhadeo Wahurwagh & Ors. v. State of Maharashtra, 2009 AIR(SC) 2292).

12. In State of U.P. v. Krishna Master & Ors., 2010 AIR(SC) 3071, this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

13. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: Gagan Kanojia & Anr. v. State of Punjab, 2006 13 SCC 516).

14. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully

with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

... ...

23. The Trial Court after taking note of rulings of various judgments of this Court as what are the essential requirements to accept the testimony of a child witness held as under:

"In the present case, statement of child witness gets affirmed by the circumstances of the incident, facts and from the activities of the other witnesses carried out by them on reaching at the place of occurrence. Thus, on the basis of above-said law precedents, statement of witness Rannu Bai not being unreliable in my opinion are absolutely true and correct.....Statement of child witness Rannu Bai gets affirmed by the statements of Munna and witness Hannu and from the medical evidence. Therefore, facts of the above-stated law precedents are not applicable to the present case."

In view of the above, it is evident that the statement of Rannu Bai (P.W.1) is affirmed by the statements of other witnesses, proved circumstances and medical evidence. Her deposition being precise, concise, specific and vivid without any improvement or embroidery is worth acceptance in toto."

Certainly, every witness is competent to narrate what has happened, however, indeed Courts have power to declare a witness incompetent due to tender age, extreme old age, disease etc. The Court can always reject the statement of a child witness of witness's being instructed or tutored, as in the present case. In the case in hand, there is strong presumption, gathered from the evidence, of victim's being tutored, so her statement cannot be made sole basis for convicting the accused. The judgment (supra), in essence, is fully applicable to the facts and circumstances of the case.

25. In ***Radhey Shyam vs. State of Rajasthan, (2014) 5 SCC 389,*** the Hon'ble Supreme Court, vide paras 11 and 12, has held as under:

"11. In Ratansinh Dalsukhbhai Nayak, this Court considered the evidentiary value of the testimony of a child witness and observed as under:

"7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are

pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

12. In Panchhi (Panchhi v. State of U.P., (1998) 7 SCC 177), after reiterating the same principles, this Court observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy pray to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. We will scrutinize PW-2 Banwari's evidence in light of the above principles."

The judgment (supra) amplifies the facet qua close scrutiny of a child witness to rule out the possibility of tutoring. It has also been held therein that Courts must find adequate corroboration to child witness' evidence. In the case in hand, there is strong presumption of victim's being instructed or tutored and her version, as discussed hereinabove, is in contrast to the statements of other key prosecution witnesses, so the same cannot form sole basis for convicting the accused. The judgment (supra) is fully applicable to the facts of the present case.

26. Keeping in view the evidence, which has come in the case in hand, and the law, as enumerated above, and also taking into consideration the testimonies of the witnesses, this Court finds that it is not reasonably possible to conclude that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. Even after re-appreciating the evidence and the record in totality we are of the considered view that the case of the prosecution is full of suspicions and certainly suspicions cannot supplant proof, thus, taking into consideration all what has been discussed hereinabove and also the fact that the statements of father (PW-2) and mother (PW-5) are not confidence inspiring, this Court finds that there is no reason to interfere with the well reasoned judgment of acquittal passed by the learned Trial Court.

27. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate courts while dealing with an appeal against an order of acquittal:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

28. Keeping in view what has been discussed hereinabove, in a nut shell it is more than safe to hold that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. Thus, there is no occasion to interfere with the well reasoned judgment of the learned Trial Court, as such the appeal, which sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, stand(s) disposed of accordingly.

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

Sunder Lal & others .....Petitioners/Defendants.

Versus

Hari Dass and another .....Respondents/Plaintiffs.

CMPMO No. 92 of 2016.
Reserved on : 7th September, 2017.
Date of Decision: 21st September, 2017.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Application for interim injunction was filed for restraining the respondents from cutting and removing the trees grown upon the suit land and causing any interference with the same- Trial Court passed an order of status quo qua the nature and possession of the suit land- appeal was filed, which was allowed and the defendants were retrained from interfering with the suit land- held that applicants are recorded as owners in possession in the revenue record which carries with it a presumption of correctness- no evidence was led to displace this presumption- applicants have prima facie arguable case in

their favour - the Appellate Court had rightly granted the injunction and rightly reversed the order of the Trial Court- appeal dismissed. (Para-2 to 5)

For the Petitioners: Mr. Raman Prashar, Advocate.
For the Respondents : Mr. Vijay Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

During the pendency of Civil Suit No. 21/1 of 2014, an application cast under the provisions of Order 39, Rules 1 and 2 of the CPC was preferred by the plaintiffs/applicants/respondents herein, before the learned trial Court, wherein, they sought a prayer for the defendants, "during" the pendency of the civil suit, being temporarily restrained from cutting or removing trees grown upon the suit land and from causing interference vis-a-vis the suit khasra numbers. The learned trial Court upon considering the respective contentions of the parties at lis, hence directed them to, till the disposal of the civil suit, hence maintain status quo qua the nature and possession of suit khasra numbers. Being aggrieved therefrom, the plaintiffs/respondents herein by preferring an appeal before the learned Addl. District Judge-II, Solan camp at Arki, hence concerted to beget its reversal. The learned Additional district Judge-II, Solan, camp at Arki allowed the appeal and set aside the verdict rendered by the learned trial Court also made a pronouncement, that till the disposal of the civil suit the defendants' being temporarily restrained from interfering, carrying out digging and construction activities over the suit land. The defendants/petitioners herein being aggrieved therefrom, hence, instituted the instant petition before this Court.

2. Apparently, the learned Appellate Court, had, proceeded to mete deference to the jamabandi(s) vis-a-vis suit khasra numbers. In the relevant jamabandies, vivid reflections occur in respect of the plaintiffs/respondents herein being borne therein, as, owners-in-possession of suit khasra numbers. With the defendants not yet adducing cogent evidence for displacing the presumption of truth attached to the aforesaid jamabandis appertaining to the suit khasra numbers, whereupon, alone the presumption of truth imputed to them would beget erosion. Corollary whereof, is, of the presumption of truth enjoyed by the apposite reflections occurring in the apposite jamabandis appertaining to the suit khasra numbers, meriting imputation of reverence thereto, as aptly done by the learned first Appellate Court. The aforesaid inference erected by this Court, does, leverage concomitant inference of (a) prima facie the plaintiffs establishing qua theirs being entitled to the relief of temporary injunction as prayed for in the application cast under the provisions of Order 39, Rules 1 and 2 of the CPC also (b) in case it is refused theirs being entailed with irreparable loss or injury and (c) the balance of convenience being loaded vis-a-vis the plaintiffs than vis-a-vis the defendants.

3. Be that as it may, with the presumption of truth enjoyed by the apposite entries occurring in the revenue records appertaining to the suit land, whereupon, they hence at this stage prima facie establish, of, the plaintiffs being entitled to the relief afforded to them besides with the aforesaid triplicate principles begetting satiation, thereupon, the learned first Appellate Court, has meted an apt deference to the relevant records, besides has aptly affirmatively applied vis-a-vis the plaintiffs, the aforesaid triplicate tests. Consequently, the impugned order recorded by the learned Appellate Court, does not, beget any stain of its either discarding germane relevant evidence or any taint of the learned first Appellate Court not applying the cardinal tests thereon. In sequel, the order of the learned appellate Court, does not, suffer from any gross perversity and absurdity of mis-appreciation of the relevant material on record.

4. The learned counsel appearing for the petitioners/defendants, had, during the course of addressing arguments before this Court, alluded to the factum of the entries appertaining to the suit khasra numbers, as, borne in the revenue record standing subjected, to,

an assault vis-a-vis their validity(ies), by the defendants comprised in theirs instituting subsequent to the instant civil suit, civil suit No. 71/1 of 2014. However, with the defendants' suit, wherein they cast a challenge vis-a-vis the validity(ies) of the entries borne in the revenue records appertaining to the suit khasra numbers, standing, evidently instituted subsequent to the instant suit, thereupon, obviously the might or the rigor of the principle of res subjudice embodied in Section 10 of the CPC looses its vigour, nor is attractable hereat nor any pronouncement made upon the application cast under the provisions of Order 39, Rule 1 and 2 of the CPC, during the pendency of the plaintiffs' suit bearing No. 21 of 2014, would also not beget any vitiation(s) arising from its standing rendered despite pendency prior thereto of the defendants' suit, especially when only upon the defendants' suit being instituted prior to the extant suit, would render any pronouncement upon the extant application cast under the provisions of 39, Rules 1 and 2 of the CPC, to beget vitiatory attraction(s) of the principle of res subjudice enshrined in Section 10 of the CPC besides emphatically when in consonance therewith any pronouncement, made upon the instant application, during pendency of prior thereto instituted suit, of the defendants, rather contrarily enjoins, of, the latter instituted suit, being ordered to be stayed. Contrarily also when the application, cast, under the provisions of Order 39 Rules 1 and 2 of the CPC , as, stood instituted in the defendants' suit bearing C.S. No. 71 of 2014, hence sequelled an order from the learned trial Court, that, till the final disposal of the main suit, the litigating parties maintaining status quo qua the suit land, whereas, the learned Appellate Court in an appeal preferred there before, by the aggrieved defendants (plaintiffs herein), reversing the aforesaid order, rather proceeding to record an alike pronouncement/order as made upon Civil Misc. Appeal No. 10 AK/13 of 2015 . Also this Court while deciding CMPMO No. 85 of 2016 as arises from the Civil Misc. Appeal No. 11AK/13 of 2015, proceeding to record the hereinafter extracted observations:-

> "The impugned order dated 24.12.2015 passed by learned Additional District Judge-II, Solan, District Solan, H.P., camp at Arki in Civil Mis. Appeal No. 11AK/13 of 2015, titled as Hari Dass and others Versus Surat Ram alias Surtia & others, is self speaking. The defendants have been retrained temporarily from interfering, dispossessing and alienating the suit property. The petitioners herein are not the defendants, as such, no interference is required in the present petition, so filed under Article 227 of the Constitution of India. However, liberty is reserved to the petitioners to seek clarification from the concerned Court or file a fresh petition on the same cause of action, if need so arises subsequently"

5. A reading whereof makes it clear of this Court, not, interfering with the orders recorded by the learned First Appellate Court in Civil Misc. Appeal No. 11AK/13 of 2015 rather it reserving liberty vis-a-vis the petitioners herein to seek clarification(s) from the concerned Court or to subsequently file a fresh petition on the same cause of action, if need so arises. Consequently, no affirmative reliance can be placed upon the aforesaid judgement. It appears that the learned First Appellate Court had accorded akin relief(s) in both Civil Misc. Appeal No. 11Ak/13 of 2015 and in Civil Misc. Appeal No.10AK/13 of 2015. However, the learned Appellate Court in Civil Misc. Appeal No. 11AK/13 of 2015 appear(s), to by sheer typographical mistake, occurring in the last page of the order recorded a stray sentence "restraining the defendants", therefrom no capital can be derived by the petitioners herein, especially when it is in conflict with its trend of reasoning besides appears to conflict with the sentences occurring prior thereto, wherein rather the Appellate Court concerned has allowed the appeal of the appellants/defendants arising from orders pronounced in a CMA instituted during the pendency of Civil Suit No.71/1 of 2014.

6. For the foregoing reasons, the instant petition is dismissed and the impugned order is maintained and affirmed. No order as to costs. All pending applications also stand disposed of.

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

Sushil Kumar .....Petitioner.
Versus
Sham Kumar & others .....Respondent.

CMPMO No. 507 of 2015.
Reserved on : 05th September, 2017.
Date of Decision: 21st September, 2017.

H.P. Panchayati Raj Act, 1994- Section 41- A claim was filed for share in the rental received from the Bharti Televenture Limited regarding the tower raised upon the land jointly owned and possessed by the claimants- Gram Panchayat passed an order and held the claimants entitled for the rental- held that in view of Section 41 of H.P. Panchayati Raj Act, 1994, Gram Panchayat cannot entertain any lis, subject matter of which exceeds Rs. 2,000/- but Section 53 permits a person to institute a case- claimants had initiated the proceedings and the bar of Section 41 will not apply to it- petition dismissed. (Para-3 to 5)

For the Petitioners: Mr. Sunny Modgil, Advocate.
For Respondents No. 1 & 2 : Ms. Ambika Kotwal, Advocate.
For Respondent No.3: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Under Annexure P-2, one Kamla Devi, for herself besides for her son one Sham Kumar, claimed from petitioner Susheel Kumar, also her son, a share in the rental(s) received by the latter from M/s Bharti Televenture Limited, in respect of the latter raising a tower upon land jointly owned and possessed by the claimants/respondents herein and by the petitioner herein. On hearing the parties at contest, the Gram Panchayat concerned proceeded, to, record an order on 21.07.2012, in respect of apposite conjoint entitlement(s) of the claimants vis-a-vis "rental(s)<' received by the petitioner herein from M/s Bharati Televenture Limited, in respect of the towner erected upon the land comprised in khasra No.3303.

2. The learned counsel appearing for the petitioner has contended that the order pronounced by the Gram Panchayat concerned, being vitiated with a stain of, its, infracting the principle of natural justice, especially when the petitioner herein was, not, heard nor obviously was given any opportunity to project his stand before the Gram Panchayat concerned. However, the aforesaid submission is not valid, given a perusal of the relevant proceedings, held by the Gram Panchayat concerned upon the petition at hand, making a vivid disclosure, of, the petitioner herein being summoned by the Gram Panchayat concerned, whereafter, he proceeded to record his presence before the Bench of the Gram Panchayat concerned. Consequently, the order recorded on 21.07.2012 by the Gram Panchayat concerned, is, not stained with the aforesaid vice. The aforesaid order(s) was/were sustained/affirmed by the learned Civil Judge, (Sr. Division), Court No.1, Amb. The objection aforesaid reared therebefore by the petitioner herein also, stood, for valid alike herewith reasons, hence, rejected by the aforesaid.

3. The learned counsel appearing for the petitioner has alluded to the provisions occurring in Section 41, of, The Himachal Pradesh Panchayati Raj Act, 1994 (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter:-

> "**41. Extent of jurisdiction**.(1) The jurisdiction of a Gram Panchayat shall extend to any suit of the following description if its value does not exceed two thousand rupees:

(a) a suit for money due on contract other than a contract in respect of immovable property;

(b) a suit for the recovery of movable property or for the value there of;

(c) a suit for compensation for wrongfully taking or damaging a moveable property;

(d) a suit for damages caused by cattle trespass; and

(e) a suit under clauses (f) and (i) of sub-section (3) of section 58 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (8 of 1974).

(2) Notwithstanding anything contained in sub-section (1), the State Government or the prescribed authority may, by notification in the Official Gazette, extend the pecuniary jurisdiction of Gram Panchayat to five thousand rupees in respect of any or all the suits of the description mentioned in sub-Section (1)."

wherein, there is a statutory bar against the Gram Panchayat(s) entertaining any lis, subject matter whereof exceeds to Rs.2,000/-, thereupon, he contends that with the subject matter of the lis set up by the claimants/respondents herein, before, the Gram Panchayat concerned, holding a value of more than Rs.2000/-, thereupon the order recorded thereon by the Gram Panchayat concerned, hence suffering from a vice of jurisdictional disempowerment. However, the aforesaid submission warrants rejection, as, it has been made by the learned counsel for the petitioner herein, from his gross unawareness vis-a-vis provisions occurring in Section 53 of the Act, provisions whereof stand extracted hereinafter:-

"**53. Institution of suits and cases**.-(1) Any person may institute a case, a suit or a proceeding before a Gram Panchayat by an oral or written application to the Pradhan, or in his absence to the Up-Pradhan, of the Gram Panchayat and shall at the same time pay the prescribed fee. The Himachal Pradesh Court Fees Act, 1968(8 of 1968)shall not apply to Gram Panchayat except as may be prescribed.

(2) In every suit the plaintiff shall state its value."

also is made in isolation therefrom, significantly when, therein liberty is preserved vis-a-vis the aggrieved, to, file a case or a suit or proceedings, before, the Gram Panchayat concerned either by an oral or written application addressed to the Pradhan or in his absence to the Up-Pradhan of the Gram Panchayat concerned. Since, liberty is reserved to the aggrieved, to, apart from instituting a case or a suit, to, also in the statutory manner institute proceedings before the Gram Panchayat concerned, thereupon, with the aggrieved in consonance therewith rearing a proceeding before the Gram Panchayat concerned, conspicuously also with apparently, the proceedings comprised in Annexure P-2, not, tantamounting to institution of a suit or rearing of a case by the aggrieved, thereupon, the bar engrafted in Section 41 of the Act is rendered not attracted vis-a-vis, it, especially when the mandate thereof, covers, only a suit instituted by the aggrieved before the Gram Panchayat concerned, whereas, it excludes proceedings alike the one reared by the claimants. Since, as aforetstated, the aggrieved constituted proceeding or a case before the Gram Panchayat concerned, whereas they did not rear a suit therebefore, thereupon, the bar enshrined in Section 41 of the Act, is, squarely not attracted qua the proceedings instituted by the aggrieved.

4. The learned counsel appearing for the petitioner has also contended that the bar of limitation enshrined in Section 46 of the Act, provisions whereof stand extracted hereinafter:-

"46. Limitation.-Every suit instituted before a Gram Panchayat after the period of limitation prescribed therefor in Schedule-IV shall be dismissed, even though limitation has not been set up as a defence:

Provided that in computing the period of limitation prescribed for any suit the time during which the plaintiff has prosecuted with due diligence the suit against the defendant in any court shall be excluded where such suit is founded upon the

same cause of action and was prosecuted in good faith in a court which from defect of jurisdiction or any cause of like nature was unable to entertain it."

was attracted vis-a-vis the suit reared by the aggrieved, before the Gram Panchayat concerned. Again the aforesaid submission of the learned counsel appearing for the petitioner, is fallacious given its being founded upon the counsel for the petitioner misconstruing qua the aggrieved instituting a suit before the Gram Panchayat concerned. A first glance at the provisions of Section 46 of the Act per se make(s) a visible display of their mandate being attracted vis-a-vis suit(s), whereas, with the aggrieved rearing a proceeding or a case before the Gram Panchayat concerned hence, with both being "not a suit" within the ambit of Section 46 of the Act, thereupon, the period of limitation prescribed under Article -2, of Schedule -IV, appended to the "Act" is rendered not attracted vis-a-vis the proceedings initiated by the aggrieved against the petitioner herein.

5. For the foregoing reasons, there is no merit in the instant petition and it is dismissed accordingly. In sequel, the impugned orders are maintained and affirmed. No order as to costs. All pending applications also stand disposed of .

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

Girish Sharma ...Petitioner.
Versus
Madan Manta ...Respondent.

CMPMO No. 195 of 2017
Date of decision: 3/10/2017

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Applicant filed an application for restraining the respondent from raising any construction in violation of Municipal Laws and provisions of HP Town & Country Planning Act and for restraining the respondent from throwing wastewater on the land of the applicant- application was allowed the respondent was restrained from raising construction in violation of the by-laws and from throwing the wastewater on the land of the applicant- appeal was filed, which was allowed and the order passed by Trial Court was set aside- held that Appellate Court had concluded on the basis of sanctioned building plan that construction was being raised on the land owned and possessed by respondent - even if, there is some deviation from the building plan, it is for the Sanctioning Authority to look into the matter- Appellate Court had rightly reversed the order of the Trial Court- appeal dismissed.

(Para-2 to 4)

For the petitioner: Mr. Bimal Gupta, Sr. Advocate with Ms. Kusum Chaudhary, counsel.
For the respondent: Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The plaintiff instituted a suit for permanent prohibitory injunction wherein he claimed the hereinafter extracted reliefs:-

a). the defendant is restrained from raising construction in violation to Municipal Laws and provisions of HP Town & Country Planning Act and rules and regulations made thereunder on the land in question and specially without leaving open set back area within the land in question.

b). Defendant is directed to remove all types of constructions raised in whatsoever shape or manner in and upon the open setback area and further to remove all types of illegal construction whatsoever raised may be raised on the land in question.

c). The defendant is directed to make suitable and scientific drainage and sewerage discharge system and arrangement so that no waste or any other type of discharge of effluent waste water sewerage water or any other type of discharge flows from the land in question towards in and upon the suit land.

d). Defendant is restrained from causing from any type of nuisance, loss, injury and further from doing any such act which may in any manner whatsoever may cause any type of prejudice to the peaceful user, rights, title and interest of the plaintiff over and qua the suit property including civic and natural amenities, either himself or through his assigns contractors, relatives and other person claiming through him.

2. During the pendency of the suit, before, the learned trial Court, the plaintiff filed an application cast under the provisions of 39 rule 1 and 2 read with Section 151 CPC, wherein he sought relief of ad-interim(s) injunction being pronounced upon defendant-respondent herein. The ad-interim relief(s) prayed for in the application, cast, under the provisions of 39 rule 1 and 2, were, limited to restraining the defendant/respondent herein from raising any construction in violation to the Municipal Laws, H.P.Town and Country Planning Act and Rules and Regulations and was also for restraining the defendant from throwing waste water onto the land of the plaintiff. The learned trial Court upon the aforesaid application recorded an order whereby it restrained the defendant, from, raising construction upon the land owned and possessed by him, if, it is raised in violation of the by-laws also the defendant, was, till the civil suit is adjudicated upon hence restrained from throwing waste water onto the land of the plaintiff. The defendant being aggrieved therefrom, instituted an appeal before the learned First Appellate Court. The learned First Appellate Court in its impugned pronouncement set-aside the order recorded by the learned trial Court. The plaintiff is aggrieved therefrom hence has instituted the instant petition before this Court.

3. The learned First Appellate Court, had, while making the impugned order, ad-extenso, alluded to the building plan sanctioned vis-à-vis the defendant, by the competent sanctioning authority. The learned First Appellate Court had also made a conclusion that since all the relevant material(s) vividly displayed of the defendant completing construction of a three storied structure, upon, the land owned and possessed by him, hence it would be a wholly redundant exercise, to restrain the defendant from raising construction upon the land owned and possessed by him. The learned counsel for the petitioner/plaintiff herein has contended with vigour, that the learned First Appellate Court in making the aforesaid observation has not heeded to the building plan sanctioned by the competent authority wherein permission was accorded to the defendant to raise 2 and half storey(s). However, even if the learned First appellate Court has not heeded to the apposite building plan in respect whereof approval was accorded by the competent authority, yet the appropriate remedy in respect thereof, would not, be of the defendant being restrained, significantly when he has completed construction(s), rather if he has digressed from the building sanction(s) accorded to him, the plaintiff would be at liberty to make appropriate motion(s) before the learned trial Court, for seeking impleadment, of the competent authority(s) also for casting all apposite averments, in the plaint in respect of digression(s) deviation(s), made, by the defendant from the building approval(s) accorded by the competent authority. Obviously also the learned trial Court, would, if it accept(s) the aforesaid endeavourers, of, the plaintiff, be enjoined to strike issues also to permit both the contesting parties to lead thereon their respective evidence(s). Since the aforesaid endeavour(s) constitute the most befitting concerts, for adoption by the plaintiff, for undoing the purported digression(s) made by the defendant from building approval(s), thereupon at that stage the order recorded by the learned First Appellate Court whereby it on the trite anvil, of, the relevant construction standing already completed, hence invalidated the reason assigned by the learned trial Court, for

thereupon the latter restraining the defendant from raising construction upon the suit property, does not, suffer from any infirmity and absurdity. Moreover, it does not also suffer from any illegality or from any material irregularity.

4. The learned counsel for the plaintiff has contended with vigour that the learned trial Court, had, correctly restrained the defendant from throwing waste water upon the suit property, hence the learned first appellate court ought not to have negated the aforesaid relief. However, the relief accorded by the learned trial Court in respect of the defendant being restrained from throwing waste water onto the property of the plaintiff, apparently, is not borne nor founded upon the report of the Local Commissioner(s) or upon certain admission(s) made by the defendant in his pleadings. Consequently, with the aforesaid relief not being rested upon any tangible material hence its according by the learned trial Court, is, inappropriate rather its negation by the learned First Appellate Court is valid. According, I find no merit in the petition. Petition dismissed. No costs.

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

Smt. Guddi Devi and others .....Applicants/Appellants

Vs.

The Nankhari Tehsil Co-Op. M&C Union and another .....Non-pplicants/Respondents

CMP(M) No. 2081 of 2016 in FAO.
Reserved on: 20.9.2017
Decided on : 03.10.2017.

Workman Compensation Act, 1923- Section 4- Commissioner passed an award granting the interest from the date of application and not from the date of accident- award was silent regarding the entitlement of the claimants for interest- held that it has been laid down by Hon'ble Supreme Court repeatedly that interest has to be awarded from the date of accident and not from the date of award- Law declared by the Hon'ble Supreme Court is binding on all courts within the territory of India- Tribunal was bound to follow the Law laid down by Hon'ble Supreme Court- claimants are entitled to interest from the date of accident which will remain payable till the date of payment- there was no necessity of filing the appeal – application disposed of with this clarification. (Para-6 to 11)

Cases referred:

Pratap Narain Singh Deo vs. Srinivas Sabata (1976) 1 SCC 289

Manju Sarkar and others vs. Mabish Miah and others (2014) 14 SCC 21

Saberabibi Yakubbhai Shaikh and others vs. National Insurance Company Limited and others (2014) 2 SCC 298

For the applicants/appellants : Mr. Daleep Singh Kaith, Advocate.

For the non-applicants/respondents : Mr. J.N. Kanen, Advocate, for respondent No.1.
Mr. Jagdish Thakur, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

CMP(M) NO. 2081 of 2016

By medium of this application, the applicants/ appellants have sought condonation of 2430 days delay that has crept-in in filing of the appeal.

2. As regards the main appeal, the same is directed against the award dated 3.8.2009 passed by learned Commissioner, under Workmen's Compensation Act (SDM), Rampur Bushahr, District Shimla, H.P. in Case No. 3-XXXI/99 whereby the learned Commissioner assessed the compensation in the following manner:

1. Name of deceased	:	Sh. Man Singh
2. Date of accident	:	4.03.1996
3. Date of death	:	7.05.1996
4. Date on which compensation due	:	8.6.1996
5. Monthly wages	:	3000/- per month ½ i.e.1500/- P.M.
6. Age at the time of death	:	38 years
7. Relevant factor	:	189.76
8. Compensation	:	1500/-x189.76=Rs.2,84,640/-
9. Interest @ 12% w.e.f. 8.6.96 to 3.8.2009 (102 months 26 days)	:	$\frac{284640x12x102.26months}{100x12}$=2,91,072/-
10.Total compensation	:	Rs.2,84,640+2,91,072/-= Rs.5,75,712/-

3. Evidently, the learned Commissioner while passing the award has granted interest only from the date of filing of the petition and not from the date of the accident. That apart, the award is conspicuously silent with regard to the entitlement of the claimants for interest in the event of the failure of the Insurance Company to deposit the compensation within 45 days of passing of such award.

4. Admittedly, the Insurance Company did not deposit the award amount within the stipulated period, constraining the petitioners to file an application under Order 21, Rule 41(1) (2) read with Section 151 CPC.

5. In this background, two questions arise for consideration:

(i) From which date the claimants are entitled to interest ?

(ii) Whether in absence of any further directions with regard to deposit of compensation amount within the stipulated period and consequences thereof would mean that the claimants are not entitled for interest on the award amount beyond this period?

6. As regards the first question, the legal position is no longer *res integra* in view of the four-Judge Bench decision rendered by the Hon'ble Supreme Court in ***Pratap Narain Singh Deo vs. Srinivas Sabata (1976) 1 SCC 289*** wherein it has been clearly held that the compensation including interest has to be paid from the date of accident and not from the date of the award.

7. In ***Manju Sarkar and others vs. Mabish Miah and others (2014) 14 SCC 21*** the Hon'ble Supreme Court has held that in absence of clause in contract of insurance excluding provision for interest, the Insurance Company is liable to pay the interest and it was held as under:

> *"13. A contention was raised by the learned counsel for the respondent No.3, Insurance Company that they are not liable to pay the interest component and reliance was placed on the decision of New India Assurance Co. Ltd. vs. Harshadbhai Amrutbhai Modhiya (2006) 5 SCC 192. In the facts of the case on which the said decision arose, the contract of insurance entered into between the parties contained a proviso that the insurance granted is not extended to include any interest. In the present case there is nothing on record to show that*

respondent No. 3, Insurance Company either pleaded about existence of such a clause in the contract of insurance or led any evidence to the said effect and hence the said decision will not help Respondent No.3 in any way and the contention raised is devoid of merit."

Thus, it is evidently clear that the amount of interest has to be paid from the date of accident and not from the date of award.

8. Now, as regards the second question in ***Saberabibi Yakubbhai Shaikh and others vs. National Insurance Company Limited and others (2014) 2 SCC 298*** the Hon'ble Supreme Court has held the appellants to be entitled to 12% interest from the date of the accident and it was observed as under:

"8. We have perused the aforesaid judgment. We are of the considered opinion that the aforesaid judgment relied upon by the learned counsel for the appellants is fully applicable to the facts and circumstances of this case. This Court considered the earlier judgment relied upon by the High Court and observed that the judgments in the case of National Insurance Co. Ltd. v. Mubasir Ahmed (2007) 2 SCC 349 and Oriental Insurance Co. Ltd. v. Mohd. Nasir, (2009) 6 SCC 280 were per incuriam having been rendered without considering the earlier decision in Pratap Narain Singh Deo case (supra). In the aforesaid judgment, upon consideration of the entire matter, a four-judge Bench of this Court had held that the compensation has to be paid from the date of the accident.

9. Following the aforesaid judgments, this Court in Oriental Insurance Company Limited v. Siby George and others (2012) 12 SCC 540 reiterated the legal position and held as follows: (SCC pp. 545-46, paras 11-13)

"11. The Court then referred to a Full Bench decision of the Kerala High Court in United India Insurance Co. Ltd. v. Alavi(1998) 1 KLT 951, and approved it insofar as it followed the decision in Pratap Narain Singh Deo.

12. The decision in Pratap Narain Singh Deo was by a four-judge Bench and in Kerala SEB vs. Valsaka K. (1999) 8 SCC 254 by a three-judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But the earlier decisions in Pratap Narain Singh Deo and Valsala K. were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir.

13. In the light of the decisions in Pratap Narain Singh Deo and Valsala K., it is not open to contend that the 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. The decisions in Mubasir Ahmed and Mohd. Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala K. do not express the correct view and do not make binding precedents."

10. In view of the aforesaid settled proposition of law, the appeal is allowed and the judgment and order of the High Court is set aside. The appellants shall be entitled to interest at the rate of 12% from the date of the accident. No cost."

9. It is more than settled that Article 141 of the Constitution of India reads thus:

"141. Law declared by Supreme Court to be binding on all Courts. *- The law declared by the Supreme Court shall be binding on all courts within the territory of India."*

10. A bare reading of Article 141 of the Constitution of India brings into sharp focus its expanse and its all pervasive nature. Article 141 of the Constitution of India unequivocally indicates that the law declared by the Hon'ble Supreme Court shall be binding on all Courts within the territory of India.

11. In such circumstances, this Court has no difficulty in concluding that there was virtually no necessity for the appellants to have filed the instant appeal as all the Courts including the Tribunal below are bound to follow the law laid down by the Hon'ble Supreme Court. Thus, the claimants, as a matter of right, were entitled to interest from the date of the accident and not from the date of filing of the petition and once the liability to pay the interest commences from the date of the accident, then obviously the same would continue till the same is not discharged. Therefore, even in absence of any further directions to the respondents to deposit the award amount, the liability of the respondents to pay the compensation alongwith uptodate interest at the rate of 12% from the date of accident would continue till the same is not paid.

12. In view of the aforesaid discussion, there was virtually no need for the claimants to have filed the present appeal and the award passed by the learned Tribunal below will essentially have to be read in a manner as indicated above. The application is disposed of in the aforesaid terms, so also the pending application.

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

Inder Verma alias Raju .....Appellant

Versus

State of Himachal Pradesh .....Respondent

Criminal Appeal No. 71 of 2009

Decided on: October 3, 2017

Indian Penal Code, 1860- Section 304- Deceased was constructing house of the accused on contract basis – the labourers employed by the deceased did not report for work on which the accused made inquiries from the deceased as to why the labourers had not arrived for construction work – the accused started giving beatings to the deceased- the deceased fell down – he was taken to Hospital and was declared brought dead – the accused was tried and convicted by the Trial Court- held in appeal that none of the prosecution witnesses had specifically stated that they had seen the accused giving blows on the head of the deceased- they admitted that deceased had lost balance and fallen down on the stairs, which probablizes the version of the defence that deceased had sustained injuries by way of fall- PW-1 and PW-2 turned hostile and did not support the prosecution version – there are major contradictions in the testimony of PW-3 and she has given a different version in the Court – the Trial Court had wrongly relied upon her testimony to record conviction – the medical evidence does not connect the accused to the injuries- prosecution version was not proved beyond reasonable doubt in these circumstances- appeal allowed- accused acquitted. (Para-9 to 32)

Cases referred:

C. Magesh and others versus State of Karnataka (2010) 5 SCC 645

State of UP versus Ghambhir Singh & others, AIR 2005 (92) Supreme Court 2439

Pawan Kumar and Kamal Bhardwaj versus State of H.P., latest HLJ 2008 (HP) 1150

For the appellant : Mr. Naresh K. Gupta, Advocate.

For the respondent : Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(Oral)*

Instant appeal under Section 374 CrPC, is directed against judgment of conviction dated 26.3.2009, passed by learned Sessions Judge, Chamba, in Sessions Trial No. 6 of 2008, whereby learned Court below, while holding accused guilty of having committed offence punishable under Section 304 IPC, convicted him to undergo rigorous imprisonment for five years and to pay a fine of Rs.10,000/- and in default of payment of fine, to further undergo imprisonment for six months.

2. Briefly stated the facts of the case, as emerge from record are that, one Shri Vijay Kumar, got recorded his statement under Section 154 CrPC, alleging therein that deceased Rajinder Kumar was a mason as well as a contractor, and he was constructing house of accused, Inder Verma, at village Udaypur on contract basis. On 5.6.2006, labourers employed by deceased Rajinder Kumar did not turn up for construction and, on that day, Rajinder Kumar was in the shop of PW-1 Vijay Kumar i.e. complainant, at Udaypur. Accused alongwith 5-6 persons, including his father, came to the shop of Vijay Kumar and asked Rajinder Kumar as to why the labourers did not turn up to carry out construction work at the site. Deceased told accused that since payment was not made to labourers, they did not turn up for work. Accused, after having heard aforesaid explanation rendered by deceased, started giving beatings to deceased Rajinder Kumar. Accused gave 2-3 blows with his head on the head of deceased, as a result of which, Rajinder Kumar fell unconscious on the spot. Complainant, Vijay Kumar, provided water to deceased, but it was not taken by him. Thereafter, accused alongwith other persons, took deceased to Satyam Hospital, Sultanpur in his vehicle, but unfortunately, he was declared brought dead. Doctors at Satyam Hospital, informed police telephonically with regard to death of Rajinder Kumar, whereafter, Inspector Jatinder Kumar reached the hospital to verify the fact. On the basis of aforesaid statement of Vijay Kumar, recorded under Section 154 CrPC, (Ext. PW-1/A), formal FIR Ext. PW-6/A came to be registered at Police Station, Sadar, Chamba, under Section 302 IPC, against the accused. On the request of police i.e. Ext. PW-5/A, a team of doctors conducted post-mortem examination of deceased at Zonal Hospital, Chamba. Since the team of doctors at Zonal Hospital, Chamba, was unable to find out the exact reason of death of deceased Rajinder Kumar, dead body was sent to Dr. Rajinder Prasad Government Medical College, Tanda, for expert opinion. Doctor Chanderdeep Sharma, posted as Junior Resident, after having conducted post-mortem examination, on the dead body of deceased Rajinder Kumar, gave his report stating therein that deceased died due to neurogenic shock due to ante mortem injury.

3. After completion of investigation, police presented *Challan* under Section 302 IPC against the accused before the Chief Judicial Magistrate, Chamba, who further committed the case to the learned Sessions Judge, Chamba. Learned Sessions Judge, Chamba, on being satisfied that prima facie case exists against accused, framed charge against accused for having committed offence punishable under Section 302 IPC, to which he pleaded not guilty and claimed trial.

4. Prosecution, examined as many as ten witnesses to prove its case. Accused in his statement recorded under Section 313 CrPC, denied the case of prosecution in toto and claimed himself to be innocent. Learned Sessions Judge, after having perused evidence collected on record by prosecution held accused guilty of having committed offence punishable under Section 304 IPC, for causing death of Rajinder Kumar and accordingly convicted and sentenced him, as noticed above.

5. Accused being aggrieved and dissatisfied with the judgment of conviction passed by learned Court below, has come before this Court, by way of instant proceedings seeking therein his acquittal after setting aside judgment of conviction recorded by the learned Court below.

6. Mr. Naresh K. Gupta, learned counsel representing the accused, while referring to the impugned judgment of conviction recorded by the learned Court below, vehemently argued that impugned judgment passed by the learned Court below is not sustainable in the eye of law, as the same is not based upon correct appreciation of evidence adduced on record by the prosecution and as such deserves to be set aside. Learned counsel representing the accused while inviting attention of this Court to the impugned judgment of conviction, strenuously argued that bare perusal of impugned judgment suggests that the learned Court below, while holding accused guilty of having committed offence punishable under Section 304 IPC, has not dealt with evidence in its right perspective, as a result of which, erroneous findings have come on record to the detriment of the accused, who is an innocent person. To substantiate his aforesaid arguments, Mr. Gupta, made this court to travel through the evidence led on record by the prosecution to demonstrate that prosecution was not able to prove beyond reasonable doubt that deceased Rajinder Kumar had died due to injuries allegedly inflicted upon his body by the accused, rather, there is ample evidence available on record, suggestive of the fact that deceased suffered injury after having fallen from stair case. Mr. Gupta, further contended that all the material prosecution witnesses i.e. PW-1, PW-2 and PW-3, who could be termed as spot witnesses, nowhere supported the case of prosecution, because, all of them categorically stated that deceased Rajinder Kumar, suffered injury while attempting to pick up a stone from the ground. Mr. Gupta, further contended that both the material prosecution witnesses i.e. PW-1 and PW-2, turned hostile and nowhere supported the case of the prosecution, save and except the factum with regard to quarrel, if any, between accused and deceased. Mr. Gupta, while making this Court to read the statement of PW-3, contended that no reliance, if any, could be placed upon version put forth by this witness, especially in view of material contradictions in her statement. While concluding his arguments, Mr. Gupta, contended that though there was no requirement at all for the police to get the re-post mortem done from Dr. RPGMC, Tanda after having received a conclusive report from Zonal Hospital, Chamba, but even otherwise, second report given by Dr. Rajinder Prasad Government Medical College, Tanda, could not be read in evidence, especially in view of the fact that the Doctor, who gave that opinion was not an expert on the subject. With the aforesaid submissions, Mr. Gupta, prayed that accused be acquitted of the charge framed against him under Section 304 IPC, after setting aside impugned judgment of conviction recorded by learned Court below.

7. Mr. M.L. Chauhan, learned Additional Advocate General, while refuting aforesaid submissions having been made by Mr. Gupta, learned counsel representing the accused, supported the impugned judgment of conviction recorded by the learned Court below and contended that there is no scope of interference with the judgment of court below, which is based upon correct appreciation of evidence adduced on record, as such, present appeal deserves to be dismissed. Mr. Chauhan, while referring to the statements of PW-1, PW-2 and PW-3, refuted the contentions of Mr. Gupta, that there are material contradictions in the statements of prosecution witnesses with regard to beatings given by accused. Mr. Chauhan, while referring to the statement of PW-3, strenuously argued that, all the prosecution witnesses categorically stated that there was a quarrel between the deceased and the accused, who, on the issue of payment of wages, gave head blow on the head of deceased, as a result of which, he (deceased) died. Mr. Chauhan, further contended that since doctors of Zonal Hospital, Chamba, were unable to give specific reason for death of deceased, dead body was sent for further examination to Dr. Rajinder Prasad Government Medical College, Tanda. Mr. Chauhan, further contended that PW-10 Dr. Chanderdeep Sharma, may not be an expert in the field of forensics, but it has specifically come in his statement that he remained posted as Registrar, Department of Forensic Medicines, Dr. RPGMC, Tanda from April, 2005 to January, 2008, as such, it can not be said that he did not have the sufficient experience in the field of forensic science. Lastly, Mr. Chauhan, contended that if statements of prosecution witnesses are read in conjunction, it clearly suggests that prosecution successfully proved on record, beyond reasonable doubt, that deceased died due to the injury caused to him by the accused, who admittedly, caused blow of head on the head of deceased, who later on died due to neurogenic shock.

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

9. As per prosecution story, on 5.6.2006, accused picked up quarrel with deceased Rajinder Kumar since labourers did not turn up for construction work. Accused gave 2-3 head blows on the head of deceased Rajinder Kumar, as a result of which, Rajinder Kumar, suffered severe injuries and fell unconscious on the spot. Prosecution, with a view to prove its case also placed on record, medical evidence in the shape of FSL report, Ext. PW-8/H, dated 11.8.2008, wherein, it was opined that deceased died due to neurogenic shock, due to ante mortem injury, whereas, accused, in his statement, under Section 313 CrPC, stated that no quarrel took place between him and deceased, rather, husband of PW-3 Raj Kumari had quarreled with him and he had pushed him out of shop. He further stated that on the date of alleged occurrence, he was in his shop at Udaypur. After having heard the noise of quarrel, he went to the place. He further stated that when quarrel had taken place, deceased Rajinder Kumar, went to lift a big stone and lost his balance, as a result of which, he fell on the stairs and became unconscious. He further stated that 8-10 persons were quarrelling at that time, and he could not state that who were those persons. In nutshell, case of the accused before the learned Court below was that deceased suffered injuries after having fallen on cemented stairs.

10. PW-1, Vijay Kumar deposed that deceased Rajinder Kumar was a mason, who was constructing house of accused on contract basis. On 5.6.2006, deceased came to his shop at Udaypur and apprised him about dispute pertaining to payment of wages by accused. He further stated that in the meantime, accused also came there and a brawl took place between accused and Rajinder Kumar, over the issue of payment of wages to the labourers. It has specifically come in his statement that both, accused and deceased, started exchanging blows on each other. As per PW-1, a few persons, present on the spot, made an attempt to stop the aforesaid persons, from fighting, but Rajinder Kumar fell unconscious in front of shop. Since aforesaid witness was not able to prove case of the prosecution, he was declared hostile and was allowed to be cross-examined by the Public Prosecutor. In his cross-examination, PW-1 admitted that deceased tried to lift a stone at the time of occurrence and he lost his control, and fell unconscious on the stairs. It has specifically come in his cross-examination that he did not see accused giving blows to the deceased Rajinder Kumar.

11. PW-2, Durgi Devi, i.e. wife of PW-1, Vijay Kumar, also did not support the prosecution case. She stated that she was inside the house, when she heard noise of quarrel. It has also come in her statement that when she came out of house, she saw accused and deceased scuffling with each other. This witness like PW-1 stated that she did not see accused giving blows to the deceased. This witness was also declared hostile and was cross-examined by the learned Public Prosecutor. But, even her cross-examination nowhere suggests that prosecution was able to extract something contrary to what she stated in her examination-in-chief. This witness also stated that Rajinder Kumar, deceased, tried to lift a stone and lost his balance and fell on stairs.

12. PW-3 Raj Kumari, who was allegedly present on the spot at the time of occurrence, supported the prosecution story that deceased Rajinder Kumar, was constructing the house of accused on contract basis. This witness deposed before the learned Court below that on the date of alleged occurrence, she came to shop of Vijay Kumar, to receive wages, where accused also came with 5-6 persons, in a vehicle. As per this witness, accused and deceased started quarelling with each other over the issue of payment of wages to the labourers. PW-3 further stated that accused gave head blows to the head of Rajinder Kumar and Rajinder Kumar fell unconscious on the spot. This witness, further deposed before the learned Court below that accused also gave knee blow on the ribs of deceased. As per this witness, water was provided to Rajinder Kumar, but he did not take the same since he was unconscious. Interestingly, this witness though denied that Rajinder Kumar fell on stairs, and became unconscious, but categorically admitted that Rajinder Kumar tried to lift stone but he could not lift the same.

13. Apart from PW-1, Vijay Kumar, PW-2 Durgi Devi, and PW-3 Raj Kumari, none of other prosecution witnesses were present on the spot, at the time of alleged occurrence, as such,

their statements may not be very relevant to determine the correctness and genuineness of the story put forth by the prosecution especially as far as beatings allegedly given by accused to deceased are concerned.

14. Conjoint reading of statements having been made by PW-1, PW-2 and PW-3, certainly compels this Court to agree with the contentions of Mr. Gupta, learned counsel representing the accused that none of prosecution witnesses specifically stated that they saw accused giving head blows to deceased.

15. True it is, that perusal of aforesaid statements having been made by these prosecution witnesses though suggests that quarrel took place between deceased and accused but, definitely there is no positive evidence available on record suggestive of the fact that accused gave blows on the head of deceased, rather, aforesaid prosecution witnesses in one way or other, have admitted that deceased, while making an attempt to pick up stone, lost his balance and fell on the cemented stairs. If the version put forth by these material witnesses is analyzed/examined, juxtaposing statement made by accused under Section 313 CrPC, there appears to be force in the defence taken by accused that deceased suffered injury after having fallen from stairs.

16. Otherwise also, if statements made by PW-1, PW-2 and especially that of PW-3 are read in their entirety, there appear to be major contradictions, which could not be ignored /brushed aside by the learned Court below, while determining the guilt of the accused.

17. True it is, contradictions minor in nature, can be overlooked by the Court while ascertaining correctness of story put forth by the prosecution, but major contradictions, if any, which create doubt with regard to correctness and genuineness of story of prosecution, can not be ignored and in that regard, benefit of doubt, if any, is required to be extended to the accused.

18. In the instant case, though PW-1 and PW-2 turned hostile, but on the request of Public Prosecutor, opportunity was granted to the prosecution to cross-examine these witnesses, but, as has been noticed above, cross-examination conducted on these witnesses, nowhere suggests that prosecution was able to extract from them that injuries caused on the person of deceased were caused by the accused.

19. In the case at hand, bare perusal of judgment of conviction recorded by the learned Court below, suggests that the deposition made by PW-3 Raj Kumari weighed heavily with the Court below, while holding accused guilty of having committed offence punishable under Section 304 IPC. At the cost of repetition, it is stated that even PW-3 Raj Kumari nowhere supported the case of prosecution, because, there are material contradictions in her statement with regard to infliction of injuries on the body of the deceased by the accused. PW-3, in her examination in chief stated that accused gave two-three head blows on the head of deceased and deceased fell unconscious on the spot. In her cross-examination, she admitted that Rajinder Kumar (deceased) tried to lift a stone, but he could not lift the same. Though this witness denied that the deceased Rajinder Kumar fell down from the stairs and became unconscious, but, if her statement recorded under Section 161 CrPC is perused, she has taken altogether a different stand before the learned Court below. PW-3, nowhere stated in her statement recorded under Section 161 CrPC, that she saw accused giving head blows to the head of deceased.

20. Similarly, she deposed before the learned Court below that she had got recorded in her statement given to the police that she was working in the house of accused in construction work but when confronted with the contents of her statement recorded under Section 161 CrPC, it was not recorded so. Similarly, she stated that she had got recorded in her statement given to the police that both, accused and deceased were quarrelling with each other, but it is not recorded so in her statement under Section 161 CrPC. Most importantly, she stated that she had got recorded in her statement given to the police that accused had given two head blows to the head of deceased, but nothing as such is recorded in her statement recorded under Section 161 CrPC. Similarly, in her statement before the Court below, PW-3 stated that accused gave knee blows on the ribs of the deceased, but no such statement was ever made by her to the police

under Section 161 CrPC. In her cross-examination, she categorically admitted that no conversation took place in her presence between Vijay Kumar and deceased. She further admitted that there are 8-10 stairs on the right side of the shop of Vijay Kumar and deceased fell down on the floor and not on stairs. She claimed that this fact was got recorded by her in her statement given to the police, but same was not recorded in her statement under Section 161 CrPC. Most importantly, in her cross-examination, she admitted that deceased tried to lift a stone but could not do so. She further admitted that it is correct to suggest that deceased fell down from 8-10 steps of stairs.

21. This Court, after having carefully perused the statement of PW-3, which has been heavily relied upon by the learned Court below, while holding accused guilty of having committed offence punishable under Section 304 IPC, is not inclined to agree with the contention of the learned Additional Advocate General, that the statement of PW-3 is cogent, reliable and confidence inspiring, rather, this Court, after having carefully gone through the records, has no hesitation to conclude that no reliance, if any, could be placed upon the statement of PW-3, but for material contradictions in her statement with regard to beatings allegedly given by the accused to deceased, Rajinder Kumar.

22. By now, it is well settled that in criminal trials, evidence of eye witnesses requires careful assessment and needs to be evaluated for its credibility. It has been repeatedly held by the Hon'ble Apex Court that fundamental aspect of criminal jurisprudence rests upon well established principle that, "*no man is guilty until proved so.*" Utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. It has been repeatedly held by the Hon'ble Apex Court that there must be a string that should join evidence of all the witnesses, thereby satisfying the test of 'consistency' in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on the touchstone of 'consistency'. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others versus State of Karnataka** (2010) 5 SCC 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
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> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> 46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.

23. Apart from above, this Court, after having carefully gone through the medical evidence led on record by the prosecution i.e. Ext. PW-10/B, finds substantial force in the arguments of learned counsel representing the accused that no reliance, if any, could be placed upon the medical opinion, rendered by PW-10, Dr. Chanderdeep Sharma, who was admittedly a Junior Resident /OBS, Gynaecology from PGI MER Chandigarh. Though, PW-10, in his statement stated that he remained posted as a Registrar, Department of Forensic Medicines, Dr. Rajinder Prasad Government Medical College, Tanda from April 2005 to January, 2008, but, admittedly, there is nothing on record suggestive of the fact that aforesaid witness was an expert in the field

of Forensic Science, rather, qualification described by him itself suggests that he was an expert in Gynaecology and not in forensic sciences.

24. In the case at hand, post mortem, at the first instance was conducted by a team of Doctors at Zonal Hospital, Chamba. PW-5, Dr. Subhash Chauhan, RH, Chamba, categorically stated that in the month of June 2006, he was posted as Medical Officer in Zonal Hospital, Chamba. On 6.6.2006, a Board of Doctors consisting of him and Dr. Devinder Kumar, conducted post-mortem examination on the body of deceased, after having received application from Police, Ext. PW-5/A. It would be appropriate to take note of the opinion rendered by him, which is as follows:

> "An average built body measuring 5-6" wearing black Checkdar white shirt, white Banyan, light brown underwear black shocks and shoes. There was no any external injury on the body seen. There was slight swelling over left cheek. Small cut on the left angele of mouth (1x.05 cms.). No ligature marks or signs of injury seen on the back.
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> On examining Cranium and spinal card, no external injury was seen on the skull (skull vault) opened and no any injury to meninges, bran mater, blood vesells could not be ascertained. Body of the deceased was send for expert opinion to R.P. Medical College, Tanda. On examining thorax, the walls, ribs, cattilages, pleaurac, larynx, and trachea, right lung, left lung were found normal. Heard was found empty chamber. Abdomen. On examination of abdomen-walls, Pharanyx, mouth, harynx and oesophagus were found normal. Stomach and its contents, small intestines and their contents, liver spleen and kidney were sent for chemical examination. Bladder was empty. Organs of generation external and internal were normal. Muscles, bones and joints were normal.
>
> Opinion. After post mortem of the body of the deceased, the cause of death could not be ascertained and the body of the deceased was send to department of Forensic Medicines, Dr. R.P. MC College Tanda for expert opinion. The viscera also send for Chemical analyst. The probable time that elapsed between injury and death was half an hour and between the death and post mortem, within 24 hours. The body of the deceased alongwith clothing, viscera handed over to Constable Chaman Lal no. 361 for expert opinion from Forensic Department, Dr. R.P.MC Tanda in a sealed cover containing 15 seals. I issued PMR Ex. PW.5/B which bears my signatures."

25. As per PW-5, cause of death could not be ascertained and accordingly, matter was referred to Dr. Rajinder Prasad Government Medical College, Tanda, for expert opinion. But, otherwise, perusal of report submitted by the aforesaid Doctor nowhere suggests that external injury, if any, on the skull of deceased was found by the team of doctors, rather, doctors at Chamba, categorically stated that on examination of cranium and spinal chord, no external injury was seen on skull and no injury was seen to the meninges, brain matter or blood vessels. Similarly, it was concluded that on examination of thorax, walls, ribs, cartilages, pleaurac, larynx and trachea, right and left lungs, they were found normal.

26. Once matter was referred to Dr. Rajinder Prasad Government Medical College, Tanda, post-mortem examination was expected to be conducted by an expert and not by a Junior Resident, who had done OBS in Gynaecology from PGI MER Chandigarh. Though the opinion, if any, given by aforesaid doctor, PW-3, has no relevance, but even if read and examined, it nowhere connects the accused with the injury allegedly caused to the body of the deceased, Rajinder Kumar. PW-10, in his opinion, PW-10/B, categorically stated that the findings retuned by the team of doctors at Chamba were consistent with the injuries mentioned in post-mortem report, dated 6.6.2006, except for the following injuries:

> "1. Reddish brown grazed abrasion right leg medial side 3 cm x 0.5 cms size.

2. Reddish brown grazed abrasions bilaterally on scrotem, 2 in no. each measuring 3 inch x 2 inch.

3. Contusion on right fronto tempro parietal region of scalp measuring 9 Cm x 8 Cms in size, reddish coloured.

4. Extradural haemorrhage 9 Cm. X 8 Cms size fronto tempo parietal region on right side, reddish coloured.

5. Intra Cerebrial haemorrhage in mid frontal intra cerebral region 3 Cm X 3 Cms. size in midline of brain, reddish in colour."

27. Save and except injury No.5, i.e. intra-cerebral haemorrhage in mid frontal intra cerebral region, none of the injuries is directly related to head injury. The aforesaid witness, in his cross-examination, categorically admitted that injury No.5 detailed in Ext. PW-10/B, is possible by fall and rolling over cemented stairs.

28. Though this Court, is of the clear view that no reliance, if any, could be placed upon the report, if any, rendered by PW-10, who was not a forensic expert, but, admission made by him in the cross-examination that injury at Sr. No. 5 could be caused due to fall and rolling over cemented stairs, lends support to the defence taken by the accused, who categorically stated that deceased suffered injury, after having fallen over cemented stairs.

29. At this stage, it may be appropriate to take note of the fact that PW-1, PW-2 and PW-3, all categorically stated before the Court below that deceased Rajinder Kumar, while making an attempt to pick up a stone, fell from the stairs and thereafter he had become unconscious.

30. After perusing the statements of the prosecution witnesses as well exhibits placed on record, two views are possible in the present case and as such, the petitioner-accused is entitled to benefit of doubt. The learned counsel for the accused has placed reliance on the judgment passed by Hon'ble Apex Court reported in **State of UP** versus **Ghambhir Singh & others**, AIR 2005 (92) Supreme Court 2439, wherein the Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

> "6. So far as Hori Lal, PW-1 is concerned, he had been sent to fetch a basket from the village and it was only a matter of coincidence that while he was returning he witnessed the entire incident. The High Court did not consider it safe to rely on his testimony because he evidence clearly shows that he had an animus against the appellants. Moreover, his evidence was not corroborated by objective circumstances. Though it was his categorical case that all of them fired, no injury caused by rifle was found, and, only two wounds were found on the person of the deceased. Apart from this PW-3 did not mention the presence of either PW-1 or PW-2 at the time of occurrence. All these circumstances do create doubt about the truthfulness of the prosecution case. The presence of these three witnesses becomes doubtful if their evidence is critically scrutinized. May be it is also possible to take a view in favour of the prosecution, but since the High Court, on an appreciation of the evidence on record, has recorded a finding in favour of the accused, we do not feel persuaded to interfere with the order of the High Court in an appeal against acquittal. It is well settled that if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred."

31. The Hon'ble Division Bench of this Court vide judgment reported in **Pawan Kumar and Kamal Bhardwaj** versus **State of H.P**., latest HLJ 2008 (HP) 1150 has also concluded here-in-below:-

> "25. Moreover, when the occurrence is admitted but there are two different versions of the incident, one put forth by the prosecution and the other by the

defence and one of the two version is proved to be false, the second can safely be believed, unless the same is unnatural or inherently untrue.

26. In the present case, as noticed hereinabove, the manner of occurrence, as pleaded by the defence, is not true. The manner of the occurrence testified by PW-11 Sandeep Rana is not unnatural nor is it intrinsically untrue, therefore, it has to be believed.

27.Sandeep Rana could not be said to have been established, even if the prosecution version were taken on its face value. It was pleaded that no serious injury had been caused to PW-11 Sandeep Rana and that all the injuries, according to the testimony of PW-21 Dr. Raj Kumar, which he noticed on the person of Sandeep Rana, at the time of his medical examination, were simple in nature.

32. Consequently, in view of detailed discussion made herein above, appeal is allowed and impugned judgment of conviction recorded by learned Court below is set aside. Accused is acquitted of the offence punishable under Section 304 IPC. Fine amount, if any, deposited by the accused, is ordered to be refunded to him. Bail bonds, if any, furnished by the accused are discharged.

Pending applications, if any, stand disposed of.

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

Nathpa Jhakri Project Corp. & Anr. ...Appellants

Versus

Shri Shibu ...Respondent

RFA No. 324 of 2010
Reserved on: 18.09.2017
Date of decision: 03.10. 2017

Land Acquisition Act, 1894- Section 18- The Reference Court awarded compensation of Rs.1 lac per bigha in respect of acquired land - the petition was dismissed in default and was restored after 10 years- it was contended that claimant was not entitled to interest for this period- held that petitioner had itself agreed to pay Rs. 1 lac per bigha for the acquired land and no fault can be found with the award- petition was dismissed in default on 28.9.1992 but was restored on 3.5.1993- evidence of the claimant was closed on 19.5.1995- petition was dismissed in default on 18.4.1998 and was restored on 24.6.2008 – a Reference petition cannot be dismissed in default and the Court had wrongly dismissed the same- however, claimant should have taken steps to bring this fact to the notice of the Court- there was delay of 9 ½ years in filing the application-the claimant is not entitled to the interest from the date when the petition was dismissed in default and the date of filing of restoration application – appeal partly allowed. (Para-3 to 19)

Cases referred:

Imrat Lal and others vs. Land Acquisition Collector and others, (2014) 14 SCC 133
Shankar vs. The State of Maharashtra & another, (2017) SCC Online Bom 7702
Khazan Singh (Dead) by LRs. vs. Union of India, AIR 2002 SC 726
Union of India vs. Shaukat Rai, 2010 (7) RCR (Civ) 2163
Union of India vs. B Kannagi, 2010 LawSuit (Mad) 2003
Parvathamma vs. Asstt. Commissioner-cum-Land Acquisition Officer, 2014 ILR (Kar) 146

For the appellants: Mr. Ramakant Sharma, Sr. Advocate, with Ms. Devyani Sharma and Mr. Basant Thakur, Advocates.
For the respondent: Mr. B. S. Attri, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Primarily, two points have been raised in the instant appeal assailing the award dated 27.08.2010 passed by the learned Additional District Judge, Kinnaur at Rampur, District Shimla, H.P. in Land Reference Petition No. 426-AR-4/95/92.

2. It is firstly averred that the Reference Court could not have awarded lump sum compensation of Rs. One lac per bigha and secondly, since the respondent-claimant (hereinafter referred to as the '**Claimant**') allowed his Reference Petition to be dismissed in default and got it restored only after about 10 years, therefore, he is not entitled to the interest for this period.

3. As regards the first contention, it would be noticed that the petitioner itself had agreed to pay Rs. One lac per bigha to all the claimants whose land has been acquired in the village Jhakri vide Award No. 10, dated 27.1.1991and therefore no fault can be found with this part of the award and the point is accordingly answered against the petitioner.

4. As regards the second contention, it would be noticed that the Reference in question was initially dismissed in default on 28.9.1992 and thereafter restored vide order dated 3.5.1993. Thereafter issues were framed on 17.8.1993, but no evidence was led by the claimant upto 24.11.1994, when the statements of two witnesses were recorded. Thereafter, the evidence of the claimant was closed vide order dated 19.5.1995. However, the case thereafter came to be dismissed in default on 18.4.1998 and application to have the same restored was filed more than 9 ½ years thereafter on 20.11.2007. The Reference ultimately came to be restored on 24.6.2008 i.e. after 10 years of its having been dismissed in default.

5. The learned counsel for the petitioner has vehemently argued that since the Reference Petition was dismissed on account of the fault of the claimant, therefore, he is not entitled to interest for the said period.

6. Reliance is placed on the judgment of the Hon'ble Supreme Court in ***Imrat Lal and others vs. Land Acquisition Collector and others, (2014) 14 SCC 133***, wherein even though the Hon'ble Supreme Court condoned the delay of 1110 days, however, the interest for this period was declined as is evident from para-15 of the judgment, which reads thus:-

> *"15. We appreciate the statement made by the learned Senior Additional Advocate General and hold that the appellants shall be entitled to enhanced compensation at the rate of Rs.1216 per square yard with other statutory benefits. However, it is made clear that the appellants shall not be entitled to interest for the period of delay i.e. 1110 days. The respondents shall pay the amount of enhanced compensation and other statutory benefits to the appellants within a period of six months from today."*

7. Reliance is further placed by the petitioner on the judgment of the Hon'ble Bombay High Court in ***Shankar vs. The State of Maharashtra & another, (2017) SCC Online Bom 7702***, wherein the Hon'ble Bombay High Court followed the judgment in ***Imrat Lal's case*** (supra) and held the claimant therein not to be entitled to interest on the amount enhanced by the Reference Court on account of delay in approaching the Court.

8. It would be noticed that in both the cases relied upon by the petitioner, the delay was on the part of the claimants in filing Reference Petition and it was on this count that even though the delay was condoned but the claimants therein were not entitled interest to the delayed period.

9. The proposition that a Reference cannot be dismissed in default and has to be answered by the Court in absence of the parties is no longer *res integra* in view of the judgment of the Hon'ble Supreme Court in ***Khazan Singh (Dead) by LRs. vs. Union of India, AIR 2002 SC 726***.

10. Similar question as posed before this Court was a subject matter of decision before the learned Single Judge of the Hon'ble Delhi High Court in ***Union of India vs. Shaukat Rai, 2010 (7) RCR (Civ) 2163,*** wherein after placing reliance on the judgment of Hon'ble Supreme Court in ***Khazan Singh's case*** (supra), it was observed as under:-

> *"4. Feeling aggrieved with the Award of the Reference Court only to the extent that it granted interest to the claimants even for the period when the Reference was not pending because of its dismissal-in-default, the Union of India has come up in appeal. Mr. Sanjay Poddar, learned counsel for the appellant, submitted that the Reference Court had while restoring the Reference, which was earlier dismissed in default due to nonappearance in the matter on behalf of the claimants seeking enhancement in compensation, specifically put a condition for restoration that the claimants in the event of succeeding finally in getting enhancement in compensation would not be entitled to get interest on the enhanced amount for the period during which the proceedings were not pending and that order was not challenged by the claimants and so the successor Judge could not have ignored that order and awarded interest for the period the Reference was not pending. Mr. Poddar submitted that the direction for payment of interest in the impugned order could not have been passed on the principles of res-judicata. It was also contended that the claimants having not challenged the earlier order of the Court disentitling them to get interest were estopped from claiming the same subsequently in the same proceedings since in fact it was impliedly on their representation to the Court that they would not claim interest if their Reference was restored, that the Reference was restored by the Court. It was also contended that even if the Reference could not have been dismissed in default, as observed in the impugned order and the Court could not have passed an order at the time of restoration of the proceedings that the claimants seeking enhancement in compensation would not be entitled to claim interest for the delayed payment even in the event of their succeeding finally, the claimants having not challenged that order can be said to have waived their right to get interest. In support of these submissions Mr. Poddar also cited some judgments of the Supreme Court which are, "Union of India v. Pramod Gupta (D) by LRs and Ors., 2005 7 Scale 187"; "Arjun Singh v. Mohindra Kumar and others, 1964 AIR(SC) 993"; "Satyadhyan Ghosal and ors. v. Smt. Deorajin Debi and another, 1960 AIR(SC) 941". One judgment of this Court, "Chander v. Union of India, 2005 122 DLT 517" was also cited in addition to some unreported decisions of this Court. Those decisions were given in RFA No. 517/1998(decided on 17/09/2007); RFA No. 623/1988, "Jagmohan and others v. UOI and others", 2006 131 DLT 374 = (decided on 25/07/2006); and in WP(C) No.1282/1978, "The Radha Soami Satsang Beas and Anr. v. The Delhi Administration and Anr." (decided on 15/10/2004).*
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> *5. On the other hand, learned counsel for the respondents supported the impugned decision of the Reference Court awarding interest to the respondents even for the period during which the Reference had remained dismissed and reliance was placed on the decision of the Supreme Court in "Khazan Singh (dead) by LRs. v. Union of India", 2002 1 SLT 387, which has been relied upon by the Reference Court also while holding that the Reference could not have been Union of India v. Shaukat Rai (D) Through Lrs (Delhi) dismissed in default and so for the fault of the Court the claimants could not be allowed to suffer by denying them the benefit of interest. Counsel also cited another judgment of the Supreme Court in "Jet Ply Wood Private Ltd. & Anr. v. Madhukar Nowlakha & Ors., 2006 2 SLT 518, wherein*

it was held that the Courts can act ex debito justitiae for doing real and substantial justice.

6. After giving my thoughtful consideration to the rival submissions and having gone through the judgments cited from both the sides I do not find any merit in this appeal filed by the Union of India. The grant of interest for the period during which the Reference had remained dismissed by the Reference Court in the final award has been impugned on the ground that the earlier order of the Reference Court passed while restoring the Reference had attained finality and subsequently while disposing of the Reference the learned Additional District Judge could not have recalled that order of the predecessor Judge since the principles of resjudicata get attracted in this fact situation. However, I do not find any merit in this contention. At the time when the Reference came to be restored by the Reference Court the question of grant or rejection of interest to the claimants was not the point in dispute between the parties and so there can be no question of applicability of the principles of res-judicata. The two judgments of the Supreme Court cited by Mr. Poddar in support of his contention regarding applicability of the principle of resjudicata do not help the appellant in any way since in those cases the question was not as to whether the Court can or cannot rectify its own mistake to prevent injustice being caused to one of the parties before it by invoking the maxim Actus curiae neminem gravabit. The Reference Court has in the impugned judgment relied upon the decision of the Supreme Court in Khazan Singh's case wherein it has been observed that a Reference cannot be rejected because of non-appearance of the parties and the Reference Court is supposed to give its award one way or the other whether the parties chose to appear in the matter or not. So, no fault can be found with the decision of the Reference Court in following the said judgment of the Supreme Court and preventing injustice being caused to the claimants because of the fault of the Court itself by denying them the benefit of interest on the enhanced compensation which invariably is awarded to the successful claimants seeking enhancement in compensation awarded by the Land Acquisition Collector. The following observations made in a Full Bench decision of this Court in the case of Chander v. Union of India which was cited by the learned counsel for the appellant himself also supports the view taken by me : "25. One has to bear in mind the distinction between inviting an order of the Court and the Court making an order of its own. In a case where the Court has made an order of its own of staying the proceedings, then the claimant should not be asked to suffer. In such a situation it was open to the other side to move the higher forum with the request to proceed with the matter so as to avoid the payment of amount of interest for the interregnum. In the case of M/s. Lekh Raj and Co. v. Union of India and Others, Civil Appeal No. 5690 of 1985 decided on 24.3.1992, the Apex Court in a somewhat similar situation, where the Court had stayed proceedings of its own and refused to grant interest during the interregnum for the period 17.11.1968 to 23.7.1974 as there was a stay order, pointed out that - "Though the grant of interest under Section 28 of the Land Acquisition Act is discretionary with the Court but in the facts and circumstances of this case, we are of the view that the discretion has wrongly been exercised by the High Court. A dispute of apportion of compensation under Section 30 of the Act is the progeny of the Act and since the Court thought to stay the proceedings for enhancement of compensation, the act of the Court in these circumstances could not go to prejudice the accrual of interest on compensation which was kept retained by the State in the interval". It is in view of this the Apex Court allowed interest for the period for which it was de- clined. On behalf of the Union of India it was submitted that in the instant case it is not an act of the Court, but the claimant being not certain about his entitlement made an application to the Court, inter alia, requesting to stay the proceedings, with a further condition that he would not claim the amount of interest and under these

circumstances the interest was denied and, therefore, the claimant is not entitled to claim any interest."

7. There is also no force in the argument of the learned counsel for the appellant that the claimants were estopped from claiming interest for the period during which Reference had remained dismissed because of their having not challenged the order passed by the Reference Court at the time of restoration of the Reference denying them the benefit of interest in advance. Learned counsel for the appellant had not stated before me that it was on the representation of the claimants that they would not claim interest in future even if they succeed that Reference Court passed the direction to that effect while restoring the Reference. So, there was no question of principle of estoppel also coming in the way of the claimants in claiming interest from the Reference Court when the stage to claim the same reached.

8. I have gone through all the judgments cited by Mr. Poddar and I find that none of them helps the appellant. In none of those decisions the question whether a Reference petition under Section 18 of the Land Acquisition Act can be dismissed because of non-appearance of the claimants had come up for consideration. In some of the decisions interest was denied to the claimants because on their request Reference proceedings were stayed by the Reference Court and for that reason it had been held that the claimants were not entitled to interest for the period the Reference proceedings had remained in abeyance at request of the claimants. In the present case, as noticed already, the claimants had not been instrumental in the delay caused in the disposal of the Reference petition. The delay occurred because of the fault of the Reference Court in dismissing the Reference petition for non-prosecution instead of deciding the same on merits and so the Reference Court did nothing wrong in giving the benefit of interest to the claimants while finally disposing of the Reference.

11. However, the learned Single Judge of Hon'ble Madras High Court in ***Union of India vs. B Kannagi, 2010 LawSuit (Mad) 2003***, case No. 455 of 2001 decided on 16.06.2010 while dealing with the case where the Reference had been dismissed in default on 11.04.1979 and was restored only on 02.11.1993, held that Principal District Judge was perfectly right in disallowing interest for the period between 11.04.1979 and 02.11.1993. It is apt to reproduce the relevant observation as contained in para - 23 of the judgment which reads thus:-

"23. For the said amount of enhanced compensation, in the normal circumstances, claimant shall be entitled to an interest from the date on which possession was taken for a period of one year @ 9% per annum and thereafter @ 15% per annum. However, since the respondent/claimant had allowed the LAOP to be dismissed for default on 11.04.1979 and the same was restored only on 02.11.1993, the learned Principal District Judge is perfectly right in disallowing interest for the said period between 11.04.1979 and 02.11.1993. But the learned Principal District Judge has chosen to award interest only from the date of restoration of the LAOP and the exclusion of the period from the date of possession up to the date of dismissal of the LAOP for default shall not be justified. The award was passed on 31.03.1978. There is no evidence regarding the date on which possession was taken by the government. Therefore, suffice to state that the respondent/claimant shall be entitled to an interest on the above said enhanced compensation for a period of one year from the date of possession @9% per annum and for the subsequent period @ 15% per annum and that the period between 11.04.1979 to 02.11.1993, during which period the LAOP stood dismissed for default should be excluded from the period eligible for calculation of interest as aforesaid."

12. To similar effect is the judgment of the learned Single Judge of Hon'ble Karnataka High Court in ***Parvathamma vs. Asstt. Commissioner-cum-Land Acquisition Officer, 2014 ILR (Kar) 146***, while dealing with a case wherein the original claimant died on

19.9.2010 and it was after about little over two years the legal representatives moved an application for impleading them as parties to the lis. The Reference Court dismissed the application merely on the ground that they had not produced the heirship certificate and had not offered any acceptable explanation for condoning the delay of two years. The Hon'ble Karnataka High Court allowed the petition by directing the petitioners to produce heirship certificates so as to satisfy the Reference Court. However, to balance equities and to ensure that the State exchequer does not suffer for no lapse on its part, it allowed the petition with a rider that if the parties herein (the legal representatives of the deceased claimant) succeed in getting the market value enhanced in the Reference even then they would not be entitled to the interest for the period from the death of the claimant till the date of the making of the three applications in question. Meaning thereby, that they would be entitled to the interest only for the period anterior to the date of the death of the claimant and posterior to the date of their making the applications seeking the impleadment. It is apt to reproduce relevant observations, which reads thus:-

> *"5. It is trite that when the lands are compulsorily acquired for a public purpose, the landowner is entitled to get the fair and just compensation. If the reference applicant does not prosecute the matter diligently or if he dies and his legal representatives do not make the necessary applications within the prescribed period, to come on record, the respondent's award, which is only in the nature of an offer, does not attain the finality. That amounts to approving of the respondent's award determining the market value. As held by the apex Court in the case of Khazan Singh (Dead) by Lrs. v. Union of India, 2002 2 SCC 242, the non-participation of a party would not confer jurisdiction on the Reference Court to dismiss the reference for default. It is impermissible to dismiss the reference for default.*
>
> *6. When once a reference is made under Section 18 of the L.A. Act, then the Reference Court is bound to issue notice to all the persons interested in the reference and proceed to determine the reference under Section 20 and make an award under Section 26 of the L.A. Act, even if the person at whose instance the reference is made, fails to appear before the Reference Court or fails to produce evidence in support of his evidence. The Madhya Pradesh High Court in the case of Mangi Lal v. State of M.P., 1991 AIR(NOC) 98 (MP) has held as follows:*
>
> > *It is manifest that when once a reference under S.18 of the Land Acquisition Act is made, then the Court has to make an award under S.26 of the Act even if the person at whose instance the reference is made fails to appear before the Court or fails to produce evidence in support of his petition. In a reference proceeding under the provisions of S.18 of the Land Acquisition Act there cannot be any dismissal or abatement of the reference proceeding. A proceeding under S.18 is not a proceeding under the Civil Procedure Code and, therefore even by virtue of S. 53 of the Land Acquisition Act it cannot be held that the provisions of the Code of Civil Procedure apply to the reference proceeding in all respect.*
>
> *7. I may usefully refer to this Court's decision in the case of M.S. Ramaiah and Others v. Special Land Acquisition Officer, 1974 AIR(Kar) 122 The relevant portions of the said judgment are extracted hereinbelow:--*
>
> > *3. ...When such a reference is made to the Court, it is the duty of the Court under the Act to determine the amount of compensation payable for the land or lands acquired. The Court has no jurisdiction to refuse to determine the amount of compensation even where the claimant remains absent or where he is present, fails to adduce evidence.... If on the basis of the data furnished in the award of the Land Acquisition Officer, the Court finds that the market value of the land has not been determined in accordance with settled principles of valuation, the Court has to determine the compensation in accordance with such principles on the basis of the data available on*

record. Therefore, the Court has to apply its mind and make an award and cannot blindly confirm the award of the Land Acquisition Officer.

8. It is also profitable to refer to this Court's decision in the case of Chandramouli @ Chandrakant & Another v. The Special Land Acquisition Officer,1999 2 KCCR 1129, wherein it is held that the Reference Court is legally bound to proceed to pass an award under Section 26 of the L.A. Act adjudicating the claimant's claim to the enhanced compensation, on the basis of whatever dependable material was available on record.

9. The Gujarat High Court's judgment in the case of Alihusain Abbasbhai and Others v. Collector, Panch Mahals, 1967 AIR(Guj) 118 is of immense value in deciding this case. It has this to say in paragraph No. 7 of its decision:--

> *7. It is, therefore clear, that when the applicant died during the pendency of the reference, the petitioners as the heirs and legal representatives of the applicant were entitled to make an application to the court for bringing themselves on record under Order 22 Rule 3 sub-rule (1). But the question is whether they were bound to make such application within any particular period. It is only if a time for making such application was limited by law that the failure to make such application within the time so limited could invite the penalty of abatement under Order 22 Rule 3 sub-rule (2). The controversy between the parties, therefore centered round the question as to whether any time was limited by law for the purpose of making an application by the heirs of a deceased applicant in a pending reference for bringing themselves on record.... It is, therefore, evident that a reference is neither a suit nor a deemed suit and Article 176 of the Limitation Act has, therefore, no application to it. If that Article does not apply, there is no other Article which can possibly be invoked on behalf of the Collector and it must be held that no time is limited by law for making of an application by the heirs of a deceased applicant for bringing themselves on record in the reference. Some reference was made to Article 181 which is a residuary Article providing a period of limitation for an application for which no period is provided elsewhere in the first Schedule but this Article provides a period of three years and even if it were applicable, the application of the petitioners in the present case for bringing themselves on record as heirs of Abbasbhai would be within time. The learned Civil Judge was, therefore, in error in holding that the reference had abated by reason of the petitioners having failed to make an application for brining themselves on record within a period of ninety days from the date of death of Abbasbhai and in dismissing the reference as having abated, he refused to exercise jurisdiction to entertain the reference which was vested in him by law.*

10. The denial of fixation of the fair market value and pinning down the legal representatives of the deceased claimant to the amounts awarded by the respondent Land Acquisition Officer is not in the letter and spirit of the provisions contained in Part III of the L.A. Act. While considering the L.R. applications, etc., the approach of the Reference Court should be liberal so as to effectuate the intents of the L.A. Act.

11. In the result, I quash the impugned order. The petitioners are directed to produce the heirship certificates, etc. to show and satisfy the Reference Court that they are the legal heirs of the deceased claimant. If there is still any doubt about their being the legal representatives of the deceased claimant, it is open to the respondent to collect the necessary materials and place them on the record of the Reference Court. If the Reference Court is satisfied that the parties herein are

indeed the legal representatives of the deceased claimant, it shall not throw them out only on the ground that they have made the time barred applications.

12. At the same time, it is also this Court's anxiety that the exchequer's interest should not suffer for no lapse on its part. To balance the equities and safeguard the interests of both the land-losers and of the Government, I deem it necessary and just to allow these petitions with the rider that if the parties herein (the legal representatives of the deceased claimant) succeed in getting the market value enhanced in L.A.C. No. 255/2006, they are not entitled to the interest for the period from the date of the death of the claimant till the date of the making of the three applications in question. It is made clear that they are entitled to the interest for the period anterior to the date of the death of the claimant and posterior to the date of their making the three applications. These petitions are accordingly allowed. No order as to costs.

13. It would be noticed that there is a conflict of opinion between the judgments of Hon'ble Delhi High Court on the one side and the Hon'ble Madras and Karnataka High Courts on the other side.

14. The Hon'ble Delhi High Court has held the action of the Reference Court in dismissing the Reference in default to be illegal on the basis of the judgment of the Hon'ble Supreme Court in ***Khazan Singh's case*** (supra). Therefore, the claimants therein were held entitled to the interest for the entire period when the Reference Petition was dismissed in default till the date of its restoration.

15. While the Hon'ble Madras High Court has though not taken note of ***Khazan Singh's case*** (supra) but has held the claimant to be dis-entitled for the interest for the period when the Reference Petition was dismissed for default till the same was restored. Whereas the Hon'ble Karnataka High Court after noticing the judgment of Hon'ble Supreme Court in ***Khazan Singh's case*** (supra) has taken into consideration the interest of the exchequer which according to it should not suffer for no lapse on its part and, therefore, to balance the equities and safeguard the interests of both the land-losers and of the government, the Court held the claimant to be not entitled to the interest for such period, in the event of the Reference Petition finally succeeding before the Reference Court.

16. To my mind, the view taken by the Hon'ble Karnataka High Court is more sound in law because even if the Reference Court could not have dismissed the Reference Petition in terms of ***Khazan Singh's case*** (supra), even then it is incumbent upon the claimant to have taken steps to have the petition restored within a reasonable time and delay of about nine and half years to move the application of restoration by no standard can be said to be reasonable.

17. That apart, it would be noticed that the judgment of the Hon'ble Supreme Court in ***Khazan Singh's case (supra)*** was rendered only on 24.1.2002 and earlier to that the legal position was in state of afflux and it was a common practice that all the Courts in absence of the claimant or his counsel, like any other petitions, the references were being dismissed in default for want of prosecution.

18. Therefore, following the ratio of the judgments laid down by Hon'ble Madras and Karnataka High Courts, I hold the claimant to be dis-entitled to the interest for the period when the Reference Petition was dismissed in default i.e. 18.04.1998 till date of the filing of the application for restoration i.e. 20.11.2007.

19. In view of the aforesaid discussion, the appeal is partly allowed. The appeal against the award of lumpsum compensation of Rs. One lac per bigha is dismissed, However, the appeal in so far as it relates to the grant of interest for the period when Reference Petition was dismissed in default till the date of filing of application for restoration i.e. 18.04.1998 to 20.11.2007 is set aside and the claimant/respondent is held dis-entitled to the interest for the said period.

20. The appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any, also stand(s) disposed of.

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

Ram Parkash .....Petitioner.

Versus

Anil Kumar & others .....Respondents.

Civil Revision No. 186 of 2016
Decided on : 3.10.2017

Code of Civil Procedure, 1908- Order 1 Rule 10- A civil suit seeking declaration regarding the invalidity of Will was filed- an application for impleadment was filed by the purchasers of the suit property, which was allowed- held that the transfer had taken place during the pendency of the suit – the purchaser would be affected by the decision in the suit – he has a right to be heard in support of his pleas and cannot be condemned unheard – the application was rightly allowed- petition dismissed.(Para-2 to 4)

Case referred:
Sarvinder Singh vs. Dalip Singh and others, 1997 (Suppl.) Civil Court Cases, page 50

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Basant Thakur, Advocate, vice counsel for respondent No.1.
Mr. Abhishek Raj, Advocate, vice counsel for respondents No.2 & 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The plaintiff propounded the testamentary disposition of the deceased testator, one Santosh Kumari, wife of late Sunder Dass, resident of Una, H.P. The plaintiff claimed a declaratory decree qua the aforesaid Will being declared to be validly executed. However, during the pendency of the suit before the learned trial Court, the suit property was alienated by the GPA of co-defendant No.3 Asha Rani vis-à-vis the latters' offsprings' namely Dinesh and Rajni Bala, consequence whereof being, of, an application cast under the provisions of Order 1 Rule 10 CPC standing instituted before the learned trial Court, wherein a prayer, was made, that the aforesaid alienees lis pendens being impleaded as parties to the lis, their impleadment being imperative, for ensuring a complete adjudication upon the entire gamut of the controversy, engaging the parties at contest. The aforesaid application was allowed by the learned trial Court, being aggrieved therefrom, the plaintiff has instituted the instant petition before this Court.

2. The learned counsel for the plaintiff has contended with vigor that the order under challenge before this Court, is ridden with a vice of illegality besides material irregularity, arising, from the factum of the learned trial Court remaining oblivious to the fact of impleadment of the alienees lis pendens, being neither just nor essential, nor theirs being either a necessary or a proper party. For carrying forward his submission, he has relied upon a judgment of Hon'ble Apex Court, rendered in ***1997 (Suppl.) Civil Court Cases, page 50 titled as Sarvinder Singh*** vs. ***Dalip Singh and others***, the relevant paragraphs 5 and 6 whereof are extracted hereunder:-

> "5. Having regard to the respective contentions, the question that arises for consideration is: whether the respondents are necessary or proper parties to the suit? It cannot be disputed that the foundation for the exclusive

right, title and interest in the property, the subject matter of the suit, is founded upon the registered Will executed by Hira Devi, the mother of the appellant as on May 26, 1952. The trial court noted that in a suit filed on a previous occasion by the appellant, the will was proponded as basis for an exclusive right, title and interest in the said property. He impleaded Rajender Kaur, one of the daughters of Hira Devi, to the suit along with two other sisters and suit came to be decreed by the trial Court on 29.3.1974. The decree became final. In view of those facts, the necessary conclusion that can be deduced is that the foundation for the relief of declaration in the second suit is the registered Will executed by Hira Devi in favour of the appellant on May 26, 1952. The respondents indisputably cannot challenge the legality or the validity of the will executed and registered by Hira Devi on 26.5.1952. Though it may be open to the legal heirs of Rajender Kaur, who was a party to the earlier suit, to resist the claim on any legally available to tenable grounds, those grounds are not available to the respondents. Under those circumstances, the respondents cannot, by any stretch of imagination, be said to be either necessary or proper parties to the suit. A necessary party is one whose presence is absolutely necessary and without whose presence the issue cannot effectually and completely be adjudicated upon and decided between the parties. A proper party is one whose presence would be necessary to effectually and completely adjudicate upon the disputes. In either case the respondents cannot be said to be either necessary or proper parties to the suit in which the primary relief was found on the basis of the registered Will executed by the appellant's mother, Smt. Hira Devi. Moreover, admittedly the respondents claimed right, title and interest pursuant to the registered sale deeds said to have been executed by the defendants-heirs of Rajender Kaur on 2.12.1991 and 12.12.1991, pending suit.

6. Section 52 of the Transfer of Property Act envisages that "during the pendency in any Court having authority within the limits of India of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose. "It would, therefore, be clear that the defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the Court. Admittedly, the authority or order of the Court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendens by operation of Section 52. Under these circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit."

3. On anvil of the aforesaid extracted relevant paragraphs 5 and 6, he submits that with theirs' encapsulating an absolute interdiction, against, impleadment in the apposite suit, of alienees lis pendens, given theirs attracting vis-à-vis them the doctrine of lis pendens, rendering hence perse void all alienation(s) lis pendens, even without a specific relief in respect of, it, being prayed to be quashed and set aside. For the aforesaid submission(s) addressed before this Court by the learned counsel for the petitioner, to hold vigor, he was enjoined to display, of, it falling in absolute tandem with the ratio decidendi encapsulated in the judgment relied upon by him, whereas, upon its incisive reading, its, unfolding its not expostulating the aforesaid either as an omnibus stare decisis nor as a ratio decidendi, thereupon this Court would be constrained to

reject his submissions. In summa for the hereinafter ascribed reasons, the Court is constrained to reject the espousals, of, the learned counsel for the petitioner. (a) The learned counsel for the petitioner inappropriately relying upon the aforesaid citation, to concomitantly, inaptly espouse of his submissions' embodying the ratio decidendi propounded in the judgment relied upon by him. (b) The judgment (supra) rendered by the Hon'ble Apex Court for its in tandem with his submission(s), hence propounding a vigorous ratio decidendi also its being rendered binding upon this Court, is enjoined to unveil, of, absolute similarity besides complete analogity existing also emerging inter-se the factual matrix therein vis-à-vis the facets at hand. Contrarily if there is a display of gross indistinctivity(s) inter-se the factual matrix prevailing therein vis-à-vis the facets prevailing hereat, thereupon the citation as relied upon by the learned counsel for the petitioner would be rendered inapplicable hereat.

4. Be that as it may, upon a cumulative reading of the judgment (supra) rendered by the Hon'ble Apex Court, along with, the factual matrix prevailing therein and the one prevailing hereat, for hence discerning, of, apt compatibilities making their emergence besides hence its propounding, in tandem, with the espousal of the counsel for the petitioner, a, binding principle of law, it, emanates (a) of, in the citation relied upon by the learned counsel for the petitioner, a binding declaratory decree being rendered in respect of validity of the Will propounded by the plaintiff herein, also therein, the apt pronouncement occurring earlier to the subsequently suit instituted by the alienees lis pendens. Obviously therein, the alienation(s) lis pendens, did not occur, during the pendency of the earlier suit, rather occurred during the pendency of the subsequent suit. Tritely hence the validity of the testamentary disposition, at stake thereat, stood, under binding judicial verdicts hence clinchingly rested, whereas hereat, the validity of the testamentary disposition propounded by the plaintiff herein, has not been, under any apt judicial verdict, hence firmly rested. (b) secondarily in the citation, relied upon by the learned counsel for the plaintiff, the alienees lis pendens are also not related to any of the party(s) to the lis, contrarily hereat the alienees lis pendens are offspring(s) of one of the co-defendants rendering hence eruption of a prima facie inference of the hereat transfer lis pendens, hence being collusive, for defeating the rights of the plaintiff vis-à-vis the suit property. (c) Since transfer(s) lis pendens hereat hence occur, in gross distinctivity vis-à-vis the factual matrix prevailing, in the citation (supra) relied upon by the learned counsel for the plaintiff, thereupon the learned counsel for the petitioner, cannot, contend that the Hon'ble Apex Court, has, therein firmly pronounced any principle of binding vigor, that, in all cases where alienations of suit property(s) occur lis pendens, thereupon the plaintiff being completely barred to seek impleadment of alienees lis pendens, in the civil suit nor it propound(s) any mighty legal principle, of, alienees lis pendens being not enjoined to be impleaded as party(s) to the lis, merely, when they attract upon themselves the principle of lis pendens contemplated in Section 52 of the Transfer of Property Act nor it expostulates any principle, that, ipso facto upon the aforesaid anvil, all alienation(s) lis pendens being nullified, without theirs being sought to be quashed and set aside. Predominantly, also when hence the alienees lis pendens would be barred to rear any plea, for validating the relevant lis pendens alienations also would be unjustly condemned unheard.

5. In aftermath, this Court is of the firm view that the alienees lis pendens are necessary parties, for completely adjudicating upon the entire gamut of the controversy(s), whereupon the parties at lis are engaged. Consequently, there is no merit in the instant petition. Accordingly it is dismissed. Parties are directed to appear before the learned trial Court on **7.11.2017**. The learned trial Court is directed to conclude the trial of the suit within six months thereafter. All pending applications are also disposed of.

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

Sher Singh ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. Revision No. 165 of 2009
Reserved on: 18.9.2017
Date of decision: 03.10.2017

Indian Penal Code, 1860- Section 323, 336, 342 and 506 read with Section 34- Informant is owner-cum-driver of a truck – he was on the way to Mandi and was accompanied by PW-2 and R – he parked his truck to make a call – the accused picked up a stone and hit the informant on the head – he became unconscious and regained consciousness after 2 – 2 ½ hours- the accused were tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held that the shirt, vest and stone came out of the same parcel, whereas, they were seized on different dates – the stone was not shown to the doctor – right of fair trial of the accused was violated by the Court – the informant admitted the presence of 100- 150 persons but no independent witness was examined – true genesis of the incident was not disclosed – no test identification parade was conducted to determine the identity – the Court had wrongly convicted the accused – revision allowed- judgment of the Trial Court and Appellate Court set aside. (Para-10 to 22)

Cases referred:
Asha Ranjan vs. State of Bihar & Ors., AIR 2010 SC 1079
State (Delhi Administration) vs. V.C. Shukla, AIR 1980 SC 1382
Lakhwinder Singh and others vs. State of Punjab, AIR 2003 SC 2577

For the Petitioner : Mr. Peeyush Verma and Ms. Renuka Thakur, Advocates.
For the Respondent : Mr. Neeraj K. Sharma, Dy. A.G. with Mr. J.S. Guleria, Asstt. A.G.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Even though this is a criminal revision petition at the instance of the convict wherein the scope of interference is quite restricted and limited but the manner in which the investigation and thereafter the trial has been conducted leaves much to be desired. However, before proceeding further, the case of the prosecution needs to be noticed.

2. On 8.7.2008 statement of Balwant Singh (PW1) was recorded at police station Keylong under Section 154 Cr.P.C. He informed that he is owner-cum-driver of truck No. HP-07-1575 and on 8.7.2003 after loading cement of Civil Supplies Corporation, he reached Keylong at 2:00 p.m. which was unloaded. At about 5:00 p.m. he was on way to Mandi and was accompanied by Rakesh (PW2) and one Roshan Lal. When they reached a little ahead of Workshop, he parked his truck in order to make a telephone call from P.C.O. booth from bus stand, Keylong. At that time he was accompanied by Rakesh Kumar. After making the call when they were proceeding towards the truck, in the meantime two young person came from Durga temple side and one of the young man was Sher Singh, who after picking up a stone hit on the head of the complainant and he sustained injuries and became unconscious and fell on the road. He regained conscious after about two-two and half hours. Then he came to know that the person who has hit on his head took him away on a scooter bearing registration No. HP-42-259 and kept him in a room. From there he went in search of Rakesh Kumar and Roshan Lal and reached at bus stand. Then they disclosed him the entire incident and said that the accused have taken him away on the scooter. He further informed that he sustained injuries on his head and his shirt and

vest have been smeared with blood and he had no dispute with the accused and had Rakesh Kumar (PW2) and Roshan Lal been not there, they would have killed him. They have further threatened him to kill him if the incident is disclosed to anybody. He is apprehending danger at the hands of these accused. As such, a legal action may be taken against them

3. After recording the statement of the complainant under Section 154 Cr.P.C. the police swung into action. On the basis of his statement the present FIR No. 0046 dated 8.7.2008 at Police Station, Keylong was recorded under Sections 323, 336, 342 and 506 read with Section 34 I.P.C. The injured was got medically examined from the doctor vide police docket Ex.PW3/A and his MLC is Ex.PW3/B. Thereafter the police went to the spot, prepared site plan Ex.PW4/B, took into possession weapon of offence i.e. stone vide seizure memo Ex.PW2/A after sealing it in a packet with seal impression K in presence of marginal witnesses namely Rakesh Kumar (PW2) and Roshan Lal and sample of seal was also separately prepared on cloth piece vide Ex.PW4/B. During the course of investigation of the case the police also took into possession shirt and vest smeared with blood vide seizure memo Ex.PW1/B after sealing the same in a packet with seal impression T and sample of seal T was also separately taken vide Ex.PW4/C. The I.O. also recorded statements of witnesses under Section 161 Cr.P.C.

4. After completion of the investigation the challan was presented before the learned trial Court who after supplying the copies of challan and other documents as required under Section 207 Cr.P.C. to the accused and after having found prima facie case against them for the commission of offence under Sections 341, 342, 323, 506 read with Section 34 I.P.C. put notice of accusation against the accused for the said offences to which accused pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case examined as many as four witnesses.

6. After the closure of the prosecution evidence, statement of the accused under Section 313 Cr.P.C. were recorded, wherein they have denied the prosecution case and stated that they are innocent and have been falsely implicated in this case. The defence of the accused is of denial simplicitor. However, they have opted not to lead any defence evidence. After the conclusion of the trial, the learned trial Court convicted and sentenced the accused to three months simple imprisonment for offence under Section 323 IPC and also sentenced to pay fine of Rs.1000/- each. For offence under Section 342 IPC both the convicts are also sentenced to three months simple imprisonment and also sentenced to pay fine of Rs.1000/- each.

7. Feeling aggrieved by the judgment of conviction passed by the learned trial Court, the petitioner as also Shri Sonam preferred separate appeal and the learned Sessions Judge vide judgment dated 15.10.2009 dismissed the appeal preferred by the present petitioner by upholding the conviction. However, as regards the appeal filed by Sonam, the same was allowed and he was ordered to be acquitted.

8. Aggrieved by the judgment of conviction passed by the learned Sessions Judge, the petitioner has filed the instant revision petition and has made the following submissions:-

1. The procedure prescribed by law was not followed.
2. No independent witness was examined despite availability and material witness given up.
3. True genesis of the case was not disclosed by the petitioner.
4. No Test Identification Parade held.

9. Learned Deputy Advocate General would argue that no interference is warranted against the findings rendered by the learned Courts below particularly, when this Court is exercising its revisional jurisdiction. He placed strong reliance on the judgment rendered by this Court in **Criminal Revision No. 50 of 2011, titled as Rajinder Singh vs. State of Himachal Pradesh**, decided on 13.9.2017, wherein the scope of criminal revision has been delineated in the following manner:-

*"In **Amur Chand Agrawal vs. Shanti Bose and another, AIR 1973 SC 799,** the Hon'ble Supreme Court has held that the revisional jurisdiction should normally be exercised in exceptional cases when there is a glaring defect in the proceedings or there is a manifest error of point of law and consequently there has been a flagrant miscarriage of justice.*

*In **State of Orissa vs. Nakula Sahu, AIR 1979, SC 663,** the Hon'ble Supreme Court after placing reliance upon a large number of its earlier judgments including **Akalu Aheer vs. Ramdeo Ram, AIR 1973, SC 2145**, held that the power, being discretionary, has to be exercised judiciously and not arbitrarily or lightly. The Court held that "judicial discretion, as has often been said, means a discretion which is informed by tradition methodolised by analogy and discipline by system".*

*In **Pathumma and another vs. Muhammad, AIR 1986, SC 1436**, the Hon'ble Apex Court observed that High Court "committed an error in making a re-assessment of the evidence" as in its revisional jurisdiction it was "not justified in substituting its own view for that of the learned Magistrate on a question of fact".*

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

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

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

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

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

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

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

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

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

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

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

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

1. The procedure prescribed was not followed

10. Learned counsel for the petitioner has taken me through the record and I really fail to understand as to how the learned trial Magistrate exhibited the shirt, vest and stone as exhibits P-1, P-2 and P-3 even before showing these to the witness PW1 Balwant Singh who also happens to be the complainant in this case.

11. What is more intriguing is that after permission was sought to open one of the parcel sealed with seal impression T, the shirt, vest and stone all come out of the same parcel. Whereas, as per the prosecution case, it has specifically come in the statement of PW2 Rakesh Kumar and PW4 Khem Chand that the stone was taken into possession on 9.7.2013 vide Ex. PW2/A whereas the shirt and vest were taken into possession on 10.7.2003 vide Ex. PW1/B. Therefore, obviously, the shirt, vest and stone could not have come out of one parcel.

12. The matter does not end here. PW3 Dr. Pardeep Kumar is the Medical Officer, who examined the complainant and narrated the injuries noted on his person and then stated that the same were possible by stone Ex.P3, that too when the stone was not even actually shown to him. The position noticed above is un-defenceable and therefore the learned Deputy Advocate General rightly did not dispute the same.

13. It would be evidently clear from what has been stated above that right to fair trial by the competent Court has been denied to the petitioner. It is more than settled that every person has right to fair trial by the competent Court in spirit of right to life and personal liberty. The concept of fair trial entails familiar triangulation of interest of the accused, the victim and the society.

14. This aspect of the matter has been dealt by the Hon'ble Supreme Court in its recent judgment in ***Asha Ranjan vs. State of Bihar & Ors., AIR 2010 SC 1079*** wherein it was held that fair trial is a concept that in its ambit and sweep covers the interest of the accused, prosecution, victim and in certain circumstances community interest as well. It is apt to reproduce the relevant observations, which reads thus:-

"31. The concept of fair trial recognized under the Code of Criminal Procedure is conferred an elevated status under the Constitution, is a much broader and wider concept. If the transfer will create a dent in the said concept, there is no justification to accept such a prayer at the behest of the petitioners. In oppugnation, the conception of fair trial in criminal jurisprudence is not one way traffic, but includes the accused and the victim and it is the duty of the court to weigh the balance. When there is threat to life, liberty and fear pervades, it sends shivers in the spine and corrodes the basic marrows of holding of the trial at Siwan. This is quite farther from the idea of fair trial. The grievance of the victims, who have enormously and apparently suffered deserves to be dealt with as per the law of the land and should not remain a mirage and a distant dream. As we find, both sides have propounded the propositions in extreme terms. And we have a duty to balance.

32. To appreciate the contention on this score, we may, at present, refer to certain authorities that have dealt with fair trial in the constitutional and statutory backdrop.

33. In J. Jayalalithaa & Ors v. State of Karnataka & Ors.[8], the Court held that fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. It has been further observed that any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general and, therefore, in all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings. The Court further laid down that denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seen to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right, but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. Elevating the right of fair trial, the Court observed:-

> *"Article 12 of the Universal Declaration of Human Rights provides for the right to a fair trial what is enshrined in Article 21 of our Constitution. Therefore, fair trial is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity and is governed by the rule of law. Denial of fair trial is crucifixion of human rights. [Vide Triveniben v. State of Gujarat[9], Abdul Rehman Antulay v. R.S. Nayak[10], Raj Deo Sharma (2) v. State of Bihar[11], Dwarka Prasad Agarwal v. B.D. Agarwal[12], K. Anbazhagan v. Supt. of Police[13], Zahira Habibullah Sheikh (5) v. State of Gujarat[14], Noor Aga v. State of Punjab[15], Amarinder Singh v. Parkash Singh Badal[16], Mohd. Hussain v. State (Govt. of NCT of Delhi)[17], Sudevanand v. State[18], Rattiram v. State of M.P.[19] and Natasha Singh v. CBI[20].]"*

34. In this regard, we may sit in the time machine and refer to a three- Judge Bench judgment in Maneka Sanjay Gandhi & another v. Rani Jethmalani[21], wherein it has been observed that assurance of a fair trial is the first imperative of

the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment is necessitous, if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. The Court observed that accused cannot dictate where the case against him should be tried and, in a case, it the duty of the Court to weigh the circumstances.

35. In Rattiram (supra), speaking on fair trial, the Court opined that:-

> *"39. … Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism." In the said case, it has further been held that:-*
>
> > *"60. While delineating on the facets of speedy trial, it cannot be regarded as an exclusive right of the accused. The right of a victim has been given recognition in Mangal Singh v. Kishan Singh[22] wherein it has been observed thus:*
> >
> > > *'14. … Any inordinate delay in conclusion of a criminal trial undoubtedly has a highly deleterious effect on the society generally, and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence.'*
> >
> > *61. It is worth noting that the Constitution Bench in Iqbal Singh Marwah v. Meenakshi Marwah[23] though in a different context, had also observed that delay in the prosecution of a guilty person comes to his advantage as witnesses become reluctant to give evidence and the evidence gets lost.*
> >
> > *x x x x*
> >
> > *64. Be it noted, one cannot afford to treat the victim as an alien or a total stranger to the criminal trial. The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the viewpoint of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. In respect of certain offences in our existing criminal jurisprudence, the testimony of the victim is given paramount importance. Sometimes it is perceived that it is the duty of the court to see that the victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice or failure of justice."*

36. Be it noted, the Court in the said case had noted that there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would

not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing."

37. In Manu Sharma v. State (NCT of Delhi)[24], the Court, emphasizing on the concept of fair trial, observed thus:-

> *"197. In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."*

38. A three-Judge Bench in Mohd. Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi[25] approvingly reproduced para 33 of the earlier judgment in Zahira Habibulla H. Sheikh v. State of Gujarat[26] (known as "Best Bakery" case) which is to the following effect:- "33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation — peculiar at times and related to the nature of crime, persons involved — directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system."

39. In Zahira Habibulla H. Sheikh (supra), it has been held:-

> *"38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.*
>
> *39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.*
>
> *40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just*

application of its principles in substance, to find out the truth and prevent miscarriage of justice."

40. In Mohd. Hussain @ Julfikar Ali (supra) the three-Judge Bench has drawn a distinction between the speedy trial and fair trial by opining that there is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end.

41. We have referred to the said authority as the three-Judge Bench has categorically stated that interests of the society at large cannot be disregarded or totally ostracized while applying the test of fair trial.

42. In Bablu Kumar and Ors. v. State of Bihar and Anr.[27] the Court observed that it is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a mock trial. The Court further ruled that a criminal trial is a serious concern of society and every member of the collective has an inherent interest in such a trial and, therefore, the court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The said observations were made keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court.

43. Recently, in State of Haryana v. Ram Mehar and Ors.[28], after analyzing the earlier judgments, the Court ruled that the concept of the fair trial is neither in the realm of abstraction or a vague idea. It is a concrete phenomenon; it is not rigid and there cannot be any straitjacket formula for applying the same. The Court observed that it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. The Court ruled that neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other, for once absolute predominance is recognised, it will have the effect potentiality to bring in an anarchical disorder in the conducting of trial defying established legal norm. The Court opined that whole thing would be dependent on the fact situation; established norms and recognised principles and eventual appreciation of the factual scenario in entirety. There may be cases which may command compartmentalisation but it cannot be stated to be an inflexible rule. Each and every irregularity cannot be imported to the arena of fair trial. There may be situations where injustice to the victim may play a pivotal role. The centripodal purpose is to see that injustice is avoided when the trial is conducted. Simultaneously the concept of fair trial cannot be allowed to such an

extent so that the systemic order of conducting a trial in accordance with CrPC or other enactments get mortgaged to the whims and fancies of the defence or the prosecution. The command of the Code cannot be thrown to the winds. In such situation, as has been laid down in many an authority, the courts have significantly an eminent role. A plea of fair trial cannot be acquiesced to create an organic disorder in the system. It cannot be acceded to manure a fertile mind to usher in the nemesis of the concept of trial as such. The Court further observed that there should not be any inference that the fair trial should not be kept on its own pedestal as it ought to remain but as far as its applicability is concerned, the party invoking it has to establish with the support of established principles. The process of the court cannot be abused in the name of fair trial at the drop of a hat, as that would lead to miscarriage of justice.

44. On a studied analysis of the concept of fair trial as a facet of Article 21, it is noticeable that in its ambit and sweep it covers interest of the accused, prosecution and the victim. The victim, may be a singular person, who has suffered, but the injury suffered by singular is likely to affect the community interest. Therefore, the collective under certain circumstances and in certain cases, assume the position of the victim. They may not be entitled to compensation as conceived under section 357A of the CrPC but their anxiety and concern of the crime and desire to prevent such occurrences and that the perpetrator, if guilty, should be punished, is a facet of Rule of Law. And that has to be accepted and ultimately protected.

2. No independent witness was examined and material witness was given up.

15. The complainant while appearing as PW1 has categorically admitted in his cross-examination that there were 100-150 people present on the spot when the alleged incident took place. However, surprisingly no independent witness has been examined and only interested witnesses have been examined.

16. That apart, the FIR in the case is admittedly recorded by HC Dhani Ram but his statement has not been recorded, rather he has been given up during the trial. The statement of this witness was absolutely essential to prove the case of the prosecution because as per FIR Ex.PW1/A recorded on 8.7.2003 at about 8:45 p.m, the complainant had disclosed the name of the person hitting him with the stone to be Sher Singh. Whereas, in the application for medical examination of the complainant Ex.PW4/A made at a later time about 9:30 p.m. it has been stated that the complainant was not knowing the two persons (much less their names) who had attacked him and could identify them in case they were brought before him. Thus, in such circumstances the non-examination of H.C. Dhani Ram is fatal to the prosecution case.

3.True Genesis of the case was not disclosed by the prosecution.

17. Evidently, the FIR does not lay down any factual foundation as to what led to the incident. After all, no sane person would hit anyone with the stone without any rhyme or reason. However, the cat is out of the bag when the Investigating Officer Khem Chand is cross-examined and states that it had come in the investigation that the scooter of the complainant had hit the scooter of the accused which led to the entire episode. If that be so, then there are many questions that have been left un-unswered, more particularly, where are the scooters. How did the complainant who had driven a truck from Mandi to Keylong get hold of the scooter that also hundreds of miles away from his home and drive the same, on account of whose fault did the accident actually take place? And lastly, it could also be possible that the complainant had sustained injuries on account of the collision of the two scooters.

4. No Test Identification Parade held

18. It is the admitted case of the prosecution that the complainant was not knowing the persons who attacked him and the accused were identified for the first time only in the Court as is evident from the statement of PW2 and document Ex.PW4/A. Once that be the admitted

position, then in my considered view, it was incumbent upon the prosecution to have conducted a Test Identification Parade.

19. In **State (Delhi Administration) vs. V.C. Shukla, AIR 1980 SC 1382**, three Judges Bench of the Hon'ble Supreme Court held that identification of a person by the witness for the first time in the Court without being tested by prior Test Identification Parade is value less.

20. Likewise, in **Lakhwinder Singh and others vs. State of Punjab, AIR 2003 SC 2577,** while dealing with a case of murder the Hon'ble Supreme Court held that not holding of Test Identification Parade to identify assailants was a serious lapse and the same was fatal to the case of the prosecution.

21. Thus, on the basis of the aforesaid discussion, it can conveniently be held that not only the judgments rendered by both the Courts below suffer from perversity but also deserves to be set aside on account of serious procedural lapses committed by the trial Magistrate which unfortunately have not at all been noticed by the learned Sessions Judge.

22. Accordingly, there is merit in this revision petition and the same is allowed and the judgments of conviction passed by the learned trial Magistrate as also upheld by the learned Sessions Judge are set aside. The petitioner is acquitted from all the charges. Bail bonds, if any, furnished by the petitioner are discharged.

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

State of H.P. .....Appellant
Versus
Nikku Ram .....Accused/Respondent.

Cr. Appeal No. 115 of 2008
Date of Decision: 03.10.2017

Indian Penal Code, 1860- Section 498-A and 323- Marriage of the informant was solemnized with the accused in the year 2004 as per Hindu rites and custom- accused started beating the informant and demanding dowry after two months of the marriage – she was also beaten in the presence of Gram Panchayat – the accused was tried and acquitted by the Trial Court- held in appeal that the prosecution version that accused had given beating to the informant and had demanded dowry was not proved – no witness except the informant stated about the demand of dowry – informant was not interested in residing with the accused but wanted to take divorce – the members of the panchayat were not cited as witnesses and adverse inference has to be drawn against the prosecution- Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 14)

Case referred:
C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645

For the appellant: Mr. P.M.Negi and Mr. M.L. Chauhan, Additional Advocate Generals.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal appeal filed under Section 378 Cr.PC, is directed against the impugned judgment of acquittal dated 3.10.2007, passed by the learned Judicial Magistrate, Ist

Class, Barsar, District Hamirpur, H.P., whereby the respondent-accused came to be acquitted of charge framed against him under Sections 498-A and 323 IPC.

2. Briefly stated facts as emerge from the record are that an FIR Ext.PW1/A came to be registered against the respondent-accused at the behest of the complainant namely Promila Devi, who alleged that her marriage was solemnized with the accused in the year, 2004 at Deotsidh Temple as per Hindu rites. After two months of marriage, respondent-accused apart from giving beatings also started demanding dowry and on 28.8.2006, accused allegedly gave beatings to the complainant in the presence of one Sanjiv Kumar i.e. relative of the complainant. Thereafter, on 8.9.2006, the complainant received one summon from Gram Panchayat Galore Khas, whereby she was called upon to appear before the Panchayat on 15.9.2006. Accordingly, complainant, her mother and her brother namely Dinesh Kumar appeared before the Gram Panchayat on 15.9.2006, wherein accused allegedly again gave beatings to the complainant at about 1:30pm in the presence of Up-Pradhan, lady ward member, mother and brother of the complainant. As per the complainant, brother and mother of the complainant saved him from the clutches of the accused. Complainant also alleged that she was subjected to mental as well as physical cruelty. On the basis of aforesaid allegations, a case came to be registered against the respondent accused. After completion of investigation, police presented challan in the competent Court of law under Sections 498-A and 323 IPC.

3. Learned Judicial Magistrate, Ist Class, Barsar, District Hamirpur, H.P., on being satisfied that prima-facie case exists against the respondent-accused put notice of accusation to him for having committed offence punishable under Sections 498-A and 323 IPC, to which he pleaded not guilty and claimed trial. Prosecution with a view to prove its case examined as many as six witnesses, whereas respondent-accused in his statement recorded under Section 313 Cr.PC, denied all the allegations leveled against him and claimed himself to be innocent. Though respondent accused did not lead any evidence in his defence but he furnished documents Exts.D1 to D3. Learned court below on the basis of material adduced on record by the prosecution, acquitted the respondent-accused of the offences punishable under Sections 498-A and 323 IPC. In the aforesaid background, appellant-State has approached this Court by way of instant proceedings, seeking therein conviction of the respondent-accused after setting aside judgment of acquittal recorded by the learned court below.

4. Mr. M.L. Chauhan, learned Additional Advocate General, while inviting attention of this Court to the impugned judgment of acquittal recorded by the court below, strenuously argued that the impugned judgment passed by the learned court below is not sustainable in the eye of law as the same is not based upon the proper appreciation of evidence and as such, same deserves to be quashed and set-aside. With a view to substantiate his aforesaid arguments, Mr. Chauhan made this court to travel through the impugned judgment of acquittal vis-à-vis evidence led on record by the prosecution to demonstrate that prosecution successfully proved on record that respondent accused demanded dowry from the complainant and also gave beatings to her in presence of her mother and brother. Mr. Chauhan, while specifically inviting attention of this court to the statements of PW1 (complainant), PW3 (mother) and PW4 (brother of the complainant), contended that bare perusal of depositions made by these aforesaid witnesses clearly proves on record that an amount of Rs. 80,000/- was demanded by the respondent-accused as a dowry from the complainant and she was also subjected to mental torture. Lastly, Mr. Chauhan invited attention of this court to the statement of PW2 (Dr. Arun Saxena) to state that injuries allegedly suffered by the complainant were medically proved in accordance with law by the prosecution and as such, there was no scope left for the court below to acquit the respondent-accused of charges framed against him. While concluding his arguments, Mr. Chauhan, contended that there is total misreading, mis-representation and mis-construction of evidence adduced on record and as such, respondent-accused deserves to be convicted for having committed offence punishable under Sections 498-A and 323 IPC, after setting aside the judgment of acquittal recorded by the court below.

5. I have heard the learned Additional Advocate General and carefully gone through the record.

6. Despite repeated pass-overs, none came present on behalf of the respondent-accused and as such, this Court had no option but to decide the instant case on the basis of material available on record.

7. This Court solely with a view to ascertain correctness and genuineness of aforesaid submissions having been made by the learned Additional Advocate General, carefully perused the impugned judgment of acquittal vis-à-vis evidence led on record by the prosecution, perusal whereof certainly not persuade this Court to agree with the contention of Mr. M.L. Chauhan, learned Additional Advocate General that there is complete mis-reading, misinterpretation and mis-construction of evidence adduced on record by the prosecution, rather this Court after having carefully gone through the evidence led on record by the prosecution has no hesitation to conclude that prosecution was not able to prove beyond reasonable doubt that the complainant was given beatings and subjected to mental torture by the respondent-accused. Similarly, this Court was unable to lay its hand to the evidence led on record by the prosecution suggestive of the fact that an amount of Rs. 80,000/- was ever demanded by the respondent-accused. This Court after having carefully perused /analyzed evidence led on record by the prosecution has reason to believe that the complainant never wanted to remain in the company of the respondent-accused despite there being availability of all facilities at the house of the accused-respondent namely Nikku Ram.

8. PW1 Promila Devi, complainant, while deposing before the court below that her marriage was solemnized with the accused in the year, 2004 categorically stated that after her marriage with the accused, she was kept properly for two months by the respondent-accused, whereafter he started demanding dowry. Similarly, aforesaid prosecution witness stated that her husband demanded Rs. 80,000/- on the pretext that no dowry was given to her at the time of marriage. Interestingly, aforesaid witness further deposed before the court below that she had disclosed aforesaid factum with regard to demand of dowry to her mother, who after making her understand, sent her back to the house of her in-laws, but there is no mention, if any, of alleged demand of dowry by the respondent-accused in the statement of PW3 Smt Raj Kumari, i.e. mother of the complainant. It emerge from the statement of PW1 Promila Devi that she had appeared before Gram Panchayat Galore Khas, where she was advised to approach appropriate court of law for redressal of her grievance. In her statement, she stated that she was given beatings on the road by the accused and people saved her from the accused. But interestingly, none of the independent witnesses including up-Pradhan Gurbax and one lady ward member was examined/cited as prosecution witnesses to give strength to the aforesaid version of the complainant that she was given beatings by the respondent-accused in front of gram Panchayat on 15.9.2006. PW1 in her cross-examination categorically admitted that all facilities are available in the house of accused but she is not interested to live with him and wants to get divorce. Apart from above, she further admitted that she also gave in writing to this effect and in this regard, she also identified her signatures upon Mark D/1.

9. PW3 Smt. Raj Kumari, mother of the complainant, while deposing on oath that marriage of her daughter (PW1) was solemnized with the accused in the year 2004, also supported the version of PW1 that respondent accused kept the complainant well for two months and thereafter, started torturing her but as has been taken note above, there is no mention, if any, of demand of dowry, by the respondent-accused, in the statement of PW3, whereas PW1, in her statement categorically stated that she had informed her mother as well as brother with regard to beatings given by the respondent-accused as well as dowry demanded by him. Similarly, PW3 in her statement stated that when her daughter went to her in laws with Sanjiv Kumar, she was again given beatings but for the reasons best known to the prosecution, Sanjiv Kumar, was never cited as prosecution witness. This witness further deposed before the Court below that the case was called in Panchayat at 12:00 noon and after that, they went to their own houses and accused went to their house. There is no whisper, if any, with regard to the beatings

allegedly given by the respondent-accused during Panchayat meeting as alleged by the PW1. This witness further admitted in her cross examination that persons namely Gurbax, Baldev and Joginder were also present in the Panchayat but unfortunately, none of these persons were cited as prosecution witnesses. She further admitted in her cross-examination that after proceedings before Panchayat, she asked her daughter to go to her in-laws. She further admitted that when her daughter refused to go to the house of her in-laws, she slapped her.

10. Shri Dinesh Kumar (PW4) brother of the complainant also deposed that marriage of his sister was solemnized with the respondent accused, who works as a meson. This witness also stated that respondent accused gave beatings to the complainant during Panchayat meeting and she was saved by the ward member of the Panchayat. He also in his cross examination admitted that his sister made a statement before the Panchayat that she does not want to live with the accused. It has also come in his statement that when his sister refused to go to her in laws, his mother slapped her. He further stated that when his sister refused to go to her in laws, Sanjiv Kumar dragged her on the road and he also admitted that beatings were given to the complainant by means of 'danda', which was 3-4 feet.

11. Conjoint reading of statements of aforesaid prosecution witnesses, who are closely related to each other nowhere proves the case of the prosecution that respondent-accused gave beatings to the complainant and also demanded the dowry, rather beatings, if any, were given to the complainant by her mother and person namely Sanjiv Kumar, who insisted upon the complainant to go to her in laws house. Similarly as has been taken note above, though there is an allegation of demand of dowry to the tune of Rs. 80,000/-, but none of the prosecution witnesses save and except complainant (PW1) stated something specific with regard to the demand of dowry by the respondent-accused. Neither mother of the complainant (PW3) nor her bother (PW4) stated something specific with regard to demand of dowry by the respondent accused and as such, no reliance, if any, could be placed upon the version put forth by the complainant (PW1). PW1 was not interested to live with her husband, rather she wanted to take divorce as is clearly evident from her statement made before the court below. It also emerge from the statements of PW3 and PW4 that PW1 was not interested to stay with her husband and she wanted to take divorce from him. No doubt, perusal of statement of PW2 Dr. Arun Saxena suggests that complainant was medically examined and certain simple injuries were found on her body but that may not be sufficient to conclude that alleged beatings were given by the respondent-accused because none of the prosecution witnesses specifically stated that beatings, if any, were given to respondent accused in their presence.

12. PW3 though stated that beatings were given to the complainant by the respondent accused in presence of one Sanjiv Kumar and Up-Pradhan Gurbax Singh and one lady member, but as has been noticed above, none of these persons were cited as PWs and as such, learned court below rightly not placed reliance upon the statement of aforesaid PWs because of material contradictions in their statements.

13. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. Reliance is also placed on Judgment passed by the Hon'ble Apex Court in ***C. Magesh and Ors. v. State of Karnataka*** (2010) 5 SCC 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasise, consistency is the keyword for upholding the conviction of an***

accused. In this regard it is to be noted that this Court in the case titled Suraj Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14)

> ***"14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***

46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses."

14. 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 valid reason to interfere with the well reasoned judgment passed by the learned court below, which otherwise appears to be based upon the proper appreciation of evidence adduced on record and as such, same is upheld. Accordingly, the appeal is dismissed being devoid of any merits.

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

State of Himachal Pradesh .....Appellant.

Versus

Susheel Kumar .....Respondent.

Cr. Appeal No. 235 of 2008
Decided on: 03.10.2017

Punjab Excise Act, 1914- Section 61(1)(a)- A car was reversed on seeing the police party- police chased the vehicle- the driver stopped the vehicle after 10 k.m. and started throwing the cartons in a Nalla- the vehicle was searched and it was found to be containing two cartons of liquor 'Bagpiper' and one carton of 'McDowell' – the liquor in Nalla was counted - 48 bottles of Bagpiper, 26 bottles of McDowell and 12 bottles of Saroor were found in Nalla- 18 bottles of Mcdowell and five bottles of Saroor were found broken- the accused could not produce any permit for transportation – samples were taken – the accused was tried and convicted by the Trial Court- an appeal was filed, which was allowed- held that the link evidence is missing as there is no evidence that sample seals were also deposited with the samples – the Appellate Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 16)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008 1 SCC 258
T.Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415

For the appellant: Mr. Pushpinder Jaswal, Deputy Advocate General with Mr. Rajat Chauhan, Law Officer.

For the respondent: Mr. I.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal has been preferred by the appellant/State (hereinafter referred to as "the appellant") laying challenge to judgment, dated 15.02.2008, passed by learned Sessions Judge, Shimla, District Shimla, H.P., in Sessions Trial No. 114-3 of 2006, whereby the judgment of conviction, as passed by learned Judicial Magistrate 1st Class, Theog, District Shimla, H.P., in Case No. 114-3 of 2006, against the respondent/accused (hereinafter referred to as "the accused"), was set aside.

2. Succinctly, the facts giving rise to the present appeal, as per the prosecution, are that on 29.03.2006 when police personnel were on patrol duty around 04:30 p.m., near Raighat-Shadyana road, in vehicle (Tata Mobile) bearing registration No. HP-07-5328, a white coloured Maruti Car having registration No. HP-01-0972 came from Shadyana side. After seeing the police party, the driver of the vehicle started reversing the vehicle in a high speed. The vehicle was chased and after about ten kilometers the driver of the vehicle, stopped the vehicle and he started throwing liquor boxes in a *nalla*. Police found three carton boxes of liquor, out of which two carton boxes were of English liquor 'Bagpiper' and one box was of English liquor 'McDowell'. Police also counted the liquor thrown in the *nalla,* which came to be 48 bottles of 'Bagpiper', 26 bottles of 'McDowell' and 12 bottles of country made liquor 'Saroor'. 18 bottles of English liquor 'McDowell' and 5 bottles of country made liquor were found broken. In total 120 bottles were recovered from the respondent/accused (hereinafter referred to as "the accused"). Police took as samples one bottle each from McDowell, Bagpiper and Country made liquor Saroor and sealed the same with seal having impression 'S'. Specimen seal was taken on a separate piece of cloth and the statement of the witnesses were also recorded. Remains of broken bottles were also taken into possession and *rukka* was sent to Police Station, Theog, whereupon FIR against the accused was registered. Site plan was prepared and vehicle of the accused was taken into possession. The accused was arrested and later on released on bail. Report of the Chemical Analyst revealed that sample of IMFL (McDowell) contains alcoholic strength 75.1%, country made liquor contains alcoholic strength 47.9% and IMFL (Bagpiper) contains 74.4% alcoholic strength. After thoroughly investigating the matter, the police found involvement of the accused in the commission of the offence under Section 61(1)(a) of the Punjab Excise Act, 1914, thus *challan* was prepared and presented in the Court.

3. The prosecution, in order to prove its case, examined as many as five witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he denied the prosecution case and claimed innocence, however, he did not examine any defence witness.

4. The learned Trial Court, vide judgment dated 19.09.2007, convicted the accused for the offence punishable under Section 61(1)(a) of the Punjab Excise Act, 1914, and sentenced him to undergo rigorous imprisonment for one year and to pay fine of Rs.7,000/- (rupees seven thousand) and in default of payment of fine, he was to further undergo simple imprisonment for three months. The accused laid challenge to the judgment of conviction, as passed by the learned Trial Court by maintaining an appeal in the learned First Appellate Court and the learned First Appellate Court, vide impugned judgment dated 15.02.2008 set aside the judgment of the Trial Court and acquitted the accused, hence the present appeal preferred by the appellant/State.

5. The learned Law Officer appearing for the appellant/State has argued that the judgment passed by the learned First Appellate Court is without appreciating the law to its true perspective and the learned First Appellate Court has failed to appreciate the fact that the prosecution has proved the case beyond the shadow of reasonable doubt. Conversely, the learned counsel appearing on behalf of the accused/respondent has argued that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. He has argued

that there was neither sealing of the recovered liquor nor the liquor was proved to be recovered from the accused. The appeal, which is without merits, required to be dismissed.

6. In order to appreciate the rival contentions of the parties, this Court has gone through the record carefully and in detail.

7. Constable Pawan Kumar (PW-1) took samples of liquor to C.T.L. Kandaghat and he has handed over the receipt to MHC. Constable Jagat Ram (PW-2), Driver, deposed that Constable Surinder Kumar and Head Constable Sita Ram were going towards Shadayana side on patrol duty. He has further deposed that when they reached about half kilometer, a Maruti Car came from Theog side and on seeing the police, driver of the vehicle reversed his vehicle and drove the same towards Dhamandri. The driver stopped the vehicle at a distance of about 10 kilometers and he was throwing liquor boxes in the *nalla.* The police personnel apprehended the driver (accused), who disclosed his name as Susheel Kumar. On search of the vehicle, three carton boxes of liquor were found and out of which two carton boxes were of English Liquor 'Bagpiper' and one box of English liquor 'McDowell'. He has further deposed that liquor thrown in the *nalla* was also counted and the same came to be 48 bottles of Bagpiper, 24 bottles of McDowell and 12 bottles of country made liquor 'Saroor'. As per this witness, one bottle each from McDowell, Bagpiper and Country made liquor Saroor were separated as samples and sealed with seal impression 'S', vide memo Ex. PW-2/A. Facsimile seals were taken on a piece of cloth. He has also signed the recovery memo and his signatures are encircled in 'A'. This witness, in his cross-examination has admitted that there are residential houses in between Raighat and village Dhamandri, however, no person was called on the spot. He has further deposed that when he alongwith others came on the spot none, except the driver (accused), was present inside the vehicle. He has admitted that just above the Janoti *nalla*, there is Janoti village. He feigned ignorance that there is village Shwag just below Janoti *nalla*. He has further deposed that 18 bottles of McDowell and 5 bottles of country made liquor 'Saroor' were found broken.

8. MHC Man Dev (PW-3) deposed that he has sent samples of liquor to C.T.L. Kandaghat, through Constable Pawan Kumar (PW-1). He has further deposed that under his custody the case property was not tampered with. He has proved on record photocopy of receipt, Ex. PW-3/A. This witness, in his cross-examination, has deposed that when the case property was deposited with him, broken bottles were not sealed. Constable Surinder Singh (PW-4) deposed that he was member of the patrolling party. He has further deposed that on 29.03.2006 he alongwith Head Constable Sita Ram, Driver Jagat Ram reached at Shadyana while patrolling. As per this witness, approximately half kilometer on Shadyana road, they spotted a Maruti Van bearing registration No. HP-01-0972 coming from the opposite side. He has further deposed that on seeing the police, the driver of the van reversed his vehicle towards Dhamandri. The vehicle was parked at Janoti *Nalla*, where the accused was throwing liquor boxes in the *nalla.* The accused was apprehended and there were three carton boxes of liquor inside the vehicle, out of which two carton boxes were of English liquor 'Bagpiper' and one box was of English liquor 'McDowell'. As per this witness, the bottles thrown in the *nalla,* on counting, were found two carton boxes of English liquor Bagpiper and one box of English liquor McDowell and besides this one carton box of country made liquor 'Saroor' were found broken. In total 123 bottles were recovered. One bottle each from McDowell, Bagpiper and country made liquor 'Saroor' were separated as samples and taken into possession vide memo, Ex. PW-2/A. This witness, in his cross-examination, admitted that village Dochi is at a distance of half kilometer towards Shadyana side from Raighat. He has further deposed that after village Tiger Sakoti, village Shadyana comes and there are 30-40 houses in that village. No person was associated therefrom as a witness and no local person was called. He feigned ignorance whether broken bottles were also sealed in separate parcel.

9. Head Constable Sita Ram (PW-5), Investigating Officer, supported the prosecution case. He has further deposed that the accused could not produce any licence/permit for possessing the liquor. As per this witness, *rukka,* Ex. PW-5/A, was sent by him to Police Station, whereupon FIR, Ex. PW-5/B, was registered. This witness, took into possession the

contraband and Maruti Car alongwith its documents, vide memo Ex. PW-2/A. He prepared spot map, Ex. PW-5/C, and also recorded the statements of the witnesses. This witness, in his cross-examination, has deposed that village Shadyana is en route and no independent witness was associated by the police, as there was no nearby *abadi.* As per this witness, 72 bottles could not be sealed, as they were not having ample cloth with them. No seal was affixed on bottles of McDowell (Ex. P-2). He has further deposed that the case property was not sealed, however, the sample bottles were duly sealed. He has further deposed that no FIR No. was written on the case property.

10. Certainly, in the cases of recovery of contraband from the exclusive and conscious possession of the accused, the onus is on the shoulders of the prosecution to prove beyond reasonable doubt, by leading cogent and convincing evidence to the effect that the accused was found in exclusive and conscious possession of the contraband. In the case in hand, as per the prosecution story, the recovery of contraband was effected from the accused, however, the link evidence qua taking out samples, sealing of samples as well as the case property, sending the samples for chemical analysis to C.T.L. Kandaghat and samples remaining intact under the police custody creates a doubt in the prosecution story.

11. In the present case, the prosecution has failed to prove that the alleged liquor was recovered from the exclusive and conscious possession of the accused and the material recovered was liquor and nothing else. In the present case, the prosecution has also failed to prove that samples were preserved after being sealed and they were not tampered with. This link evidence is missing, which is clear from the statement of PW-1, Constable Pawan Kumar. PW-1 could not depose that he had brought the seal impressions with the samples, which were deposited by him with MHC. At the same point of time, PW-3, MHC Man Dev deposed that seal impressions were separately deposited with him. As per this witness, seal impressions were not sent to the chemical analysis alongwith the sample parts. PW-5, Head Constable Sita Ram, is silent qua seal impressions having been sent to MHC of the concerned Police Station alongwith the sample parts. Even dockets, Ex. PZ-1 to Ex. PZ-3 also do not reflect that seal impressions were separately sent to the laboratory with the sample parts. As the seal impression were not compared in the laboratory by the chemical analyst, in these circumstances it is unsafe to conclude that the prosecution has proved the guilt of the accused beyond reasonable doubt. It is settled that where there is doubt in the prosecution story, it cannot be said that the prosecution has proved its case beyond all reasonable doubt. At the same point of time, the spot wherefrom the alleged liquor was recovered is also doubtful, and the quantity recovered is also doubtful, as bulk was not sealed.

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

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

14. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal:

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***1. An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***

2. The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

3. Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

4. An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

5. If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court."

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

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

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

Sushil Kumar Bansal .....Petitioner.

Versus

Cantonment Board Kasauli ....Respondent.

CMPMO No. 184 of 2017
Decided on : 3.10.2017

Code of Civil Procedure, 1908- Order 6 Rule 17- A civil suit for injunction for restraining the defendant from enforcing the order of demolition was filed – an application for amendment was filed pleading that the notice issued and the order passed in appeal are also bad – the application was dismissed by the Trial Court after holding that the facts were within knowledge of the applicant- held that the applicant had sought the injunction order regarding the demolition order and the Court was bound to adjudicate the validity of the same- it cannot do so in absence of the

specific pleadings – the application was filed to incorporate the plea and it was wrongly dismissed by the Trial Court- appeal dismissed. (Para-4)

For the petitioner: Mr. P.S. Goverdhan, Advocate.
For the respondent: Mr. Neel Kamal Sharma, CGC.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The plaintiff had instituted a suit against the defendant, wherein he claimed a decree, of, permanent prohibitory injunction with respect to the suit property, being, pronounced upon the defendant and also claimed a decree for restraining the defendant, to, in sequel to an order of 20.9.2013, recorded by the defendant, from, hence demolishing the suit property. Even though, the plaintiff had sought a relief that the defendant be restrained from enforcing the order of demolition rendered in respect of the suit property, by the defendant, yet, in the plaint, it was not initially espoused that the aforesaid order suffers from vice of any illegality nor any relief was sought of it being quashed and set aside. Subsequently, the plaintiff, through, an application cast under the provisions of Order 6 Rule 17 CPC sought the leave of the Court to incorporate in the plaint, the hereinafter extracted averments:-

> "5 (a) that the order passed by the ld. Principal Director (Appellate Authority) dated 20.9.2013 under Section 340 of Cantonment Act in appeal titled as Sushil Kumar Bansal vs. C.B. Kasauli thereby order dated 23.6.2012 is wrong, illegal, inoperative and is not sustainable in the eyes of law. The whole order is based upon surmises and conjectures and also contrary to the facts of the case. The impugned order is prima facie bad in law and perverse inasmuch as the same is against the principles and rules of natural justice. The observation given in the order is also wrong and contrary to the factual position. It is further submitted that since there is no violation of any provision of the Cantonment Act in any manner whatsoever, therefore, the show cause notice dated 19.6.2012, notice under Section 320 Cantonment Act and then notice under Section 248 dated 23.6.2012 are also wrong, illegal, null and void and has no effect on the right, title and interest. In fact no addition or alteration or erection or re-erection has taken place and therefore, the above notices could not be issued and the impugned order also could not be passed. The notice was also served upon the defendant to withdraw the notices, impugned orders and drop the proceedings against the appellant, but neither any reply has been given to the plaintiff nor the notice has been acted upon."
>
> "A decree for declaration may be passed in favour of the plaintiff and against the defendant that the notice under Section 248 dated 23.6.2012 on the basis of wrong and contrary report and show cause notice dated 19.6.2012, notice under Section 320 dated 21.10.2013 and order passed in appeal by the Appellate Authority under Section 340 dated 20.9.2013 are wrong, illegal, null and void and are not binding upon the plaintiff being against principles of natural justices, contrary to the facts and being the fact that there is no violation of the law and no addition or alteration or erection and re-erection has been carried out by the plaintiff and the whole process is wrong, illegal and against law without adopting any procedure and conducting any inquiry."

2. The application was dismissed by the learned trial Court, on, the short ground that with the aforesaid fact being within the knowledge of the plaintiff, his, omission(s), to, in respect thereof make the aforesaid prayer in the plaint, is a marked display of grave indiligence of the plaintiff, thereupon no indulgence is bestowable vis-à-vis the plaintiff. The aforesaid reason suffers from a gross perversity, of, the learned trial Court mis-understanding the operative

part of the relief clause of the plaint, also its grossly misapplying thereon the principles of law encapsulated in various judicial verdicts narrated in the order impugned.

3. The learned trial Court has not borne in mind the fact that the plaintiff had in the relief clause of the plaint, made, a prayer that the order of demolition, be not enforced.

4. Though, it is apparent, of, the plaintiff not initially asking for the apposite order being quashed and set aside. However, the learned trial Court, had concluded that with the aforesaid order, being, within the knowledge of the plaintiff, hence enjoined the plaintiff, to, in the plaint make apposite specific averments in respect of its being quashed and set aside, whereas, his thereat omission(s) barring him to seek the leave of the Court, to incorporate averments in respect thereof in the plaint. It is the aforesaid reasoning, which suffers from a gross infirmity, conspicuously with the plaintiff casting a prayer in the apposite relief clause of the plaint, in respect of the defendant being restrained from enforcing the order of demolition rendered qua the suit property, thereupon the learned trial Court was enjoined to pronounce upon validity(s) thereof besides the learned trial Court, was, obliged to record a verdict in respect of enforceability of the order of demolition recorded by the defendant. However, the learned trial Court, for want of apposite specific pleadings, in respect of validity thereof(s), may thereupon be precluded from striking an appropriate issue thereon, nor it could injunct the plaintiff to adduce thereon his evidence(s). Consequently despite the learned trial Court being enjoined to pronounce upon its validity, it, for all the aforestated reasons may be precluded to do so, omission(s) whereof arise, not, as grossly inapt concluded, by the learned trial Court, from any indiligence of the plaintiff rather by his sheer inadvertence, inadvertence whereof is curable by the asked for pointed clarification in respect thereof being permitted to be carried forth in the plaint. Predominatingly also thereupon with the leave being accorded, it, would facilitate the learned trial Court, to strike issues in respect(s) thereof also would facilitate the plaintiff to adduce thereon his evidence, whereupon it would be empowered to pronounce a just decision upon the entire gamut of the controversy. In aftermath, the impugned verdict suffers from a patent illegality besides a gross impropriety. Accordingly it is quashed and set aside. However, the learned trial Court is directed to strike apposite issue(s) vis-a-vis the amended pleadings of the parties and is also directed to permit them to thereon adduce theirs respective evidence(s).

5. Parties are directed to appear before the learned trial Court on **6.11.2017**.

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

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

State of Himachal Pradesh ...Appellant.
Versus
Desh Raj ...Respondent.

Cr. Appeal No. 453 of 2016
Reserved on: 13.09.2017
Decided on: 04.10.2017

Protection of Children from Sexual Offences Act, 2012- Section 354- **Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989-** Section 3(1)(xi)- Prosecutrix belongs to scheduled caste category and is student of 8th class- accused runs a shop outside the school- prosecutrix and her friends used to visit the shop of the accused- accused fondled the prosecutrix and on protest promised not to repeat such act- however, accused again fondled the prosecutrix when she visited the shop- she narrated the incident to her mother- accused was tried and

acquitted by the Trial Court- held in appeal that prosecutrix admitted that frooty might have been stolen by her sister- possibility of filing a false case, when the prosecutrix was found stealing the frooty cannot be ruled out- testimony of the prosecutrix is not satisfactory and the Trial Court had rightly discarded the same – appeal dismissed. (Para-8 to 20)

For the appellant: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG and Mr. Rajat Chauhan, Law Officer.

For the respondent: Mr. Ashwani Pathak, Sr. Advocate, with Mr. Sandeep K. Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The instant appeal has been preferred by the appellant/State (hereinafter referred to as "the appellant") laying challenge to judgment, dated 21.09.2015, passed by learned Special Judge, Hamirpur, District Hamirpur, H.P., in Sessions Trial No. 11 of 2014, whereby the accused/respondent (hereinafter referred to as "the accused") was acquitted for the offence punishable under Section 8 of The Protection of Children From Sexual Offences Act, 2012 read with Section 354(1) Indian Penal Code and Section 3(1)(xi) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. The brief facts of the case, as per the prosecution, can tersely be described as under:

> On 21.09.2013 the victim (name withheld) filed a complaint with Superintendent of Police, Hamirpur, alleging that she is student of 8th standard and belongs to scheduled caste category. As per the victim, outside the school the accused runs a shop and she alongwith her friends used to visit there. The accused, on an earlier occasion, pinched the breasts of the victim and after protest he promised not to repeat such things. However, on 19.09.2013, after the school hours, when she visited the shop of the accused, he again pinched her breasts and asked for sexual favour. The victim narrated the episode to her mother. The accused proclaimed that father of the victim is known to him and reputation of the victim would be tarnished. The victim further contended that on earlier occasions also accused used to do obscene acts with other girls and Principal of the school was apprised about this. On the basis of the complaint, so made by the victim, police machinery was set into motion and FIR was registered against the accused. Statement of the victim was recorded under Section 164 Cr.P.C. and the same was also audio and videographed. Record qua date of birth of the victim was also collected, which revealed that she was born on 27.12.2000, thus she was child on the date of occurrence. The accused was arrested and subsequently enlarged on bail. After completion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as fourteen witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he denied the prosecution case and claimed innocence, however, the accused did not examine any defence witness. He pleaded that the victim had stolen a biscuit packet from his shop and he did not report the matter to the police.

4. The learned Trial Court, vide impugned judgment dated 21.09.2015, acquitted the accused for the offence punishable under Section 8 of The Protection of Children From Sexual Offences Act, 2012 read with Section 354(1) Indian Penal Code and Section 3(1)(xi) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, hence the present appeal.

5. Learned Additional Advocate General has argued that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt, but the learned Trial Court has acquitted the accused on the basis of surmises and conjectures. He has argued that the statement of the victim and her class-mates go to show that accused has committed a serious crime. Conversely, the learned counsel for the respondent has argued that the statement of the victim does not at all inspire confidence, as she has admitted that her *taya* has paid for the biscuit packet and that biscuit packet was not stolen by her, but by her sister. In these circumstances, story of the defence that the victim was given a slap by the accused, as she was stealing articles from his shop and that resulted into the lodging of the present FIR, cannot be ruled out. He has further argued that other witnesses of the prosecution have not supported the version of the victim. The shop of the accused remains busy and it is in bazaar and as the statement of the victim is not confidence inspiring and also the fact that the accused is aged about 62 years, running shop for many years, the offence, as alleged, is not expected from the accused. He has argued that the appeal be dismissed.

6. In rebuttal, the learned Additional Advocate General has argued that the prosecution has proved the guilt of the accused beyond the reasonable doubts, so the accused be convicted.

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

8. In the instant case, the statement of the victim is very vital; hence the same is being discussed at the very outset. As per the victim (PW-10) on 19.09.2013, during recess, she went to the shop of the accused and the acused pinched her breasts and also asked when she would give sexual favour to him. As per the victim, her class-mates, viz., Miss Deepika, Miss Vandna and Miss Sonali during the occurrence were standing outside the shop and she also divulged the incident to them. Thus, statements of Miss Deepika, Miss Vandna and Miss Sanoli are of great value, as the same can easily provide lateral support to the version of the victim.

9. PW-11, Miss Deepika, class-mate of the victim, deposed that the victim did not disclose anything to her qua the incident. This witness, in her cross-examination has deposed that on 19.09.2013, when she was standing with Miss Vandna (PW-13), the victim told her that the accused pinched her breasts and asked for sexual favour. She has further deposed that the matter was reported to Principal of the school. A year prior to the occurrence the accused committed wrong activity with her. She, in her cross-examination, has again deposed that the victim did not disclose anything to her qua the incident committed by the accused.

10. PW-12, Miss Sonali, deposed that on 19.09.2013 the victim went to the shop of the accused and subsequently she went to her house. As per this witness, the victim did not disclose anything to her. This witness, in her cross-examination, did not support the prosecution story. She deposed that on 23.09.2013 police came to their school and enquired from her in presence of the Principal. PW-13, Miss Vandna Kumari, feigned ignorance what had happened with the victim on 19.09.2013. She, in her cross-examination, also did not support the prosecution story and, in fact, she denied the prosecution case as a whole.

11. PW-1, Smt. Pyungla Devi (mother of the victim) and Shri Dharam Pal (father of the victim). PW-1, Smt. Pyungla Devi, deposed that on 20.09.2013 the victim disclosed to her that on 19.09.2013 something bad took place with her. She further deposed that she do not know whether it is correct or not. The victim disclosed that accused pressed her breasts and asked her that when she will give sexual favour to him. She narrated the occurrence to her husband (PW-2) and subsequently the matter was reported to the police. This witness, in her cross-examination, has deposed that her *jeth,* Purshotam, paid the accused for two Frooti packets. She admitted that the shop of the accused remains crowded. She denied that just to settle the score with the accused, as he had beaten the victim for stealing biscuits from his shop, he has been roped falsely. PW-2, Shri Dharam Pal, deposed that his wife (PW-1) disclosed to him about the incident. He, in his cross-examination, deposed that he is not aware that on the day of

occurrence the accused caught the victim red handed while stealing two packets of biscuits and he slapped her. He further deposed that complaint, mark-A, was written by the victim on the dictation of the police officer.

12. PW-4, Dr. P.R. Katwal, Chief Medical Officer-cum-Registrar Birth and Death, deposed that on application, Ex. PW-4/A, moved by the police, he had issued birth certificate, Ex. PW-4/B, which bears his signatures. PW-7, Dr. Shiv Kumar, Additional Superintendent of Police, District Kangra, deposed that through application, Ex. PW-6/A, moved to Tehsildar, Hamirpur, he obtained pedigree table, Ex. PW-6/B, and caste certificates, Ex. PW-6/D, of the victim and of the accused. The licence of the shop of the accused, Ex. PW-7/A, was also taken into possession. Copy of *jamabandi,* Ex. PW-7/B, was taken into possession vide memo, Ex. PW-7/A.

13. PW-3, Shri Tek Chand, deposed that he runs a tea-stall in front of Government Senior Secondary School, Didwin Tikkar, where accused also runs a confectionery shop. As per this witness, he heard about the incident when mother of the victim came to the shop of the accused and she was saying something to him. On his asking she disclosed the incident to him. This witness, in his cross-examination, has deposed that he did not hear about the incident from anybody, except from PW-1 (mother of the victim). PW-5, Shri Balwant Singh, Principal, Government Senior Secondary School, Didwin Tikkar, deposed that on application, Ex. PW-5/A, moved by the victim, Nisha, Diksha, Sonali, Priyanka, Vidya, Rohit and Shilpa, he enquired the matter from the girl students of the school and it was unearthed that accused used to tease them. However, the accused denied that he used to tease the girls. This witness, in his cross-examination, deposed that in his inquiry the accused disclosed that the victim was caught red handed while stealing a biscuit packet from his shop and he slapped her. PW-6, Shri Lalman, Tehsildar, Hamirpur, deposed that on application, Ex. PW-6/A, moved by the police, he countersigned pedigree table, Ex. PW-6/B, which was issued by Patwari, Patwar Circle Didwin Tikkar, and, Ex. PW-6/C, schedule of castes was also signed by him. Pedigree table of the accused, Ex. PW-6/D, was also countersigned by him.

14. PW-8, Inspector Ramesh Chand, deposed that on the basis of application, Ex. PW-8/A, FIR, Ex. PW-8/B, was registered, which bears his signatures and endorsement thereon is Ex. PW-8/A. After completion of investigation, he prepared report under Section 173 Cr.P.C. and presented the same in the Court.

15. PW-9, Miss Nisha (sister of the victim), deposed that on 19.09.2013 she was standing near the shop and her sister (victim) alongwith her friends went to the shop of the accused. As per this witness, when the victim came back, she disclosed to her that accused pinched her breasts. This witness was declared hostile and subjected to exhaustive cross-examination. She, in her cross-examination, denied that the victim also disclosed to her that the accused asked her that when she will give sexual favour to him. She feigned ignorance whether Ex. PW-5/A (complaint to the Principal of the School) was collectively submitted. She admitted that after the school hours there remains crowd in the shop of the accused.

16. PW-14, Inspector Reeta Sharma, deposed that on 21.09.2013 the victim, through application, Ex. PW-8/A, reported the matter, whereupon FIR, Ex. PW-8/B, was registered. On 22.09.2013 she visited the spot and prepared spot map, Ex. PW-14/B. Birth certificate, Ex. PW-4/B, was procured by moving application, Ex. PW-4/A. She also took into possession application, Ex. PW-5/A, from Principal, Government Senior Secondary School Didwin. Statements of Nisha Kumar, Sonali and Vandna Kumar were recorded, which are Ex. PW-14/C, Ex. PW-14/D and Ex. PW-14/E, respectively. Statement of the victim was also recorded under Section 164 Cr.P.C., which is Ex. PW-10/A. This witness, in her cross-examination, has deposed that all the witnesses are friends of the victim. She denied that the caste of all the witnesses is same as that of the victim.

17. PW-11, Miss Deepika, class-mate of the victim categorically deposed that the victim did not disclose anything to her qua the incident committed by the accused. She was cross-examined at length, but nothing favourable to the prosecution could be extracted. PW-12,

Miss Sonali, student of the same school, also deposed that the victim did not disclose anything to her with regard to the alleged incident. Similarly, PW-13, Miss Vandana Kumari, deposed that the victim did not disclose anything to her qua the incident. She has further deposed that neither any incident took place in her presence, nor was reported by the victim to her. Thus, the prosecution has failed to prove that the accused pinched the breasts of the victim. Similarly, all the above mentioned prosecution witnesses have stated that they did not hear any cries when the breasts of the victim were pinched by the accused, as narrated by the victim. At the same point of time, it has come on record that crowd remains in the shop of the accused and many children were also present at the time of the alleged occurrence. The statements of other shopkeepers are hearsay and the statements of other prosecution witnesses are full of lacunae.

18. Indeed, in cases of such like nature, statement of the victim is of great importance. In the case in hand, the victim was examined as PW-10. She, supported her earlier version, however, in her cross-examination, she deposed that she went there to purchase *emli* (tamarind). She has categorically stated that her breasts were pinched by the accused and she cried in pain. However, no signs of injury or redness on her breasts were found, as she herself deposed that she showed her breasts to her mother. She has admitted that her *taya,* Shri Purshotam, paid for Frooty, whereas as per the victim Frooty might have been stolen by her sister. Thus, the possibility of stealing, either by the victim or by her sister, cannot be ruled out. There is also possibility that when the act of stealing was noticed by the accused, the same was highlighted to the Principal of the School and may be due to this the students got annoyed. The close scrutiny of the prosecution evidence goes to show that PWs 11, 12 and 13 have not supported the prosecution case. The victim, in her cross-examination, has admitted that during day time the shop of the accused remains over crowded and her class-mates remained outside. As per the statement of PW-5, Shri Balwant Singh, Principal of the school, on inquiry the accused divulged that the victim was caught red-handed while stealing biscuit from his shop.

19. The statement of the victim becomes unbelievable, especially when PWs, 11, 12 and 13 have not supported the prosecution case, therefore, the accused cannot be convicted on the sole statement of the victim, which is also full of suspicions. PW-2, Shri Dharam Pal (father of the victim) deposed that his wife and brother Purshotam never disclosed to him that he (Purshotam) paid the accused for two packets of Frooty, which were allegedly stolen by the victim. This witness did not deny that on the day of occurrence the victim was caught red handed and the accused slapped her and due to this reason the victim got annoyed and she subsequently divulged untrue facts to her mother against the accused. Thus, the statement of PW-2, Shri Dharam Pal, belies the prosecution story and also creates a doubt in it and the benefit of the same can safely be given to the accused.

20. Keeping in view what has been discussed hereinabove, in a nut shell it is more than safe to hold that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. Thus, there is no occasion to interfere with the well reasoned judgment of the learned Trial Court, as such the appeal, which sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, stand(s) disposed of accordingly.

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

Jamuna Devi & others .....Petitioners.

Versus

Charanji Lal. .....Respondent.

CMPMO No. 478 of 2016
Decided on : 5.10.2017

Code of Civil Procedure, 1908- Order 6 Rule 17- A civil suit for specific performance of contract was filed – an application was filed for seeking amendment to incorporate the plea that defendants No. 3 and 4 are bona fide purchasers, which was dismissed- held that the application was filed for clarifying the facts- the character of the defence was not being changed by the proposed amendment- the rejection of the application was not proper- petition allowed- the order set aside. (Para-2 to 4)

For the petitioners: Mr. Dheeraj K. Vashishat, Advocate.
For the respondent: Mr. Sunny Modgil, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

A Civil Suit bearing No. 297 of 2010 was instituted by the plaintiff before the learned trial Court, wherein, he claimed a decree for specific performance, of, oral contract of sale recorded inter-se him and co-defendants No. 1 and 2, contract whereof is with respect to the suit property. The suit was resisted by all the co-defendants, by their(s) instituting a common written statement thereto. However, when the civil suit progressed upto the stage of closure of plaintiff's evidence, whereat, the defendants' were to adduce their evidence upon all the relevant issues, thereat an application cast under the provisions of Order 6 Rule 17 CPC was instituted by all the co-defendants, before the learned trial Court. The amendment as sought to be incorporated in paragraph-3 of the written statement is reproduced hereunder:-

> "That the applicants/defendants wants to amend the para No.3 of the written statement in the line No.23 after the word "defendant No.3 and 4" by adding the following "hence the defendant No. 3 and 4 are bonafide purchaser"."

It was specifically averred in the application that upon the aforesaid amendment being permitted to be incorporated, it, would not alter the nature and complexion of the pleadings initially setup by the defendants, rather it being merely clarificatory in nature, hence leave for its incorporation in paragraph-3, being affordable vis-à-vis the defendants. The said application was dismissed by the learned trial Court, hence being aggrieved therefrom, the defendants are led to institute the instant petition before this Court.

2. The fulcrum for testing the validity of the pronouncement impugned before this Court, rests, upon whether the amendment in respect thereof leave, for its, incorporation in the relevant paragraph of the written statement, was prayed for, by the defendants, being or not clarificatory in nature. In case this Court upon making fathomings' of the pleadings discerns therefrom qua the proposed amendment being merely clarificatory in nature, ipso facto, thereupon the nature and complexion of the pleadings initially setup by the defendants would remain unaltered. The concomitant sequel whereof would be, of, the leave refused by the learned trial Court, to the defendants, for incorporation in the written statement, the proposed amendment, being ingrained with a vice of illegality besides material irregularity. However, in making the aforesaid gaugings, it is imperative, to make an incisive reading of the pleadings setup by the contesting parties.

3. In paragraph-6 of the plaint, which stands extracted hereinafter:-

> "That on dated 26.8.2010 plaintiff received a registered postal letter and when he read it he was shocked to read that defendants No. 3 and 4 has filed a false and frivolous case of permanent injunction regarding the suit land and claiming themselves as owner in possession over the suit land, then plaintiff enquired the matter from revenue department and applied for certified copy of sale deed then he came to know that defendant No. 1 and 2 has sold the suit land to defendant No. 3 and 4 on 28/10/2009 illegally for which they had no right to do so. Moreover, it was in the knowledge of defendant No. 3 and 4 that defendant No. 1

and 2 has agreed to sale the suit land to plaintiff as per agreement to sell (oral) dated 15/6/2009 as all the parties are from the same village and are in relationship with each other further it was in the knowledge of defendants No. 3 and 4 that plaintiff has constructed his house and cattle shed over the suit land."

it is specifically elucidated of, co-defendants being aware of the factum of occurrence of an oral agreement of sale, of the suit property, inter-se the plaintiff and co-defendants No. 1 and 2. The aforesaid trite factum, carries all the elements, of, the plaintiff concerting to blunt besides oust any espousal(s), of, co-defendants No. 3 and 4, of, the execution of the sale deed by defendants No. 1 and 2 with them, acquiring any virtue of validity, arising from the factum of co-defendants No. 3 and 4 being bonafide purchaser(s) without notice, for value, conspicuously with theirs holding knowledge of existence, thereat, of an oral agreement of sale entered inter-se the plaintiff and co-defendants No. 1 and 2. The aforesaid averments were most vehemently denied by all co-defendants, by theirs meteing dis-affirmative reply(s) thereto. The learned trial Court has, however, not borne in mind the aforesaid material existing on record, rather it appears to be guided merely by the principle(s) of law encapsulated in judicial verdicts, narrated in its impugned order. The principle(s) of law encapsulated in the verdicts enunciated, in, the impugned order, though make a vivid pronouncement, of, belated concerts of the litigant concerned, to seek leave of the Court concerned, to beget amendment(s) in the pleadings, not, warranting imputation of any validity thereto, especially with material marking the factum of the litigant concerned, being aware, of the existence of the relevant fact(s) tritely at the stage of institution of the pleadings, whereupon the disabling factor of his being indiligent is attractable vis-à-vis him.

4. However, the extant pleadings, as referred hereinabove, do not unveil, of, the co-defendants not resisting the espousal(s) made by the plaintiff, in, paragraph-6 (supra), whereupon he strived to blunt any assaying(s) of the co-defendants, of, theirs acquiring ostensible title and legal ownership vis-à-vis the suit property, espousals whereof of the plaintiff, stood vehemently denied by all the co-defendants. The effect of the aforesaid pleadings, is, of the co-defendants meteing appropriate reply(s) to the pleadings (supra) of the plaintiff, though therein theirs', not, taking to cast them in the precise legal phraseology, nor theirs with pin pointed accuracy making apposite articulations' in their written statement, of, the sale deed executed in respect of the suit property enjoying legal validity, it being a sequel, to theirs' acquiring the protection of Section 44 of the Transfer of Property Act. Consequently, if they subsequently, even if belatedly, make an effort, to, with the leave of the Court, incorporate the hereinabove extracted averments theirs hence merely mete clarifications, with pointed precision, of, the benefits, contemplated in Section 42 of the Transfer of Property Act, being ensuable vis-à-vis them. Concomitant, sequel thereof, is that with the nature of pleadings initially setup by the defendants, hence not undergoing any gross alteration in their character or complexion, rather the proposed amendment(s) being merely clarificatory in nature, hence all judicial pronouncements relied upon by the learned trial Court in its impugned judgment, were grossly misapplied vis-à-vis the facts at hand. In aftermath, the impugned order suffers from a gross perversity and absurdity. Accordingly, the petition is allowed and impugned order is quashed and set aside.

5. Parties are directed to appear before the learned trial Court on **24.10.2017**. The learned trial Court shall permit the plaintiff to institute amended replication to the amended pleadings of the defendants.

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

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

M/s Daulat Ram and Mangat Ram ...Appellant.
Versus
Oriental Insurance Company and others. ...Respondents.

FAO No.: 92 of 2017
Date of Decision : 05/10/2017

Employees Compensation Act, 1923- Section 4- Commissioner saddled the insurance with liability to pay the interest – aggrieved from the award, present appeal has been filed – held that the insurer cannot be directed to satisfy the liability regarding the interest where the contract excludes the same- the policy did not exclude the payment of interest by the insurer in the present case – the Commissioner had rightly saddled the insurer with liability – appeal dismissed. (Para-2)

Case referred:
New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and another, 2006 ACJ 1699

For the Appellant: Mr. Raman Sethi, Advocate.
For the respondents: Mr. Lalit Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (oral)*

The instant appeal is directed against the order recorded on 13.12.2016 by the learned Commissioner Workman Compensation, Court No.1, Shimla. Upon hearing the counsel for the contesting parties, the following substantial questions of law arise for determination:

a). Whether the insurer can be exonerated from liability to pay interest on the amount of compensation in the absence of any express stipulation in the policy of insurance qua its non-liability for the payment of interest.

b). Under the impugned order the apposite indemnificatory liability qua interest levied upon the principal compensation amount was fastened upon the employer of deceased Virender Kumar.

2. The counsel for the appellant contends that the fastening, in, the impunged order, of, the apposite indemnificatory liability upon the insured precisely qua the interest levied on the principal compensation amount, is in gross conflict with a judgement rendered by the Hon'ble Apex Court, judgement whereof is borne in a case titled New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and another reported in *2006 ACJ 1699,* relevant paragraph whereof is reproduced hereinafter.

> "20. The views taken by us find support from a recent judgement of this Court in P.J. Narayan V. Union of India, 2004 ACJ 452 (SC), wherein it was held:-
>
> (1) This writ petition is for the purpose of directing insurance company to delete the clause in the Insurance policy which provides that in case of compensation under the workmen's Compensation Act, 1923, the Insurance Company will not be liable to pay interest. We see no substance in the writ petition. There is no statutory liability on the insurance company. The statutory liability under the Wiorkmen's Compensation Act is on the employer. An insurance is a matter of contract between the insurance company and the insured. It is always open to the insurance company to refuse to insure. Similary, they are entitled to provide by contract that they

will not take on liability of interest. In the absence of statute to that effect, insurance company cannot be forced by Courts to taken on liabilities which they do not want to take on. The writ petition is dismissed. No order as to costs."

However, for applying the ratio decidendi encapsulated therein, of, the insurer concerned being amenable, to bear the liability of interest levied upon the the principal compensation amount, unless in the relevant contract of insurance there exists an apposite thereto specific explicit exclusionary clause, clause whereof excludes the fastening of liability of interest levied upon the principal compensation amount vis-à-vis the insurer. Consequently, it is to be discerned from the relevant insurance cover, qua therein, existing, a precise explicit clause whereby the insurer is rendered, unamenable, for bearing the liability of interest levied upon the principal compensation amount. However, a, perusal of the insurance cover is manifestive of, no, specific precise clause standing borne therein whereby the insurer is contractually excluded from being fastened with the liability to pay interest upon the principal compensation amount. Corollary whereof, is that the ratio decidendi carried in the judgement rendered by the Hon'ble Apex Court in New India Assurance Co. Ltd. (Supra) hence standing affirmatively satisfied vis-à-vis the insured also thereupon it is apt to conclude of the insurer being, amenable for, liability of interest levied upon the principal compensation amount, being fastenable upon it. Contrarily, the learned Commissioner has fastened the liability of interest, carried, in the principal compensation amount, upon, the employer of deceased employee, one M/s Daulat Ram and Mangat Ram. Consequently, the questions of law are answered in favour of the appellant. The impugned order is modified to the extent that the liability of interest levied on the principal compensation amount shall be borne by the insurer concerned. All the applications disposed of accordingly. Appeal partly allowed. No costs.

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

Shri Virbhadra Singh (HUF) through its Karta Shri Virbhadra Singh ...Appellant.

Versus

Principal Commissioner of Income Tax ...Respondent.

ITA No.4 of 2017
Reserved on: September 21, 2017
Date of Decision: October 5, 2017

Income Tax Act, 1961- Section 143- Assessee filed a return declaring net taxable income as Rs. 7,22,943/- and he disclosed Rs. 15 lacs as income from the agriculture- a notice was issued to the assessee- assessee filed a revised return in which he enhanced his agriculture income to Rs. 2,80,92,500/- return was accepted by Assessing Officer- however, commissioner set aside the assessment order holding it to be erroneous and remanded the matter for a fresh assessment- assessee filed a statutory appeal which was dismissed- Assessing Officer assessed the agriculture income as Rs. 15 lacs and declared additional income of Rs. 2,65,82,500/- as income earned from undisclosed sources and added it to the taxable income- assessee filed the present appeal- held that it is undisputed that assessee and his family members had made investments in L.I.C. in the year 2008, 2009 and 2011 worth Rs. 6.18 crores – the Commissioner found that earning of additional income of Rs. 2.65 crores so reflected in the revised return was already in the knowledge of the assessee- the Assessing Officer had failed to inquire from the assessee about the source of income – no inquiry was conducted for ascertaining the authenticity of the bills, vouchers, books of account of the assessee – it is not disputed that entire sale of horticulture produce of more than Rs. 2.8 crores is in cash – income from agricultural source is marginal – the assessee filed a revised return on receipt of the notice- the omission or wrong statement in the

original return must be due to a bona fide inadvertence or mistake on the part of the assessee – Assessing Officer failed to notice that in the original return there was a reference to investment in LIC but the investment was not disclosed, even income from the orchard was also not disclosed – the additional evidence pertaining to the agent was led during the proceedings, which was rightly accepted – no prejudice was caused to the assessee by this additional evidence – the Commissioner has wide powers to pass such orders as may be deemed fit in the circumstances of the case- appeal dismissed. (Para-21 to 125)

Cases referred:

Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, Kerala State, (2000) 2 SCC 718
Commissioner of Income Tax v. Kwality Steel Suppliers Complex, (2017) 395 ITR 1: AIR 2017 SC 2949
Commissioner of Income Tax v. Gabriel India Ltd., (1993) 203 ITR 108
Commissioner of Income-Tax v. Sunbeam Auto Ltd., (2011) 332 ITR 167
Income-Tax Officer v. DG Housing Projects Ltd., (2012) 343 ITR 329
Commissioner of Income-Tax v. Text Hundered India Pvt. Ltd., (2013) 351 ITR 57
Maruti Udyog Limited V. ITAT, (2000) 244 ITR 303 (Delhi)
Andaman timber Industries v. Commissioner of Central Excise, Kolkata-II, (2015) 281 CTR 241 : 2016) 15 SCC 785
K. Venkataramkiah v. A. Seetharma Reddy and others, AIR 1963 SC 1526
Tara Devi Aggarwal v. Commissioner of Income-Tax, West Bengal, (1973) 88 ITR 323 : (1973) 3 SCC 482
Syed Abdul Khader v. Rami Reddy and others, AIR 1979 SC 553
State of Rajasthan v. T.N. Sahani and others, (2001) 10 SCC 619
Thakur V. Hari Prasad v. Commissioner of Income-Tax, (1987) 167 ITR 603
T.M.S. Mohamed Abdul Kader v. Commissioner of Gift-Tax, Madras, (1968) 70 ITR 237(Madras)
Commissioner of Income Tax v. Emery Stone Mfg. Co., (1995) 213 ITR 843 (Rajasthan)
Sunanda Ram Deka v. Commissioner of Income-Tax, (1994) 210 ITR 988
Amjad Ali Nazir Ali v. Commissioner of Income-Tax, Kanpur, (1977) 110 ITR 419 (Allahabad)
Addl. Commissioner of Income-Tax, Lucknow v. Radhey Shyam, (1980) 123 ITR 125 (Allahabad)
Sasi Enterprises v. Assistant Commissioner of Income Tax, (2014) 5 SCC 139
Commissioner of Income Tax, Mumbai v. Amitabh Bachhan, (2016) 11 SCC 748
Commissioner of Income Tax, Delhi (Central) vs. S. Sucha Singh Anand, (1984) 149 ITR 143 (Delhi) (Two-Judge Bench)
Commissioner of Income Tax v. Dr. Sajjan Singh Malik, (1989) 178 ITR 643
Commissioner of Income-Tax v. Vikas Polymers, (2012) 341 ITR 537(Delhi)
Commissioner of Income Tax vs. Ashok Logani, (2012) 347 ITR 22 (Delhi) (Two-Judge Bench)
CIT vs. Smt. Minalben S. Parikh, (1995) 215 ITR 81 (Guj)
Commissioner of Income-Tax v. New Delhi Television Ltd., (2014) 360 ITR 44 (Delhi)
Commissioner of Income Tax (Central) Ludhiana v. Max India Limited, (2007) 15 SCC 401
Keshav Mills Ltd. v. Income-tax, Bombay, AIR 1953 SC 187
Commissioner of Income-tax, Calcutta v. M/s British Paints India Ltd., AIR 1991 SC 1338 : 1992 Supp (1) SCC 55
Sanjeev Woollen Mills v. Commissioner of Income Tax, Mumbai, (2005) 13 SCC 307
M/s Standard Triumph Motor Co. Ltd. v. Commissioner of Income Tax, Madras, 1993 Supp (3) SCC 315
Commissioner of Income Tax, Shillong vs. Assam Travels Shipping Service, Dibhrugarh, 1993 Supp (4) SCC 206
Hukumchand Mills Ltd. v. Commissioner of Income-Tax, Central, Bombay, (1967) 63 ITR 232 : AIR 1967 SC 455
Income-Tax Officer, Cannanore v. M.K. Mohammed Kunhi, (1969) 71 ITR 815

Commissioner of Income-Tax, Madras v. Mahalakshmi Textile Mills Ltd., (1967) 66 ITR 710 : AIR 1968 SC 101
National Thermal Power Co. Ltd. v. Commissioner of Income Tax, (1997) 7 SCC 489
Goetze (India) Ltd. v. Commissioner of Income-Tax, (2006) 284 ITR 323
North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (Dead) by LRs, (2008) 8 SCC 511
Rasiklal M. Parikh vs. Assistant Commissioner of Income Tax, (2017) 393 ITR 536 (Bom)

For the Appellant	:	Mr.P.Chidambaram, Sr.Advocate, with M/s Rohit Jain, Vishal Mohan, Pranay Pratap Singh, S. Khurana, Aditya Sood and Sushant Kaprate, Advocates.
For the Respondent	:	Mr. Vinay Kuthiala, Senior Advocate with Ms Vandana Kuthiala & Mr. Diwan Singh, Advocates.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

By way of present appeal, so filed under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act), appellant Shri Virbhadra Singh (HUF) (hereinafter referred to as the Assessee), lays challenge to the order dated 8.12.2016 (Annexure A-1), passed by the Income Tax Appellate Tribunal (hereinafter referred to as the Tribunal), affirming the order dated 18.3.2014 (Annexure A-2), passed by the Commissioner of Income Tax (hereinafter referred to as the Commissioner), who set aside the order dated 28.3.2013 (Annexure A-4) (Page-276), passed by the Assessing Officer, in accepting the Revised Return filed by the Assessee.

2. Parties agreed for admission of the appeal on the following Substantial Questions of Law, which we are called upon to decide:

> "i) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in upholding the validity of the revisionary order dated 18.03.2014 passed under section 263 of the Act?
>
> ii) Whether on the facts and in the circumstances of the case, the impugned order of the Tribunal dated 8.12.2016 admitting and considering the additional evidences in gross violation of the procedure laid down in ITAT Rules and in violation of principles of natural justice and fair play, is illegal and bad in law?"

3. The facts, leading to the filing of the instant appeal are as under.

4. The Assessee is regularly assessed to income tax. On 19.7.2010, Assessee filed a Return, declaring net taxable income, for the Financial Year 2009-2010 - Assessment Year 2010-2011 (hereinafter referred to as the relevant year) to be Rs.7,22,943/- (Page-262). In the said Return, income from the source of agriculture, germane to present proceedings, he disclosed a sum of Rs.15,00,000/-. Perusal of the Return (Page-265) reveals the Assessee to have also generated income from the source of LIC.

5. Such return was selected for scrutiny assessment through CASS. Hence, on 24.8.2011, statutory notice under Section 143(2) of the Act was issued.

6. However, on 2.3.2012, Assessee filed a Revised Return, declaring his income from the agricultural source (hereinafter referred to as "agricultural source"), enhancing it from Rs.15,00,000/- to Rs.2,80,92,500/- (Page-265).

7. Vide order dated 28.3.2013 (Annexure A-4) (Page-276) (hereinafter referred to as the assessment order), the Assessing Officer, in deciding the proceedings for assessment under Section 143(3) of the Act, accepted the income so declared by the Assessee.

8. On 12.2.2013, the Commissioner, by invoking revisional jurisdiction, under Section 263 of the Act, issued notice to the Assessee (Annexure A-5) (Page-282), and after affording opportunity of hearing, vide impugned order dated 18.3.2014 (Annexure A-2) (Page 203), set aside the assessment order, holding it to be erroneous as well as prejudicial to the interest of Revenue and remanded the matter back for fresh assessment in accordance with law.

9. Sometime in the month of May/June, 2014, Assessee laid challenge to the same by filing a statutory appeal before the Tribunal, which stands dismissed vide impugned order dated 8.12.2016 (Annexure A-1) (Page-70). It is a matter of record that during the course of such proceedings, Revenue placed additional material, which was considered in deciding/dismissing the appeal.

10. Prior thereto, pursuant to the order of remand, the authorized Assessing Officer, vide order dated 31.3.2015 (Page-574) re-assessed the income from the agricultural source, by concluding that:

> "14. Finally by the all possible exercises and enquiries, I conclude that most reasonably the orchard would have produced apple crops after setting off the expenses incurred for earning the said agriculture income, the net agriculture income of Rs.15,00,000/- as per the original return of income filed by the assessee on 29.07.2010. I also conclude that the alleged MoU dated 15.06.2008 is a false and fabricated document which was prepared later by the assessee as an afterthought.
>
> 15. In view of the above, I treat the income (which has been declared as additional agricultural income in the revised return) of Rs.2,65,82,500/- as income earned from undisclosed sources and add this amount u/s 68 of the Income Tax Act 1961 to the taxable income of the assessee.
>
> 16. Further, keeping in view the discussions as above, I am satisfied that the assessee has furnished inaccurate particulars of his income amounting of Rs.2,65,82,550/- and has suppressed his taxable income by Rs.2,65,92,550/- therefore, penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 are being initiated separately.
>
> 17. With above remarks the taxable income of the assessee is computed as under:
>
> (All figures in INR)

Taxable income as declared by the assessee.		Rs.44,67,584/-
Add	Income from undisclosed sourced as discussed para 15	Rs.2,65,92,550/-
	Taxable Income	Rs.3,10,60,134/-

> Agriculture income is assessed at Rs.15,00,000/- as per original return filed on 29.07.2010." (Emphasis supplied)

11. It is a matter of record that now such order of assessment is pending adjudication before the Commissioner of Income Tax (Appeals).

12. However, pursuant to order of re-assessment and pending consideration of said appeal, Assessee filed the instant appeal on 18.1.2017, in which notice was issued on 20.1.2017.

13. Parties insisted on the hearing of the appeal and as such, they have addressed on various issues touching the substantial questions of law.

14. On behalf of the Assessee, Mr.P.Chidambaram, learned Senior Counsel, argued:

a). View taken by the Assessing Officer was a possible and plausible one. Simply because the Commissioner disagreed with the same, it was not open for him to have exercised his revisional jurisdiction, more so, without satisfying and recording the order being erroneous and prejudicial to the interest of Revenue.

b). In the alternative, having satisfied about the order being erroneous, rather than remitting the matter, the Commissioner himself, ought to have conducted the inquiry as it was not a case of "no inquiry" but "some inquiry".

c). While examining the correctness of jurisdiction exercised by the Commissioner, Tribunal erred in accepting and considering additional evidence placed on record by the Revenue.

d). Still further, Tribunal erred in accepting such additional evidence, for (a) it was in gross violation of Rule-29 of the Income Tax Rules, 1962, (b) additional evidence was allowed without passing a separate speaking order, (c) no opportunity to rebut the same was afforded to the Assessee, and (d) no opportunity was afforded to the Assessee to cross-examine the person whose statements were accepted by the Tribunal.

15. At this juncture, this Court feels obliged to reproduce the note handed over by Mr. Chidambaram, learned Senior Counsel, termed as "Legal Propositions", restricting the grounds of challenge and the issues arising for consideration in the present appeal:

"Proposition I: Section 263 of the Income Tax Act, 1961 ("the Act") permits the CIT to revise the order only if it is:

(a) Erroneous; and

(b) Prejudicial to the interest of Revenue.

If the assessing officer takes a plausible view, the CIT cannot hold that order to be erroneous merely because he disagrees with that view.

In the present case, first condition, viz. order being "erroneous" is not satisfied.

Proposition II: Without prejudice to proposition (I), in a case where the CIT has correctly come to the conclusion that the order is erroneous but there is some enquiry by the assessing officer, then the CIT cannot remit the matter to the assessing officer but he should decide it himself.

Remit is permissible only in a case of no enquiry.

Proposition III: The Appellate Tribunal (ITAT) was obliged to examine the correctness of the exercise of jurisdiction by the CIT under section 263 of the Act; in such a case rule permitting filing of additional evidence does not apply.

In the present case, ITAT erred in permitting the additional evidence while examining the correctness of jurisdiction of the CIT under section 263 of the Act.

Proposition IV: Without prejudice to proposition III, the ITAT erred in permitting new and additional evidence because it was:

a). in gross violation of Rule 29 of the ITAT Rules;

b). without passing a separate speaking order allowing the additional evidence;

c). without granting opportunity to the appellant to rebut the additional evidence or to cross-examine the person making ex-parte statements."

16. In support, reliance is sought on the following decisions rendered by different Courts of the land: (1) *Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, Kerala State,* (2000) 2 SCC 718; (2) *Commissioner of Income Tax v. Kwality Steel Suppliers Complex,* (2017) 395 ITR 1 : AIR 2017 SC 2949; (3) *Commissioner of Income Tax v. Gabriel India Ltd.,* (1993) 203 ITR 108; (4)*Commissioner of Income-Tax v. Sunbeam Auto Ltd.,* (2011) 332 ITR 167; (5) *Income-Tax*

Officer v. DG Housing Projects Ltd., (2012) 343 ITR 329; (6) *Commissioner of Income-Tax v. Text Hundered India Pvt. Ltd.,* (2013) 351 ITR 57; (7) *Maruti Udyog Limited V. ITAT,* (2000) 244 ITR 303 (Delhi) and (8) *Andaman timber Industries v. Commissioner of Central Excise, Kolkata-II,* (2015) 281 CTR 241 : (2016) 15 SCC 785.

17. In addition, Mr. Vishal Mohan, learned Counsel, has argued that in deciding the appeal, Tribunal ought to have confined consideration only to the material on record, so defined under clause (b) of sub-section (1) of Section 263 of the Act.

18. On the other hand, Mr. Vinay Kuthiala, learned Senior Counsel appearing for the Revenue, with vehemence defends the action *inter alia* contending that (a) the impugned orders passed are strictly in accordance with law, (b) present appeal merits rejection in limine, for the Assessee, who is forum shopping, is guilty of *suppressio veri, expressio falsi* (c) similar issues based on similar facts already stand adjudicated by this Court in *Shri Virbhadra Singh v. Deputy Commissioner, Circle Shimla,* CWP No.3072 of 2016, decided on 26.12.2016 (d) alternate remedy already stands exhausted by the assessee and, as such, cannot be allowed to pursue the present appeal.

19. Reliance is sought on the following reports: (1) *K. Venkataramkiah v. A. Seetharma Reddy and others,* AIR 1963 SC 1526; (2) *Smt. Tara Devi Aggarwal v. Commissioner of Income-Tax, West Bengal,* (1973) 88 ITR 323 : (1973) 3 SCC 482; (3) *Syed Abdul Khader v. Rami Reddy and others,* AIR 1979 SC 553; (4) *State of Rajasthan v. T.N. Sahani and others,* (2001) 10 SCC 619; (5) *Thakur V. Hari Prasad v. Commissioner of Income-Tax,* (1987) 167 ITR 603; (6) *T.M.S. Mohamed Abdul Kader v. Commissioner of Gift-Tax, Madras,* (1968) 70 ITR 237(Madras); (7) *Commissioner of Income Tax v. Emery Stone Mfg. Co.,* (1995) 213 ITR 843 (Rajasthan); (8) *Sunanda Ram Deka v. Commissioner of Income-Tax,* (1994) 210 ITR 988; (9) *Amjad Ali Nazir Ali v. Commissioner of Income-Tax, Kanpur,* (1977) 110 ITR 419(Allahabad); (10) *Addl. Commissioner of Income-Tax, Lucknow v. Radhey Shyam,* (1980) 123 ITR 125 (Allahabad); (11) *Sasi Enterprises v. Assistant Commissioner of Income Tax,* (2014) 5 SCC 139 and (12) *Commissioner of Income Tax, Mumbai v. Amitabh Bachhan,* (2016) 11 SCC 748.

20. We shall first deal with the preliminary objections.

21. With vehemence, Mr. Kuthiala, learned Senior Counsel, has highlighted the conduct of the Assessee, who, according to the Revenue, has not only tried to procrastinate the proceedings of assessment but suppressed, misled and mis-stated true facts. Also, an endeavour is made to resort to multiple proceedings and remedies, with a view to confuse the issue and abuse the process of law. Our attention is invited to the fact that in the present appeal, Assessee failed to disclose that against the order of remand dated 18.3.2014, though an appeal was filed but no application seeking stay of the order passed by the Commissioner was filed. For more than one and a half years, hearing of the appeal was allowed to be delayed. In the meanwhile, a fresh order pursuant to remand was passed, against which also an appeal was preferred. Though the appellant could have sought stay of the proceedings but deliberately chose not to do so, for he was forum hunting. By taking a calculated risk, in fact as a gamble, he waited for the authorities to pass an order. Now finding the same not to his liking, he has pursued the appeal, and that too without disclosing such facts. As such, he is guilty of *suppressio veri, expressio falsi.* Reference is made to *Sasi Enterprises* (supra).

22. Well, we are not inclined to dismiss the appeal on this count, for we have endeavoured to answer the issues on merit.

23. It is next contended that the grounds raised in the present appeal can be considered and adjudicated in the appeal already preferred by the Assessee, assailing fresh order of assessment (re-assessment) passed by the Assessing Officer. Also we are not inclined to dismiss the appeal on this count.

24. Order passed by the Assessing Officer, being erroneous and prejudicial to the interests of the Revenue, cannot be agitated by the Assessee in the pending proceedings, assailing the order passed pursuant to an order of remand.

25. This Court in *Shri Virbhadra Singh v. Deputy Commissioner, Circle Shimla,* CWP No.3072 of 2016 has only considered the legality and propriety of issuance of notices under Sections 147 & 148 of the Act. Hence, findings returned therein cannot be said to be in the nature of *res judicata*.

26. As such, uninfluenced of the preliminary objections, we proceed to examine the appeal on merits.

27. For adjudicating relevant statutory provisions, Sections 139, 142, 143, 147, 263, 254 of the Act and Rule 29 of the Income Tax Rules, 1962 (hereinafter referred to as the Rules) need to be examined.

28. Section 139 of the Act casts an obligation on every person, specified therein, to furnish return of his income, in a prescribed manner. Law provides (sub-section (5) of Section 139) that wherever an Assessee "discovers any omission or any wrong statement" in an already furnished return, he may furnish a revised return, within the period of limitation prescribed therein.

29. Section 142 of the Act postulates an inquiry before assessment.

30. Assessment is carried out in terms of Section 143.

31. Under Section 147 of the Act, the Assessing Officer, if he has reason to believe that any income chargeable to tax has escaped assessment for the Assessment Year, may subject to all just exceptions, assess or reassess such income.

32. Under Section 263 of the Act, the Commissioner is empowered to call for and examine the record of any proceedings under the Act and on consideration, if the order passed by the Assessing Officer is found to be erroneous, insofar as it is prejudicial to the interest of Revenue, may, after giving the Assessee an opportunity of hearing and making or causing to make such inquiry, as may be deemed necessary, pass any order, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment.

33. Clause (b) of sub-section (1) of Section 263 of the Act itself defines "record" to mean that record shall include and be deemed always to have included all records relating to any proceeding under the Act available at the time of examination by the Principal Commissioner or Commissioner.

34. Further remedy is by way of an appeal to the Tribunal (Sections 253/254) and thereafter an appeal, on a substantial question of law, to the High Court under the provisions of Section 260A of the Act.

Certain Facts

35. It is a matter of record that in relation to three Assessment Years, i.e. 2008, 2009 and 2011, the Assessee and his family members made investments in the policies of Life Insurance Corporation (LIC) worth Rs.6.18 crores. It is also an undisputed fact that in the relevant year (2009-10), Assessee and his family members made investments in purchase of LIC Policies for an amount, in excess of the income declared from the agricultural source in the relevant year. Following are such investments indicated in a tabulated form:

"Relevant year"

S. No.	Name of person	Policy No.	Date of Purchase	Amount
1.	Rani Pratibha Singh	153234331	29.05.2009	10,00,000

2.	Vikramditya Singh	153234332	29.05.2009	10,00,000
3.	Aprajita Kumari	153234335	29.05.2009	10,00,000
4.	Virbhadra Singh	153379960	31.12.2009	50,00,000
5.	Vikramditya Singh	153596172	26.02.2010	50,00,000
6.	Rani Pratibha Singh	153596173	26.02.2010	50,00,000
7.	Virbhadra Singh	153597194	27.03.2010	1,00,00,000
8.	Rani Pratibha Singh	153596149	26.02.2010	50,00,000
9.	Vikramditya Singh	153596174	26.02.2010	50,00,000
				3,80,00,000

36. On 19.7.2010, Assessee did not disclose such fact and declared his income from agricultural source to be Rs.15,00,000/-. In the Revised Return filed on 2.3.2012, such income was declared to be Rs.2,80,82,500/-.

37. Perusal of the order of the Assessing Officer, reveals the Assessee to have taken the following stand– (a) he is owner of agricultural land, i.e. orchard known as Shrikhand Orchard; (b) vide agreement dated 15.6.2008, he appointed Shri Anand Chauhan as his Agent to manage it for a period of three years; (c) consideration being payment of commission @ 2% on net sale proceeds, after deduction of all expenses; (d) said Agent stood authorized to make investments of the sale proceeds in Government securities, mutual funds, schemes of LIC; (e) which was actually so done by him; (f) In the year 2011-12, when accounts were settled, professional advise was sought and (g) since there was no regular assessment and there being a "mistake/defect/omission" in the original return, a revised return was filed within the stipulated period of time.

38. The Assessing Officer has observed that: (a) notices were issued to the Agent who appeared and placed on record documents i.e. (i) his Income Tax Return for the relevant year, (ii) copies of account of gross apple receipts for the relevant year, and (iii) copies of bills of sale proceeds of horticulture produce issued by the vendor, i.e. M/s Universal Apple Association, Parwanoo; also explained the shortfall in the income, in the relevant year, matching it with the investment made in the LIC, to be routed through one Shri M.R. Chauhan (such amount is more than Rs.1 crore); and (b) information with respect to assessment proceedings of the Agent was sought for verification from his Assessing Officers.

39. Thus, finding the Assessee to have "established that the agriculture income disclosed in the revised return of income" "pertains to the sale proceeds of horticulture" and the same to have "been invested" by the Agent "in LIC policies in the names of members of the HUF, as per the terms and conditions of the M.O.U", the Assessing Officer accepted the revised return.

40. One additional important fact. Between the date of filing of Revised Return (2.3.2012) and passing of the assessment order (28.3.2013), certain directions were issued by a Superior Officer, i.e. Additional Commissioner, on 1.2.2013 and 7.2.2013, in the capacity of a Supervisory Officer. Also, on 25.10.2012, notices were issued to the Assessee, seeking clarifications.

41. Let us examine what weighed with the Commissioner in finding the Assessing Officer not to have made "effective inquiry" or the "mistake and the omission" that of the Assessee in the original return to be not bonafide, in setting aside the order of assessment.

42. The Commissioner found the order passed by the Assessing Officer to be erroneous as well as prejudicial to the interests of Revenue, inter alia, on the ground that– (a) earning of additional income of Rs.2.65 crore, so reflected in the Revised Return, was already

within the knowledge of the Assessee, (b) it is not a case of bonafide omission, (c) the Assessing Officer failed to inquire from the Assessee, the source of Rs.1.19 crore, an amount in excess of the income of Rs.2.65 crore (approximately) from the agricultural source, (d) no inquiry was conducted for ascertaining the authenticity of the bills, vouchers, books of account of the income, (e) inquiry conducted was "invalid", inasmuch as the Assessing Officer "blindly accepted" the "version of the Assessee's Agent" and (f) the income appeared to be disproportionately high as compared to the income from the said source in relation to the preceding and the succeeding years.

43. At this juncture, it be only observed that entire sale of horticulture produce of more than Rs.2.8 crore is in cash. This fact is not disputed.

44. Further, it be kept in mind that the Assessee and his family members appeared to be fully aware of the income from agricultural source, for after all policies were purchased not in the name of the Agent, in an escrow account, for and on behalf of the Assessee, but in the name of the Assessee and his family members. After all, for purchase of such policies of huge amounts, requisite formalities are required to be completed by the applicant (purchaser of the policy). It is not the case of Assessee that anyone of his family members is a minor or that no forms were filled up by the respective purchasers.

45. What is contended is that in relation to the income in question, Assessee was adopting mercantile system of accounting and as such exact amount of income could be ascertained only with the settlement of account, after a period of three years, which was sometime in the month of September, 2011.

46. At this juncture, one fact, which is not disputed, to which our attention is invited by the Revenue, is that in relation to the years preceding and succeeding to the relevant year, income from agricultural source, is marginal, bordering what was originally declared by the Assessee. Income, grossly disproportionate is only with respect to the relevant year.

47. As we have already observed, in the instant case, Assessee did file his return, under Section 139 of the Act. However, only when notice under Section 143(2) was issued, he filed a revised return, in exercise of his right under sub-section (5) of Section 139, which came to be assessed, under Section 143(3) of the Act.

48. The Assessee was satisfied with such assessment and as such did not take recourse to remedies provided under the Act.

49. But however, in exercise of his revisional jurisdiction, the Commissioner initiated proceedings for revising such order. In his wisdom, Commissioner found the order passed by the Assessing Officer to be "erroneous", for it being "prejudicial to the interests of Revenue". He did not find the Assessee to have revised his return "on the basis of discovery" or "omission" or "any wrong statement therein".

50. Hence, we are concerned with the meaning of expressions "erroneous"; "prejudicial to the interests of Revenue"; "discovery"; or "omission".

51. At this juncture, we may also observe that we are also concerned with the power of the Tribunal. Is it circumscribed to be the one exercised by the Commissioner, restricting it to the "record" so available at the time of examination or is it that the Tribunal can allow any party to adduce additional material, which can be considered for just decision of the appeal.

52. At this point in time, we deem it appropriate to first discuss the law referred to and certain other decisions dealing with the interpretation and application of Sections 139 and 263 of the Act.

Discovery of omission in filing a Revised Return under Section 139(5)

53. A Division Bench of the Allahabad High Court, in *Amjad Ali Nazir Ali* (supra), has held as under:

> "It will be seen that so far as revised returns are concerned, the provisions under the old Act and the new Act are in pari materia. Now, after the decision of the Supreme Court in Commissioner of Income-tax v. S. Raman Chettiar [1965] 55 ITR 630 (SC), there cannot be any doubt that the revised return is also a return under Section 22 of the Indian Income-tax Act. Since the language of Section 139(5) of the new Act is in pari materia, it must be held that the revised return filed under Section 139(5) is a return contemplated by Section 139. But the question is whether the filing of the revised return obliterates the original return. S. Raman Chettiar's case [1965] 55 ITR 630 (SC) does not throw light on this controversy. In order to answer the question posed, it will be useful to concentrate on the language of Section 139(5) of the Act. It is apparent that a revised return can be filed only where any person discovers any omission or any wrong statement therein. The use of the word "discovers", in our view, connotes discovery of some omission or wrong statement in the return, of which the assessee was not aware at the time of filing of the original return. It cannot cover a case where the omission or wrong statement contained in the first return is deliberate, for, in that case, it cannot be said that the revised return was filed by the assessee on discovery of any omission or wrong statement, as he would all the time have knowledge of the omission or wrong statement in the original return. This being so, on the language of Section 139(5), an assessee who had deliberately made any omission or wrong statement in his original return cannot avail himself of the advantage given by this subsection of filing a revised return. In cases where an assessee has deliberately omitted particulars of his income or made wrong statement in the return, the revised return filed by him would be outside the pale of section 139(5) of the Act, and it would not be a revised return as contemplated by the Act. Once this position is reached the question of considering the revised return for the purposes of penalty would hardly arise, for, in the eye of law, there would be no revised return as contemplated by Section 139(5). Such a revised return cannot supplant the original return and, for the purposes of penalty, it will be only the original return that will have to be looked into." [Emphasis supplied]

54. This view stands reiterated in *Commissioner of Income Tax, Delhi (Central) vs. S. Sucha Singh Anand,* (1984) 149 ITR 143 (Delhi) (Two-Judge Bench). In fact in *Sunanda Ram Deka* (Two-Judge Bench) (supra), the Court observed that *"In our opinion, the further requirement is that this omission or wrong statement in the original return must be due to a bona fide inadvertence or mistake on the part of the assessee."*

55. In *Radhey Shyam* (supra), the Allahabad High Court, has held that non-disclosure of correct income, due to gross or willful negligence on the part of the Assessee would not entitle him to file revised returns, requiring assessment in accordance with law.

56. In *Commissioner of Income Tax v. Dr. Sajjan Singh Malik*, (1989) 178 ITR 643, the Punjab & Haryana High Court, in a case where the total income returned by the Assessee was less than 80%, the Court presumed that the Assessee had failed to rebut the presumption that he had failed to disclose the income in accordance with law.

SCOPE OF SECTION 263 OF THE ACT

57. The Apex Court (three-Judge Bench) in *Smt. Tara Devi Aggarwal* (supra), has clarified that:

> ".....The words of the section enable the Commissioner to call for and examine the record of any proceeding under the Act and to pass such orders as he deems necessary as the circumstances of the case justify when he considers the order passed was erroneous in so far as it is prejudicial to the interests of the revenue. It is not, as submitted by the learned advocate, prejudicial to the interests of the revenue only if it is found that the assessment for the year was

> disclosed (sic) on the basis that an income had been earned which is assessable. Even where an income has not been earned and is not assessable, merely because the assessee wants it to be assessed in his or her hands in order to enable someone else who would have been assessed to a larger amount an assessment so made can certainly be erroneous and prejudicial to the interests of the revenue. It so-and we think it is so-the Commissioner under S. 33B has ample jurisdiction to cancel the assessment and may initiate proceedings for assessment under the provisions of the Act against some other assessee who according to the income-tax authorities is liable for the income thereof....."
>
> [Emphasis supplied]

58. The Apex Court in *Kwality Steel Suppliers Complex* (supra), while reiterating the aforesaid principle, clarified that in exercise of its revisional jurisdiction, Commissioner must exercise proper application of mind. In the given facts, Court found the view taken by the Assessing Officer to be a plausible one, inasmuch as family business, with the death of one of the partners continued to be carried on by the son of the deceased with his mother being another partner, accepting the book value of the stock-in-trade to be plausible and permissible view.

59. A Division Bench of the Rajasthan High Court, in *Emery Stone Mfg. Co.* (supra), has observed that simply because facts were disclosed by the Assessee, it would not give immunity from exercise of any revisional jurisdiction, which the Commissioner can exercise in the amplitude of his statutory powers.

60. Mr. Chidambaram, learned Senior Counsel, invites our attention to the decision rendered by the High Court of Bombay in *Gabriel India Ltd.* (supra), wherein the Court held the term "erroneous" to mean deviating from law. We lay emphasis on portions extracted hereunder:

> "... ... ... According to the definition, "erroneous" means "involving error' deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law, or upon erroneous application of legal principles".
>
> From the aforesaid definition it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualize a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interest of the

> Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed."

61. In *Commissioner of Income-Tax v. Vikas Polymers,* (2012) 341 ITR 537(Delhi), Court reiterated the principle of order of the Commissioner fulfilling the twin test of revising the order passed by the Assessing Officer. It must be erroneous and prejudicial to the interests of Revenue. The Commissioner can call for and examine the record and by giving an opportunity of hearing make such inquiry as is deemed necessary. The Court, by taking into account the decision referred to by the Bombay High Court in *Gabriel India Ltd.* (supra), *observed, "erroneous" to mean an order which is not in accordance with law. There must be material to show that the tax which was exigible has not been imposed and expression "prejudicial to the interests of the Revenue" to mean the orders of assessment under challenge being not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realized and cannot be realized.* It also reiterated the difference between "lack of inquiry" and "inadequate inquiry".

62. In fact in subsequent decision the very same High Court (Delhi) in *Commissioner of Income Tax vs. Ashok Logani,* (2012) 347 ITR 22 (Delhi) (Two-Judge Bench) reiterated the view taken by the High Court of Gujarat in *CIT vs. Smt. Minalben S. Parikh,* (1995) 215 ITR 81 (Guj), as under:-

> "The words 'prejudicial to the interests of the Revenue' has not been defined. However, giving the ordinary meaning to the words used in the statute, they must mean that the orders under consideration are such as are not in accordance with law and, in consequence whereof, the lawful revenue due to the State has not been realized or cannot be realized. The well settled principle in considering the question as to whether an order is prejudicial to the interests of the Revenue or not is to address oneself to the question whether the legitimate revenue due to the exchequer has been realized or not or can be realized or not if the orders under consideration are allowed to stand. For arriving at this conclusion, it becomes necessary and relevant to consider whether the income in respect of which tax is to be realized has been subjected to tax or not or if it is subjected to tax, whether it has been subjected to tax at the rate at which it could yield the maximum revenue in accordance with law or not. If the income in question has been taxed and legitimate revenue due in respect of that income had been realized, though as a result of an erroneous order having been made in that respect, the Commissioner cannot exercise the powers for revising the order under section 263 merely on the basis that the order under consideration is erroneous. If the material in that regard is available on the record of the assessee concerned the Commissioner cannot exercise his power by ignoring that material which links the income concerned with the tax realization made thereon. The two questions are inter-linked and the authority exercising the powers under section 263 is under an obligation to consider the entire material about existence of income and the tax which is realizable in accordance with law and further what tax has in fact been realized under the assessment order."
>
> [Emphasis supplied]

63. The ratio and the decision stands reiterated subsequently in *Commissioner of Income-Tax v. New Delhi Television Ltd.,* (2014) 360 ITR 44 (Delhi).

64. In *Malabar Industrial Co. Ltd.* (supra), the Apex Court (two-Judge Bench), clarified that pre-requisite for the Commissioner to suo motu exercise its jurisdiction is that the order of Income Tax Officer is erroneous, insofar as it is prejudicial to the interests of Revenue. The Court laid down twin conditions for the Commissioner to be satisfied – (i) the order sought to be revised is erroneous and (ii) prejudicial to the interests of Revenue. It clarified that the power cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. *What is prejudicial to the interests of Revenue is to be understood in its ordinary meaning, for it is of wide import/amplitude and not confined to loss of tax*. Every loss of revenue cannot be treated as prejudicial to the interests of revenue. It clarified that when an Assessing Officer adopts one of the courses permissible in law, which has resulted in loss of revenue or where two views are possible, then difference of opinion cannot be treated as erroneous or prejudicial to the interests of Revenue, unless view taken by the Assessing Officer is unsustainable in law. The Court reiterated that where *"a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of Revenue"*. The principle stands further reiterated in *Commissioner of Income Tax (Central) Ludhiana v. Max India Limited,* (2007) 15 SCC 401.

65. Mr. Chidambaram also invites our attention to the decision of Delhi High Court in *Sunbeam Auto Ltd.* (supra), wherein a distinction is cast between "lack of inquiry" and "inadequate inquiry", clarifying that only in a case of "lack of inquiry", would the Commissioner be entitled to exercise its revisional jurisdiction.

66. In *DG Housing Projects Ltd.* (supra), the Delhi High Court has only held that:

> "18. … … …An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law."
>
> (Also: *Commissioner of Income Tax, Mumbai v. Amitabh Bachhan,* (2016) 11 SCC 748)

67. The Apex Court (two-Judge Bench) in *Amitabh Bachhan* (supra), has held that:

> "22. There can be no doubt that so long as the view taken by the Assessing Officer is a possible view the same ought not to be interfered with by the Commissioner under Section 263 of the Act merely on the ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from. However, the above is not the situation in the present case in view of the reasons stated by the learned C.I.T. on the basis of which the said authority felt that the matter needed further investigation, a view with which we wholly agree. Making a claim which would prima facie disclose that the expenses in respect of which deduction has been claimed has been incurred and thereafter abandoning/withdrawing the same gives rise to the necessity of further enquiry in the interest of the Revenue."
>
> [Emphasis supplied]

68. Applying the aforesaid principles, we further proceed to discuss facts.

69. Perusal of order dated 28.3.2013, passed by the Assessing Officer, reveals that the original return filed by the Assessee was selected for scrutiny assessment through CASS and notice under Section 143(2) of the Act issued and served upon the Assessee on 29.8.2011. On 2.3.2012, in exercise of his right under Section 139(5), Assessee filed a revised return. While

assessing the same, notices under Section 142(1) and 143(2) were issued to the Assessee, to which he responded by placing on record Memorandum of Understanding (MoU) dated 15.6.2008, appointing his Agent to manage the orchard. Accounts came to be settled in September, 2011. Whereafter, Assessee filed the revised return. To verify correctness of the transaction, Agent appeared and produced on record (a) his income tax return for the relevant year, (b) copies of bills, and (c) copies of vouchers with regard to sale proceeds. Additionally, information from the Officer, assessing the return of the Agent was called, which revealed that a sum of Rs.2,65,92,500/- was "payable to the assessee" as agricultural income. Based on the said material, Assessing Officer carried out assessment, accepting the income declared in the revised return from agricultural sources to be Rs.2,80,92,500/-, in place of Rs.15,00,000/- as declared in the original return.

70. In this backdrop, can it be said that the Assessing Officer conducted any inquiry, as envisaged in law. In our considered view, "no". On first brush, it appears that the Assessing Officer did conduct "some inquiry" as Mr. Chidambaram, learned Senior Counsel, wants us to believe. Whether such inquiry is "inadequate" or "no inquiry" at all, is what requires consideration.

71. "Inquiry" has to be in accordance with law and that being with proper application of mind. Also, it is not a case of "inadequate inquiry" but in fact "no inquiry" as envisaged in law. The Assessing Officer did not examine as to whether gross mismatch in the income, was on account of any bonafide omission or a mistake. The order is conspicuously silent on this aspect. He does not consider that the receipts of sale proceeds of such income, in its entirety, amounting to Rs.2,80,92,500/- in the relevant year, were in cash. It is not that the Assessee was not in the know of the investments made in the LIC. Huge investments of a sum of Rs.3.80 crore (approximately) were made in the names of the Assessee and his family members. Statement of the Agent that excess amount of Rs.1 crore was routed through one Shri M.R.Sharma, was accepted as gospel truth and no inquiry with regard thereto conducted at all. The Assessing Officer does not record that the Assessee was adopting the mercantile system of accounting.

72. Also, the fact that income from agricultural source was disproportionately high, only in the year in question and neither in the preceding or succeeding years there was such huge income from the orchard. Validity of the return, fulfilling the condition prescribed under Section 139(5) was not examined, more so in the factual backdrop when the revised return came to be filed only after issuance of notice for scrutiny. Also, what took the Assessee more than six months to revise the return was not considered.

73. No doubt, views of the Officer assessing the Agent's income were solicited, but then such assessment could not be a binding precedent, for the Assessing Officer is obliged to independently inquire correctness of the returns of income declared by the Assessee. What is crucial is that in the return of the Assessee or the Agent, there is no reference of shortfall of Rs.1 crore, which amount was routed through Shri M.R.Sharma, who also was not called during the course of inquiry.

74. Whether return filed was false or not, which fact was within the knowledge of the Assessee was not examined by the Assessing Officer. Similarly, plea of settlement of accounts after a period of three years was legally tenable or not, was not examined. Whether it was due to bonafide inadvertence or mistake, which fact never came to be disclosed in the original return was also not examined.

75. In fact, contradiction about the source of income, emanating from the order of the Assessing Officer, is writ large. On one hand, investment is accepted to have been made from the agricultural income and the money borrowed in the relevant year, whereas, on the other hand, it is sought to be justified as an agricultural income with respect to Assessment Years 2009-10 and 2010-11.

76. At this juncture, it be also observed that the Assessing Officer failed to take note of the fact that in the original return, even though there is reference of investment in LIC, but

there is no disclosure of (a) the investments in question, (b) the fact that the Assessee had entered into an MoU with third party for management of the orchard, (c) there was income from the orchard, (d) agent invested the amount in LIC, (e) Assessee had been adopting the mercantile system of accounting and as such there was no settlement of accounts. All this, despite the Assessee having categorically disclosed therein, that a sum of Rs.15 lakhs (approx.) was received as compensation for acquisition of land and that there was an income of Rs.15 lakhs from agricultural source. Significantly, it is not the Assessee's case that such income was from another agricultural source/land. Perusal of the Return (Page-265) reveals the Assessee to have also generated income from the source of LIC.

77. Thus, the order passed by the Assessing Officer is without application of mind, resulting into loss of revenue, and as such being erroneous and prejudicial to the interest of Revenue.

78. Perusal of order of the Commissioner, reveals that during the course of assessment, Additional Commissioner of Income Tax had issued directions, in the following terms:

> *"1. Tally the receipts of exact amount of income in hands of the assessee from Sh. Anand Chauhan and exact mode of receipt date wise.*
>
> *2. Find out the detailed accounts or originally shown agriculture income i.e. Rs.15 lacs with dates of receiving sale proceeds.*
>
> *3. Find the details of Rs.43,84,396/- income from other sources.*
>
> *4. Keep in mind the agriculture income shown in immediate proceeding and succeeding year from the years in which the income has been received i.e. A.Y. 2008-09, 2012-13, while examining the genuineness of the revised agriculture income in the year 2010-11."*
>
> "1. *Call for and examine the details of Income/ Expenditure Account in view of Col. 4 of M.O.U.*
>
> 2. *Coordinate the proceedings and share the information with ITO, Ward-1, Shimla regarding the investigation made by him in the case of Sh. Anand Chauhan, who as per MOU is looking after the Orchards of M/s Vir Bhadra Singh (HUF)."*

79. The said Officer in her report observed the Assessing Officer not to have conducted any independent inquiry, before accepting the return. Presumably, the Assessing Officer "remained passive in his own inquiries and has relied only on the conclusions drawn by ITO, Ward-1, Shimla, in the case of Sh. Anand Chauhan".

80. Well, the observations of the Additional Commissioner of Income Tax have not weighed with us at all.

81. However, perusal of the order reflects the Commissioner to have carefully gone through the "record", in correctly concluding that (a) in the given facts and circumstances, discovery of mistake or omission by the Assessee appears to be incorrect (Page-200), for the assessee was fully aware that there was annual agricultural income being invested in LIC policies, (b) there were huge investments of more than Rs.3.84 crore in the relevant year, as compared to originally declared income of Rs.15 lakhs, (c) there was mis-match in the agricultural income and investments made, (d) in the aforesaid backdrop, plea of the assessee adopting mercantile system of accounting was factually incorrect and legally untenable, (e) there was non-compliance of directions issued under Section 144A, (f) assessment was carried out without conducting "essential inquiry" (Page-230), as directed under Section 144A, (g) assessment was completed in "casual and routine" manner, (h) hence, it is a case of "no inquiry" (Page-232) and the order passed by the Assessing Officer to be erroneous as well as prejudicial to the interests of the Revenue (Page-237).

Mercantile System of Accounting

82. It cannot be said that the Commissioner erred in appreciating that the system for accounting adopted by the Assessee was on mercantile basis. The issue with regard to accounting of such system is no longer *res integra.*

83. The Apex Court (four-Judge Bench) in *Keshav Mills Ltd. v. Income-tax, Bombay,* AIR 1953 SC 187, has explained the difference between 'mercantile assessment' and 'accounting system'. The Court held as under:

> "12. The mercantile system of accounting or what is otherwise known as the double entry system is opposed to the cash system of book keeping under which a record is kept of actual cash receipts and actual cash payments, entries being made only when money is actually collected or disbursed. That system brings into credit what is due, immediately it becomes legally due and before it is actually received and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed. The profits or gains of the business which are thus credited are not realised but having been earned are treated as received though in fact there is nothing more than an accrual or arising of the profits at that stage. They are book profits. Receipt being not the sole test of chargeability and profits and gains that have accrued or arisen or are deemed to have accrued or arisen being also liable to be charged for income-tax the assessability of these profits which are thus credited in the books of account arises not because they are received but because they have accrued or arisen.
>
> (Followed in *Commissioner of Income Tax, Chennail v. Bilahari Investment (P) Ltd.,* (2008) 4 SCC 232)

84. If the method of accounting consistently followed by the Assessee is not emanating from the record, Assessing Officer was duty bound to adopt such appropriate method as may be found fit for determining the issue. [*Commissioner of Income-tax, Calcutta v. M/s British Paints India Ltd.,* AIR 1991 SC 1338 : 1992 Supp (1) SCC 55; *Sanjeev Woollen Mills v. Commissioner of Income Tax, Mumbai,* (2005) 13 SCC 307; & *M/s Standard Triumph Motor Co. Ltd. v. Commissioner of Income Tax, Madras,* 1993 Supp (3) SCC 315.

85. Emphatically, Mr.Chidambaram invites attention to the following reasons adopted by the Commissioner, emphasizing that the Officer passed the order without returning any positive findings, for he was too presumptuous and unsure with regard to the status of inquiries so conducted by the Assessing Officer.

86. In para-10 of the order (Page-248), the Commissioner has observed as under:

> "From the above findings, it is hereby concluded that the A.O. has not made the required and essential enquiries as warranted by the facts of the case regarding the agriculture income and source of investment in LIC policy. He has not applied his mind to check whether there can be any possibility or availability of such a huge agriculture income. The A.O. has failed to make proper enquiries in this case and has not applied his mind in the right perspective. This is the case where no relevant enquiries have been carried out. In absence of requisite evidences/proof/ explanation regarding the source of huge investment in LIC policies etc. it can't be held as being invested out of agriculture income. In view of the above circumstances, action of the A.O. in passing assessment order u/s 143(3) on the basis of invalid revised return as well as by accepting ht agriculture income declared by the assessee without any documentary evidences is erroneous as well as prejudicial to the interest of revenue. Even during the proceedings u/s 263, the assessee has not given any material evidence to prove his contention that the investment in LIC policies are from the agriculture income earned from Shrikhand Orchard."

87. It is true that the Commissioner has loosely used certain expressions, with regard to the manner in which inquiry was conducted by the Assessing Officer, but then perusal of entire order reveals that he was certain about one fact. And that being, the inquiry conducted by the Assessing Officer not to be the one envisaged in law. He is certain that the order does not bear proper and complete application of mind. Commissioner has assigned four reasons (Page 244), while holding that the revised return filed by the Assessee was not bonafide and has further assigned ten reasons (Page-245) for holding the order passed by the Assessing Officer to be erroneous as well as prejudicial to the interests of the Revenue which we find to be totally borne out from the record and based on correct and complete appreciation of factual matrix with proper application of provisions of law.

88. We may only observe that the findings of the Commissioner are based on the "record" as defined in clause (b) of sub-section (1) of Section 263 of the Act.

89. Relying upon *Sunbeam Auto Ltd.* (supra) Mr.Chidambaram, argued that it is not open for the Commissioner to remit/remand the matter back to the authority. We find said decision to have been rendered in the given facts and circumstances, for the issue in question is no longer *res integra* in view of the law laid down by the Apex Court in *Commissioner of Income Tax, Shillong vs. Assam Travels Shipping Service, Dibhrugarh,* 1993 Supp (4) SCC 206, wherein the Court categorically held that *"The expression "as it thinks fit" is wide enough to include the power of remand to the authority competent to make the requisite order in accordance with law in such a case even though the Tribunal itself could not have made the order enhancing the amount of penalty."*

90. Ambit and scope of power exercised by the authorities under Sections 263 and 254 are totally different and distinct. We have already discussed the scope of the former and now proceed to discuss about the latter.

91. The Income Tax Appellate Tribunal is not a Court but is a Tribunal exercising judicial powers. The Tribunal's powers in dealing with the appeals are of the widest amplitude and have in certain cases held similar to and identical with the powers of an Appellate Court under the Civil Procedure Code. The Tribunal, for the purposes of discharging its functions, is vested with all the powers which are vested in the Income Tax authorities referred to in Section 131 of the Act. Any proceedings before the Tribunal are also deemed to be judicial proceedings within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code (45 of 1860). It is also deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (5 of 1898) corresponding to Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

92, The Apex Court in *Hukumchand Mills Ltd. v. Commissioner of Income-Tax, Central, Bombay,* (1967) 63 ITR 232 : AIR 1967 SC 455 (Three-Judge Bench), has held that the power of the Tribunal cannot be circumscribed or controlled by the Rules (Income Tax) which are merely procedural in character. It stands followed in *Assam Travels Shipping Service, Dibrugarh* (supra).

93. In *Income-Tax Officer, Cannanore v. M.K. Mohammed Kunhi,* (1969) 71 ITR 815, the Apex Court (three-Judge Bench), has held that:

> "It is well known that an Income tax Appellate Tribunal is not a court but it exercises judicial powers. The Tribunal's powers in dealing with appeals are of the widest amplitude and have in some cases been held similar to and identical with the powers of an appellate court under the Civil Procedure Code: see *Commissioner of Income tax, Bombay City v. Hazarimal Nagji and Co.*, (1962) 46 ITR 1168 (Bom) and *New India Assurance Co. Ltd. v. Commissioner of Income-tax, Excess Profits Tax*, (1957) 31 ITR 844. In *Polini v. Gray*, (1879) 12 Ch.D 438. Appeal to grant stay at page 443:
>
> > "It appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful

> party is to reap the fruits of that litigation, and not obtain merely a barren success. That principle, as it appears to me, applies as much to the Court of first instance before the first trial, and to the Court of Appeal before the second trial, as to the Court of last instance before the hearing of the final appeal."" [Emphasis supplied]

94. The Apex Court (three-Judge Bench) in *Commissioner of Income-Tax, Madras v. Mahalakshmi Textile Mills Ltd.,* (1967) 66 ITR 710 : AIR 1968 SC 101, has held thus:

> "By the first question the jurisdiction of the Tribunal to allow a plea inconsistent with the plea raised before the Departmental authorities is canvassed. Under sub-section (4) of Section 33 of the Indian Income-tax Act, 1922, the Appellate Tribunal is competent to pass such orders on the appeal "as it thinks fit." There is nothing in the Income-tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal. If for reasons recorded by the Departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the Departmental authorities and the Tribunal, and indeed they would be under a duty to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him."
>
> (Also: *Shree Hari Chemicals Export Ltd. v. Union of India and another,* (2006) 1 SCC 396)

95. In *National Thermal Power Co. Ltd. v. Commissioner of Income Tax,* (1997) 7 SCC 489, the Apex Court (three-Judge Bench) has held that:

> "4. .....Under Section 254 of the Income Tax Act the Appellate tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the tribunal in dealing with the appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of income Tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the tribunal. We fail to see why the tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.
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> 5. In the case of *Jute Corpn. of India Ltd. v. CIT*, (1991) Supp(2) SCC 744, this court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations if any prescribed by the statutory provisions. In the absence of any statutory provision the appellate authority is vested with all the preliminary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the income Tax Officer. This court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the

ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the tribunal also.

6. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income Tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide e.g. *CIT v. Anand Prasad,* (1981) 128 ITR 388 (Del): *CIT v. Karamchand Premchand (P) Ltd.,* (1969) 74 ITR 254 (Guj) and *CIT v. Cellulose Products of India Ltd.,* (1985) 151 ITR 499 (Guj)]. Undoubtedly, the Tribunal will have the discretion a to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee." [Emphasis supplied]

96. The Apex Court (two-Judge Bench) in *Goetze (India) Ltd. v. Commissioner of Income-Tax,* (2006) 284 ITR 323, has held as under:

> "The decision in question is that the power of the Tribunal under section 254 of the Income Tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the assessing officer to entertain a claim for deduction otherwise than by filing a revised return……."

97. Applying these principles we proceed on merits.

98. Perusal of the order passed by the Tribunal reveals that for more than 1½ year, matter was adjourned for one reason or the other. In November, 2016, Revenue filed written submissions, enclosing therewith certain documents, when the appeal was adjourned. Though the authorized representative of the Assessee objected to the filing of written submissions by the Revenue "at such a late stage", yet it sought time for filing rebuttal thereto, which request was accepted and the matter adjourned for 29.11.2016, on which date, learned counsel appearing for the Assessee objected to the documents being taken on record and accepted for consideration of the appeal. Overruling such objection, Tribunal accepted the documents, as additional evidence and considered the same for deciding the appeal.

99. It is in this backdrop, we proceed to discuss as to whether action of the Tribunal in accepting the documents, as additional evidence, is legally tenable or not.

100. We are in respectful agreement with the finding recorded by the Tribunal that the word "record" so defined in Section 263 of the Act, confines only to the proceedings conducted thereunder.

101. The Tribunal found the additional material sought to be relied upon by the Revenue only to support the view already taken by the Commissioner. Such additional material was germane for deciding the issue in controversy. The Tribunal did take note of Rule-29, permitting production of additional evidence before itself and being satisfied of its necessity to enable it to pass orders. Even in the absence of written application, Tribunal, after recording its satisfaction, accepted the same and took them on record.

102. Additional material adduced, is nothing but what was collected during the course of proceedings pertaining only to the Agent and his submissions/statements during the course of adjudication thereof.

103. The question, which arises for consideration, is as to whether prior to the decision, the authority ought to have passed a separate order, accepting the additional evidence on record.

104. In *Text Hundered India Pvt. Ltd.* (supra), the Delhi High Court held the power of the Tribunal wide enough to admit additional evidence at its discretion for doing substantial justice in the matter. However, party intending to lead evidence before the Tribunal, for the first time, has to show that it was prevented by sufficient cause to do so and that it could have material bearing on the issue for just decision of the case and the ends of justice demands admission thereof. The Court on an undisputed statement held Rule 29 of the Rules, akin to Order 41 Rule 27 of the Code of Civil Procedure, and thus observed:

> "13. .....This can be done even when application is filed by one of the parties to the appeal and it need not to be a suo motu action of the Tribunal. The aforesaid rule is made enabling the Tribunal to admit the additional evidence in its discretion if the Tribunal holds the view that such additional evidence would be necessary to do substantial justice in the matter. It is well settled that the procedure is handmade of justice and justice should not be allowed to be choked only because of some inadvertent error or omission on the part of one of the parties to lead evidence at the appropriate stage. Once it is found that the party intending to lead evidence before the Tribunal for the first time was prevented by sufficient cause to lead such an evidence and that this evidence would have material bearing on the issue which needs to be decided by the Tribunal and ends of justice demand admission of such an evidence, the Tribunal can pass an order to that effect.
>
> 14. .....The true test in this behalf, as laid down by the Courts, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. The legitimate occasion, therefore, for exercise of discretion under this rule is not before the Appellate Court hears and examines the case before it, but arises when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent to the Appellate Court coming in its way to pronounce judgment, the expression 'to enable it to pronounce judgment' can be invoked. Reference is not to pronounce any judgment or judgment in a particular way, but is to pronounce its judgment satisfactory to the mind of Court delivering it....."

105. On this issue, we may take note of a Constitution Bench judgment of the Apex Court in *K. Venkataramkiah* (supra), wherein power of the Court to take on record additional evidence is discussed. That additional evidence can be allowed to be taken on record, in the interest of justice, if something remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner.

106. In *T.N. Sahani* (supra), the Apex Court (two-Judge Bench), has held that an application for leading additional evidence is to be decided alongwith the appeal.

107. In *North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (Dead) by LRs,* (2008) 8 SCC 511, the Apex Court ((two-Judge Bench) further held that the question whether looking into the documents, sought to be filed as additional evidence, would be necessary to pronounce judgment in a more satisfactory manner, has to be considered by the Court at the time of hearing of the appeal on merits. The appellate Court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". Though the general rule is that ordinarily, the appellate Court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted, but Section 107 CPC, which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to

be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 CPC.

108. A Division Bench of the Madras High Court in *T.M.S. Mohamed Abdul Kader* (supra), has held the expression "such orders as it deems fit" to be wide enough to call for fresh evidence from the authorities under the Act. To similar effect is the judgment rendered by a Division Bench of Andhra Pradesh High Court, in *Thakur V. Hari Prasad* (supra).

109. In *Thakur V. Hari Prasad* (supra), the Court observed that:

> "Any material relevant to the point in controversy is evidence. The Supreme Court in D. M. Manasvi v. CIT , held that the findings given in assessment proceedings would be relevant and admissible material in penalty proceedings. Even the statements recorded under section 161, Criminal Procedure Code, during the investigation, though unsigned by the maker thereof, may be relevant evidence. The only inhibition is that it cannot be pressed into service without supplying a copy thereof to the assessee so as to enable him to controvert, if he disputes the correctness of the contents thereof, if need be, by calling the maker for examination tendering his oral evidence. Both the Revenue as well as the assessee have adduced oral and documentary evidence. The statements recorded under section 161, Criminal Procedure Code, of the two prize winners (viz., M. Sriramulu and Shankaraiah), Sri Malakondaiah (District Collector) and Diwakar Setty were supplied, they were examined and cross-examined at length. How far the statements under section 161, Criminal Procedure Code, or evidence can be relied on or accepted or inference to be drawn therefrom in support or against the conclusion of concealment, are matters exclusively for the primary authority and the appellate forum, as fact-finding authorities. Therefore, the procedure adopted by the Appellate Tribunal is one of statutory compliance of section 274(1) but not "filling up gaps in the sense of a criminal trial." The Act itself makes a distinction in using the phraseology in the relevant provisions for prosecution or penalty, like section 276C(1) - "Wilful attempt to evade tax", section 276CC - "Wilful failure to furnish particulars", etc. But under section 271 (1)(c), mere concealment is sufficient to impose penalty. Thus considered, the doctrine of "filling up gaps" does not apply to the penalty proceedings in Chapter XXI but would be applicable to prosecution under the Act.'
>
> ".....Though the settled legal principle is that the power of the appellate authority is co-extensive with that of the original authority, the exercise of power by the Appellate Tribunal is not hedged in by any limitation. As seen, the power of the Appellate Tribunal under section 254 is of wide amplitude. Therefore, it is permissible to adopt such procedure conducive to the circumstances of a case so warranted."

110. In view of the aforesaid decision, we find reliance on *Maruti Udyog Limited* (supra) to be misplaced, also for the reason that it came to be delivered in the attending facts and circumstances and distinguished in *Rasiklal M. Parikh vs. Assistant Commissioner of Income Tax,* (2017) 393 ITR 536 (Bom).

111. In the instant case, there are no elements of surprise. In fact, the Assessee was fully aware that the Revenue had placed additional material in support of its case. No doubt, Assessee had protested, but then, himself took time to rebut the same. It is not that surreptitiously, such material came to be placed on record or accepted by the Tribunal. The matter was pending for more than 1½ year and written submissions filed. The Chartered Accountant appearing for the Assessee took time to rebut the same. Thus, adequate opportunity was afforded to the Assessee. Enough time (more than a fortnight) was afforded to the Assessee to rebut the same, which, for unexplainable reasons he chose not to do so. And the protest is also not with vehemence. No written application was filed opposing the same. No other remedy was

taken recourse to. We find the Tribunal to have extensively dealt with the issue of accepting the documents as additional evidence as also the need for passing an order prior to its decision.

112. Also in the instant case, what prejudice is caused to the Assessee, in accepting the documents as additional evidence, remains unexplained. We find the Tribunal to have decided all these issues in the first part of the order (Pages-78 to 93) and as such do not find any infirmity with the same. Appeal on merits was adjudicated in the second part of the order. It cannot be said that principles of natural justice stand violated.

113. Much reliance is placed on *Andaman Timber Industries* (supra), to highlight the point of lack of opportunity for cross-examining the witnesses. We do not find the decision to be applicable, for in the instant case statement was that of the Agent of the Assessee, in fact on whose return the Assessee seeks reliance upon.

114. The Tribunal has extensively dealt with the issue of (a) acts of the Assessee in filing the revised return to be not bonafide, for he was already in the know of income and as such omission or wrong statement in the original return cannot be said to be a discovery of fact, for such action was neither bonafide nor genuine (Page-93), (b) the Assessing Officer did not comply with the directions that of the Additional Commissioner of Income Tax, issued under Section 144A (Pages 104 to 111), (c) Assessing Officer did not conduct the inquiry, "verifying the genuineness of agriculture income" which prima facie was found to be false in view of statements dated 13.12.2011, 23.1.2013 and 11.2.2013 that of the Agent, so recorded during the course of proceedings of his assessment of return of income (Pages-111 to 137).

115. The Tribunal found the stand taken by the Assessee to be not correct, also for the reason that (a) the date of agreement, i.e. 17.6.2008, *prima facie* appeared to be fabricated, for the stamp papers inscribing the same, were printed and dispatched from the Indian Security Press, Nasik, only on 24.9.2008 and 14.3.2009, (b) books of account of expenditure incurred prima facie appeared to be fictitious, (c) the landholding of the Assessee could not have yielded the returns of such huge amount, (d) the Agent had not truly declared his income generated as commission under the said agreement, (e) the Agent was not having sufficient income to have incurred the expenditure (Rs.69.12 lakhs approximately) (Page-123) so reflected in the books of account, thus believing the plea of the transactions in question being not genuine, if not false.

116. It is in this backdrop, Tribunal found the inquiry conducted by the Assessing Officer not to be in accordance with law (Pages 137 to 148) and the view taken by the Officer not to be a plausible one (Pages 148-153), holding that since it was a case of "no inquiry", Commissioner rightly remitted the case back to the Assessing Officer, for carrying out assessment in accordance with law (Pages 153-158).

117. At this juncture, it be also observed that by the very same order, the Tribunal also decided the appeals filed by the Agent (Pages 159 to 200), inter alia, observing as under, to which no challenge is laid:

> "An overview of the above features indicates that the agricultural produce was not proved; transportation of the same to UAA was also not proved; bills issued by UAA were not genuine; cash received from UAA shown at Rs.1.00 crore did not appear in their books of account; the expenses claimed were not backed by any vouchers/bills; and all the expenses were claimed to have been incurred on one single day and that too in cash. We fail to comprehend as to how the assessment order accepting the genuineness of carrying out the agricultural operations and earning a huge income in such circumstances can be considered as an order made after proper inquiry as has been canvassed by the assessee... ....."

118. Thus, in the given facts and circumstances, we hold the Tribunal to have correctly affirmed the order passed by the Commissioner. Also, it cannot be said that the Tribunal erred in accepting the additional evidence placed on record by the Revenue. It also

cannot be said that the Tribunal committed any material irregularity and violated any procedure and such action is illegal or bad in law. In fact, we find principles of natural justice and fair play to have been adhered to and fully complied with.

119. We reiterate that sub-section (1) of Section 263 confers sufficient powers upon the Commissioner to decide all issues of law, after recording its satisfaction that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. The power is wide enough to take in its sweep the action of modifying, cancelling or directing fresh assessment, particularly when it is a case of "no inquiry". We are of the considered view that no inquiry, as envisaged in law, was carried out, hence, question of the Commissioner taking an alternate possible view does not arise. The Assessing Officer cannot be said to have taken a plausible view, as envisaged in law, and the view taken by the Commissioner to be an alternative one. Finding of the Commissioner that the order is erroneous is not on account of his mere disagreement with the view taken by the Assessing Officer. Any inquiry, without application of mind, is nonest. The given facts warranted the Assessing Officer to have conducted complete and proper inquiry and only thereafter, assessed the income so declared by the Assessee. He ought to have considered that the Assessee had sought to revise the return by declaring an income 1872% higher than what was originally returned and that too after action for scrutinizing the return was initiated. All transactions of sale of agricultural produce were in cash. Income declared was (a) disproportionately high only with respect to the relevant year and never in the preceding or succeeding years, (b) investment of huge amount of Rs.3.8 crore was carried out by the Assessee himself, be from whatever source and there was no reference thereof in the original return. As such, omission or wrong statement cannot be said to be bonafide. *Prima facie* returns, being invalid, ought to have been rejected.

120. The case in hand being that of no inquiry, and the amplitude of the powers of the Commissioner being wide enough to pass "such order" as the circumstances of the case justify, including (a) cancelling the assessment, (b) modifying the order of assessment, (c) directing fresh assessment, as such, the Commissioner was well within his right to pass an appropriate order of remission.

121. Scope of the Tribunal to examine correctness of the exercise of jurisdiction by the Commissioner is wide enough and not limited and restricted to the record as defined under clause (b) of sub-section (1) of Section 263 of the Act. In any case, even this definition is inclusive. It includes all records relating to any proceedings under the Act, be that of the Assessee or a third party, available at the time of examination by the Commissioner. The record need not pertain to the proceedings of the Assessee alone, be it for the relevant year or assessments pertaining to other years. It can also pertain to any other assessee. In fact, record of any proceedings under this Act available at the time of examination can be considered. Such record need not be placed by the parties. He has power to call for and examine the record of "any proceedings under this Act".

122. As is evident, definition of word "record", inclusive in nature, is restricted to and confined only to the exercise of power by the Commissioner and would not relate to the amplitude of the power exercisable by the Tribunal "to pass such orders" "as it deems fit".

123. We are unable to persuade ourselves to accept the submission made by Mr.Vishal Mohan, that the jurisdictional issue of the Tribunal is confined only to the record of the Commissioner, not only in view of our discussion supra, but also in view of law laid by the Apex Court (three-Judge Bench) in *National Thermal Power Co. Ltd.* (supra).

124. Relying upon *Syed Abdul Khader* (supra) (Two-Judge Bench), Mr.Kuthiala contends that the Agent cannot be treated to be a one under the provisions of the Indian Contract Act, 1872. We leave this issue open to be examined by the fact finding authority.

125. Substantial questions of law are answered accordingly. Present appeal, devoid of any merit, is dismissed. Pending application(s), if any, also stand disposed of accordingly.

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

Farook Ahmed ..Non applicant/appellant/defendant.
Versus
Riyaz Ahmed and others ..Applicants/Respondents/Plaintiffs.

CMP No. 6367 of 2016 in
RSA No. 241 of 2008
Date of decision: 6/10/2017

Code of Civil Procedure, 1908- Section 151- The execution of the judgment and decree was stayed subject to deposit of Rs. 3,000/- per month as mesne profit – however, the amount was not deposited - it was contended that the stay would become inoperative, hence, the Trial Court be directed to execute the judgment & decree and appeal be dismissed – held that the stay order was operative on deposit of the amount – the consequence of non-deposit of the amount would be that stay order will become inoperative – the appeal cannot be dismissed for non-deposit of amount – application dismissed. (Para- 3 and 4)

For the appellant: Mr. R.L. Chaudhary, 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, J: (Oral)

The learned counsel for the appellants herein/plaintiff, submits, that despite his making repeated insistence(s) upon the appellant/defendant, for his depositing, a sum of Rs.3,000/- per mensem, adjudged towards mense profits from 29.2.2009 upto November, 2017, in the Registry of this Court, his insistence(s) remaining unacceded . Since only upon the aforesaid direction(s) being complied with by the appellant, would constrain this Court to extend the longevity of the order pronounced on 5.1.2016, whereby the execution of the judgement and decree, assailed hereat by the appellant came to be stayed. However, visible non-compliance by the defendant with the aforesaid condition precedent, for, the order recorded by this Court on 5.1.2016, whereby, this Court temporarily stayed the execution of the decree impugned before this Court, hence remaining alive, till a decision is made upon the extant RSA rather constrains this Court, to vacate the apposite order recorded on 5.1.2016. The learned trial Court is directed to ensure prompt execution of the judgement and decree pronounced vis-à-vis defendant/JD. The mesne profits assessed by this Court under orders recorded on 5.1.2016, shall however not be put to coercive execution.

2. At this stage, the learned counsel for the respondents herein/decree holders, submits, that this Court direct the learned Executing Court to ensure coercive recovery of Rs.3,000/- adjudged as per mesne profits, from 29.2.2008 till date. He submits that the aforesaid amount, has, become a part of decree, hence the learned Executing Court, is enjoined to ensure coercive recovery thereof, from the defendant/appellant herein or from his estate. However, the aforesaid submission, cannot, at this stage be accepted by this Court, as quantification of pecuniary sum(s) of mesne profits, was, only a condition precedent for the order made by the Court, on 5.1.2016, temporarily, staying the execution of the impugned judgement

and decree, hence remaining alive upto the decision made upon the extant RSA. Also since the aforesaid amount obviously, does not, become a part of the decree, assailed hereat by the plaintiffs/respondents herein, hence the aforesaid sum(s) of money, cannot, be directed to be put to coercive execution.

3. The learned counsel for the decree holders, has also contended that for want of the aforesaid deposits being made by the Judgement Debtor, thereupon this Court can validly dismiss the extant appeal for non prosecution. However the aforesaid argument is also not acceptable, as deposits, of the aforesaid sums of money, was, only a condition precedent, for, the order made by this Court on 5.1.2016 continuing to hold binding force, till a decision is made upon the extant RSA. Also since the performance of the aforesaid act, is, not peremptorily necessary for ensuring the further progress of the instant appeal rather non-compliance thereof, has, sequelled the apt legal consequence, of the apposite order made by this Court, temporarily, staying the execution of the impugned hereat judgement and decree being recalled besides vacated also thereupon the aforesaid submission is rendered to hence founder. The relevant provisions of Order 14 Rule 3 CPC stands extracted hereinafter:-

> "Court may proceed notwithstanding either party fails to produce evidence, etc.
>
> Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default-
>
> (a) if the parties are present, proceed to decide the suit forthwith; or
>
> (b) if the parties are, or any of them is absent, proceed under rule 2."

Hence, it would not be expedient or just to either construe the liquidation(s) by the defendants, of, the aforesaid sums defendants being imperatively necessary, for, ensuring the further progress of the extant appeal nor it would be just to order that hence for want of apposite deposit(s) by the defendant, the instant RSA warranting, its, being dismissed for non prosecution. Moreover, the aforesaid quantification, was merely, an ad-interim measure also non-compliance therewith has begotten the aforestated befitting legal mishap to befall the defendant. Being so, given the may be possibility of the JD succeeding in the extant appeal, thereupon it would not be legally sagacious, to, at this stage, merely, for want of its deposit, by the appellant, make a conclusion that the instant appeal warrants dismissal, especially when the aforesaid amounts, do not, constitute a part of the decree impugned before this Court also rather when validity(s) of apposite levyings, is to be yet determined by this Court, determination whereof would occur only upon a verdict on merits being here-after pronounced upon the extant RSA.

4. The learned counsel for the respondents/decree holders, re-submits, that further necessary proceedings being undertaken vis-à-vis the JD, for ensuring coercive recovery of the aforesaid sums, determined as mesne profits. However, the aforesaid submission would hold validity, only upon the instant JD appeal being dismissed, on merits, whereas rather with the appellant may be succeeding in the extant appeal, thereupon if during pendency of the instant appeal, the DH affirmatively proceeds to constrain this Court, for, adoption of coercive measures, for ensuring recovery of sums aforesaid, thereupon, it, would result in avoidable restitutory measures warranting adoption, for hence ensuring qua the aforesaid sums of money being realized from the plaintiffs, exercise whereof would tantamount to obviable multiplicity of proceedings being unjustly launched. Accordingly the instant application is dismissed.

List for hearing on 29th November, 2017.

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

Smt. Mumtaz ..Appellant

Versus

The Executive Engineer, Aug (E) Div. No.-2, H.P.S.E.B. Ltd. ..Respondent

FAO No. 174 of 2012
Decided on: October 6, 2017

Employees Compensation Act, 1923- Section 4- The Commissioner awarded the compensation of Rs. 5,84,800/- and funeral expenses of Rs. 5,000/- - the Board was directed to deposit the amount within one month from the date of the order, failing which the interest was to be paid @ 12% per annum- aggrieved from the non-grant of interest, present appeal has been filed – held that the dependents of the workman were entitled to compensation from the date of accident – the employer is under an obligation to deposit the amount due under the Act and in case of failure to deposit the amount within one month from the date it fell due, the Commissioner can award interest @ 12% per annum or at such higher rate not exceeding the maximum of the lending rate – the amount was not deposited by the Board within time and the Commissioner erred in not awarding interest on the compensation- appeal allowed – claimant held entitled to interest @ 12% per annum on compensation amount from the date of accident. (Para-6 to 16)

Cases referred:

Sita Ram versus Satvinder Singh & another, Latest HLJ 2008 (HP) 1110

Pratap Narain Singh Deo versus Shrinivas Sabata and another, AIR 1976 SC 222

For the Appellant Ms. Shikha Chauhan and Mr. Khushi Verma, Advocates.

For the Respondent Mr. Satyen Vaidya, Senior Advocate with Mr.Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of instant appeal filed under Section 30 of the Workmen's Compensation Act, challenge has been laid to order dated 31.12.2011 passed by the Commissioner under Employee's Compensation Act in Case No. 16/2 of 2011/10, whereby the Commissioner below while allowing the petition filed under Section 4 of the Workmen's Compensation Act, 1923 held the appellant-claimant entitled to compensation to the tune of Rs.5,84,800/- and Rs.5,000/- as funeral charges. Learned Commissioner below, while awarding aforesaid amount as compensation, also directed the respondent-Board to pay/deposit the aforesaid compensation amount within one month from the date of order i.e. 31.12.2011 before him, failing which respondent was directed to pay interest @ 12% per annum after 31.1.2012.

2. Ms. Shikha Chauhan, Advocate, while inviting attention of this Court to impugned order dated 31.12.2011, fairly stated that there is no challenge as such to the quantum of compensation awarded by the learned Commissioner below in petition under Section 4 of the Workmen's Compensation Act filed by the claimant, rather, petitioner is aggrieved with non-grant of interest from the date of accident, as prayed in the petition filed under Section 4 of Employee's Compensation Act. Learned counsel further contended that otherwise also, aforesaid award passed by learned Commissioner below has attained finality qua amount of compensation since no appeal, whatsoever, has been preferred against the same by the respondent-Board.

3. Learned counsel while placing reliance upon the judgment passed by this Court, in case titled as **Sita Ram** versus **Satvinder Singh & another**, Latest HLJ 2008 (HP) 1110, contended that the appellant-claimant is/was entitled to interest @ 12% per annum on compensation amount, from the date of accident. Learned counsel also placed reliance upon

judgment of Hon'ble Apex Court in **Pratap Narain Singh Deo** versus **Shrinivas Sabata and another**, AIR 1976 SC 222 to contend that employer becomes liable to pay compensation as soon as injury is caused to the workman.

4. Mr. Satyen Vaidya, learned Senior Advocate duly assisted by Mr.Vivek Sharma, Advocate, while refuting aforesaid submissions having been made by the learned counsel representing the appellant, stated that there is no illegality or irregularity in the impugned order passed by learned Commissioner below, as such, same deserves to be upheld. Mr. Vaidya, learned Senior Advocate, further contended that judgments cited above, have no application in the present case, as such, present petition deserves to be dismissed being devoid of merits.

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

6. It is undisputed that there is no challenge, if any, to the amount of compensation awarded by the learned Commissioner below, as such, this Court is only called upon to determine whether appellant is/was entitled to interest from the date of accident or from the date of passing of award by the learned Commissioner below.

7. Before adverting to the merits/demerits of the arguments having been advanced by the learned counsel representing the parties, this Court deems it fit to take note of Section 4 of the Workmen's Compensation Act, which provides for grant of compensation to be paid to the workman, on account of injury or death:

> **"4. Amount of compensation**
>
> (1) Subject to the provisions of this Act the amount of compensation shall be as follows namely :-
>
> where death results from the injury an amount equal to fifty per cent of the monthly wages of the deceased workman multiplied by the relevant factor; or an amount of fifty thousand rupees whichever is more;
>
> 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 sixty thousand rupees whichever is more.
>
> **Explanation I :** For the purpose of clause (a) and clause (b) relevant factor in relation to a workman means the factor specified in the second column of Schedule IV against the entry in the fits 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 birthday immediately preceding the date on which the compensation fell due;
>
> **Explanation II :** Where the monthly wages of a workman exceed two thousand rupees his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be two thousand rupees only;
>
> (c) where permanent partial disablement results from the injury in the case of an injury specified in Part II of Schedule I such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the lass of earning capacity caused by that injury; and in the case of an injury specified in Schedule I such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;
>
> **Explanation I :** Where more injuries than one are caused by the same accident the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.

Explanation II : In assessing the loss of earning capacity for the purpose of sub-clause

(ii) the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I;

(d) where temporary disablement whether total or partial results from the injury a half monthly payment of the sum equivalent to twenty five per cent of monthly wages of the workman to be paid in accordance with the provisions of sub-section (2).

(1A) Notwithstanding anything contained in sub-section (1) while fixing the amount of compensation payable to a workman in respect of an accident occurred outside India the Commissioner shall take into account the amount of compensation if any awarded to such workman in accordance with the law of the country in which the accident occurred and shall reduce the amount fixed by the amount of compensation awarded to the workman in accordance with the law of that country.

(2) The half-monthly payment referred to in clause (d) of sub-section (1) shall be payable on the sixteenth day -

from the date of disablement where such disablement lasts for a period of twenty-eight days or more or after the expiry of a waiting period of three days from the date of disablement where such disablement lasts for a period of less than twenty-eight days; and thereafter half-monthly during the disablement or during a period of five years whichever period is shorter :

Provided that -

there shall be deducted from any lump sum or half monthly payments to which the workman is entitled the amount of any payment or allowance which the workman has received from the employer by way of compensation during the period of disablement prior to the receipt of such lump sum or of the first half monthly payment as the case may be; and no half monthly payment shall in any case exceed the amount if any by which half the amount of the monthly wages of the workman before the accident exceeds half the amount of such wages which he is earning after the accident.

Explanation : Any payment or allowance which the workmen has received from the employer towards his medical treatment shall not be deemed to be a payment or allowance received by him by way of compensation within the meaning of clause (a) of the proviso.

On the ceasing of the disablement before the date on which any half monthly payment falls due there shall be payable in respect of that half monthly a sum proportionate to the duration of the disablement in that half month. If the injury of the workman results in his death the employer shall in addition to the compensation under sub-section

(1) deposit with the Commissioner a sum of one thousand rupees for payment of the same of the eldest surviving dependant of the workman towards the expenditure of the funeral of such workman or where the workman did not have a dependant or was not living with his dependant at the time of his death to the person who actually incurred such expenditure. 4A. Compensation to be paid when due and penalty for default Compensation under section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed he shall be bound to make provisional payment based on the extent of liability which he accepts and such payment shall be deposited with the

Commissioner or made to the workman as the case may be without prejudice to the right of the workman to make any further claim.

direct that the employer shall in addition to the amount of the arrears pay simple interest thereon at the rate of twelve per cent annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government by notification in the Official Gazette on the amount due; and if in his opinion there is no jurisdiction for the delay direct that the employer shall in addition to the amount of the arrears and interest thereon pay a further sum not exceeding fifty per cent of such amount by way of penalty :

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to shoe cause why it should not be passed.

Explanation : For the purposes of this sub-section "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act 1934 (2 of 1934

(3A) The interest payable under sub-section (3) shall be paid to the workman or his dependant as the case may be and the penalty shall be credited to the State Government.

Method of calculating wages In this Act and for the purpose thereof the expression "monthly wages" means the amount of wages deemed to be payable for a months' service (whether the wages are payable by the month or by whatever other period or at piece rates) and calculated as follows namely :-

where the workman has during a continuous period of not less than twelve months immediately preceding the accident been in the service of the employer who is liable to pay compensation the monthly wages of the workman shall be one-twelfth of the total wages which have fallen due for payment to him by the employer in the last twelve months of that period; where the whole of the continuous period of service immediately preceding the accident during which the workman was in the service of the employer who is liable to pay the compensation was less than one month the monthly wages of the workman shall be the average monthly amount which during the twelve months immediately preceding the accident was being earned by a workman employed on the same work by the same employer or if there was no workman so employed by a workman employed on similar work in the same locality; in other cases including cases in which it is not possible for want of necessary information to calculate the monthly wages under clause (b) the monthly wages shall be thirty times the total wages earned in respect of the last continuous period of service immediately preceding the accident from the employer who is liable to pay compensation divided by the number of days comprising such period.

Explanation : A period of service shall for the purposes of this section be deemed to be continuous which has not been interrupted by a period of absence from work exceeding fourteen days.

8. It is quite apparent from bare reading of aforesaid provisions of law that workman or his dependant, be it wife or children, are entitled to compensation on account of injury or death of a workman, during the course of employment. Section 4A of the aforesaid Act provides for penalty in default of payment of compensation. As per provisions contained in Section 4A, in cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim. Similarly, sub-section 3 of Section 4A provides that wherever any employer is in default in paying compensation due under the Act, within one month from the date it fell due,

Commissioner can direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears, and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty. Apart from above, Section 3A provides that the interest and the penalty payable under sub-section (3) of Section 4A of the Act, shall be paid to the workman or his dependant, as the case may be. Section 4A of the Act ibid is reproduced herein below:

4A. Compensation to be paid when due and penalty for default.—

1. Compensation under section 4 shall be paid as soon as it falls due.

2. In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

3. Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall—

a. direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

b. if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears, and interest thereon pay a further sum not exceeding fifty per cent of such amount by way of penalty:

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

Explanation.—For the purposes of this sub-section, “scheduled bank” means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

3A. The interest and the penalty payable under sub-section (3) shall be paid to the workman or his dependant, as the case may be.]]

9. It is undisputed before this Court that no amount, as provided under Section 4 of the Workmen's Compensation Act/Employee's Compensation Act, was ever deposited by the respondent-Board, immediately after accident, rather, it emerges from the record that respondent Board failed to deposit the amount even after filing of the claim petition, and same has been deposited after passing of order in execution petition filed by the claimant.

10. It is quite evident from the provisions of law taken note above, that claimant is/was entitled to interest over compensation amount from the date of accident i.e. 9.2.2010, but, in the instant case, learned Commissioner below while holding claimant entitled for compensation, failed to exercise jurisdiction vested in him, in as much as, in not awarding interest as provided under aforesaid provisions of law, from the date of accident.

11. This Court, after having carefully gone through the aforesaid provisions of law, sees no justification in denying the interest to the claimant on the amount of compensation awarded by the learned Commissioner below from the date of accident.

12. Hon'ble Apex Court in **Pratap Narain Singh Deo** versus **Shrinivas Sabata and another**, AIR 1976 SC 222, has held as under:

"7. Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section provides that the employer shall be liable to pay compensation if "personal injury is caused to a workman by accident arising out of and in the course of his employment." It was not the case of the employer that the right to compensation was taken away under sub-section (5) of section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore became liable to pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due with after the Commissioner's order dated May 6, 1969 under section 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of a agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation under section 3, in respect of the injury, was suspended until after the settlement contemplated by section 19. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary.

8. It was the duty of the appellant, under section 4A(1) of the Act, to pay the compensation at the rate provided by section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under sub-section (2) of section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no heed to the respondent's personal approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making and application to the Commissioner for settling the claim, and even there the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement setting the claim for a sum which was so grossly inadequate that it was rejected by the Commissioner. In these facts and circumstances, we have no doubt that the Commissioner was fully justified in making an order for the payment of interest and the penalty."

13. This Court in case titled as **Sita Ram** versus **Satvinder Singh & another**, Latest HLJ 2008 (HP) 1110, has held as under:

"2. The undisputed facts are that the applicant was a Workman and filed a claim petition for compensation on account of personal injury sustained in an accident while discharging his duties as a driver. The learned Commissioner awarded compensation of Rs.2,21,004/-. It further directed that the amount be deposited within sixty days from the date of order, failing which, the Insurance Company would be liable to pay interest at the rate of 12% per annum. The workman challenged this award only on the ground that the Commissioner has failed to award statutory interest at the rate of 12% per annum from the date the amount fell due and also prayed that the Commissioner has failed to exercise jurisdiction vested in him by law in not awarding penalty and interest in terms of Section 4-A of the Workmen's Compensation Act.

Section 4-A of the Workmen's Compensation Act reads as follows:-

"4-A. Compensation to be paid when due and penalty for default.-(1) Compensation under section 4 shall be paid as soon as it falls due. (2) In

case where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

(3) Where any employer is in default in payment the compensation due under this Act within one month from the date it fell due, the Commissioner shall-

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent. of such amount by way of penalty:

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed."

3. A bare perusal of this Section shows that an employer in terms of Section 4-A is expected to deposit the amount of compensation payable to an employee within one month. If he does not pay the compensation within one month, he is liable to pay interest and penalty. The main question which arises for consideration in this case is when does the compensation "fall due". Section 3 of the Workmen's Compensation Act makes an employer liable to pay compensation in respect of personal injury or death of an employee in an accident arising out of and in the course of employment. As per the provisions of this Section, the amount falls due when the accident takes place. Section 4 lays down the criteria to calculate the amount of compensation payable. Section 4-A, which has been quoted hereinabove, lays down that the compensation under Section 4 shall be payable as soon as it falls due. Section 4(2) provides that even when the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the Workman without prejudice to the right of the Workman while making any further claim. From a bare perusal of Section 4-A(1) and 4-A (2), it is apparent that the compensation falls due on the date of accident and the employer is expected to make the payment immediately and even if he does not accept the liability to the extent claimed, he is bound to make provisional payment.

4. It would be pertinent to note that under the provisions of the Workmen's Compensation Act, it is not necessary that a claim petition must be filed. The employer of his own can also deposit the compensation with the Commissioner. Section 4-A (3) lays down that where the employer is in default in paying the compensation due under the Act within one month from the date it falls due, the Commissioner shall direct the employer to pay interest in addition to compensation at the rate of 12% per annum or at such higher rate not exceeding the maximum the lending rates of scheduled banks. Section 4-A (3) (b) empowers the Commissioner to impose penalty, if he is of the opinion that there is no justification for the delay in depositing the amount. From a perusal of all the aforesaid statutory provisions, it is apparent that the compensation falls due on

the date of accident. The liability to pay interest/penalty can be avoided by depositing the amount payable or at least making provisional payment within one month of the accident.

5. The question as to when the amount falls due, came up for consideration before a Constitution Bench of the Supreme Court in Partap Narain Singh Deo versus Shrinivas Sabata and another, AIR 1976 Supreme Court 222. The Apex Court was considering the provisions of Sections 3,4, 4-A and 19 of the Workmen's Compensation Act. The contention which was raised before the Supreme Court, has been noted by it in para-6 of the said judgment. In para-7 and para-8, the Apex Court dealt with the question as to when the compensation falls due. The relevant portion of the judgment reads as follow:-

> "6. It has next been argued that the Commissioner committed a serious error of law in imposing a penalty on the appellant under Section 4-A (3) of the Act as the compensation had not fallen due until it was 'settled' by the Commissioner under Section 19 by his impugned order dated May 6,1969. There is however no force in this argument."
>
> "7. Section 3 of the Act deals with the employer's liability for compensation Subsection (1) of that section provides that the employer shall be liable to pay compensation if "personal injury is caused to a workman by accident arising out of and in the course of his employment." It was not the case of the employer that the right to compensation was taken away under sub-section (5) of Section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore became liable to pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the Commissioner's order dated May 6,1969 under Section 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation under Section 3, in respect of the injury, was suspended until after the settlement contemplated by Section 19. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary."
>
> "8. It was the duty of the appellant, under Section 4-A (1) of the Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under sub-section (2) of Section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence." (Emphasis supplied)

6. It would also be pertinent to mention that a three Judge Bench of the Apex Court in Kerala State Electricity Board versus Valsala K., 2000 ACJ 5, held that the relevant date for determining the rate of compensation and liability of the parties concerned, is the date of the accident and not the date of adjudication of the claim. No doubt, in that case, the question raised, was as to whether compensation should be assessed in accordance with the provisions of Section 4 of the Workmen's Compensation Act, as existing on the date of adjudication or as

per the law which was in force on the date of accident. The Apex Court clearly held that the rights of the parties will be governed by the law as it exists on the date of accident. The view of the Apex Court in Partap Narain Singh Deo's case, was being followed by all the Courts as well as this Court for the last more than three decades.

7. This Court in Ram Dulari Kalia versus H.P. State Electricity Board and another, ILR 1986 H.P. 842, following the aforesaid judgment held as follows:-

> "8. Against the background aforesaid, it is manifest that in the present case duty to pay the compensation at the rate provided in section 4 arose under sub-section (1) of section 4-A of the Act as soon as the accident resulting in the injury to the deceased workman and in his consequential death occurred and that the respondents being in default in paying the compensation due under the Act within one month from the said day, the discretion conferred on the Commissioner under sub-section (3) of section 4-A to award interest on the compensation amount in accordance with law was required to be exercised reasonably and in a judicial manner after taking into consideration all the relevant factors and that if, in her considered opinion, there was no justification for the delay, the penalty was also required to be ordered to be recovered. The Commissioner has held, as earlier pointed out, that since the respondents had admitted the liability to pay the compensation "whatever is to be awarded" and that they had also deposited the amount of compensation in the Court, the claim with regard to the payment of interest was not justified. The question of imposition of penalty does not appear to have been considered at all presumably on the same ground. The question for determination is whether the award suffers from any error of law based, inter-alia, upon the misconstruction of the relevant statutory provision."

8. It would be pertinent to mention here that in a large number of cases, the Apex Court as well as this Court were granting interest from one month after the date of the accident or from the date of filing of the application. However, the respondent-Insurance Company has placed reliance upon the judgment of the Apex Court in National Insurance Co. Ltd. versus Mubasir Ahmed and another, 2007 ACJ 845. in this case the Apex Court held as follows:-

> "9. Interest is payable under section 4-A (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 4-A was dealt with by this court in Maghar Singh v. Jaswant Singh, 1997 ACJ 517 (SC). By amending Act 30 of 1995, section 4-A of the Act was amended, inter alia fixing the minimum rate of interest to be simple interest at the rate of 12 per cent. In the instant case, the accident took place after the amendment and, therefore, the rate of 12 per cent 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 4- A (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 4-A. 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."

9. The Apex Court held that the compensation falls due only after the adjudication is done and consequently interest can be awarded only from the date of adjudication. With due respect, it appears that the earlier judgment of the Apex Court in Partap Narain Singh Deo versus Shrinivas Sabata and another, rendered by a Bench of four Judges was not brought to the notice of the Apex Court while deciding the aforesaid case. Even the judgment rendered in the Kerala State Electricity Board versus Valsala K., was not brought to the notice of the Apex Court. It is apparent that the judgment in National Insurance Co. Ltd. versus Mubasir Ahmed and another is in direct conflict with the view taken by a larger Bench in Partap Narain Singh Deo versus Shrinivas Sabata and another's case. Reliance is also placed by the Insurance Company on a judgment of a learned Single Judge of this Court in Executive Engineer and another versus Ambika Sharma, 2008 ACJ 664, wherein also the Single Judge relying upon the judgment of the Apex Court rendered in National Insurance Co. Ltd. versus Mubasir Ahmed and another held that interest could only be granted from the date of award. This judgment also does not take into consideration the Constitution Bench judgment in Partap Narain Singh Deo versus Shrinivas Sabata and another. Therefore, the said judgment is per incuriam.

10. When there are two conflicting judgments of the Apex Court, the only option before the High Court is to follow the judgment rendered by the Larger Bench of the Apex Court. In this behalf, reference may be made to Mattulal versus Radhe Lal's case, AIR 1974 Supreme Court 1596. A reference may also be made to the judgment of the Apex Court rendered in N.S. Giri versus Corporation of City of Mangalor and others, (1999) 4 Supreme Court Cases 697, wherein the Court held as follows:-

> "12. The abovesaid decision does support the proposition canvassed by the learned counsel for the appellant that an industrial settlement would operate even by overriding a statutory provision to the contrary. However, suffice it to observe that the Constitution Bench decision in New Maneck Chowk Spg. and Wvg. Co. Ltd. and also the decision of this Court in Hindustan Times Ltd. which is a four-Judge Bench decision, were not placed before the learned Judges deciding LIC of India case. A decision by the Constitution Bench and a decision by a Bench of more strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of a binding authority; more so, when the attention of the Judges deciding the latter case was not invited to the earlier decisions available."

11. The Constitution Bench had already decided the question as to when compensation falls due in terms of the Workmen's Compensation Act, 1923. Unfortunately, this decision of the Constitution Bench was not brought to the notice of the Apex Court while deciding National Insurance Co. Ltd. Versus Mubasir Ahmed and another, 2007 ACJ 845. Therefore, I feel that this Court is bound by the judgment rendered by the Constitution Bench of the Apex Court and I accordingly hold that the compensation falls due on the date when the accident takes place and in case the same is not deposited within thirty days, the workman is entitled to claim interest at the rate of 12% per annum without having to show that delay in depositing the compensation was attributable to the

employer. While taking this view, I am supported by a Division Bench judgment of the Kerala High Court reported in National Insurance Co. Ltd. Versus Rekha, 2008 ACJ 886."

14. It is quite apparent from the aforesaid exposition of law that employer is bound to deposit the amount of compensation as claimed by the claimant or his/her dependant, as the case may be, immediately within 30 days from the date of accident and in case same is not deposited within aforesaid stipulated period, workman/claimant is entitled to claim interest @ 12% p.a. In the case at hand, as has been noticed above, at no point of time, amount was deposited by the respondent-employer within 30 days from the date of accident, rather, same came to be deposited, after filing of execution by the claimant, as such, claimant could not be denied interest on the amount of compensation.

15. Accordingly, the present appeal is allowed. Order dated 31.12.2011 passed by the Commissioner under Employee's Compensation Act in Case No. 16/2 of 2011/10 is modified to the extent that the claimant shall be entitled to interest @ 12% per annum on compensation amount, from the date of accident i.e. 9.2.2010.

16. Since instant appeal came to be filed in the year 2012, whereafter, it remained pending for almost five years, this Court hopes and trusts that respondent-Board shall calculate the interest @ 12% strictly in terms of this judgment and thereafter make payment expeditiously, preferably within a period of three months, from today.

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

National Insurance Company. .....Appellant

Versus

Smt. Khanddo Lama & others .....Respondents.

FAO No. 198 of 2010
Decided on : 6.10.2017

Employees Compensation Act, 1923- Section 4- Compensation of Rs.4,01,300/- was awarded by the Commissioner – it was contended that deceased was not employed by C but by B – C had died during the pendency of the petition and was substituted by his legal representatives who have not denied the relationship between the parties- Insurance Company had also not taken a plea that there was no valid insurance – appeal dismissed. (Para-2 to 6)

For the Appellant: Mr. Deepak Bhasin, Advocate.
For the Respondents: Mr. Dibender Ghosh, Advocate, for respondents No. 1 to 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant appeal is directed against the order of 7.12.2009, rendered by the learned Commissioner, for Employee's Compensation, Kullu, District Kullu, H.P., while his exercising jurisdiction under the Employee's Compensation Act, whereby, he assessed compensation in a sum of Rs. 4,01,300/- vis-a-vis the dependents/successors-in-interests, of the deceased employee.

2. The learned counsel for the appellant, submits, that one Sh. Cherring Rigzin was not the employer of the deceased workman, one Babu Lama. He cements his submission by alluding to an echoing occurring in the cross-examination of PW-3, qua her deceased husband

being under the employment of one Gialson, with whom, the insurer never executed any binding contract of insurance, thereupon the fastening of the apposite indemnificatory liability(s) upon the insurance company, hence suffering from a gross patent illegality. The aforesaid submissions' impinge upon the crucial imperative statutory fact, of, at the relevant point of time, the predecessor-in-interest of the claimants, holding employment under one Chhering Rigzin, besides only upon rendition of an affirmative verdict qua the aforesaid trite statutory fact, would, render the fastening of apposite indemnificatory liabilities upon the insurance company, to hold validity.

3. As aforestated, though, the aforesaid echoings displaying qua purported lack of any subsisting contract of employment existing inter-se the purported employer of the deceased workman with the insurance company, whereas, uncontrovertedly an apposite validly executed contract of insurance standing entered inter-se deceased respondent No.1 and the insurer, do find occurrence, in a part of the cross-examination of PW-3, yet, conclusive clinching reliance cannot be placed thereon, given the aforesaid echoings standing succeeded by the widow of the deceased workman, subsequently making articulations, of her deceased husband 5-6 years prior to hers' rendering her testification hence holding employment under one Gialson, thereupon an inference emerges, of, with the relevant mishap occurring in the year 2003, hence the period whereat the deceased workman held employment under one Gialson, not, appertaining to the time contemporaneous to the occurrence of the ill-fated occurrence, rendering hence the aforesaid admission to be insignificant, in firmly pronouncing besides resting the aforesaid crucial statutory fact.

4. Respondent No.1 Chhering Rigzin, expired, during the pendency of the claim petition before the learned Commissioner. Consequently, an application was instituted before the learned Commissioner for his being substituted by his LRs. The learned Commissioner, as borne in order(s), recorded, on 12.9.2009, his thereat upon his being apprised, of, respondent No.1 no longer surviving, his proceeding to ask for filing of his legal representative certificate. The aforesaid order, does also, reveal that the learned Commissioner hence proceeded to permit the LRs of respondent No.1 to be brought on record. Also, amended memo of parties in compliance thereof was placed on record by the counsel concerned, whereafter reflection(s) in consonance therewith, do not, occur in the impugned order, reflections whereof be made by the learned Commissioner.

5. Nowat, with the LRs of the, deceased workman, filing a reply to the aforesaid application, wherein, they echoed, of, the deceased workman rendering employment under one Chhering Rigzin, deceased respondent No.1, at, the time contemporaneous to the occurrence of the ill-fated mishap, whereas, neither the applicant concerned nor the insurance company, by, instituting befitting response(s) thereto, not, controverting the aforesaid fact, does also constrain a conclusion of the insurance company acquiescing qua the deceased workman Babu Lama, holding, a contract of employment under one Chhering Rigzin, deceased respondent No.1. Since all the aforesaid conclusions clearly depict, of all, the statutory canons, for, rendering the apposite application maintainable vis-à-vis deceased respondent No.1, hence begetting satiation, thereupon with the insurance company, not, contesting the factum, of, a valid contract of insurance being executed with deceased respondent No.1, sequel thereof, is of, the fastening of the apposite liabilities upon the insurance company, not, suffering from any illegality or absurdity.

6. The learned counsel for the appellant submits that he does not press issue No.2, hence the same is decided accordingly as not pressed.

7. In view of the above, there is no merit in this appeal, the same is accordingly dismissed. Impugned order is maintained and affirmed. All pending applications stand disposed of accordingly.

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

Prem Sharma ....Petitioner.
Versus
State of HP and others ... Respondents.

CWP No. 6263 of 2012.
Decided on: 6.10.2017.

Constitution of India, 1950- Article 226- Petitioner challenged the scheme, whereby the taking of insurance was made compulsory for loanee apple cultivators as violative of Article 14 – held that the scheme was framed for implementation of Pilot Weather Based Crop Insurance Scheme (WBCIS) in which insurance of the crop was made compulsory for the farmers who had obtained loans from various lending institutions and it was made optional for non-loanee farmers – the classification between loanee farmers and non-loanee farmers is based upon intelligible differentia which has a nexus with the object of protecting the interest of lending institution and the farmer- no such protection is required in case of non-loanees – the scheme is not violative of Article 14 – petition dismissed. (Para- 5 and 6)

For the petitioner. Mr. Keshav S. Thakur, Advocate.
For respondents Mr. Vikram Thakur, Dy. Advocate General for respondent-State.
Mr.Ashok Sharma, ASGI for respondent No.2.
Dr. Lalit K. Sharma, Advocate for respondents No.4 and 5.
Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate for respondent No.6.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J*(Oral).*

By way of this petition, the petitioner who claims himself to be a farmer and also President of Kullu Phalotpadak Mandal, Mahili Katrain, District Kullu has prayed for the following reliefs:-

> "a) That this Hon'ble Court be pleased to allow this writ petition;
>
> b) A writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India be issued calling for record of the case and condition 2(a) of the Scheme Annexure P-1 and condition (5) in the Scheme Annexure P-5, making the insurance scheme compulsory for loanee Apple cultivators be set aside and quashed;
>
> c) A writ of mandamus be issued against respondent Agriculture Insurance Company directing it to make payment of sum insured as per rate promised in condition No.6 of the scheme Annexure P-1 and arrears paid with interest @ prevalent Bank/Market rate.
>
> d) Costs of this petition be awarded against respondent No.3 and respondent No.5 and
>
> e) For such further and other orders as the nature and circumstances of the case may require."

2. During the course of arguments Mr. Thakur learned counsel for the petitioner has confined his submission to only one ground, i.e., according to him Scheme Annexure P-1 is unsustainable in law and liable to be quashed and set aside, as it creates an artificial classification between loanee farmers and non-loanee farmers, which classification as per him is

violative under Article 14 of the Constitution of India. According to Mr. Thakur, farmer is a farmer be he a loanee farmers or non-loanee farmers and the classification which has been so created between the said two categories is not sustainable in law.

3. No other point was urged.

4. I have heard learned counsel for the petitioner as well as learned counsel for respective respondents and have also gone through the pleadings of the case.

5. In my considered view, there is no merit in the contention of learned counsel for the petitioner. Article 14 of the Constitution of India permits classification provided the classification is based on intelligible differentia and the intelligible differentia has some nexus with the object to be achieved.

6. A perusal of the Scheme demonstrates that the said Scheme has been framed for the purpose of implementation of Pilot Weather Based Crop Insurance Scheme (WBCIS). A perusal of the Scheme further demonstrates that insurance of the crop has been made compulsory for those farmers who have obtained loans from various lending financial institutions, i.e., Bank branches, PACS etc., whereas the same has been made optional for non-loanee farmers, i.e., those farmers who have not taken any loan from lending financial institution. In my considered view, the classification which has been so made between these two categories is not an arbitrary classification. The classification so made is based on intelligible differentia as one group consists of loanee farmers, whereas the other group consists of non loanee farmers. This intelligible differentia has a nexus with the object, which object is that once a loanee farmer, i.e., a farmer who has obtained loan from lending financial institutions, i.e., Bank Branches, PACS etc. undertake compulsory insurance of their crop, not only their interest is protected but in the advent of the failure of the crop, the interest of the financial institutions from whom they have obtained the loans is also protected. The rationale for making crop insurance scheme compulsory for loanee farmers is that because such like farmers have obtained loans from financial institutions, therefore, compulsory insurance of their crop would obviously cover the risk of the farmer as well as the financial institutions in case of crop failure. On the other hand the same has not been made compulsory for a loanee farmer because such like farmer in the absence of having taken loan etc. from financial institutions is not liable to indemnify any such financial institutions. Therefore, from what I have held above not only the classification is based on an intelligible differentia the same also has a reasonable nexus with the object to be achieved and there is no illegality in the same.

In view of the above, as there is no merit in the present petition, accordingly the same is dismissed. Pending miscellaneous applications if any also stand disposed of.

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

Smt. Anchal ...Petitioner

Versus

Sh. Raman Kumar ...Respondent

CMPMO No. 233 of 2017
Decided on: October 9, 2017

Code of Civil Procedure, 1908- Section 24- Marriage between the parties was solemnized as per Hindu rites and custom – the wife left the matrimonial home after one year – the husband filed a petition for divorce in the Court of District Judge, Kangra- the wife filed a petition seeking transfer of the divorce petition on the ground that it would be difficult for her to attend the hearing at a distance of more than 100 k.m.- held that the wife is residing at Chamba while the

petition for divorce has been filed at Dharmshala which is at a distance of more than 100 k.m. – she has to spend the money on transportation – petition allowed and the divorce petition ordered to be transferred to Chamba. (Para- 9 to 20)

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 6

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. H.S. Rangra, Advocate.

For the respondent: None.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under Article 227 of the Constitution of India, read with Section 24 of the Code of Civil Procedure, prayer has been made to transfer HMP No. 69/2017 titled as Raman Kumar versus Smt. Anchal from the Court of learned Additional District Judge-I, Kangra at Dharamshala, District Kangra to the Court of learned District Judge, Chamba, District Chamba, Himachal Pradesh.

2. Before considering the aforesaid prayer having been made by the petitioner by way of instant petition, it may be noticed that this Court, taking note of averments contained in the petition, issued notice to the respondent on 29.5.2017, returnable on 20.6.2017. However, the fact remains that respondent, who was served through his mother, failed to put in appearance on 24.7.2017, but at that point of time, this Court instead of proceeding in the matter ex parte, issued court notice returnable for 28.8.2017. Even on 28.8.2017, respondent failed to put in appearance but this Court, taking note of the nature of litigation pending before this Court, issued fresh court notice to the respondent specifically intimating therein that in case he fails to put in appearance on the next date of hearing, case shall be decided on material available on record, in his absence.

3. Today, i.e. 9.10.2017, respondent has not come present despite having received court order. As per report submitted by the process server notice issued by this Court was duly served upon the respondent, but despite that he chose not to come present before this Court, as such, this Court has no other option but to decide the present case on the basis of pleadings adduced on record by the petitioner as well as law on the point.

4. Facts, as emerge from the record are that marriage of the petitioner was solemnized on 2.8.2013 at Mohala Uper Dharang, Tehsil and District Chamba, Himachal Pradesh, as per Hindu rites, customs and ceremonies. Parties resided together as husband and wife till September 2014 and one male child namely Rudu Sharma born out of their wedlock. Perusal of record further suggests that relations between parties remained cordial for one year and thereafter petitioner left the matrimonial house without informing the respondent or his family members. Since petitioner failed to join the company of the respondent despite his requests, as such, respondent preferred a petition under Section 13(1)(ia)(ib) of the Hindu Marriage Act, 1955, with a prayer to dissolve the marriage between the parties, by a decree of divorce, in the Court of District Judge, Kangra at Dharamshala. In the aforesaid petition, respondent alleged that the petitioner left the matrimonial house of the respondent without any reason and has not been residing with him for more than two years and also not performing her

conjugal duties being legally wedded wife of respondent and therefore, a decree for dissolution of marriage be granted/passed.

5. As per the petitioner, petition having been preferred by the respondent is at initial stage as the same was fixed for service of the petitioner on 23.3.2017 , whereafter, same was listed for reply of petitioner in the month of June, 2017. At this stage, learned counsel representing the petitioner stated that service in the case is complete and same is fixed for reply, if any, to the petition. As per the petitioner, she as well as learned Court below repeatedly made attempts to reconcile the matter between the parties but respondent is not ready and willing even to appear in the reconciliation meeting, as fixed by learned Court below, as such, she is finding it difficult to attend the proceedings at Dharamshala, which is more than 100 kms away from her place of residence i.e. Chamba. She has further stated that she is having minor child aged 3 years, who is under the care and custody of the petitioner and it is very difficult for her to attend the Court at Dharamshala on each and every hearing, as such, it would be in the interest of justice, if proceedings initiated at the behest of the respondent under Hindu Marriage Act, are transferred to the Court of learned District Judge, Chamba. Petitioner has further stated that at present she is living with her mother in her parental house, since father of the petitioner has expired and there is nobody to support her widowed mother and it is not possible for her to leave her minor son aged 3 years, back at Chamba, to attend Court at Dharamshala.

6. Apart from above, petitioner has also claimed that she is unable to spend huge amount so as to attend the Court at Dharamshala and to pay fee to the Counsel at Dharamshala. It is further alleged that since respondent is local resident of District Kangra, as and when she visits Dharamshala to attend the Court for hearing, she suffers humiliation and harassment as other persons accompanying the respondent comment upon her conduct.

7. With the aforesaid submissions, which have been further canvassed by Mr. H.S. Rangra, learned counsel representing the petitioner during arguments, prayer has been made on behalf of the petitioner to transfer the petition pending before learned Additional District Judge-I, Dharamshala to the Court of learned District Judge, Chamba.

8. Mr. H.S. Rangra, learned counsel representing the petitioner, in support of his aforesaid contentions also 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.

9. 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.

10. 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.

11. 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."

12. 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.

13. In the case at hand, facts, as have been discussed above, which have not been refuted, it clearly emerges that at present, petitioner resides at Chamba, which is definitely more than 100 kms away from Dharamshala i.e. Court, where respondent-husband has filed petition for divorce. Similarly, there appears to be no dispute with regard to petitioner having minor child aged three years and it can be presumed that it is difficult for the petitioner to attend each and every hearing at Dharamshala, leaving her minor child at Chamba.

14. 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) at Dharamshala, is always under obligation to attend the Court at Dharamshala.

15. 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.

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:-

i) Availability of video conferencing facility.

ii) Availability of legal aid service.

iii) Deposit of cost for travel, lodging and boarding in terms of Order XXV CPC.

iv) E-mail address/phone number, if any, at which litigant from out station may communicate."

16. 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"

17. 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.

18. Though this Court, after having taking note of the aforesaid grounds raised in the instant petition coupled with the law on the point, as has been laid down by the Hon'ble Apex Court as well as this Court, sees no impediment in transferring the proceedings pending before learned Additional District Judge-I, Kangra at Dharamshala to Chamba, but even otherwise, as has been informed by the learned counsel representing the petitioner, another petition under Section 125 CrPC initiated at the behest of present petitioner is also pending before the leaned Chief Judicial Magistrate Chamba and in that case, respondent(husband) is already appearing. Since petition under Section 125 CrPC is also pending at Chamba against the present respondent and in that case he has been also appearing before the Court concerned, no prejudice shall be caused to the respondent, in case proceedings under Hindu Marriage Act, pending at Dharamshala, are transferred to the Court at Chamba.

19. After having carefully considered the material available on record, as well as submissions having been made by the learned counsel representing the petitioner, and law laid down by the Hon'ble Apex Court, this court deems it fit to transfer HMP No. 69/2017 titled as Raman Kumar versus Smt. Anchal from the Court of learned Additional District Judge-I, Kangra at Dharamshala, District Kangra to the Court of learned District Judge, Chamba, District Chamba, Himachal Pradesh. Learned counsel for the petitioner undertakes to cause appearance of the petitioner before learned District Judge, Chamba on **10.11.2017**, on which date, learned District Judge, Chamba shall issue notice to the respondent, to put in appearance on the date to be fixed by him/her. Learned Additional District Judge-I, Kangra at Dharamshala shall transfer the aforesaid petition to the Court of District Judge, Chamba, forthwith, to enable learned District Judge, Chamba, to do the needful, as ordered vide this judgment.

20. Registry to send copy of instant judgment to the learned Additional District Judge-I, Kangra at Dharamshala as well as learned District Judge, Chamba, forthwith, to enable them to do the needful well within stipulated time.

21. In view of above, the present petition is disposed of, alongwith pending applications, if any.

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

Raksha Gupta & Ors. ...Petitioners
Versus
State of H.P. & Ors. ...Respondents

CWP No. 2868 of 2008
Reserved on: 13.09.2017
Date of decision:10.10. 2017

H.P. Tenancy and Land Reforms Act, 1972- Section 18- Society was constituted inter alia to purchase or take on long lease or acquire by exchange or otherwise land for the construction of the houses or housing colonies– the members were enrolled on fake address – out of 173 members, only 14 were found to be residents of the area of operation of the society – the authority cancelled the membership of the petitioner as well as the allotment made to them after inquiry – held that different types of societies exist for different purposes, which are governed by their bye-laws – since, there is restriction on the acquisition of the land by non-agriculturist, therefore, a housing society formed by agriculturist can allot land to its members – however, when the members are non-agriculturist, the society can allot the building to the member and not the plots- members of cooperative department have failed to conduct a check on the activities of the society – directions issued to the Deputy Commissioners to conduct a thorough probe to identify such societies and to take action in accordance with law – the petitioners are not the residents of the area of the operation of the society and have violated the law – the petition dismissed.

(Para- 4 to 21)

Case referred:
Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram (1986) 4 SCC 447

For the petitioners	Mr. Sanjeev Bhushan, Sr. Advocate, with Ms. Abhilasha Kaundal, Advocate.
For the respondents	Ms. Meenakshi Sharma, Addl. A.G. with Mr. Neeraj K. Sharma, Dy. A.G. for respondents No. 1, 2, 4 and 5. Mr. R.P. Singh, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This writ petition exposes an ingenious land scam where large scale illegal transfer of land is being carried out in the State contrary to Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 (for short the '**Tenancy Act**') through various Co-operative Societies registered in State.

2. The petitioners, who admittedly are the non-agriculturists, after becoming members of respondent No. 3 – Society, were allotted plots by respondent No. 3 – Society in contravention to not only the aforesaid provisions of the Tenancy Act but also the provisions of the bye-laws framed by respondent No. 3 - Society.

3. Respondent No. 3-Society came to be registered under the provisions of H.P. Co-operative Societies Act, 1968 (for short the '**Act**') on 12.07.1990 vide registration No. 554 with the following objects as enumerated in Clause 4 of the bye laws, which reads thus:-

"4. The objects of the society shall be:-

i. To purchase, take on long lease or acquire by exchange or otherwise land for construction of houses or housing colonies.

ii. To construct, hire or acquire buildings for the individual and collective benefit of the members.

iii. To sell or to exchange house sites with members, rent out or lease buildings for common use, surrender or accept surrender of houses or house sites.

iv. To purchase and sell to members requisite material for construction and repair of houses.

v. To establish and carry sanitary, social, educational and recreational activities for the benefit of the members.

vi. To raise funds and to give loans to members for the construction of houses by themselves or on their behalf.

vii. To prescribe house plans.

viii. To undertake measure to spread knowledge of co-operative principles and practices.

ix. To undertake such other activities as are conducive to the attainment of the above objects."

4. As would be evident, the object of the society amongst other was to purchase, take on long lease or acquire by exchange or otherwise land for construction of houses or housing colonies and then to sell or to exchange house sites with members, rent out or lease buildings for common use, surrender or accept surrender of houses or house sites.

5. In terms of the bye-laws of the Society, the area of operation as per Rule 11(1) of the H.P. Cooperative Societies Rules, 1971 (for short the '**Rules**') in order to make one eligible for admission as member of the Society, apart from others was that one must be an ordinary resident of villages Kattha and Billawalli in Tehsil Nalagarh. Even though the petitioners did not reside in the said villages within the area of operation of the Society, yet they were enrolled members by furnishing fake addresses, for example, the petitioner No. 1 had furnished the Address: MIG plot No. 91, Sector-4, Parwanoo, however, on enquiries made by the Society, it was revealed that the plot belonging to one Krishna Malhotra and not the petitioner No. 1.

6. Even otherwise, it is not in dispute that none of the petitioners belong to the area of operation of the Society, rather out of 173 members only 14 members were found to be resident of area of operation of the Society, whereas remaining 159 members including the petitioners herein were found to be belonging to areas outside the operation of the Society. Therefore, their enrollment was illegal not only in terms of the bye laws of the Society but even the provisions of Section 118 of the Tenancy Act. Even otherwise, the addresses furnished by the petitioners of Parwanoo did not entitle them to be enrolled as members as the same admittedly fell outside the area of the operation of the Society.

7. The petitioners by way of this petition have assailed the cancellation of their membership as also the cancellation of plots which orders have been upheld by the authorities constituted under the Act and have been impugned herein. All the authorities have found the petitioners to have submitted fake affidavits in order to get membership by furnishing the address i.e. House No. 91, Sector-4, Parwanoo, whereas they are permanent residents of Ludhiana (Punjab).

8. Rule 11(1) of the Rules lays down the condition of membership, of an individual and one of the essential condition as per clause (e) is that the individual should be resident of area of operation of Society for the last more than six months. It is apt to reproduce Rule 11 (1) of the Rules, which reads thus:-

11. Condition of membership of individuals-

(1) No person shall be eligible for admission as a member of the society if he:-

(a) is an applicant to be adjudicated a bankrupt or an insolvent or is an uncertified bankrupt; or is an undischarged insolvent; or

(b) has been sentenced for any offence involving moral turpitude and such sentence has not been reversed, or has not been pardoned; or

(c) is a minor, except when he happens to be minor heir, or nominee of a deceased member; or

(d) is of unsound mind; or

(e) is not a resident of the area of operation of the society, for the last six months; or

(f) carries on business similar to that conducted by the society of which he wishes to become a member; or

(g) does not fulfil such other conditions as specified in the bye-laws of the society.

9. Whereas Section 118 of the Tenancy Act, reads thus:-

*"**118. Transfer of land to non-agriculturists barred**.- (1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, no transfer of land (including transfer by a decree of a civil court or for recovery of arrears of land revenue) by way of sale, gift, will, exchange, lease, mortgage with possession, creation of a tenancy or in any other manner shall be valid in favour of a person who is not an agriculturist.*

Explanation.- For the purpose of this sub-section, the expression "transfer of land" shall not include,-

(i) transfer by way of inheritance;

(ii) transfer by way of gift made or will executed, in favour of any or all legal heirs of the donor or the testator, as the case may be;

(iii) transfer by way of lease of land or building in a municipal area;

but shall include-

(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non-agriculturist; and

(b) an authorization made by the owner by way of special or general power of attorney or by an agreement with the intention to put non-agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land.

(2) Nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of.-

(a) a landless labourer, or

(b) a landless person belonging to a scheduled caste or a scheduled tribe; or

(c) a village artisan; or

(d) a land less person carrying on an allied pursuit; or

(dd) a person who, on commencement of this Act worked and continues to work for gain in an estate situated in Himachal Pradesh; for the construction of a dwelling house, shop, or commercial establishment in a municipal area, subject to the condition that the land to be transferred does not exceed:-

(i) in case of dwelling house - 500 square metres; and

(ii) in the case of shop or commercial establishment – 300 square metres:

Provided that such person does not own any vacant land or a dwelling house in a municipal area in the State;

(e) the State Government or Central Government, or a Government Company as defined in section 617 of the Companies Act,1956 or a Company incorporated under the Companies Act, 1956 for which land acquired through the State Government under the Land Acquisition Act,1894, or a statutory body or Corporation or Board established by or under a statute and owned and controlled by the State or Central Government;

(f) a person who has become non-agriculturist on account of-

(i) acquisition of his land for any public purpose under the Land Acquisition Act, 1894; or

(ii) vestment of his land in the tenants under this Act; or ;

(g) a non-agriculturist who purchases or intends to purchase land for the construction of a house or shop, or purchases a built up house or shop, from the Himachal Pradesh State Housing and Urban Development Authority, established under the Himachal Pradesh Housing and Urban Development Authority Act,2004, or from the Development Authority constituted under the Himachal Pradesh Town and Country Planning Act,1977 or from any other statutory Corporation set up for framing and execution of house accommodation schemes in the State under any State or Central enactment, or

(h) a non-agriculturist with the permission of the State Government for the purposes that may be prescribed:

Provided that that a person who is non-agriculturist but purchases land either under clause (dd) or clause (g) or with the permission granted under clause (h) of this sub-section shall, irrespective of such purchase of land, continue to non-agriculturist for the purposes of this Act:

Provided further that a non-agriculturist who purchases land under clause (dd) or in whose case permission to purchase land is granted under clause (h) of this sub-section shall put the land to such use for which the permission has been granted within a period of two years or a further such period not exceeding one year, as may be allowed by the State Government for reasons to be recorded in writing, to be counted from the day on which the sale deed of land is registered and if he fails to do so or diverts, without the permission of the State Government, the said use for any other purpose or transfer by way of sale, gift or otherwise, the land so purchased by him shall, in the prescribed manner, vest in the State Government free from all encumbrances;

(3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act,1908 (16 of 1908), shall register any document pertaining to a transfer of land, which is in contravention of sub-section (1):

Provided that the Registrar or the Sub-Registrar may register any transfer-
(i) Where the lease is made in relation to a part or whole of a building; or

(ii) Where the mortgage is made for procuring the loans for construction or improvements over the land either from the Government or from any other financial institution constituted or established under any law for the time being in force or recognized by the State Government.

(3-A) Where-

(a) the Registrar or the Sub-Registrar, appointed under the Indian Registration Act, 1908, before whom any document pertaining to transfer of land is presented for registration comes to know or has reason to believe that the transfer of land is in contravention of sub-section (1);

(b) a Revenue Officer either on an application made to him or on receipt of any information from any source comes to know or has reason to believe that any land has been transferred or is being transferred in contravention of the provisions of sub-section (1);

Such Sub-Registrar, the Registrar or the Revenue Officer, as the case may be, shall make reference to the Collector of the District, in which land or any part thereof is situate, and the Collector, on receipt of such reference or where the Revenue Officer happens to be the Collector of the District himself, he either on an application made to him or on receipt of any information from any source comes to know or has reason to believe that any land has been transferred or is being transferred in contravention of the provisions of sub-section (1), shall after affording to the persons who are parties to the transfer, a reasonable opportunity of being heard and holding an enquiry, determine whether the transfer of land is or, is not in contravention of sub-section (1) and he shall, within six months from the date of receipt of reference made to him or such longer period as the Divisional Commissioner may allow for reasons to be recorded in writing record his decision thereon and intimate the findings to the Registrar, Sub-Registrar or the Revenue Officer concerned.

(3-B). The person aggrieved by the findings recorded by the Collector that a particular transfer of land is in contravention of the provisions of sub-section (1), may within a period of 30 days from the date on which the order recording such findings is made by the Collector or such longer period as the Divisional commissioner may allow for reasons to be recorded in writing file an appeal to the Divisional Commissioner, to whom such Collector is subordinate, and the Divisional Commissioner may, after giving the parties an opportunity of being heard of the case from the Collector reverse, alter or confirm the order made by the collector and the order made by the Divisional Commissioner shall be final and conclusive.

(3-C). (a) The Financial commissioner may, either on a report of a Revenue Officer or on an application or of his own motion, call for the record of any proceedings which are pending before, or have been disposed of by, any Revenue Officer subordinate to him and in which no appeal lies thereto, for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein and may pass such order in relation thereto as he may think fit.

(b) No order shall be passed under this sub-section which adversely effects any person unless such person has been given a reasonable opportunity of being heard;

(3-D) Where the Collector of the District under sub-section (3A), in case an appeal is not made within the prescribed period or the Divisional Commissioner in appeal under sub-section (3-B) or the Financial Commissioner in revision, under subsection (3C), decides that the transfer of land is in contravention of the provisions of sub-section (1), such transfer shall be void abinitio and the land involved in such transfer together with structures, buildings or other attachments, if any, shall in the prescribed manner, vest in the State Government free from all encumbrances; and

(4) It shall be lawful for the State Government to make use of the land which is vested or may be vested in it under sub-section (2) or sub-section (3D) for such purposes as it may deem fit to do so.

Explanation-I. For the purpose of this section, the expression "land" shall include-

(i) land recorded as "Gair-mumkin", "Gair-mumkin makan" or any other Gair-mumkin land, by whatever name called in the revenue records, and

(ii) land which is a site of a building in a town or a village and is occupied or left out not for agricultural purposes or purposes subservient to agriculture, but shall not include a built up area in a municipal area;

Explanation-II.- For the purpose of this section the expression "municipal area" means the territorial area of a Nagar Panchayat, Cantonment Board, Municipal Council or a Municipal Corporation constituted under any law for the time being in force.

10. Evidently, Section 118 of the Tenancy Act starts with non obstante clause and it is well known that a non obstante clause is a legislative device which is usually implied to give overriding effects to certain provisions over contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid operation and effect of contrary provisions.

11. In ***Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram (1986) 4 SCC 447***, the scope of non obstante clause was explained in the following words:

A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment.

12. It is otherwise elementary that a provision of the Act, statutory enactment will override the provisions of the Rules framed under any Act and thus the provisions of Section 118 of the Tenancy Act would essentially have an overriding effect over the provisions of Rule 11(1) of the Rules.

13. While construing provisions of the Cooperative Act, the Court is not oblivious to the fact that more than 5000 different types of Societies registered as business entity under the Act, some of which are; PACS, Thrift and Credit N/A, Urban Co-operative Banks, Housing Coop. Societies, Consumer Stores, Weaver Societies, Industrial Societies, Dairy and Animal Husbandry, Marketing and Processing, Fisheries, Transport Societies, Labour and Construction, Other Non Agri. Societies, State and Central Coop. Banks and Agri. & Rural Dev. Bank etc.

14. In Primary Agriculture Credit Societies (PACS) and the Agricultural and Rural Development Banks, the membership is only given to the agriculturists or bonafide residents of Himachal Pradesh because the services rendered by these societies are directly related to agriculture and purposes subservient to agriculture. The ownership of land is one of the basic criteria for acquiring membership in these societies and thus, the bye-laws of these societies provide for the same in view of the provision contained in clause (g) of sub-rule (1) of Rule 11 of the Rules.

15. In Urban Co-operative Banks and Non-Agriculture Thrift and Credit Societies (NATC), the membership consists of businessmen, salary earners, non-agriculturists, etc. For their financial needs persons of these categories become members of such societies and get the services. In order to avail the services, it is necessary to become member in such societies. It is not required that salary earners and traders must be from out of the categories of agriculturists or bona fide residents for, a large number of these persons belong to States other than the H.P. Therefore, the membership in these type of societies is given to the ordinary residents of the area of operation of the societies who have been residing there for the last six months and are in occupation of some legitimate profession. In case any restriction is imposed qua the ordinary

residence, a large number of individual would be deprived of the services rendered by these societies. It is also clarified that these societies cannot deal with non-members as for rendering or availing financial services it is imperative to make them members to bring them within the ambit of arbitration clause under the Act for securing safety of societies' funds in case of default by any one of them.

16. Likewise, in other categories of societies viz. transport, fisheries, industrial, weaver, labour and construction, consumer stores, etc. ordinary residents residing in the area of operation of the concerned society for the last six months are made members for fulfilling their specific needs and earning livelihood. As the objects of these societies vary from society to society therefore, the class of membership and their requirement also differ. For example, the labour and construction societies, weaver societies, fisheries societies, transport societies, etc. are registered with a specific object to earn livelihood. In case clause (e) supra is construed to mean permanent or bona fide residents, the ordinary residents intending to acquire membership of such societies would be discouraged and lose their right of livelihood.

17. Insofar as membership in housing societies is concerned, if a housing society is formed by agriculturists and consists membership of that class only, it can allot plots to its members. But in the case of other House Building cooperative Societies where ordinary residents or non-agriculturist are enrolled as members such societies could only allot flats or houses to its members and not the plots.

18. As already observed above, out of 173 members of the Society only 14 members were found the residents of the area of the operation of the Society whereas remaining 159 members including the petitioners were found outside the area of the operation of the Society. This clearly proves the large scale land scam that is existing in the State.

19. As per Chapter VIII of the Act, the accounts of the respondent department is assigned and entrusted work of audit, inquiry, inspection and, therefore, it is difficult to imagine that the Society continue to enroll members contrary to the law when the officials of the Cooperative department being in *peridelicto* with those responsible for the scam. After all despite there being large scale bungling and manipulation, there is hardly any proper supervision. Such malpractices and irregularities are offences not only against the Society as a whole but against the system established by law. The members of the Society have committed forgery by playing systematic fraud in a pre-planned scheme by inventing a novel device to defy the law i.e. the provisions of Section 118 of the Tenancy Act.

20. It is, therefore, high time that there is crack down on such land scams. Accordingly, all the Deputy Commissioners of the State are directed to conduct a thorough probe and identify such societies and members who have blatantly violated the provisions of the Tenancy Act and ensure that not only criminal cases are registered against them but appropriate proceedings for having the properties vested in the State are also initiated. The Registrar, Cooperative Societies as also the other government agencies including the Police Department are directed to ensure all necessary assistance for identifying such societies / members who have allotted plots or purchased plots contrary to the provisions of the Tenancy Act. It is clarified that this order shall not apply to the societies or members who have purchased built up structure as is permissible under the provisions of the Tenancy Act.

21. Adverting to the facts, since the petitioners admittedly are not only non-agriculturists but are not even the residents of the area of the society and have themselves blatantly violated the law, no relief or indulgence can be shown in favour of such litigants.

22. Consequently, the writ petition, as regards reliefs claimed therein, merits dismissal and is accordingly dismissed. The Deputy Commissioners are directed to submit their reports within a period of six months and for that purpose case be listed on **10.4.2018**.

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

Nek Singh ....Petitioner
Versus
State of Himachal Pradesh. ....Respondent

Cr. MMO No. 186 of 2017
Reserved on : 20.07.2017.
Date of Decision: 11.10.2017

Code of Criminal Procedure, 1973- Section 457- JCB machine was seized by the police in connection with FIR registered under Section 353, 504 and 506 of I.P.C in police Station, Kala Amb- application for release was rejected by CJM and the revision was dismissed by Sessions Judge – held that the accused and his brother were found to be involved in illegal mining on earlier occasions – a vehicle involved in the mining activities is liable to be confiscated – police was competent to seize the vehicle – however, the challan was not filed under Mining Act, therefore, vehicle ordered to be released on sapurdari bond of Rs.2 lac with one surety in the like amount- SP directed to look into the reason for not filing the challan under Mining Act- the Court directed to look into the applicability of Mining Act, if challan is filed under the same.

(Para- 5 to 14)

For the Petitioner: Mr.Karan Singh Kanwar, Advocate.
For the Respondent: Mr.Rupinder Singh, Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

This petition has been filed against the order passed by Ld. Sessions Judge, Sirmaur on 10.4.2017, dismissing Cr. Revision Petition No.7-CrR/10 of 2017, preferred by present petitioner against rejection of his application No. 35/4 of 2017, filed under Section 457 Cr.P.C., before the Ld. Chief Judicial Magistrate, Nahan for releasing his JCB Machine No. HP-18B-6678, seized during investigation of the Case FIR No. 22/17, dated 10.3.2017, registered under Sections 353, 504, 506 IPC in Police Station, Kala Amb,District Sirmaur on a complaint of one Lady Forest Guard Maneesha Sesodia against one Tarsem (brother of petitioner Nek Singh) for commission of an act with the help of JCB machine to facilitate illegal mining.

2. As per averments made in the petition and submissions made on behalf of petitioner, the courts below have committed illegality and injustice to the petitioner by rejecting his application for releasing of JCB Machine on the ground that prosecution has yet to prove its case against the petitioner and by the conclusion of trial, the JCB Machine, will be damaged on account of deterioration caused by idle parking of the said JCB, resulting irreparable loss and injury to the petitioner which cannot be compensated in terms of money.

3. Respondent-State has filed reply and also status report through SHO, Police Station, Kala Amb, District Sirmaur. On the basis of status report as well as reply filed on behalf of respondent-State, Ld. Additional Advocate General submits that petitoner Nek Ram, owner of JCB Machine is real brother of one Tarsem Singh, who is accused in present case FIR No. 22/17 and the JCB Machine in question was being used by the said Tarsem Singh for the purpsoe of illegal mining on 10.3.2017 at about 12.30 P.M. at Roon river as with the help of the said JCB machine, Tarsem Singh was filling up the ditches/pits which were dug by the Forest Department in order to prevent transportation of mines extracted through illegal mining and on noticing it, complainant-lady Forest Guard Maneesha Sasodiya tried to restrain him from doing so, whereupon, Tarsem Singh abused and pushed her, because of which, she fell down and Tarsem Singh fled from the spot with JCB Machine, whose photograph was also taken by the complainant through her mobile. According to her, he also threatened her life. It is further

submitted by ld. Additional Advocate General that before this incident, both brothers (accused Tarsem Singh and Nek singh petitioner) along with JCB Machine in question and other tipper and tractor were apprehended by the police for committing the officence of illegal mining and they are habitual offenders for committing illegal mining and in case, the JCB Machine is released, the same will be again used for committing illegal minining. Details of cases registered against the accused Tarsem Singh and his brother Nek Singh (petitioner), owner of JCB, mentioned in status report, referred by the Ld. Additional Advocate General for supporting the plea of State for opposition of release of JCB in question, are as under:-

1. Case No.103/03, dated 30.05.2003, Section 341, 323, 506 IPC, Police Station Nahan is pending in Gram Panchayat, Trilokpur.
2. Case No. 152/05, dated 08.08.2015, Section 323, 324, 325, 427, 452, 506 IPC, Police Station Narayangarh, District Ambala, Harayana is pending in the Court.
3. Case No. 117/06, dated 16.06.2006, Section 341, 323, 506, 451, 325, 34 IPC, Police Station Nahan, is acquitted on 26.12.2011.
4. Case No. 10/13, dated 12.01.2013, Section 341, 323 IPC, Police Station Kala Amb, is acquitted on 21.02.2014.
5. Case No. 17/13, dated 20.02.2013, Section 353, 506, 34 IPC, Police Station Kala Amb, is acquitted on 21.02.2014.
6. Case No. 03/14, dated 08.01.2014, Section 341, 323, 506B, 382, 427, 34 IPC, Police Station Kala Amb, is pending in the Court.

Besides, aforesaid criminal cases registered against the petitoner Nek Ram and his elder brother Tarsem Singh, they were also fined for illegal mining, details on which as per status report, are as under:-

1. Challan No. 6/13, dated 11.01.2013, accused Tarsem Singh (Tractor No. PB04-4949, fine amount Rs. 5000/-).
2. Challan No. 24/15, dated 6.11.2015, accused Nek Singh (JCB A/F, fine amount of Rs. 25,000/-).
3. Challan No. 19/16, dated 15.3.2016, accused Nek Singh (Truck Tipper No. HP18B-6677, fine amount of Rs. 7500/-).

As per status report, it has been found by the Investigating Officer that Forest Department has dug deep trinches/pits on the road leading to Roon Khad to prevent illegal mining so as to restrain vehicular traffic to the Khad (river) for the said purpose and accused Tarsem Singh with the help of JCB Machine has been found filling these trinches/pits. It is further stated in the report that information about commission of illegal mining by accused Tarsem Singh and his brother Nek Singh (petitioner) with the help of their JCB and other vehicles used to be received by police on numerous occasions but both of them, always, flee from the spot very smartly along with their vehicles immdiately after having information about the arrival of local police in the Khad for taking action against illegal mining and on the day of incident also, accused Tarsem Singh was found filling the Pits with JCB Machine, (registered in the name of his brother Nek Singh petitioner), which were dug by the Forest Department to prevent the illegal mining.

4. Ld. trial court had dismissed the application filed by the petitioner on the ground that his JCB Machine in question and other vehicles were found involved in illegal mining and releasing of vehicle will amount to assisting the applicant to commit the crime, whereas, Ld. Sessions Judge, after considering number of cases registered against the accused Tarsem Singh and his brother Nek Singh (petitioner) and also the JCB Machine in question was found involved to cause the transportation of illegal mining, has dismissed the application on the ground that vehicle involved in illegal mining is liable to be seized and confiscated in view of provisions of

Section 21 of Mines and Minerals (Development & Regulation) Act, 1957, (hereinafter referred to as Act).

5. Section 4 of the Act provides that prospective or mining operations are to be under licence or lease. Relevant provisions read as under:-

> "*4(1)-No person shall undertake any reconnaissance, prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a reconnaissance permit or of a prospecting license or, as the case may be, of a mining lease, granted under this Act and the rules made thereunder:*
>
> *Provided that nothing in this sub-section shall affect any prospecting or mining operations undertaken in any area in accordance with the terms and conditions of a prospecting license or mining lease granted before the commencement of this Act which is in force at such commencement:*
>
> *Provided further that nothing in this sub-section shall apply to any prospecting operations undertaken by the Geological Survey of India, the Indian Bureau of Mines, (the Atomic Minerals Directorate for Exploration and Research) of the Department of Atomic Energy of the Central Government, the Directorates of Mining and Geology of any State Government (by whatever name called), and the Mineral Exploration Corporation Limited, a Government company within the meaning of clause (45) of Section 2 of the Companies Act, 2013 (18 of 2013), and any such entity that may be notified for this purpose by the Central Government:*
>
> *Provided also that nothing in this sub-section shall apply to any mining lease (whether called mining lease, mining concessin or by any other name) in force immediately before the commencement of this Act in the Union territory of Goa, Daman and Diu."*
>
> *"4 (1-A)- No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder."*

6. Relevant provisions of Section 21 of the Act providing penalty for violation of the provisions of the Act, reads as under:-

> *"21 (4) - Whenever any person raises, transports or causes to be raised or transported, without any lawful authority, any mineral from any land, and, for that purpose, uses any tool, equipment, vehicle or any other thing, such mineral, tool, equipment, vehicle or any other thing shall be liable to be seized by an officer of authoirty specially empowered in this behalf."*
>
> *"21 (4 A)- Any mineral, tool, equipment, vehicle or any other thing seized under sub-section (4), shall be liable to be confiscated by an order of the Court competent to take cognizance of the offence under sub-section (1) and shall be disposed of in accordance with the directions of such Court."*

7. Section 22 of the Act dealing with the provisions related to cognizance of offences is also relevant, which reads as under:-

> *"No Court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorized in this behalf by the Central Government or the State Government."*

8. Section 21 (4) provides seizure of vehicle, used for raising, transporting or causing to raise or transport without any lawful authority any mineral from any land, by an officer of the authority specially empowered for doing so. According to Section 21 (4-A), the said vehicle shall be liable to be confiscated by an order of the Court competent to take cognizance of the offence under sub-section (1) of Section 21 and shall be disposed of in accordance with direction of such Court.

9. In exercise of the powers conferred under Sub-Section (2) of Section 26 read with Section 21 (4) of Act, State of Himachal Pradesh has issued Notification No. Ind-II(F)6-20/2005, dated Shimla-2, the 30.4.2011, empowering /authorizing numerous officers including all the Station House Officers of local Police Stations and all the Sub Inspectors/ Assistant Sub Inspectors (Police Post Incharge) in Himachal Pradesh to seize any mineral raised or transported or caused to be raised or transported by any person without any lawful authority, any mineral from any land and any tool, equipment, vehicle or any other thing used for that purpose.

In exercise of power conferred under Sub-Section (2) of Section 26 read with Section 22 of the Act, State of Himachal Pradesh has issued notification vide No. Ind-II (F)6-20/2005, dated Shimla-2, the 30.04.2011, authorizing all the Station House Officers of local Police Stations and all the Sub Inspectors/ Assistant Sub Inspectors (Police Post Incharge) in Himachal Pradesh to make complaint in writing in the Court of competent jurisdiction in respect of any offence punishable under the Act or any rules made there under.

10. From aforesaid porvisons of the Act and notifications issued by the State of Himachal Pradesh, it is evident that SHO of Police Station Kala Amb was competent to seize the vehicle under Section 21 (4) and was also authorized to file complaint under Section 22 of the Act against the accused so as to enabling the court to take cognizance of the offence committed under the Act.

11. Section 21 (4) of the Act provides that seizure of the vehicle even it is found causing to transport minerals by illegal mining. In the present case, as per status report, vehicle of the petitioner was involved in facilitating the illegal mining which amounts to cause to transport mineral extracted by illegal mining and, therefore, provisions of the Act are attracted in the present case. However, despite having found that accused along with the JCB Machine was involved in facilitating commission of illegal mining, to the reasons best known to the police, challan has only been presented under Section 353, 504 and 506 of IPC.

12. Despite taking specific stand particularly in reply and status report filed by the respondent-State, accused Tarsem Singh and the JCB Machine in question was involved an act in commission of offence under Section 4 (1) and 4 (1-A) of the Act, for extraneous reasons, the police/concerned authority has chosen not to file challan/complaint under the Act against the accused for committing an offence facilitating or causing to transport the extract of illegal mining, may be for negligence, lack of knowledge or to cooperate the offender or any other reason best known to the police. Therefore, Superintendent of Police, Sirmaur at Nahan is directed to look into the matter personally; and after proper and complete investigation within 15 days after receipt of this order; if required, ensure filing of supplementary challan under Section 173 Cr.P.C/ Complaint under the provisions of the Act against the accused for commission of offence under Section 4 (1) and 4 (1-A) of the Act and also for using the JCB Machine in question for commission of the said offence.

13. At present, though pressed in oral submissions and stated in the status report that vehicle in question was involved in an act related to illegal mining, no complaint or challan has been filed for commission of the said offence. Therefore, JCB Machine in question, if not required in any other case, is directed to be released on sapurdari bond in the sum of Rs. 2,00,000/- to be furnished by the petitioner with one surety in the like amount to the satisfaction of the trial court within 4 weeks from today specifically undertaking therein not to alienate the said JCB Machine and to produce the said JCB Machine as and when directed to do so by the Court or to hand over the said JCB Machine to the competent authority/concerned agency in case the said JCB Machine is ordered to be seized and /or confiscated in present case.

14. It is also directed that in case the complaint under the act of supplementary challan invoking the provision of the Act for contravention of the said provisions filed by the competent/authorized officer then applicability of Section 21 (4) and 21 (4-A) of the Act and its

effect upon the said JCB Machine shall be dealt with by the concerned Court in accordance with law on its own merit independent of observations made by this Court in present petition.

Petition is disposed of in aforesaid terms.

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

Anu Ranjan Rana ....Petitioner.

Vs.

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

Cr.MP(M) No.: 1263 of 2017
Date of Decision: 12.10.2017

Code of Criminal Procedure, 1973- Section 439- FIR was registered for the commission of offence punishable under Section 376 of I.P.C. – the petitioner filed an application for bail – held that the offence alleged against the accused is heinous offence committed against a mentally challenged lady – the accused can influence the investigation- the discretion of bail cannot be exercised in his favour- petition dismissed. (Para-5 to 7)

Cases referred:

Bhagirathsinh Judeja, AIR 1984 Supreme Court 372
Sunil Kumar Vs. State of Himachal Pradesh, Latest HLJ 2003 (HP) 151
Dwarku Devi Vs. State of Himachal Pradesh, Latest HLJ 2014 (HP) Suppl. 666
Amar Chand Vs. State of H.P., Latest HLJ 2015 (HP)1347

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Vikram Thakur, Deputy Advocate General.
Inspector Surjit Kumar, SHO, Women Police Station Dharamshala, District Kangra present alongwith records of the case.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this application filed under Section 439 of the Code of Criminal Procedure, the petitioner has prayed for grant of bail in FIR No. 14/2017, dated 21.07.2017, under Section 376 of the Indian Penal Code, registered at Women Police Station Dharamshala, District Kangra.

2. I have heard the learned counsel for the petitioner as well as learned Deputy Advocate General and have also gone through the status report filed by the State as well as the records of the case.

3. The allegation against the petitioner is that he has sexually molested a lady, who is differently abled being mentally challenged. The factum of the victim being in the company of the petitioner has not been denied by the learned counsel for the petitioner on the date when the alleged incident is stated to have taken place. However, as per the learned counsel for the petitioner, on account of incessant rain, the petitioner had taken shelter in a Rain Shelter, wherein victim was also present. As per the petitioner, as all his clothes were wet, therefore, he had taken off his clothes and despite his asking the victim not to do so, she also tried to imitate the petitioner, which has been misconstrued as an act on the part of the petitioner of having sexually molested the victim. Learned counsel for the petitioner has further submitted that as the

investigation is almost complete and further as the petitioner is a local resident of Dari, there is no apprehension of his evading trial in case he is released on bail. In support of his contention that the petitioner is entitled for grant of bail, learned counsel for the petitioner has relied upon the following judgments:

1. *Bhagirathsinh Judeja, AIR 1984 Supreme Court 372.*
2. *Sunil Kumar Vs. State of Himachal Pradesh, Latest HLJ 2003 (HP) 151.*
3. *Dwarku Devi Vs. State of Himachal Pradesh, Latest HLJ 2014 (HP) Suppl. 666.*
4. *Amar Chand Vs. State of H.P., Latest HLJ 2015 (HP)1347.*

4. On the other hand, the case of the prosecution, as is made out from the contents of the FIR as well as the status report filed, is that the victim, who is about 50 years old, is a mentally challenged lady. On 20.07.2017, at around 11:00 a.m., she left her house as she usually used to roam in Dari. As despite lapse of quite sometime, she did not return back to her house, the complainant, who is the sister of the victim, started searching her in the market. In the interregnum, she received a phone call from her brother Vinod, who asked her where was she. She told her brother that she was searching for the victim and on this, he asked the complainant to proceed towards the curve near the Tea Factory to find out as to what has happened to the victim. When complainant reached there, her brother Vinod was already there alongwith many other persons and therein, on the asking of the complainant, victim told her that the accused had raped her. Learned Deputy Advocate General has accordingly submitted that taking into consideration the gravity of the offence and the fact that the accused is charged with raping a mentally challenged lady, he is not entitled to be released on bail, as he being a local person, shall be in a position to influence the witnesses and thus create hurdles in the process of investigation.

5. Having heard learned counsel for the parties, in my considered view, the petitioner has not been able to make out a case, in the peculiar facts of the case that he is entitled for grant of bail. This is for the reason that not only the alleged offence committed by the petitioner is an heinous offence, the said offence is further alleged to have been committed against a mentally challenged lady. Not only this, the petitioner is a local resident of Dari and there is force in the contention of the learned Deputy Advocate General that in view of the fact that he is a local resident of Village Dari, he shall be in a position to influence the witnesses as well as the investigation.

6. Judgments referred by the learned counsel for the petitioner, in my considered view, have no applicability in the facts of the present case. In *Bhagirathsinh Judeja's case (supra)*, the Hon'ble Supreme Court besides holding that the power to grant bail is not to be exercised as if the punishment before trial is being imposed, it has further been held by the Hon'ble Supreme Court that material considerations while granting or refusing bail *inter alia* are whether the accused shall be available for trial and whether he is likely to abuse the discretion granted in his favour by tampering with evidence. Besides this, in the said case, the Hon'ble Supreme Court was dealing with the situation where the High Court had cancelled the bail granted in favour of the accused therein by the learned Sessions Judge. In the present case, as I have already discussed above, taking into consideration the fact that the victim is a mentally challenged lady and the petitioner happens to be a local resident of the area, on his released on bail, there is a possibility of his tampering with the evidence by trying to influence the witnesses etc. Not only this, it is also a settled principle of law that while exercising its discretion of granting bail, the Court *inter alia* also has to keep into consideration the gravity of the offence alleged to have been committed by the accused.

7. In other judgments referred to by the learned counsel for the petitioner, this Hon'ble Court in the facts and circumstances of each case, has passed appropriate orders. However, there is no judicial precedent to the effect, nor it can be that in every case where investigation is complete or is on the verge of completion, an accused, no matter what the gravity of the offence alleged against him is, has a right to be released on bail.

In view of above discussion, as there is no merit in the present case, the same is dismissed.

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

Tajinder Singh ...Petitioner

Versus

Anil Nayyar ...Respondent

Cr. Revision No. 132 of 2017
Reserved on: October 10, 2017
Decided on: October 13, 2017

Indian Evidence Act, 1872- Section 45 and 73- Complainant filed a complaint about the commission of an offence punishable under Section 138 of N.I. Act stating that cheque of Rs. 4 lac was issued by the accused to discharge his liabilities but the cheque was dishonoured- an application was filed by the accused for comparison of the signatures and handwriting of the complainant with the handwriting on the disputed cheque – the application was dismissed by the Trial Court- held that the accused had taken a defence that his cheque was stolen and was misused by the complainant – it was not disputed by the accused that the cheque was signed by him and therefore there was sufficient authority with the holder of the cheque to fill the same – the comparison of the signatures and handwriting on the cheque will be of no use in these circumstances – the Trial Court had rightly rejected the application – petition dismissed.

(Para-10 to 25)

Cases referred:

Ashok kumar Uttamchand Shah versus Patel Mohmad Asmal Chanchad, AIR 1999 Gujarat 108

Manoj Sharma versus Anil Aggarwal, 2012 (4) Civil Court Cases 175 (Delhi)

Sudarshan Kumar versus Manish Manchanda, 2015(4) Civil Court Cases 346 (P&H)

Avinash Ramkrushna Lokhande versus Miyasaheb Gramin Bigarsheti Sahakari Patsanstha Ltd., 2013 (4) Civil Court Cases 716 (Bombay)

For the petitioner: Mr. N.S. Chandel, Advocate.

For the respondent: Mr. B.S. Chauhan, Senior Advocate with Mr. Munish Datwalia, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Petitioner being aggrieved and dissatisfied with order dated 18.5.2017, passed by learned Additional Chief Judicial Magistrate, Chamba, whereby application filed on behalf of the petitioner-accused under Sections 45 and 73 of the Indian Evidence Act, for comparison of admitted/specimen handwriting of accused and complainant with disputed handwriting on cheque by the hand writing expert, came to be dismissed, has approached this Court by way of instant proceedings, seeking therein direction for sending admitted /specimen handwriting of the accused and the complainant with the handwriting on the disputed instrument to the handwriting expert, after setting aside aforesaid order dated 18.5.2017.

2. Facts as emerges from the record are that respondent-complainant filed a complaint under Section 138 of the Negotiable Instruments Act, in the Court of learned Chief Judicial Magistrate, Chamba, which came to be registered as Case No. 125/15, alleging therein that he had advanced a sum of Rs.4.00 Lakh to the accused on his request on return basis. Accused with a view to discharge his aforesaid liability, issued a cheque bearing No. 393674

dated 2.10.2015, of Parvatiya Gramin Bank, Obri Sultanpur Branch, now renamed as Himachal Gramin Bank Obri, for a sum of Rs. 4.00 Lakh, against account No. 99228100080011, in favour of the complainant. However, the fact remains that the aforesaid cheque on its presentation to the Bank concerned, was dishonoured with the endorsement "not arranged for". Complainant, immediately after having received aforesaid memo from the Bank concerned, issued a legal notice dated 30.11.2015, Ext. CW-1/E, calling upon the accused to make payment good within a period of 15 days. However, the fact remains that accused despite having received aforesaid notice failed to make payment qua the cheque in question to the complainant, as such, the complainant was compelled to initiate proceedings under Section 138 of Negotiable Instruments Act in the competent Court of law. It also emerges from the record that legal notice dated 30.11.2015 was duly received by the petitioner-accused on 20.11.2016 as is evident from postal receipt, Ext. CW-1/D. Complainant, with a view to prove his claim, examined himself as CW-1 and reiterated the averments contained in the complaint filed by him under Section 138 of Negotiable Instruments Act. Accused, in his statement recorded under Section 313 CrPC, categorically denied issuance of cheque to the complainant and claimed that cheques No. 393668-393674 were lost. He further stated before the Court below that he and complainant used to sit together and perhaps complainant got hold of these cheques and misused the same. He admitted that cheque in question was dishonoured but this fact came to his notice later on. Accused, in his statement recorded under Section 313 though admitted averments with regard to receipt of legal notice, but categorically stated that he did not make payment as he had no liability towards the complainant. Accused, while claiming himself to be innocent, admitted his signatures on the cheque in question. Subsequently, petitioner-accused moved an application under Section 145(2) of the Negotiable Instruments Act, stating therein that complainant had removed cheques bearing No. 393668-393674 from the drawer of the accused and misused cheque No. 393674 by issuing it in his name by filling in amount of Rs.4.00 Lakh in it, with his own hand. By way of aforesaid application, accused further averred that he had been searching his lost cheques but could not locate the same and came to know about removal of aforesaid cheques by the complainant, only after having received notice from Court, to face proceedings under Section 138 of the Negotiable Instruments Act. With the aforesaid averments in the application, accused prayed that he be allowed to contest the complaint having been filed by complainant on the defence stated in the application, referred to herein above. Aforesaid application was allowed by the Court below and accordingly, matter was ordered to be listed for examination of complainant's witnesses. Statement/ cross-examination of the complainant was recorded on 22.12.2016, whereafter, his evidence was closed.

3. On 1.2.2017, statement of accused came to be recorded under Section 313 CrPC, wherein he denied all the incriminating evidence against him and sought time to lead evidence in defence. It also emerges from the record that the accused, apart from examining himself also examined four other witnesses. On 28.3.2017, accused preferred an application under Sections 45 and 73 of Indian Evidence Act, for comparison of handwriting of complainant on disputed cheque with his admitted signatures and handwriting of complainant and accused.

4. Complainant by way of reply opposed aforesaid application filed by the petitioner and specifically denied that petitioner used to keep cheque book in drawer of his table and he was in the habit of signing cheques in advance. Complainant further averred in his reply to the application that aforesaid plea was never taken by the petitioner by filing reply, if any, to the legal notice issued by the complainant.

5. Learned Court below vide order dated 18.5.2017, disposed of aforesaid application preferred on behalf of the petitioner-accused under Sections 45 and 73 of the Indian Evidence Act, whereby aforesaid prayer made on behalf of the petitioner-accused for sending admitted/specimen handwriting of the accused and complainant with the disputed handwriting on the cheque to the handwriting expert for comparison, came to be rejected.

6. In the aforesaid background, petitioner-accused has approached this Court, in the instant proceedings.

7. Mr. N.S. Chandel, learned counsel representing the petitioner, vehemently argued that impugned order dated 18.5.2017, is not sustainable in the eye of law as such same deserves to be quashed and set aside. Mr. Chandel, while inviting attention of this Court, to the cross-examination conducted upon the complainant, CW-1, forcefully contended that once there was a candid admission on the part of the complainant that he had not filled in cheque, Court below ought to have allowed the application preferred by the petitioner, under Sections 45 and 73 of the Indian Evidence Act, especially in view of candid defence put forth by the petitioner/accused that cheque in question was misused by the complainant. Mr. Chandel, further contended that true it is that signatures on cheque in question stand admitted by the petitioner but same could not be a ground for the Court below to dismiss the application preferred by petitioner for sending admitted /specimen handwriting of the accused and the complainant with the handwriting on the disputed instrument to the handwriting expert. Mr. Chandel, further contended that had the learned Court below acceded to the request having been made by the petitioner-accused in the application filed under Sections 45 and 73 of the Indian Evidence Act, it would have rather helped the learned Court below to adjudicate the present controversy in most fair manner and no prejudice whatsoever would have been caused to either of the parties. While placing reliance upon the judgment passed by the High Court of Madhya Pradesh in **Sohan Lal Singhal and others** versus **Sunil Mahajan**, decided on 15.12.2014, and judgment of Gujarat High Court in case titled **Ashokkumar Uttamchand Shah** versus **Patel Mohmad Asmal Chanchad,** decided on 26.3.1998 reported in AIR 1999 Gujarat 108, learned counsel contended that in the teeth of admission made by the complainant that he had not filled in cheque with his own hand, matter should have been sent to the handwriting expert, especially to ascertain the age of the ink and handwriting/signatures of the petitioner as well as other /remaining handwriting on the cheque.

8. Mr. B.S. Chauhan, learned Senior Advocate duly assisted by Mr. Munish Datwalia, Advocate, while refuting aforesaid submission having been made by Mr. N.S. Chandel, Advocate, supported impugned order dated 18.5.2017 and stated that there is no illegality or infirmity in the same as such, there is no scope of interference. Mr. Chauhan, invited attention of this Court to the legal notice dated 30.11.2015 i.e. Ext. CW-1/E, which was got issued by complainant after having received information with regard to dishonouring of the cheque, from the bank concerned, to demonstrate that intimation with regard to dishonouring of cheque was given to the petitioner on 30.11.2015, by way of legal notice, which was duly received by him, as is evident from Ext. CW-1/D. Mr. Chauhan, further contended that after having received aforesaid notice dated 30.11.2015, which was duly received by him, no steps, whatsoever were taken by the petitioner to lodge FIR or complaint either with the police or in the Court for such a long time, rather, petitioner, for the first time preferred a private complaint under Section 156(3) CrPC in the Court of learned Chief Judicial Magistrate, Chamba, on 25.11.2016 i.e. after almost one year of issuance of legal notice. Mr. Chauhan, further invited attention of this Court to the Ext. CW-1/D, legal notice dated 25.10.2016, wherein for the first time, complainant was called upon to return cheques bearing No. 393668 to 393673 and withdraw the complaint filed by him under Section 138 of the Negotiable Instruments Act. While concluding his arguments Mr. Chauhan contended that once, factum with regard to loss of cheques including cheque in question had come to the knowledge of the petitioner, after receipt of legal notice dated 30.11.2015, which was duly received by him, it is not understood what prevented petitioner-accused to lodge complaint against the complainant for such a long time. Mr. Chauhan, further contended that private complaint also came to be filed after one year of receipt of legal notice. Mr. Chauhan, while disputing application of aforesaid judgments cited by the learned counsel representing the petitioner, contended that same are not applicable in the present case, in view of the peculiar facts and circumstances of the case, wherein application under Sections 45 and 73 of Indian Evidence Act, has been only filed to complicate the proceedings initiated by the complainant. While inviting attention of this Court to the provisions contained under Sections 20 and 87 of Negotiable Instruments Act, Mr. Chauhan, contended that proof of filling up of negotiable instrument by complainant, if any, may not be of any relevance, especially when petitioner has not disputed his signatures on cheque. Mr. Chauhan, in support of his arguments,

placed reliance upon the judgment passed by Delhi High Court in **Manoj Sharma** versus **Anil Aggarwal**, 2012 (4) Civil Court Cases 175 (Delhi), and judgment of Punjab and Haryana High Court in **Sudarshan Kumar** versus **Manish Manchanda**, 2015 (4) Civil Court Cases 346 (P&H).

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

10. It is not in dispute that the petitioner, while admitting his signatures on cheque in question, has taken defence that cheques bearing No. 393668-393674 had been lost and one of the cheques bearing No. 393674 was misused by the complainant. Petitioner also took defence that he was in the habit of keeping cheques in his drawer, which were removed/ stolen by the complainant, in his absence, which he later on misused by presenting the same in the Bank concerned.

11. Whether the cheque in question was removed/stolen by the complainant from the drawer of petitioner, shall be decided by the Court below, on the basis of pleadings adduced on record by respective parties as well as law on the point, but it is undisputed before this Court that cheque in question was signed by the petitioner. At this stage, this Court deems it fit take note of Section 20 of the Negotiable Instruments Act:

> **"20. Inchoate stamped instruments**
>
> Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in 14[India], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount; provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

12. Bare perusal of provisions of Section 20 of the Act, clearly suggests that where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments, either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp.

13. After having perused aforesaid provision of law as contained in Section 20 of the Negotiable Instruments Act, this Court is inclined to agree with the contention of Mr. B.S. Chauhan, learned Senior Advocate, that proof of filling up of negotiable instrument by the complainant or for that matter by any person, may not be of any relevance, especially when signatures on cheque have not been disputed by the petitioner. At this stage, this Court may take note of candid admission made by the petitioner in the statement recorded under Section 313 CrPC, while denying his liability to pay amount, if any, to the complainant. Petitioner, in his statement recorded under Section 313 CrPC, has specifically admitted his signatures on cheque in question but with further qualification that he had kept signed cheques in his drawer, which have been misused by the complainant. Presumption of issuance of cheque for discharge of liability would definitely arise against petitioner in terms of provisions contained in Section 20 of the Act.

14. In this regard, reliable is placed upon judgment of Delhi High Court in **Manoj Sharma** versus **Anil Aggarwal**, 2012 (4) Civil Court Cases 175 (Delhi), wherein it has been held as under:

> "4. It is seen that similar pleas were taken before the M.M. as also before the ASJ.

5. Though, it was held in the case of T.Nagappa Vs. Y.R. Muralidhar, (2008) 5 SCC 633 on which reliance was placed before the court of ASJ, that the accused should be given fair trial to lead evidence in his defence, but, at the same time, it was also held that the court being the master of the proceedings must determine as to whether the application of the accused in terms of Section 243 (2) CrPC is bona fide or not or whether thereby accused intends to bring on record a relevant material. Taking as it is that the blanks in the cheques and the pro-notes were filled up by the respondent/complainant, still petitioner was not entitled to prove the same by way of opinion of Handwriting Expert. In the case of Ravi Chopra Vs. State and Another, 2008(2) JCC (NI) 169, Delhi, it was held by this Court after discussing Section 87 and Section 20 of the N.I.Act:

> "A collective reading of the above provisions shows that even under the scheme of the NI Act it is possible for the drawer of a cheque to give a blank cheque signed by him to the payee and consent either impliedly or expressly to the said cheque being filled up at a subsequent point in time and presented for payment by the drawee. There is no provision in the NI Act which either defines the difference in the handwriting or the ink pertaining to the material particulars filled up in comparison with the signature thereon as constituting a 'material alteration' for the purposes of Section 87 NI Act. What however is essential is that the cheque must have been signed by the drawer. If the signature is altered or does not tally with the normal signature of the maker, that would be a material alteration. Therefore as long as the cheque has been signed by the drawer, the fact that the ink in which the name and figures are written or the date is filled up is different from the ink of the signature is not a material alteration for the purposes of Section 87 NI Act".

6. Further, in the case of P.S.A. Thamotharan Vs. Dalmia Cements (P) Ltd., 2005 (1) JCC (NI) 96 Madras, it was held that to have a validity of Negotiable Instrument such as cheque, it is not mandatory and no law prescribes that the body of the cheque should also be written by the signatory to the cheque. A cheque could be filled up by anybody, if it is signed by the account holder of the cheque, accepting the amount mentioned therein.

7. In view of this dictum and law as laid down in the afore-cited two judgments, and keeping in view the true spirit of Section 20 and 87 of the N.I.Act, the proof of filling up of these negotiable instruments by the respondent or any person, would not be of any relevance. The petitioner has not disputed his signatures on the said cheques and even in cross- examination, has admitted this fact that the cheques were issued by him and handed over to the complainant along with the covering letter. The presumption of issue of cheques for discharge of the liability would arise against the petitioner. Thus, I do not see any impropriety or illegality in the orders of the M.M. as also that of the ASJ. The petitions being without any merit are hereby dismissed in limini."

15. Though this Court, after having carefully perused aforesaid provisions of law finds no force in the arguments of Mr. Chandel, learned counsel representing the petitioner, that court below ought to have sent the handwriting of petitioner as well as complainant to the hand writing expert in view of defence taken by the petitioner as well as candid admission made by complainant in his cross-examination, but, even if aforesaid prayer, for the sake of argument, is accepted, this Court has no hesitation to conclude that the learned Court below rightly has not acceded to the request of the petitioner for sending admitted /specimen handwriting of the accused and the complainant with the handwriting on the disputed instrument to the handwriting expert, keeping in view the conduct of the petitioner, who admittedly took no steps for almost one year to lodge complaint, if any, against the complainant for having removed signed cheques unauthorisedly from his drawer. In the case at hand, it is quite apparent that aforesaid

notice dated 30.11.2015 was duly received by the petitioner vide Ext. CW-1/D, which fact has been further acknowledged by him in his statement recorded under Section 313 CrPC, meaning thereby petitioner was fully aware of the fact that cheque bearing No. 393674 dated 2.10.2015 has been presented in bank concerned against account No. 99228100080011.

16. Interestingly, petitioner kept mum for more than one year and no steps, whatsoever were taken by him to either lodge FIR against the complainant or to file private complaint, if any, against him. It is only after filing of complaint under Section 138 of the Negotiable Instruments Act, which came to be filed on 11.12.2015, petitioner chose to file private complaint under Section 156 (3) CrPC, that too on 25.11.2016, i.e. after almost one year of lodging complaint under Section 138 of Negotiable Instruments Act.

17. Similarly, this Court finds from the record that though petitioner pursuant to notice issued to him by the Court below in the proceedings initiated by the complainant under Section 138 of the Negotiable Instruments Act, put in appearance through his counsel on 3.3.2016, for the first time, but interestingly, application under Section 145 (2) of Negotiable Instruments Act, whereby petitioner sought permission of court below to contest complaint on the defence as disclosed by him in the application, came to be filed on 15.11.2016, i.e. after eight months of putting appearance in the Court below.

18. Apart from above, statement of complainant came to be recorded before court below on 22.12.2016, wherein admittedly, he in the cross-examination, denied the suggestion that cheque was filled in by him, but application under Sections 45 and 73 of Indian Evidence Act for comparison of handwriting of accused appearing on disputed cheque with his admitted signatures/handwriting came to be filed on 28.3.2017, i.e. after four months of recording of statement of complainant.

19. After, having carefully perused the pleadings adduced on record as well as defence set up by the petitioner-accused, this Court sees no illegality or infirmity in the order dated 18.5.2017, whereby it rejected the prayer of petitioner accused for sending admitted /specimen handwriting of the accused and the complainant with the handwriting on the disputed instrument to the handwriting expert.

20. Had the petitioner immediately after having received legal notice dated 30.11.2015, taken steps for lodging complaint, if any, against the complainant, this Court would have found some force in the prayer of the learned counsel representing the petitioner that court below ought to have sent admitted /specimen handwriting of the accused and the complainant with the handwriting on the disputed instrument to the handwriting expert for comparison. But in the instant case, where accused even after four months of recording statement, failed to file application under Sections 45 and 73 of the Indian Evidence Act, as such, Court below rightly rejected the same. As has been discussed herein above that filling up of particulars on cheque in different handwritings or ink from that of signatures of drawer is not to be considered as material alteration as per provisions of Negotiable Instruments Act.

21. Similarly, there is no provision in law, which provides that cheque is to be filled in one handwriting as such, learned Court below rightly held that even if upon examination of handwriting expert, disputed handwriting on cheque is found to be different from that of signatures and even age of ink used on cheque is found to be different, same may not be of any help to the Court, while deciding actual controversy, especially when signatures on cheque are admitted by the accused. At this stage, it would be profitable to take note of judgment passed by the Punjab and Haryana High Court in case **Sudarshan Kumar** versus **Manish Manchanda**, 2015(4) Civil Court Cases 346 (P&H), wherein it has been held that it is not possible to give definite age of ink, as there is no scientific method of doing so. The High Court of Punjab and Haryana has held as under:

> "5. As per the contentions raised by learned counsel for the petitioner, it is alleged that the cheques in question have been manipulated later on by filling in the necessary particulars in the body of the cheques. He has pleaded that the

cheques in question should be sent to the Forensic Science Laboratory to determine the age of the ink used to fill in the necessary particulars in the body of the cheques. But in my opinion, it is not possible for a document expert to give any definite opinion about eth age of the ink as it is not known in which year the ink used to write the document was manufactured. The Constitutional Bench of Hon'ble Supreme Court in case **Union of India** Vs. **Jyoti Prakash Mitter, AIR 1971 SC 1093,** elaborately dealt with this issue and laid down as under:-

> "After consultations between the Ministry of Home Affairs and the Ministry of Law, the Home Ministry sent certain old writings of the year 1904, 1949, 1950 and 1959, and requested the Director to determine the age of the writing of the disputed horoscope and marginal note in the almanac by comparison. The Director on April 17, 1965 wrote that it "was impossible to give any definite opinion by such comparisons particularly when the comparison writings were not made with the same ink on similar paper and not stored under the same conditions as the documents under examination", and that it "will not be possible for a document expert, however reputed he might be, anywhere in the world, to give any definite opinion on the probable date of the horoscope and the ink writing in the margin of the almanac"."

22. Consequently, in view of aforesaid discussion as well as law cited herein above, this Court has no hesitation to conclude that the aforesaid judgments cited by the learned counsel representing the petitioner in support of his arguments, have no applicability in the instant case.

23. In case titled as **Sohanlal Singhal and another** versus **Sunil Jain** decided on 15.12.2014 by the High Court of Madhya Pradesh Bench at Gwalior, accused had taken defence that cheque was not filled with his handwriting and operative part of cheque was filled by using different pens, therefore, it would be beneficial evidence in favour of the petitioners/ accused to ascertain the age of both the writings, signature of the petitioners as well as other remaining writing of the cheque.

24. High Court of Punjab and Haryana, in **Sudarshan Kumar** versus **Manish Manchanda**, as has been taken above, has specifically held that it is not possible for handwriting expert to give definite opinion of age of ink and there is no scientific method to determine age of ink.

25. Bombay High Court in **Avinash Ramkrushna Lokhande** versus **Miyasaheb Gramin Bigarsheti Sahakari Patsanstha Ltd.,** 2013 (4) Civil Court Cases 716 (Bombay) held that Section 20 of the Act authorizes the payee or holder in due course to complete an incomplete negotiable instrument and there was no necessity to send the disputed cheque to hand writing expert for verification of hand writing and signatures thereon. It has been held as under:

> "9. At the outset, it appears that the parties have adduced /produced their respective evidences before the learned trial court and even the statement of the petitioner-accused has been recorded under Section 313 of the Code of Criminal Procedure. Thereafter, the petitioner has preferred an application Exh. 47 on 11.01.2012 requesting to send the disputed cheque in question to the hand writing expert for verification of the hand writing and signature thereon and to call expert's opinion in that regard. However, the petitioner has nowhere disputed /denied his signature on the cheque in question (Exh.15) and the substance of the evidence is silent in that respect. Hence, in that view of the matter, there was no necessity to send the disputed cheque in question to the hand writing expert for verification of hand writing and signature thereon and the learned trial court has rightly rejected the application preferred by the petitioner on 13.02.2012.

Hence, there is no error in the impugned order, and therefore, no interference is called for therein. Hence, present petition deserves to be rejected."

26. Accordingly, in view of the detailed discussion made herein above and judgments of various High Courts, as referred above, the present petition deserves dismissal and same is dismissed. pending applications, if any, are also disposed of. Interim directions, if any, are also vacated.

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

Geeta Devi .....Petitioner.
Versus
State of H.P. and others .....Respondents

CWP No. 2250 of 2017
Decided on: 17.10.2017

Constitution of India, 1950- Article 226- Petitioner aged 19 years and having mild to moderate mental retardation has filed the writ petition for abortion of foetus on the ground that it is risky for her to complete the normal period of pregnancy and to deliver the child – the medical board was constituted, which submitted the report that due to abnormal growth of foetal head, life of foetus is in danger- normal delivery is not possible in these circumstances and there can be danger to the life of the mother as well - the petition disposed of with a direction to arrange for the termination of the pregnancy and to preserve the DNA of the foetus for use during the investigation, inquiry, and trial in a criminal case. (Para- 2 to 11)

For the petitioner: Ms. Anita Parmar, Advocate.
For the respondents: Mr. Shrawan Dogra, A.G with Mr. M.A. Khan, Addl. A.G and Mr. Anup Rattan, Addl.A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

The petitioner aged 19 years, having mild to moderate mental retardation, and an unfortunate mother has approached this Court for seeking a direction to the Medical Superintendent, Kamla Nehru Hospital for Mother and Child, Shimla to arrange for abortion of a foetus in her womb on the grounds inter-alia that it is risky for her to complete the normal period of pregnancy and deliver child on the due date.

2. On very first day of hearing i.e., 6.10.2017, following order came to be passed in this matter:

"2. In the meanwhile, we direct respondent No.2 to have the petitioner (hereinafter referred as to 'X') medically examined from a Medical Board comprising of at least five doctors, to be headed by Head of the Department of Gynecology of any of the State Level Hospitals in the State of Himachal Pradesh. Needless to add, respondent No.2 shall consider directions issued by the Hon'ble Supreme Court from time to time and more specially order, dated 7th February, 2017, passed in Writ Petition (Civil) No. 81 of 2017, titled as Mrs. X and Ors. Passed in Civil Appeal No. 10463 of 2017, titled as Ms. Z Vs. The State of Bihar and Ors. Needful shall be done within a period of one week.

3. We clarify that the Medical Board shall consider the medical health and condition of the foetus, as also the mother, more so, in the light of the provisions of the Medical Termination of Pregnancy Act, 1971.

4. We are informed that 'X' is physically challenged and as such, perhaps she may not be able to travel alone to the place of sitting of the Medical Board. In these circumstances, we direct respondent No.2 to ensure that she be conveniently and comfortably brought to the place of her examination in an ambulance and taken back to the place of her residence in the company of a lady medical attendant.

5. We also direct Member Secretary, H.P. State Legal Services Authority to follow up with 'X' for ensuring compliance of the order. Registrar General is directed to communicate the order to the Member Secretary, H.P. State Legal Services Authority.

List on 13th October, 2017."

3. Therefore, while issuing notice to the respondents, a direction was given for conducting medical examination of the petitioner by a Medical Board, left open to be constituted by the 2nd respondent. Consequently, the Medical Board comprising following six doctors, expert in their respective field came to be constituted:-

i). Dr. Bishan Dhiman.

ii). Dr. Anupam Jhobta

iii). Dr. Rita Mittal.

iv). Dr. Piyush Kapila

v). Dr. Prince Raj and

vi). Dr. Dinesh Sharma.

4. The Chief Medical Officer, Kullu was directed through Director, Health Services, Himachal Pradesh to provide a vehicle/ambulance for transportation of the petitioner assisted by one para medical staff from her native place at Banjar to Kamla Nehru Hospital, Shimla. The petitioner accompanied by one para medical staff was brought to Kamla Nehru Hospital along-with her relatives on 10.10.2017. On her arrival, she was subjected to preliminary examination immediately and all steps were taken to ensure her care and comfort in the hospital.

5. However, on the returnable date i.e. 13th October, 2017, the report submitted by the Medical Board was not available on record. The matter, as such, was adjourned to 16th October, 2017, with a direction to the doctors who examined the petitioner to remain present in person to assist the Court. Yesterday on 16.10.2017 also, the report was not on record, therefore, a direction was issued to the respondents to place the same on record by way of affidavit. Now when this matter was called, learned Additional Advocate General has produced the report on record along with the affidavit of Dr. Piyush Kapila, one of the members of the Medical Board. We have allowed the same to be taken on record.

6. The examination of the petitioner by the Medical Board comprising six doctors expert in their respective field amply demonstrates that the petitioner a mild and moderately mentally retarded mother is carrying the pregnancy of about 32 weeks. The report of ultrasound reveals that a single live intra-uterine foetus having abnormal head growth is in her womb. The foetal head is enlarged and still growing due to fluid accumulation. Also that, in case of vaginal delivery, destructive operation upon the foetal head may be required and in that event life of the foetus may also jeopardize. The termination of pregnancy at this stage may need major surgical procedure with the consequences such as, bleeding, sepsis and anesthesia hazards. In the event of pregnancy is to be continued the foetus may have severe cognitive and motor impairments even after surgical procedure also. As a matter of fact, the opinion of the Medical Board reads as follows:

Opinion of the Medical Board dated 16.10.2017

The board members appeared in the Hon'ble High Court on 16.10.2017 at 10AM. After deliberations the Hon'ble Court directed the board to simplify the opinion in layman's language.

The board again met in the office of Medical Superintendent Kamla Nehru Hospital for Mother and Child Shimla and were unanimously of the opinion that

1. **Risk to Child**
   a) Because of abnormal foetal head which is enlaged and still growing due to fluid accumulation which has led to severe thinning of brain which may result in mental retardation.
   b) The possibility of this child's survival outside the womb of the mother is low.
   c) Even if the child survives, the child will require surgical intervention and even after surgical intervention there may be severe mental retardation to the child.
2. **Risk to Mother**:
   a) As detailed in the previous medical opinion of the board the mother is having mild to moderate mental retardation.
   b) Normal vaginal delivery is not possible in this case due to short stature.
   c) Only option is surgical intervention. More the pregnancy in this case is going to advance, head size will increase further and there will be more complications in the surgery and thus more risk to the mother as well.
   d) Inspite of surgical approach to deliver the baby the head of the baby may be required to be decompressed by taking out fluid which further limits the chances of survival.
   e) During the investigations of the mother on 13.10.2017, she has been found suffering with suspected Atrial Septal Defect, which is hole in the heart which may further lead to the complications of surgery.

Sd/-	Sd/-	Sd/-	Sd/-
Dr. Bishan Dhiman	Dr Anupam Jhobta	Dr. Rita Mittal	Dr. Piyush Kapila
Sd/-	Sd/-		
Dr. Prince Raj	Dr. Dinesh Sharma		

7. It is thus seen that the mother, petitioner herein having mild to moderate mental retardation and short stature, the only available option as per the medical opinion is left with i.e., to go for premature delivery with surgical intervention because to allow the pregnancy to continue up to its normal tenure, the head size of the foetus will increase further and in that event the surgery is going to become more complicated, besides causing more risk to her life. In that event even the head of the baby (foetus) may also necessitate decompression by taking out fluid out of it which may also limit the chances of survival of the baby. The petitioner herein is also found to be suffering from suspected Atrial Septal Defect i.e. hole in the heart, which may lead to further complications at the time of surgery.

8. Not only this but as per medical opinion, the enlarged head of foetus is still growing further due to fluid accumulation which in the opinion of the Board may lead to severe thinning of brain and ultimately result in mental retardation. The possibility of survival of the baby outside the womb of the mother would also be low. Not only this but even if the baby survives, may require surgical intervention and despite that also, the baby may suffer with severe mental retardation. The report submitted by the Medical Board is, therefore, exhaustive one and self speaking. On perusal of the report, we are fully satisfied that allowing the pregnancy to complete its normal tenure and delivery of foetus/baby on due date is dangerous not only to the

life of the petitioner but the foetus/baby may also not survive. The examination of the petitioner, general, medical, radiological and psychiatric, therefore, amply demonstrates that to allow the pregnancy to continue is not in the interest of the petitioner nor in that of foetus in her womb. The anaesthetic and obstetric evaluation also reveals that condition of the foetus is not compatible with extra uterine life. In other words, the foetus may not be able to survive outside the uterus, besides causing danger to the life of the petitioner, if she is made to wait for the delivery of baby on due date. The continuation of pregnancy, therefore, endangers the physical and mental health of the petitioner. Therefore, we find the present a fit case where the risk of termination of her pregnancy is within the acceptable limits. In a similar case titled ***Meera Santosh Pal and Others*** V. ***Union of India and Others, Writ Petition (Civil) No. 17 of 2017, decided on 16th January, 2017***, having similar set of facts and circumstances, the Apex Court has held as follows:

> **"This Court, as at present being advised, would not enter into the medico-legal aspect of the identity of the fetus but consider it appropriate to decide the matter from the standpoint of the right of petitioner no.1 to preserve her life in view of the foreseeable danger to it, in case she allows the current pregnancy to run its full course. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the fetus would not be able to survive outside the uterus without a skull. In Suchita Srivastava and Anr. vs. Chandigarh Administration [(2009) 9 SCC 1], a bench of three Judges held "a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution". The Court there dealt with the importance of the consent of the pregnant woman as an essential requirement for proceeding with the termination of pregnancy. The Court observed as follows:-**
>
> > **"22. There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Further more, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children....."**
>
> **The crucial consideration in the present case is whether the right to bodily integrity calls for a permission to allow her to terminate her pregnancy. The report of the Medical Board clearly warrants the inference that the continuance of the pregnancy involves the risk to the life of the pregnant woman and a possible grave injury to her physical or mental health as required by Section 3 (2)(i) of the Medical Termination of Pregnancy Act, 1971. Though, the pregnancy is into the 24 week, having regard to the danger to the life and the certain inability of the fetus to survive extra uterine life, we consider it appropriate to permit the petitioner to terminate the pregnancy. The overriding consideration is that she has a right to take all such steps as necessary to preserve her own life against the avoidable danger to it.**

In these circumstances given the danger to her life, there is no doubt that she has a right to protect and preserve her life and particularly since she has made an informed choice. The exercise of her right seems to be within the limits of reproductive autonomy.

In the circumstances, we consider it appropriate in the interests of justice and particularly, to permit petitioner no.1 to undergo medical termination of her pregnancy under the provisions of Medical Termination of Pregnancy Act, 1971. The learned Solicitor General Mr. Ranjit Kumar who took notice on the last date of hearing has not opposed the petitioners prayer on any ground, legal or medical. We order accordingly.

The termination of pregnancy of petitioner no.1 will be performed by the Doctors of the hospital where she has undergone medical check-up. Further, termination of her pregnancy would be supervised by the above stated Medical Board who shall maintain complete record of the procedure which is to be performed on petitioner No.1 for termination of her pregnancy.

With the aforesaid directions, the instant writ petition is allowed in terms of prayer (a) seeking direction to the respondents to allow petitioner no.1 to undergo medical termination of her pregnancy."

9. It is seen that points in issue in the present writ petition are squarely covered by the judgment ibid in favour of the petitioner because here also as per the report submitted by the Medical Board, continuance of pregnancy involves risk to the life of the petitioner and in case she is not permitted to terminate the pregnancy, likely to suffer grave injury, not only to her physical, but mental health also. The relief sought in this writ petition, therefore, is also covered by Section 3(2)(i) of the Medical Termination of Pregnancy Act, 1971. True it is that the pregnancy is at an advance stage i.e. 32 weeks, however, having regard to the danger to the life of the petitioner and expert opinion that the foetus may not survive to extra uterine life, we deem it appropriate to grant permission to the petitioner to terminate the pregnancy. Above all, in view of the ratio of the judgment of the Apex Court in ***Meera Santosh Pal's*** case supra, the petitioner has every right to take all steps necessary to preserve her own life against the avoidable danger to it. It is also necessary to protect and preserve her life. Learned Advocate General assisted by Mr. M.A. Khan, learned Additional Advocate General is also not averse to the termination of pregnancy the petitioner is carrying in the peculiar facts and circumstances of this case.

10. In view of what has been said hereinabove, we allow the present writ petition and dispose of the same with the following directions:-

i). The 5th respondent i.e. Medical Superintendent, Kamla Nehru Hospital, Shimla is directed to arrange for termination of the pregnancy of petitioner by the expert Gynaecologist(s) under the supervision of the Medical Board constituted pursuant to the orders passed by this Court at the earliest possible and without any further loss of time.

ii). Since in the opinion of the Medical Board, the petitioner is mild to moderate mentally retarded mother, therefore, in addition to her own affidavit in support of the writ petition, consent of her father or mother, as the case may be, be obtained before she is subjected to surgical intervention (ceasarean) enabling her to deliver the baby prematurely.

iii). The DNA of the newly born baby be preserved by the team of doctors for being used during the course of investigation, inquiry and trial in criminal case stated to be registered in Police Station, Banjar, District Kullu, H.P. under Sections 376(2) (L) of the Indian Penal Code and also in other civil consequences which may follow after premature delivery and survival of the newly born.

iv). Other consequential issues if crop-up on the surgical intervention and birth of newly born baby are left open to be considered and decided by the competent forum in appropriate proceedings, if initiated in accordance with law.

11. The writ petition though is disposed of with the above directions, however, there shall be a direction to respondent No.5, the Medical Superintendent, Kamla Nehru Hospital for Mother and Child, Shimla to swear in an affidavit indicating therein the outcome of the surgical intervention to be conducted pursuant to this judgment on 7th November, 2017 at 4.15 P.M., for which the matter shall be listed in the Chambers of one of us (Justice Vivek Singh Thakur, J.)

An authenticated copy of this judgment be supplied to learned Additional Advocate General and learned counsel for the petitioner for compliance.

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

Sh. Heera Lal .....Petitioner.
Versus
Subhash Chand & others ....Respondents.

Cr.MMO No. 72 of 2017.
Reserved on:21st September, 2017.
Date of Decision: 17th October, 2017.

Code of Criminal Procedure, 1973- Section 320- The matter was compromised between the accused and the legal representatives of the deceased complainant- a revision was filed against the order, which was dismissed on the ground that Lok Adalat is not inferior to the Revisional Court - aggrieved from the order, the present petition has been filed pleading that Lok Adalat had no jurisdiction to record the compromise- held that the Lok Adalat is a statutory authority and is not inferior to the Criminal Court- revisional court had rightly held that revision was not maintainable- petition dismissed with liberty to initiate appropriate proceeding. (Para-2 to 7)

Cases referred:
Amar Nath & others versus State of Haryana & others, 1977 CRI. L. J. 1891
Dharampal and others versus Smt. Ramshri and others, 1993, CRI. L.J. 1049
Deepti alias Arati Rai versus Akhil Rai and others, 1995 SCC (Cri) 1020
Prabhu Chawla v. State of Rajasthan and another, AIR 2016, SC, 4245
Krishnan and another versus Krishnaveni and another, (1997)4 SCC 241

For the petitioner: Mr. Dheeraj K. Vashisat, Advocate.
For respondents No.1 to 8: Mr. Ajay Sharma, Advocate.
For respondent No.9: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

A bench of Lok Adalat, on, anvil of statements recorded before it, by the legal representatives of deceased complainant and, on, anvil of joint statement(s) of the accused, in statement(s) whereof each echoed their volitional readiness to compound the offences borne in FIR No.28/2011 of 16.04.2011 lodged with police station, Gagret, hence proceeded to dismiss as withdrawn case No.19-11-12/14-11, titled as State of H.P. Vs. Subhash Chand and others. One Heera Lal, legal representative of injured, one, Dhan Devi upon whose person injuries were

inflicted by the accused, assailed the order pronounced by the Bench of the Lok Adalat, by his, carrying a Criminal Revision therefrom, before the learned Additional Sessions Judge, (II), Una. His trite espousal for invalidating the pronouncement made by the Bench of Lok Adalat, was, grooved in the factum of the latter holding no jurisdictional competence, to, make an order for compounding the relevant offences, given some amongst them being non-compoundable. Secondarily, he contended before the learned Revisional Court, that, with Dhan Devi, upon whose person, injuries were inflicted, in the relevant occurrence, by the accused, no longer alive at the stage when the impugned order was pronounced by the bench of the Lok Adalat, hence, in consonance with the mandate enshrined in Section 320 (4) (b) of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C.), provisions whereof stand extracted hereinafter:-

> "320. Compounding of offences.-
>
> (1).....
>
> (2).....
>
> (3).....
>
> (4)(a).....
>
> (b) When a person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908 (5 of 1908) of such person may, with the consent of the Court compound such offence."

given his evidently being her legal representative, was enjoined to be summoned by the bench of the Lok Adalat, to, thereat make an apposite statement on behalf of his predecessor-in-interest, in respect of his also holding an apt volitional readiness, for thereupon the Bench of the Lok Adalat, proceeding to make a valid order for composition of the offences borne in the apposite FIR. Since, the aforesaid Heera Lal, the evident legal representative of one Dhan Devi, was in the relevant proceedings, not visibly, associated by the Bench of the Lok Adalat, nor he hence echoed his volitional consent before it, for thereupon any valid order being pronounced by the Bench of the Lok Adalat, for, composition of the offences borne in the apposite FIR, thereupon, the order pronounced by the Bench of the Lok Adalat, begetting infraction of the aforesaid mandatory statutory provisions, rendering it, hence, to be legally besmirched. The learned Revisional Court proceeded to dispel the contention(s), of, one Heera Lal, on, the score that with statutory conclusivity being fastened upon the orders pronounced by the Bench of Lok Adalat, hence, dehors some of the offences constituted in the apposite FIR being not compoundable, thereupon, the relevant impugned order, being not, rendered legally inefficacious. Also it declared the criminal revision petition to be not maintainable before it, given the statutory judicial forum, of, "Lok Adalat" being not a Court inferior to the Revisional Court.

2. Before dwelling upon the efficacy of the aforesaid espousal(s), it is incumbent upon this Court, to also test the merit, of, the submission(s) addressed before this Court, by Mr. Ajay Sharma, learned counsel appearing for respondents No.1 to 8, submission(s) whereof, impinge upon the maintainability herebefore of the instant petition, cast under the provisions of Section 482 of the Cr.P.C. Mr. Ajay Sharma, learned counsel in making vehement contentions before this Court, that with Section 397(2) of the Cr.P.C., creating an explicit statutory bar against the availment(s) of revisional jurisdiction, for assailing, of, interlocutory order(s), thereupon, availment of the provisions of Section 482 of the Cr.P.C., by the aggrieved, also suffering an alike express ouster, has laid dependence upon a judgment of the Hon'ble Apex Court rendered in a case titled as ***Amar Nath & others versus State of Haryana & others,*** reported in ***1977 CRI. L. J. 1891,*** relevant paragraph No.3 whereof stands extracted hereinafter:-

> "3. While we fully agree with the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred under sub-s. (2) of S. 397 of the 1973 Code the inherent powers contained in S.482 would not be available to defeat the bar contained in S. 397(2). Section 482 of

> the 1973 Code contains the inherent powers of the Court and does not confer any 'new powers but preserves the powers which the High Court already possessed. A harmonious construction of Ss. 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred under S.397(2) and cannot be the subject of revision by the High Court, then to such a case the provisions of S.482 would not apply. It is well settled that the inherent powers of the, Court can ordinarily be exercised when there is no express provision on the subject-matter. Where there is an express provision, barring a particular remedy, the Court cannot resort to the exercise of inherent powers." (p.1893)

However, the *ratio decidendi,* of, the judgment borne in the aforesaid citation, does, on its incisive discernment, unravel, that the Hon'ble Apex Court, had, meted deference vis-a-vis the statutory interdiction(s) against preferment of revision petition(s) for assailing interlocutory order(s), thereupon, it concluded, of, the apposite statutory interdiction also concomitantly barring the aggrieved, from availing the remedy borne in Section 482 of the Cr.P.C. Nonetheless, the Hon'ble Apex Court had therein also pronounced that with the order impugned before it, not, falling within the genre of interlocutory order(s), or hence its falling outside the express statutory bar, against, its being challenged through a revision petition, had, concluded that with the aggrieved hence holding an alternative remedy of assailing it, through, preferment of a revision petition before the competent Court, whereas, availment of a remedy constituted under Section 482 of the Cr.P.C., being a residuary remedy,thereupon, its being not available for exercise by the aggrieved. Consequently, the aforesaid citation, does not, for the reasons to be assigned hereinafter, hence, completely endorse the submission of Mr. Ajay Sharma, that in the case law supra there being an absolute untrammeled bar, against, availment by the aggrieved, of, the provisions borne in Section 482 of the Cr.P.C, despite, Section 397(2) of the Cr.P.C., purportedly fastening an apposite statutory bar, against, availment of the remedy of revisional jurisdiction by the aggrieved, even from any order, though not, falling within the genre of interlocutory orders. The further reason, for making the aforesaid conclusion arises from the impugned order made by the Bench of Lok Adalat, being, subject to the hereinafter observations, hence, may not assailable by the aggrieved by his invoking the revisional jurisdiction of competent Courts, rather upon its, manifestly sequelling a gross abuse of process of law also for precluding miscarriage of justice, hence, may entitle the aggrieved to invoke the plenary inherent jurisdiction of this Court vested, in it, by the mandate of Section 482 of the Cr.P.C.

3. Mr. Ajay Sharma, learned counsel also relied upon a judgment of the Hon'ble Apex Court rendered in a case titled as ***Dharampal and others versus Smt. Ramshri and others, reported in 1993, CRI. L.J. 1049,*** relevant paragraph No.4 whereof stands extracted hereinafter:-

> "4. There is no doubt that the learned Magistrate had committed an error in passing the subsequent orders of attachment when the first attachment was never finally vacated and had revived the moment the revision application filed against it was dismissed by the learned Sessions Judge. It appears that none of the parties including the Sessions Judge realised this error on the part of the Magistrate. The learned Sessions Judge had also committed a patent mistake in entertaining revision application against the fresh orders of attachment and granting interim stays when he had dismissed revision application against the order of attachment earlier. Let that be as it is. The question that falls for our consideration now is whether the High Court could have utilised the powers under Section 482 of the Code and entertained a second revision application at the instance of the 1st respondent. Admittedly the 1st respondent had preferred a Criminal Application being Cr. R.No. 180/78 to the Sessions Court against the order passed by the Magistrate on 17th October, 1978 withdrawing the attachment. The Sessions Judge had dismissed the said application on 14th May, 1979. Section 397(3) bars a second revision application by the same party. It is now well settled that the inherent powers under Section 482 of the Code cannot be utilised for exercising powers which are expressly barred by the code.

> Hence the High Court had clearly erred in entertaining the second revision at the instance of 1st respondent. On this short ground itself, the impugned order of the High Court can be set aside." (p..1051)

to make an espousal, that, with the Hon'ble Apex Court, therein, construing invocation by the aggrieved, of the inherent jurisdiction vested in High Courts under Section 482 of the Cr.P.C., holding parity with besides being akin, to availment by the aggrieved, of revisional jurisdiction, whereas, with a second criminal revision petition(s), remaining statutorily uncontemplated, thereupon, the order pronounced by the competent Courts, in, the exercise of revisional jurisdiction being unchallengeable, by the aggrieved, by the latter casting a petition under the provisions of Section 482 of the Cr.P.C. The aforesaid view is also propounded by the Hon'ble Division Bench of the Hon'ble Apex Court, in, a case titled as ***Deepti alias Arati Rai versus Akhil Rai and others, reported in 1995 SCC (Cri) 1020***.

4. However, the efficacy of the aforesaid submission(s) addressed before this Court, by Mr. Ajay Sharma, stands obliterated, by a pronouncement made by the Hon'ble Apex Court, in a case titled as ***Prabhu Chawla v. State of Rajasthan and another, reported AIR 2016, SC, 4245***. Since, the aforesaid pronouncement, made, by the Hon'ble Apex Court, stand rendered, by a three Judge(s) bench of the Hon'ble Apex Court, thereupon, with the bench strength, rendering the aforesaid verdict, holding, a superior numerical strength vis-a-vis the Bench strength of the Hon'ble Apex Court, which rendered a judicial pronouncement in Dharmapal's case (supra), relied upon by Mr. Ajay Sharma, Advocate, thereupon, the view propounded by the Hon'ble Apex Court, in its, judgment rendered in Prabhu Chawla's case (supra), relevant paragraphs No.5 and 6 whereof stand extracted hereinafter, hold a mighter legal clout also hold the apposite *ratio decidendi* vis-a-vis the pronouncement(s) recorded by the Hon'ble Apex Court, in Dharampal's case (supra). Relevant paragraphs No.5 and 6 of Prabhu Chawla's case (supra) read as under:-

> "5. Mr. P.K. Goswami learned senior advocate for the appellants supported the view taken by this Court in the case Dhariwal Tobacco Products Ltd. (supra). He pointed out that in paragraph 6 of this judgment Justice S. B. Sinha took note of several earlier judgments of this Court including that in R.P. Thaiur v. State of Punjab, AIR 1960 SC 866) and Som Mittal v. Govt. of Karnataka, AIR 2008 SC 1528 for coming to the conclusion that "only because a revision petition is maintainable, the same by itself, ..., would not constitute a bar for entertaining an application under Section 482 of the Code." Mr. Goswami also placed strong reliance upon judgment of Krishna Iyer, J. in a Division Bench in the case of Raj Kapoor and Ors v. State and Ors, AIR 1980 SC 258. Relying upon judgment of a Bench of three Judges in the case of Madhu Limaye v. The State of Maharashtra,AIR 1978 SC 47 and quoting therefrom, Krishna Iyer, J. in his inimitable style made the law crystal clear in paragraph 10 which runs as follows:
>
> "10. The first question is as to whether the inherent power of the High Court under Section 482stands repelled when the revisional power under Section 397 overlaps. The opening words of Section 482 contradict this contention because nothing of the Code, not even Section 397, can affect the amplitude of the inherent power preserved in so many terms by the language of Section 482. Even so, a general principle pervades this branch of law when a specific provision is made: easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code. In Madhu Limaye v. The State of Maharastra (AIR 1978 SC 47) this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that Section 482 is pervasive it should not subvert legal interdicts written into the same Code, such, for instance, in Section 397(2). Apparent conflict may arise in some situations between the two provisions and a happy solution.

"would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction".

In short, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In between is a tertium quid, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the court's process. Can we state that in this third category the inherent power can be exercised? In the words of Untwalia, J.: (SCC p. 556, para 10 of AIR).

"The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible."

I am, therefore clear in my mind that the inherent power is not rebuffed in the case situation before us. Counsel on both sides, sensitively responding to our allergy for legalistics, rightly agreed that the fanatical insistence on the formal filing of a copy of the order under cessation need not take up this court's time. Our conclusion concurs with the concession of counsel on both sides that merely because a copy of the order has not been produced, despite its presence in the records in the court, it is not possible for me to hold that the entire revisory power stands frustrated and the inherent power stultified."

6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of High Court under Section 482 Cr.P.C. is unwarranted. We would simply reiterate that Section 482 begins with a non-obstante clause to state: "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J. "abuse of the process of the Court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more." We venture to add a

further reason in support. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 Cr.P.C. only to petty interlocutory orders! A situation wholly unwarranted and undesirable.

5. A reading of the hereinabove extracted paragraphs borne in Prabhu Chawla's case (supra), make, it abundantly clear (a) despite existence of statutory interdiction(s) against preferment of a petition before the High Courts under the provisions of Section 397(2) of the Cr.P.C., especially with a challenge carried therein qua interlocutory orders, thereupon, not ousting the plenary inherent jurisdiction vested under Section 482 of the Cr.P.C, especially with evident display, of criminal proceedings being legally vitiated or being without jurisdiction, (b) thereupon, for remedying them, High Courts, within, the domain of Section 482 of th Cr.P.C., for undoing initiation of legally ineffcacious proceedings hence holding the apt jurisdiction, more so, when it would prevent abuse of process of law also would secure the ends of justice; (c) the amplitude of the non substante clause existing in the opening lines of Section 482 of the Cr.P.C., hence, vesting the High Courts, with, a plenary jurisdiction to entertain petitions cast within its provisions, especially when it would facilitate blunting of abuse of process(es) of law also would secure ends of justice and (c) exercise of jurisdiction by High Courts under Section 482 of the Cr.P.C., being unbounded, with, respect to orders, not, falling within the genre of interlocutory order(s) nor earlier thereto preferment before the learned Sessions Court, of revision petition(s), by, the aggrieved, casting, any absolute bar, against availment of remedy, by him, under the provisions of Section 482 of the Cr.P.C., availment whereof preponderantly being a residuary remedy, available for recourse by the aggrieved concerned, when no other remedy is available. The aforesaid view is also in consonance with the earlier therewith view recorded by the Hon'ble Apex Court in a case titled as ***Krishnan and another versus Krishnaveni and another, (1997)4 SCC 241***.

6. Having rejected the submission addressed by Mr. Ajay Sharma, Advocate, with respect tot he instant petition cast under the provisions of Section 482 of the Cr.P.. being not maintainable before this Court, yet rejection thereof, does not, for hereainafter reasons, hold any binding efficacy. Hereinafter it is necessary also to initially make a determination vis-a-vis the legality of the concurrent orders pronounced, respectively, by the Bench of the Lok Adalat and by the learned Revisional Court, especially when one Heera Lal, the evident legal representative, of, one Dhan Devi upon whose person injuries were inflicted by the accused, standing evidently not associated in the proceedings, occurring before the Bench of Lok Adalat nor his, thereupon, making any affirmative statement revealing his volitional readiness to compound the offences borne in the apposite FIR. The evident non participation of Heera Lal, the legal representatives of deceased injured Dhan Devi, despite his association in the relevant proceedings being statutorily peremptory, does visit, the concurrent orders made by the Bench of Lok Adalat and by the Revisional Court, to be, infected with a pervasive vice of each openly flouting the mandate of the provisions of Section 320(4)(b) of the Cr.P.C.

7. Be that as it may, even if the Lok Adalat is a statutory adjudicatory forum also when it may be *stricto sensu* construable to be a Court not inferior to the Revisional Court, whereas, with its evidently being a court inferior to the Revisional Court, would facilitate the latter,to, in the exercise of jurisdiction vested in it under Section 397(2) of the Cr.P.C., to pronounce qua the legality of the apposite orders, hence, thereupon the learned Revisional Court appears to be correct in dismissing the criminal revision petition, on the trite score of its being not maintainable before it. However, the learned counsel appearing for the petitioner has contended with vigour, of the jurisdictional infirmities vis-a-vis non maintainability vis-a-vis the criminal revisional petition before the learned Revisional Court, standing cured, by the petitioner preferring hereat the instant petition cast under the provisions of Section 482, Cr.P.C., importantly when the sweep of the statutory clout of 482 of the Cr.P.C., is expansive enough, to undo the legal mischief, done by the Bench of Lok Adalat. For the reasons assigned hereinafter, the aforesaid submission is rudderless (a) since the purported illegal order made by the Bench of Lok Adalat, remains uncontemplated in any of the provisions borne in the Cr.P.C. or in the

provisions borne in the relevant statute, whereunder Lok Adalat, is envisaged to be, a Court inferior to Revisional Courts, contemplated in the Cr.P.C., whereas, exercise of revisional jurisdiction by competent Courts, being, exerciseable vis-a-vis Courts inferior to the Revisional Courts, (b) thereupon, with the Bench of the Lok Adalat, hence, being not a Court inferior to the Revisional Court, any exercise of jurisdiction by the latter, for testing the legality of the orders rendered by the Bench of Lok Adalat, being wholly beyond the domain of the revisional jurisdiction of the Revisional Court. (c) With Section 482 of the Cr.P.C., being also obviously borne in the very same statute wherein Section 397 of the Cr.P.C., is also embodied, thereupon, the exercise of jurisdiction vested in High Courts, under Section 482 of the Cr.P.C., necessarily warranting, (d) prior thereto impugned pronouncements being validly made within the jurisdictional competence, of Revisional Courts also the orders assailed, through, a petition cast under the provisions of Section 482 of the Cr.P.C., being rendered, with Revisional Court(s) holding jurisdiction to make a verdict upon merits of apposite revisional petition(s), (e) theirs being statutorily maintainable before them, (f) whereas, for the aforesaid reasons, the revisional Court holding, no, statutory jurisdiction to test the legality of the order(s) made by the Bench of the Lok Adalat, begets, as a natural corollary, an inference of even the availment of remedy by the aggrieved of the jurisdiction vested in this Court, under Section 482 of the Cr.PC., being both inappropriate also it being not exercisable by this Court. (g) The order rendered by the Bench of the Lok Adalat was assailable by the aggrieved by his directly therefrom motioning this Court under Section 482 of the Cr.P.C.,; (h) The order of the Revisional Court, wherein, it had aptly concluded that it holds, no, jurisdictional competence to decide it, when hence is not wanting in legal efficacy, thereupon, it would not be befitting to reverse it. (i) the order recorded by the learned Revisional Court is affirmed and maintained only in respect of the criminal revision petition being, not, jurisdictionally maintainable before it and (j) the legality of the orders made by the bench of Lok Adalat is open to challenge by the petitioner, by his availing an appropriate befitting remedy before the appropriate Court. The instant petition stands disposed of with the aforesaid directions. All pending applications also stand disposed of. No costs.

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

Jai Gopal Attari (since deceased) through his LR's and others .....Appellants/Plaintiffs.

Versus

Smt. Seema Sharma .....Respondent/Defendant.

RSA No. 250 of 2003.
Reserved on : 09.10.2017.
Decided on : 17th October, 2017.

Specific Relief Act, 1963- Section 5- Plaintiffs filed a civil suit seeking possession pleading that a house was owned jointly by the plaintiffs– a portion of the house consisting of two rooms, one bathroom, one kitchen and common toilet was allowed to be used by the defendant as a licencee on the payment of licence charges of Rs.400/- per month- defendant was allowed to continue as a licencee on the enhanced charges of Rs.470/- per month- the defendant got married and handed over the possession to her parents- the licence was terminated by way of a registered notice- the licence fee was also not paid- hence, the suit was filed for seeking the relief of possession and mesne profits- the defendant pleaded that she was a student and her father had taken a three rooms set from the plaintiffs on a monthly rental of Rs.600/- subsequently, he shifted to a smaller room in the same house on the payment of the monthly rent of Rs.400/-- she was residing in Delhi with her husband and her parents are in possession as tenants and not licencees – the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that the execution of the licence is not disputed – it was executed between the plaintiffs and the defendant- mere stay of the parents of the defendant in the premises will not

confer any right upon them. The notice terminating the licence was also proved on record – plaintiffs have a right to take possession on termination of the licence- the Trial Court had rightly decreed the suit – the appellate Court had wrongly held the parents to be the licencees- appeal allowed- judgment of the Appellate Court set aside and that of the Trial Court restored.

(Para-8 to 11)

For the Appellants: Mr. Karan Singh Kanwar, Advocate.
Respondent already proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs instituted a suit against the defendant, claiming therein rendition of a decree for vacant possession of the suit premises. The plaintiffs' suit stood decreed by the learned trial Court. In an appeal carried therefrom by the defendant before the learned First Appellate Court, the latter Court allowed the appeal, whereupon, it dis-concurred with the verdict recorded by the learned trial Court. In sequel thereto, the plaintiffs/appellants herein are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that a house (No.199/11) situated in Katcha Tank Mohalla of Nahan town was jointly owned by the plaintiffs and that the defendant was allowed to resident in a portion thereof depicted by letter 'ABCDEFGHIJKL' in the site plan as a licensee in September, 1993. As to the license, which was initially created for a period of 11 months only, an agreement was executed by the licensee on September 25, 1993. The suit premises in respect of which license was created consisted of two rooms, a bath, a kitchen and a common toilet and the charges for use and occupation were agreed to be paid at the rate of Rs.400/- per month. After expiry of the stipulated period the defendant, at her request was allowed to continue as a licensee. However, the use and occupation charges were enhanced to Rs.470/- per month w.e.f. January, 2000. On being married, she shifted to Delhi. Before leaving for Delhi She, instead of handing over vacant possession of the suit premises to the plaintiffs, delivered possession to her parents. Terming her parents as trespassers, the plaintiffs averred that the defendant had also failed to pay the outstanding use and occupation charges amounting to Rs.5,000/- and that the licence created in her favour stood terminated by efflux of time as well as through a registered A.D. notice dated June 18, 2000. They, therefore, instituted the aforementioned suit for vacant possession of the suit premises and recovery of Rs.5,000/- along with interest at the rate of 12% per annum, besides they prayed for future mesne profits at the rate of Rs.470/- per month.

3. The defendant contested the suit and filed written statement. Execution of a writing of September, 1993 inter se the defendant with the plaintiff was admitted. It is submitted that the defendant was a student at the relevant time and did not have any independent source of income and was, therefore, completely dependent on her parents and that it was in fact her father Braham Dutt, who had taken from the plaintiffs a three roomed set on a monthly rental of Rs.600/-. About two months later, he shifted to a smaller apartment of the same house. The apartment to which he shifted was a two roomed set in respect of which the monthly rentals were Rs.400/-. Claiming to have been married in 1996, the defendant averred that shehad been living with her husband in Delhi, ever since, and that possession of her parents was as tenants and not as licensees. Her father, according to her, fell in arrears of rent from June 2000, since his money order was refused by the plaintiffs.

4. The plaintiffs/appellants herein filed replication to the written statement of the defendant/respondent, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiffs are entitled to the recovery of possession of suit property, as alleged?OPP.

2. Whether this Court has no jurisdiction to entertain and try the present suit?OPD

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

4. Whether the suit is bad for non joinder of necessary parties? OPD.

5. Whether there exists no relationship of landlord and tenant between the parties. If so its effect?OPD.

6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the defendants/respondents herein, before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 11.10.2004, this Court, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

1. Whether the learned Additional District Judge has misconstrued, misinterpreted and misapplied licence deed Ex. P-1, statement of plaintiff Jai Gopal Attri, as PW-1 without considering the statement of defendant Seema Sharma who appeared as DW1 and thus, erred in law in holding that Ex. P-1 is not in respect of suit premises?

Substantial questions of Law No.1:

8. The execution of EX.P-1, inter se the co-plaintiffs and the sole defendant, one , Seema Sharma, stands proven, by affirmative depositions rendered by all executants thereof. Recitals borne in Ex.P-1, unfold that the contract of licence embodied therein being executed only inter se the co-plaintiffs and the sole defendant, one Seema Sharma. The aforesaid contract of licence would enable the plaintiffs to stake a claim for a decree of vacant possession being rendered in respect of premises embodied therein, despite the suit premises, after the departure therefrom of the sole defendant, one, Seema Sharma, hence, being retained by her parents, unless, subsequent thereto an apposite contract of licence stood also executed inter se the parents of Seema Sharma with the co-plaintiffs. Also the mere stay of the parents, of, defendant Seema Sharma, in the licensed premises, would not, preclude the learned Courts to pronounce a decree of eviction vis-a-vis them, given rendition of a decree of handing over of vacant possession of the relevant premises, being not either per individuo or in personam, rather obvioulsy its might and clout encompassing the relevant premises, premises whereof, are borne in Ex.P-1. Since, Ex.P-1 stands proven to be validly executed also subsequent thereto, a, notice borne in Ex.P-3, whereby the license in respect of suit premises of one Seema Sharma, stood rescinded, came to be issued upon her, notice whereof stood, not, received by her, despite, hers in her deposition underscoring the fact of the cover of Ex.P-3 reflecting her correct address. The effect of sole defendant Seema Sharma, hence evidently intentionally avoiding to receive Ex.P-3, despite its being enclosed in a cover evidently bearing her correct address also hers consequently, not meteing any reply thereto, unfolding, the factum, of, on hers departing to Delhi, on, hers getting married, thereupon, the plaintiffs receiving the licence fee, from, her parents, hence, obviously in substitution of Ex.P-1, a novated contract of licence being executed inter se them, with, the plaintiffs. For intentional want of defendant Seema Sharma, meteing a befitting reply to Ex.P-3, with, the all aforesaid echoings therein, renders rudderless, the espousal in her written

statement, of the decree of vacant possession qua the suit premises embodied in Ex.P-1, not, warranting any rendition upon her parents, the latter subsequent to her departure to Delhi, in rescission of Ex.P-1, entering into a fresh contract of licence with the co-plaintiffs. The defendant, had, in her deposition conceded to the trite factum, of, the receipt(s) with respect to the liquidations of the apposite licence fee to the landlords, standing, issued in her name, thereupon, it is to be concluded of any inference of the mother of the defendant, purportedly defraying licence fee(s) to the co-plaintiffs, getting blunted, corollary whereof is of hence upon the aforesaid purported count, any inference of, the mother of the defendant defraying licence fee vis-a-vis the co-plaintiffs, thereupon, a fresh implied oral contract of licence coming into being inter se her parents vis-a-vis the co-plaintiffs, also concomitantly getting benumbed. The effect of the aforesaid inference, would come to be overwhelmed, by sole defendant, one, Seema Sharma adducing before the learned trial Court, the money orders or other modes, whereby, her parents defrayed licence fee(s), qua the licenced premises vis-a-vis the plaintiffs, significantly, with adduction of the aforesaid best documentary evidence, being imperative, for firming up an inference, of, a fresh oral contract of licence vis-a-vis suit premises, coming into being inter se her parents with the plaintiffs. Sequel of its non adduction, is, of with Ex.P-1 standing executed inter se the plaintiffs with defendant Seema Sharma, thereupon, with obviously, the plaintiffs holding, no, privity of contract with the parents of the defendant nor subsequent to the departure of the defendant to Delhi, thereupon, on rescission of Ex.P-1, a, fresh contract of tenancy, express or implied occurring inter se the plaintiffs and her parents, renders the relevant premises to be open for a decree of vacant possession in respect thereof being pronounced, even if, possession thereof is held by the parents of sole defendant Seema Sharma.

9. Be that as it may, despite all the aforesaid inferences emanating, from the relevant evidence, on record, the learned First Appellate Court, had, reversed the apposite decree of eviction rendered by the learned trial Court, merely on the ground of the parents of defendant Seema Sharma, after the latter's departure, to Delhi in the year 1996, hence, holding possession of the licenced premises, also on score of the plaintiffs being uncontrovertedly proven to receive the apposite licence fee(s) from parents of the defendant. The aforesaid conclusion(s) formed by the lerned First Appellate Court are obviously misfounded also are (a) not bed-rocked upon appropriate appreciation, by it, of the relevant besides germane evidence, apt appreciation(s) whereof contrarily purveys an inference of, with evidently, no, privity of contract existing inter se the plaintiff and the parents of sole defendant Seema Sharma, rather the contract of licence occurring only inter se defendant Seema Sharma with the plaintiffs. (b) Moreover with the contract of licence , suffering rescission under an intentionally evaded, unserved notice borne in Ex.P-3, standing issued by the plaintiffs upon defendant Seema Sharma, renders the suit premises, dehors, theirs being occupied by the parents of the contracting licensee, to be amenable, for a decree of vacant possession being pronounced in respect thereof, as aptly done by the learned trial Court.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the appellants and against the respondent.

11. In view of above discussion, there is merit in the instant appeal, which is accordingly allowed. Consequently, the impugned judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 52-N/13 of 2002, on, 31.3.2003 is quashed and set aside, whereas, the judgment and decree rendered by the learned Senior Sub Judge, Sirmaur District at Nahan in Civil Suit No. 71/1 of 2001 on 6.7.2002 is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Manoj Kumar & others .....Appellants/Defendants.
Versus
Ms. China & others .....Respondents/Plaintiffs.

RSA No. 248 of 2005.
Reserved on : 03.10.2017
Decided on : 17th October, 2017.

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for seeking declaration and specific performance of the contract executed with M, the predecessor-in-interest of the defendants – it was pleaded that the property was to be sold for Rs.60,000/- - loan of Rs.7,300/- raised on the suit would be paid by the predecessor-in-interest of the plaintiffs – an amount of Rs.41,500/- was paid to M- the plaintiffs are ready and willing to perform their part of the agreement- the defendants denied that any agreement was executed – the suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that previous suit was withdrawn by the counsel as per the statement who had sought permission to institute a fresh suit- the Court had dismissed the suit as withdrawn keeping in view the statement of the counsel- implied permission to file a fresh suit was granted by the Court and the present suit is not barred- the agreement was duly proved – the Appellate Court had properly appreciated the evidence- appeal dismissed.(Para-8 to 12)

For the Appellants: Mr. Aman Sood, Advocate.
For the Respondents: Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs instituted a suit against the defendants, claiming therein a decree for declaration besides a decree for specific performance of contract, as well as, a decree for permanent prohibitory injunction was claimed. The suit of the plaintiffs stood dismissed by the learned trial Court. In an appeal carried therefrom by the plaintiffs before the learned First Appellate Court, the latter Court allowed the appeal, whereupon, it partly decreed the suit of the plaintiff, for recovery of Rs.48,800/- along with proportionate costs and future interest at the rate of 6% per annum, from the date of institution of the suit till full and final realization of the decretal amount. In sequel thereto, the defendants/appellants herein are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiffs filed a suit for declaration and specific performance of contract dated 12.1.1983 against the defendants. The case of the plaintiffs is that the suit property comprised in Khasra No.9167/4057 measuring 58-4 square yards, Khata-Khatoni No. 467/626 is recorded and shown in the ownership of Shri Madho Ram, predecessor-in-interest of the defendants. Defendant No.1, who is minor is residing under the care and custody of defendant, his mother and her interest is not adverse to the interest of the minor. Hence, defendant No.3 is appointed as guardian of minor. That their predecessor-in-interest late Sh. Gulam Mohammad was tenant prior to agreement to sell dated 12.1.1983. On 12.1.1983, the predecessor-in-interest of the plaintiffs purchased the disputed property for a consideration of Rs.60,000/- and agreement to sell in this behalf was executed by late Shri Mdho Ram, the predecessor-in-interest of the defendants. It was agreed between the parties to contract that whole amount of loan raised by executant Madho Ram shall be paid by Shri Gulam Mohammad, predecessor-in-interest of the plaintiffs, who paid a sum of Rs.7300/- to the

government in installments upto 7.10.1996 and that the plaintiffs are ready to pay the balance amount of sale price and balance loan amount to late Shri Madho. Late Shri Madho also received part consideration of Rs.41,500/- from the plaintiffs and their predecessor-in-interest pursuant to this agreement dated 12.1.1983. It has been averred that sale deed could not be executed due to certain embargo upon the suit property. Shri Gulam Mohammad expired in the year 1994-95 and by virtue of agreement to sell, the plaintiffs have become owners of the disputed property as the defendants through their predecessor-in-interest late Shri Madho Ram have received the part consideration of Rs.48,800/- from the plaintiff and their predecessor-in-interest and they are in possession of the suit property from 1981. It has been averred that they requested the defendants to get the sale deed registered pursuant to the agreement to sell, the plaintiffs did not care at all, rather they moved an application under the Rent Control Act before the Rent Controller seeking eviction of the plaintiffs from the disputed property. It has been averred that the plaintiffs are ready to perform their part of contract by making payment of the remaining sale consideration. Hence this Suit for declaration, specific performance and in the alternative for recovery of Rs.48,800/- has been filed by the plaintiffs against the defendants.

3. The defendants contested the suit and filed written statement, wherein they have taken preliminary objections qua limitation, estoppel and locus standi. On merits, they refuted the claim of the plaintiffs. It has been averred that after the death of Shri Madho Ram, their predecessor-in-interest, they have become owners of the suit property and mutation of inheritance has also been attested in their favour. Shri Gulam Mohammad, predecessor-in-interest of the plaintiffs was tenant of the disputed property which controversy has been finally settled by the learned Appellate Authority vide judgment dated 18.9.1998 passed in Civil Appeal No. 13 of 1997. It has been averred that no agreement was executed by late Shri Madho Ram in favour of late Shri Gulam Mohammad and the so called agreement is forged and fictitious document which has been manipulated by the plaintiff. The receipts relied upon by the plaintiffs are also forged as late Shri Madho Ram never received any amount from late Shri Gulam Mohammad. It has been averred that late Shri Gulam Mohammad was tenant of the disputed property and after his death, tenancy has come to an end and defendants No.1 to 3 have become owners of the disputed property. The earlier suit instituted by the plaintiffs for specific performance and declaration was dismissed as withdrawn and no application was moved by the plaintiffs for restoration of the suit and no permission was sought by the plaintiffs from the court to file the second suit and as such, the extant suit is not maintainable. It has been averred that late Shri Gulam Mohammad also never paid installments of the loan amount on behalf of late Shri Madho Ram. The plaintiffs are in possession of the suit property as tenants.

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

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

1. Whether the defendant had agreed to sell the property in question in favour of the plaintiffs vide agreement dated 12.1.1983,as alleged? OPP

2. Whether the plaintiff is entitled to a decree for specific performance of agreement dated 12.1.1983 as alleged?OPP.

3. Whether the plaintiffs in the alternative are entitled to a decree for recovery of Rs.48,800/- with interest as alleged?OPP

4. Whether the plaintiffs are entitled to a decreefor permanent prohibitory injunction?OPP.

5. Whether the suit is within limitation?OPD

6. Whether the suit is barred under Order 2, Rule 2 CPC?OPD

7. Whether the plaintiffs are estopped from filing the suit by their act and conduct?OPD.

8. Whether the plaintiffs have no cause of action?OPD.

9. Whether the plaintiffs are in occupation of property in question as tenant?OPD.

10. Relief.

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

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission, on 09.09.2005, this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether in law on proper construction and appraisal of Order 23 and its sub rules 1,3 and 4 of Code of Civil Procedure and of Exhibit DW1/F to Ex.DW1/G (plaint and amended plaint in the previous suit?, Ex.DW1/D (order dismissing the earlier suit as withdrawn) and the pleadings in the present case, plaintiffs/respondents were precluded from instituting the present suit?

b) Whether in view of the provisions of Section 61 to Section 68 read with Sections 74 and 77 of the Indian Evidence Act, 1872, agreements Exhibit PW2/A and Ex.PW3/A were not legally and validly proved thereby vitiating the findings of the learned appellate court below to hold to the contrary?

c) Whether for misconstruction and misinterpretation of exhibits PW2/A, PW3/A, PX and statements of PW1, PW5 and PW7, the findings of the learned Appellate Court below to hold the suit having been filed within limitation are vitiated?

d) Whether in the face of decree/judgment, Ex. DW1/A restraining permanently Sh. Madho Ram, the predecessor-in-interest of the defendants/appellants to dispose of or alienate the suit property, the agreements Exhibits Ex.PW1/A and PW3/A were illegal, void and unforceable thereby dis-entitling the plaintiffs/respondents to base their claim on these documents?

Substantial question of Law No.1:

8. The learned counsel appearing for the appellants contends, of, the instant suit instituted by the plaintiff before the learned trial Court, attracting, the bar of statutory estoppel contained in Order 23, Rule 1 of the CPC, provisions whereof stand extracted thereinafter:-

> **"1. Withdrawal of suit or abandonment of part of claim.-** (1) At any time after the institution of a suit the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim. Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned Without the leave of the court.
>
> (2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

> (3) Where the court is satisfied,—
>
> a) that a suit must fail by reason of some formal defect, or
>
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,
>
> it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.
>
> (4) Where the plaintiff,—
>
> (a) abandons any suit or part of claim under sub-rule (1), or
>
> (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule
> (3),
>
> he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.
>
> (5) Nothing in this rule shall be deemed to authorise the court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

especially when, as borne in Ex.DW1/D, the learned trial Court concerned, upon, the previous suit, visibly reflected, in Ex.DW1/G to be inter partes, all the parties at lis herein vis-a-vis hereat also it being with respect to a subject common to the previous suit and to the extant suit, had not, explicitly afforded permission to the plaintiffs, to, reinstitute the extant suit, thereupon, the statutory bar of estoppel, is reinforcingly attracted vis-a-vis the extant suit. However, though the aforesaid submission, does on its facade, appear to carry a lot of shine, yet its sheen is faded by the fact of the learned counsel appearing for the appellants making a *stricto sensu* reading of the pronouncement recorded in the previous suit, borne in Ex.DW1/D, reading whereof emanates from his being oblivious to the statement comprised in Ex.DW1/E, statement whereof is of the learned counsel for the plaintiffs, wherein, he had made a very clear communication, of, liberty being granted to the plaintiffs to withdraw the suit also had therein, made, a vivid communication, of, his client being at liberty to file a fresh suit before the appropriate forum. Now with Ex.DW1/D, therein, making recitals, recitals whereof stand ad verbatim extracted hereinafter:-

> "Keeping in view the separate statement made by the learned counsel for the plaintiffs, the instant suit is dismissed as withdrawn. Parties to bear their own costs. File after due completion be consigned to the R.R."

Conspicuously, the learned trial Court concerned, as stood, seized with the previous suit, borne in EX.DW1/J, making the order borne in Ex.DW1/D, on anvil, of the statement of the learned counsel appearing for the plaintiff, as is visible on occurrence of hereafter words therein "keeping in view the separate statement made by the counsel for the plaintiffs", hence ordering for dismissal of the suit, as withdrawn, thereupon, the mere fact, of, Ex.DW1/D, not, purveying any explicit permission to the plaintiff, to re-institute a fresh suit, is not sufficient to make any firm inference(s), (a) of, the statutory bar of estoppel egrafted under the provisions of Order 23, Rule 1 of the CPC, standing attracted vis-a-vis the plaintiffs nor hence, of, the extant suit being barred. The reasons for so concluding are very simple (b) a clear reading of the recitals borne in Ex.DW1/D, recitals whereof stand extracted hereinabove, making, a categorical echoing of the dismissal of the previous suit, as withdrawn, being singularly anvilled upon the statement of the counsel for the plaintiffs, statement whereof is borne in Ex. DW1/E, wherein firm echoings exist, of, the counsel for the plaintiffs reserving liberty vis-a-vis the plaintiffs, for, filing a fresh suit in the appropriate forum. (c) Thereupon, the order of the learned trial Court concerned borne in Ex.DW1/D, when apparently is made in consonance with the statement of the counsel for the plaintiffs, statement whereof exists in Ex.DW1/E, hence, renders open an inevitable corollary, of,

the statement borne in Ex.DW1/E, with occurrence therein of the aforesaid firm apt echoings, hence being borne in mind by the trial Court concerned, while its recording Ex.DW1/D and (d) further sequel therefrom is, of, despite no explicit apposite permission standing granted by the learned trial Court concerned, as stood, seized with the previous suit inter se analogous parties therein vis-a-vis hereat besides qua same controversy(ies) prevailing thereat vis-a-vis hereat, thereupon, it, not, being construable to be barring the plaintiffs, to, reinstitute the instant suit nor the bar of estoppel contemplated in the apt provisions of Order 23, Rule 1 of the CPC being attractable qua the extant suit. Consequently, substantial question of law is answered in favour of the respondents and against the appellants.

Substantial question of law No.2 & 3

9. EX.PW2/A and Ex.PW3/A, are, the photo copies of the relevant documents, relied upon by the learned Appellate Court. Being photocopies of the relevant documents, imputation of solemnity thereto, was, impermissible unless prior thereto, the litigant(s) concerned, had, within the ambit of Section 65 of the Indian Evident Act, sought the apposite leave of the trial Court concerned, naturally for tendering the aforesaid documents as secondary evidence(s) vis-a-vis original(s) thereof. However, the aforesaid documents, despite, prior thereto the apposite leave in respect of theirs being tendered into evidence being either sought or granted, by the learned trial Court, are yet not rendered either unreadable nor inadmissible in evidence, the reason(s) being (a) the witnesses concerned, who tendered the aforesaid documents in evidence, in their examinations-in-chief, making, clear unequivocally testification(s) qua their valid execution by the executors concerned also upon a reading of their deposition(s) borne in their examinations-in-chief, it is apparent, of, occurrence of endorsement of exhibit mark(s) thereon, being a sequel, to the witnesses concerned, producing in contemporaneity thereof, their original(s) in Court. (b) At the time of exhibition marks being endorsed upon the aforesaid documents, the learned counsel for the defendants, omitting to make, any protest with respect, to validities of their exhibition and (c) the witnesses concerned, who tendered the aforesaid documents into evidence, during, the course of their respective cross-examinations by the counsel for the defendants, not, thereat being put by the latter, any efficacious suggestions, for belying, their depositions, borne in their respective examinations-in-chief, specifically qua their valid execution by the executors concerned nor thereafter any endeavour being made by the counsel for the defendant, for, ensuring adduction of efficacious proof qua their valid execution by their executants, comprised in his moving an application, for the signatures of the executants concerned, being sent, for comparison with their apt admitted signatures, to the expert concerned.

10. EX.PW3/A was executed in the year 1992. Since this Court for the reasons stated hereinabove has imputed conclusive solemnity qua its valid execution by its executants, thereupon, the findings recorded by the learned First Appellate Court qua the cause of action continuing to survive vis-a-vis the plaintiffs, given the relevant contract remaining unsatiated upto the institution of the plaint, hence, the suit falling within limitation, does not warrant any interference. Consequently, substantial questions of law No.2 and 3 are answered in favour of the respondents and against the plaintiffs.

Substantial questions of law No.4.

11. Ex.DW1/A, exhibit whereof embodies a judgment pronounced by the learned Senior Sub Judge, Chamba, wherein, the predecessor-in-interest of the defendants, one Madho Ram, arrayed as a defendant therein, stood, permanently restrained from disposing or alienating, the suit property, without prior thereto taking permission of the guardian of the minors or of any competent authority, whereas, it is espoused of with Ex.DW3/A standing executed by the aforesaid Madho Ram, without, his in consonance with the verdict borne in Ex.DW1/A taking the permission of the guardian of the minors or of any competent authority, thereupon, imputation of any credence to Ex.DW3/A, is rendered susceptible to skepticism. However, for the aforesaid submission, to hold vigour, it was imperative for the learned counsel for the appellants, to adduce, firm clinching evidence in portrayal of one Madho Ram prior to his executing Ex. PW3/A

and Ex.PW2/A, not, taking the apposite prior permission either of the guardian of the minors or of any competent authority(ies). For lack of adduction of the aforesaid apposite cogent evidence, it, cannot be concluded, that, one Madho Ram in executing Ex.PW2/A and Ex.PW3/A, had hence infracted the mandate enshrined ini Ex.DW1/A. Consequently, substantial question of law No.4 is answered in favour of the respondents and against the appellants.

12. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration.

13. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgement and decree rendered by the learned first Appellate Court in Civil Appeal No.35/2004/2003 on 17.02.2005 is maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Sanjokta Thakur ....Petitioner.
Versus
High Court of H.P. & others ....Respondents.

CWP No. 594 of 2010.
Reserved on : 22nd September, 2017.
Decided on : 17th October, 2017.

Constitution of India, 1950- Article 226- Petitioner challenged the appointment of respondent No.2 as Chief Librarian- the petitioner claimed that she was appointed in the service in the year 1988 whereas respondent No.2 was appointed in the year 1992 – she is senior to respondent No.2 and should have been considered for the post in preference to respondent No.2 – held that respondent No.2 had discharged the duties of Assistant Librarian and Librarian – he had more experience for the post- his appointment as Assistant Librarian and Librarian was not challenged- the feeder category for the post of Chief Librarian is Librarian – the petitioner was drawing a salary equivalent to the salary of Librarian but this will not make her eligible for holding the post of Chief Librarian- petition dismissed.(Para-3 to 5)

For the Petitioner:	Mr. Sanjeev Bhushan, Senior Advocate with Mr. Ashish Jmalta, Advocate.
For Respondent No.1:	Mr. Romesh Verma, Advocate.
For Respondent No.2:	Mr. Mr. Dilip Sharma, Sr. Advocate with Mr. Umesh Kanwar, Advocate.
For Respondent No.3:	Mr. Praveen Chandel, Advocate, vice to Mr. Surender Sharma, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

Through the instant petition, the petitioner seeks quashing of Annexure P-4 & of Annexure P-5, whereunder, respectively the representation made by the petitioner for hers being considered for promotion to the post of Chief Librarian stood rejected, whereas, under Annexure

P-5, respondent No.2 stood appointed as Chief Librarian. The crucial fact(s) warranting their imperative allusion, for a effective adjudication being rendered upon the extant lis, are, of consequent upon the selection and appointment of Smt. Santosh Negi, Chief Librarian to the post of Court Secretary in the year, 2009, hence post of Chief Librarian falling vacant. Besides the petitioner, one Het Ram Garg, Brij Lal Sharma, Rajinder Singh Kanwar and Dharam Pal Sharma, also aspired for being considered for selection for the aforesaid vacancy. All the aforesaid, hence, made separate representations, for theirs being considered for selection and appointment to the aforesaid post. Their representations were rejected and the Hon'ble Chief Justice constituted a committee comprising of Hon'ble Mr. Justice R.B. Misra and Hon'ble Mr. Justice Sanjay Karol, for determining the respective claims of the remaining aspirants to the post of Chief Librarian, aspirants whereof were respectively the petitioner and respondent No.2. The Committee after considering the competing claim of the aspirants concerned, also after its making an indepth analysis of the apposite rules, rejected the claim of the petitioner, whereas, it accepted the claim of respondent No.2, besides given the latter, not, satiating the essential requisite educational qualification, of his being a graduate, recommended for apposite relaxation(s) in respect thereto being meted by the Hon'ble Chief Justice. The then Hon'ble Chief Justice accepted the recommendation(s) of the Committee. Moreover, the Hon'ble Chief Justice, relaxed the requisite educational qualification(s) of respondent No.2.

2. The learned counsel appearing for the petitioner constitutes an onslaught upon the impugned annexures, on the trite anvil of (a) respondent No.2 being appointed as a clerk in the year 1992, whereas, hers being appointed in the year 1988, hence her induction in service occurring prior to respondent No.2, thereupon, her seniority being computable from the time of her induction in service vis-a-vis the later thereto, time of induction in service of respondent No.2, with a concomitant countervailing besides frustrating, effect upon, the claim of respondent No.2 for his being considered for selection and appointment to the post of Chief Librarian. (b) Hers holding the post of Senior Assistant at the time contemporaneous to the occurrence of the apposite vacancy, also with the post of Senior Assistant, holding, a pay scale at par with the pay scale of a librarian, hence, hers being construable to be a librarian, post whereof comprising the apposite feeder channel(s), amongst others posts besides streams, mentioned in the apposite R & P Rules, for leveraging the aspirants' claim for selection and appointment against the post of Chief Librarian. Apposite Rules stand extracted hereinafter:-

Name of the Post	No. of posts	Mode of appointment	Qualification	Experience length of service in feeder cadre	Scale of pay
Chief Librarian	1	(I) Be selection from amongst (a) Librarians (b) Deputy Superintendents. (c) Revisors on the basis of merit-cum-length of service in the existing scale.	Graduation with Diploma in Library Science or Degree in Library Science.	Five years in case of Graduate with Diploma in Library Science. Three years in case of Degree in Library Science.	Rs. 7800-220-8100-275-10,300-340-11,660 + S.A. Rs.400/-

		(ii) By direct recruitment in case candidates referred to at (I) with requisite qualifications and experience are not availabe.	Graduation + Degree in Library Science	Three years.	

(c) Thereafter, her counsel espouses of hers being rendered eligible for being considered at par with the post of Librarian, imperatively when preceding thereto, the meteing(s) of the benefits of aspired for, apposite relaxation(s), vis-a-vis her or thereupon hence alikeness in the relaxation(s) meted vis-a-vis want of requisite educational qualification held by respondent No.2, would ensure, emanations of upsurgings qua equality/parity in the apposite meteing(s), inter se them.

3. Before adjudicating upon the aforesaid contentions addressed before this Court, by the learned counsel appearing for the petitioner, it is worthwhile, to, mention that respondent No.2, had, prior to his being considered for selection and appointment, to the post of Chief Librarian in the Library of the High Court, held, the post(s), respectively of Assistant Librarian and of Librarian. The Committee had meted reverence, to, the length of experience possessed by respondent No.2, whereas, want(s) thereof, apart therefrom, lack of, other disqualificatory factors vis-a-vis the petitioner, constrained the Committee, to, reject her representation. Consequently, with the petitioner, not, challenging the respective appointment(s) of respondent No.2 initially, to, the post of Assistant Librarian and subsequently to the post of Librarian, the latter whereof is, one, amongst the feeder categories constituted in the apposite Rules, for enabling the aspirant(s) to stake a tenable claim, for being considered for selection besides appointment to the post of Chief Librarian, renders an inference of the petitioner being estopped, to, now espouse, of, the appointments of respondent No.2, respectively as a Assistant Librarian and as a Librarian, suffering from any invalidity; (b) rather with hers at the stage, of, respondent No.2 standing selected and appointed as an Assistant Librarian and as a Librarian, hence, falling in a category besides a stream of service, not, embodied in the apposite rules, to be one amongst the envisaged streams or feeder category(ies), renders her disabled to, hence compete with respondent No.2, for selection besides appointment to the post of Chief Librarian, despite hers possessing a higher educational qualification vis-a-vis respondent No.2, also despite hers holding a degree in Library Science. The apt inference therefrom is of with the petitioner, not, falling in any of the feeder category(ies) constituted in the apposite rules, thereupon, she cannot leverage a strong claim for her candidature being considered for selection besides appointment to the post of Chief Librarian.

4. The apposite Rule 22 of the Himachal Pradesh High Court Officers and the members of the Staff (Recruitment, conditions of service, conduct & Appeal) Rules, 2003), which stand extracted hereinafter:-

> "22. Relaxation: The Chief Justice may, from time to time, to remove any hardship in an individual case or in case of any class or group of cases, relax any condition or any requirement as it relates to age, qualification or minimum experience, as is or may be prescribed in or under these Rules"

in exercise of relaxing discretion(s) encapsulated therein, the then Hon'ble Chief Justice meted relaxation(s) vis-a-vis respondent No.2, specifically, qua want of the latter, not, possessing the requisite educational qualification(s), remains unchallenged. In sequel, with the petitioner, not,

challenging the vires of the apposite rules, bolsters an inference, of, the Committee of Hon'ble Judges, making (a) an indepth scrutiny of the rival claims of the petitioner and of respondent No.2 for theirs being respectively considered for selection to the post of Chief Librarian, (b) thereafter, it recommending, the candidature of respondent No.2, (c) whereas, its recommending vis-a-vis the Hon'ble Chief Justice, for rejecting the representation of the petitioner, (d) besides its apt recommendations, for according relaxation(s) vis-a-vis respondent No.2 for his not holding thereat the requisite educational qualification, (e) both recommendations whereof stood affirmatively accepted by the Hon'ble Chief Justice, (f) the satisfaction drawn(s) by the Committee of Hon'ble Judges in rejecting the representation of the writ petitioner, whereas, its accepting the representation of respondent No.2, also the further affirmative satisfaction(s) drawn by the Hon'ble Chief Justice, are all thereupon, to be concluded to be beyond the scrutiny of the writ Court, on the trite threshold of any purported malafides or arbitrariness, being ingrained therein, especially when no specific ascriptions thereof are ventilated in the writ petition.

5. Be that as it may, the learned counsel for the petitioner has contended that with the petitioner, at the time contemporaneous of the accrual of the vacancy of Chief Librarian, holding, the post of Senior Assistant, pay scale whereof being, at par, with the pay scale of a Librarian, hence after hers being meted the apposite relaxation(s), as, meted vis-a-vis respondent No.2 qua his not, at the relevant time, holding the requisite educational qualification, hers hence being construable to be a Librarian, whereas, the apposite relaxation being, not, arbitrarily meted vis-a-vis her, renders the impugned Annexures, to suffer from a vice of invalidity. In making the aforesaid submission, the learned counsel appearing for the petitioner misreads besides misinterprets, the apposite Rules, specifically the trite factum (i) of the prescribed mode of appointment(s) and (ii) of qualification(s), being respectively borne in distinct columns, of, the apposite Rules. The occurrence, in distinct columns of the apposite Rules, respectively, of, variant streams and the feeder category(ies), wherein the aspirants, are, enjoined to peremptorily occur "and of" the qualifications, they are imperatively required, to, hence possess,, at the time of accrual of the vacancies, does foster an inference (iii) of the power vested, in the Hon'ble Chief Justice under Rule 22 of the R & P Rules, given the phrase "relax any condition or any requirement as it relates to age, qualification or minimum experience" occurring therein, carrying the parlance, of the aforesaid underlined discretion(s), of, meteing relaxation(s), only, appertaining to any condition or any requirement, also the apt phrase(s) "condition or any requirement", holding an explicit candid signification, of, each/both enjoining ascription of similar meanings thereto, (iv) thereupon, the statutory coinage, "condition or any requirement" in respect whereof the power of relaxation is conferred upon the Hon'ble Chief Justice, being amenable to a construction of its might being restricted in respect of age, qualification or minimal experience, as prescribed under the apposite Rules. Consequently, with the power of relaxation being restricted besides trammeled, inasmuch as, its clout operating vis-a-vis "any requirement or condition", appertaining, to, only age, qualification or minimal experience prescribed, for post(s) falling vacant in any establishment of the High Court, (v) thereupon, the factum of occurrence of variant streams or of apposite feeder category(ies) in a column, distinct from the column appertaining to qualification, besides with the column appertaining to "mode of appointment", wherein the feeder categories occur, enjoining the aspirants concerned, to, without any relaxation in respect thereof, being validly meted, hence imperatively possess them, at the stage of accrual of vacancy(ies), stems an inference, (vi) of the feeder category of Librarian, constituted, in column No.4 of the apposite Rules, apposite to the post which fell vacant, hence, warranting each of the aspirant(s), to at the relevant time peremptorily hold it, irrespective of any of them holding a pay scale at par with the pay scale of a Librarian. In other words, the mere factum of the petitioner at the time contemporaneous vis-a-vis the accrual of vacancy of a Chief Librarian, hers, holding a pay scale at par with the pay scale of a Librarian, would not, render her to be construable to be a Librarian, given the Rules holding an explicit contemplation, of, each of the aspirants at the relevant stage, hence holding the post of a Librarian, whereas, theirs, not, prescribing that given any aspirant holding any post in the establishment of this High Court, post whereof holds a pay scale at par with an aspirant holding the post of a Librarian,per se, rendering

the aspirant concerned to be fit to stake a valid claim, to the post of Chief Librarian, thereupon, also the espousal of the petitioners falls apart. The further effect of the aforesaid contradistinctivityIes) of occurrences of modes of appointment or streams or feeder categories, in a column distinct from the qualification column, in one amongst stream(s) whereof, the aspirant concerned, at the time contemporaneous to the occurrence of vacancy(ies), hence ought to imperatively fall, also with this Court, on an interpretation, of apposite Rule 22, holding, that the discretion to mete relaxation vis-a-vis the aspirants concerned being limited with respect to age, qualification and minimal experience, contrarily with the apposite Rules, being, not, construed to be leveraging in the Hon'ble Chief Justice, any discretion to mete relaxation(s) qua the aspirants concerned, not falling, in any one of the mandated streams or feeder categories also constrains an inference of the power of relaxation exercised by the Hon'ble Chief Justice vis-a-vis respondent No.2, for want of his, not, holding the requisite educational qualification(s), being in consonance with the apposite rules, whereas, want of exercise thereof, by, the Hon'ble Chief Justice vis-a-vis the petitioner specifically qua hers, not falling, in any mandated streams also not suffering from any vice of any invalidation.

6. For the foregoing reasons, there is no merit in the instant petition and it is accordingly dismissed. No costs. All pending applications also stand disposed of.

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

Babija Devi .....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No.: 3407 of 2012
Date of decision: 18.10.2017

Constitution of India, 1950- Article 226- Petitioner was appointed as Anganwari worker but her appointment was held to be bad by Additional Deputy Commissioner primarily on the ground that her income was in excess of the limit prescribed in the scheme/guidelines for the engagement of Angarwari workers- an appeal was filed, which was dismissed – held that inquiry report filed by Tehsildar, Shilai shows that the family income of the petitioner was in excess of Rs. 12,000/- - however, the family income of the petitioner was not determined by Tehsildar – it was incumbent upon the Tehsildar to state the actual family income of the petitioner – the authorities had wrongly relied upon the report of Tehsildar – appeal allowed – matter remanded to the Appellate Authority for deciding the appeal afresh by affording an opportunity of being heard.

(Para-7 to 10)

For the petitioner: Ms. Shalini Thakur, Advocate.

For the respondents: Mr. Vikram Thakur, Deputy Advocate General, for respondents No. 1 to 4.
Mr. Jagdish Thakur, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

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

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

"(i) For quashing impugned order at annexure P-6 dated 5.4.2012 whereby the appointment of the petitioner has been quashed and orders have been issued

for appointment of an admittedly ineligible candidate as Anganwadi Worker in Anganwadi Centre Koraya, Tehsil Shillai, District Sirmaur, H.P.

(ii) Respondents may kindly be directed to produce the record of the case before the Hon'ble Court.

(iii) Any other writ, order or direction as deemed fit in the facts and circumstances of the case may also be granted in favour of the petitioner."

2. The appointment of the petitioner was held to be bad by the Additional Deputy Commissioner, District Sirmaur vide order dated 26.10.2009 primarily on the ground that the petitioner was not eligible to be appointed as Anganwari Worker, as her family income was in excess of the limit so prescribed in the Scheme/Guidelines for the engagement of Anganwari Workers/Helpers on honorary basis under ICDS Scheme run by Social Justice & Empowerment Department vide Notification, dated 06.07.2007, wherein the upper ceiling fixed was Rs.12,000/- per annum. Findings so returned by the Additional Deputy Commissioner, Sirmaur have been affirmed in appeal by the Deputy Commissioner, Sirmaur.

3. Learned counsel for the petitioner has argued that Annexures P-5 and P-6 are not sustainable in the eyes of law, as while setting aside the appointment of the petitioner on the ground that her family income was in excess of Rs.12,000/- per annum, there is no definite finding by either of the authorities as to what was the actual family income of the petitioner. She further submitted that the inquiry report which has been made the genesis for setting aside the appointment of the petitioner is also vague and cryptic, because even in the inquiry report, there is no definite finding as to what was the actual family income of the petitioner. On these basis, she submitted that Annexure P-6, dated 05.04.2012 be quashed and set aside.

4. Mr. Jagdish Thakur, learned counsel appearing for the private respondent, on the other hand, has argued that there is no illegality or perversity with the orders so passed by the authorities below, because taking into consideration the extent of land which was owned by the family members of the petitioner, both these authorities have rightly come to be conclusion that the family income of the petitioner from all sources was in excess of Rs.12,000/- per annum. He further submits that simply because the actual amount in this regard is not referred in the impugned orders, this does not mean that the said orders are not sustainable in the eyes of law.

5. Learned Deputy Advocate General has also defended the impugned orders on the same ground. He has further submitted that perusal of the impugned orders, which stand assailed before this Court demonstrates that the same are reasoned and speaking.

6. I have heard the learned counsel for the parties and have also gone through the records.

7. Inquiry report so filed by Tehsildar, Shillai stands appended by respondent No. 5 alongwith her reply. A perusal of the said inquiry report demonstrates that Tehsildar, Shillai while holding that the family income of the petitioner was in excess of Rs.12,000/- and while cancelling the income certificate which was so issued in favour of the petitioner, has not returned any finding as to what actually was the income of the petitioner. All that the said authority has stated in the inquiry report is that both Sh. Amar Singh and Sh. Ran Singh, who are stated to be fathers-in-law of petitioner own more than 70 bighas of land and it is on these basis that an inference has been drawn by the authority concerned that the family income of the petitioner was in excess of Rs.12,000/- per annum. A perusal of Annexure P-5, dated 26.10.2009 passed by the Additional Deputy Commissioner, Sirmaur and Annexure P-6, dated 05.04.2012 passed by the Deputy Commissioner, District Sirmaur demonstrates that it is the said report of the Tehsildar that has been made genesis by both the authorities while returning the finding that the family income of the petitioner was in excess of Rs.12,000/- per annum. In my considered view, while returning the said finding, both the authorities concerned erred in not appreciating that in his inquiry report, Tehsildar, Shillai had not given a definite finding as to what actually was the family income of the petitioner at the relevant time.

8. The Scheme envisages that in order to be eligible to be considered for appointment as Anganwari Worker, the family income of the concerned candidate at the relevant time should not be in excess of Rs.12,000/- per annum. Whether the family income of a candidate is in excess of Rs.12,000/- per annum or not is not something which the authorities decide in abstract. For this, they rely upon the certificates which are so issued to the candidates by the authorities concerned. Now, incidentally, the income certificate which is so issued in favour of any candidate by the authority concerned is also not something in abstract and it is categorically mentioned in the same as to what is the exact income of the family of the concerned candidate.

9. In this view of the matter, in my considered view, it was incumbent upon the Tehsildar, Shillai to have had stated in the inquiry report while coming to the conclusion that the family income of the petitioner was in excess of Rs.12,000/- annum as to what actually was the family income of the petitioner. Having failed to do so, both the Additional Deputy Commissioner, District Sirmaur and Deputy Commissioner, Sirmary erred in relying upon the report so filed by the Tehsildar, Shillai. In view of a definitive finding having not been returned by the Tehsildar to the effect that as to what actually was the family income of the petitioner, which ought to have been so depicted in the order, the said report could not have been relied upon in the mode and manner in which it has been relied upon by the authorities concerned.

10. In view of the above discussion, the petition is allowed. Orders Annexure P-5 dated 26.10.2009 passed by the Additional Deputy Commissioner, Sirmaur and Annexure P-6, dated 05.04.2012 passed by the Deputy Commissioner, District Sirmaur are quashed and set aside. Case is remanded back to the Appellate Authority for deciding the appeal filed by Smt. Geeta Devi afresh by affording an opportunity of being heard to all the stakeholders. This Court hopes and expects that the appeal shall be decided by the Appellate Authority by passing a speaking and reasoned order. It is clarified that as Smt. Geeta Devi is presently performing the duties of Anganwari Worker at Anganwari Centre Kuraya, she shall not be disturbed and shall be permitted to continue as such, subject to the orders, which shall be so passed on the appeal so filed by her before the authority concerned. Learned Appellate Authority, if it so deems fit, shall be at liberty to call for the fresh report from the competent authority qua the family income of the candidate concerned, as it was at the relevant time when the candidatures of the parties were considered for being appointed as Anganwari Worker at Anganwari Centre Kuraya.

Petition stands disposed of in above terms. No order as to costs.

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

Sh. Bhim Singh .....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No.: 746 of 2011
Date of decision: 18.10.2017

Constitution of India, 1950- Article 226- Land was recorded in the ownership of petitioner and others but was in exclusive possession of petitioner as well as one H – the share of H was mutated in favour of the petitioner – land was allotted to the petitioner under consolidation – respondents No. 3 and 4 filed a revision claiming the allotment on the basis of the judgment and decree passed by Civil Court – revision was allowed by Divisional Commissioner- the order of Divisional Commissioner has been assailed by the present writ petition- held that Civil Court had granted a decree declaring the parties to be joint owners- Divisional Commissioner had only ordered the correction of revenue entries in accordance with the judgment – the revenue officials

are otherwise under an obligation to give effect to the decree of the Civil Court- there is no infirmity in the order passed by revenue court – petition dismissed. (Para-6 to 8)

For the petitioner:	Mr. G.R. Palsra, Advocate.
For the respondents:	Mr. Vikram Thakur and Ms. Parul Negi, Deputy Advocate Generals, for respondents No. 1 and 2. Mr. Bhupender Gupta, Senior Advocate, with Ms. Rinki, Advocate, for respondents No. 3 and 4. None for other respondents.

The following judgment of the Court was delivered:

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

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

"(i) That the order dated 22.09.2010 contained in Annexure P-3 passed by the Respondent No. 2 may kindly be quashed after issuing writ of certiorari.

(ii) That the respondents may kindly be directed not to change the revenue entry existing in the name of the petitioner by issuing writ of mandamus.

(iii) To direct the respondents to produce the entire record pertaining to the present case for the kind perusal of this Hon'ble Court.

AND OR

(iv) Any other relief to which the petitioner is found entitled by this Hon'ble Court in the facts & circumstances of the case may kindly be granted in her favour & against the respondents.

(v) Cost of this petition be as well awarded in favour of the petitioner & against the respondents."

2. Case of the petitioner is that land measuring 3-17-11 bighas (*Kharyatar*), situated in Muhal Katwandi/72, Illaqua Tilli, Tehsil Chachoit, District Mandi was recorded in the ownership of the petitioner and others, but was in the exclusive possession of the petitioner as well as one Sh. Hem Prabh. Vide mutation No. 101, dated 24.05.1989, share of Hem Prabh also stood mutated in favour of the petitioner, which fact was duly reduced into a note in jamabandi for the year 1984-1985. Consolidation proceedings started in Muhal Katwandi before the year 1992 and the land subject matter of the petition, stood allotted to the petitioner in the said consolidation operation by way of partition. Khasra number of the said land was subsequently changed to Khasra No. 465 and as per the petitioner, respondents No. 3 and 4 with a *malafide* intent of disturbing the plot of the petitioner, filed a revision petition under Section 54 of the Himachal Pradesh Consolidation Act, demanding that land be allotted to them from Khasra No. 563/1, measuring 1-10-0 bighas on the basis of judgment and decree dated 20.12.1982, passed by the learned Additional Sub Judge, Mandi in Civil Suit No. 131/81, titled Smt. Kanauri Devi Vs. Daulat Ram and others. Revision so filed by the said respondents was allowed by the Divisional Commissioner, Mandi Division, which order stands assailed by way of this writ petition. As per the petitioner, order passed by respondent No. 2 is *prima facie* bad as the land in issue stood rightly allotted to the petitioner post consolidation proceedings and respondents No. 3 and 4 already stood compensated by way of allotment of land to them from other Khasra numbers in the process of consolidation itself.

3. No other point was urged.

4. Respondents No. 3 and 4 by way of their reply have contested the claim of the petitioner *inter alia* on the ground that there was no illegality or infirmity with the order passed by respondent No. 2. As per the said respondents, though land comprised in Khasra No. 563, measuring 3-7-11 bighas was recorded in the ownership of the parties, however, petitioner was

not in exclusive possession of said Khasra number. As per the said respondents, Khasra No. 563 was earlier denoted by khasra No. 193, as per jamabandi for the year 1961-1962 and at that time, parties were recorded as *Gair Marusi*. In 1975, parties became owners of the land including Khasra No. 563 and the share of the parties was 1/3rd each, as is evident from copy of mutation No. 36, dated 27.07.1975. Further, as per respondents No. 3 and 4, entries reflecting petitioner to be in exclusive possession of Khasra No. 563 in revenue records were erroneous, which stood challenged by way of a Civil Suit, which suit of the said respondents stood decreed in the year 1982. It is further the stand of the said respondents that as per operative part of the judgment, they were shown in possession of Khasra No. 563/1 and though necessary entries were carried out in the *Girdawari* for the year 1979-1980, but these entries were not carried forward in subsequent jamabandis and when they came to know about the same, they moved an application before the Assistant Consolidation Officer for correction of the same, but the same was not done. In these circumstances, they filed proceedings before Consolidation Officer, who also did not took any action. When the said respondents approached the Settlement Officer, he directed them to file appropriate proceedings before Director Consolidation and this led to their filing revision petition before the appropriate authority under Section 54 of the Act, who has correctly passed the appropriate orders, which call for no interference. They thus pray for dismissal of petition.

5. I have heard the learned counsel for the parties and have also gone through the pleadings.

6. It is not in dispute that in a Civil Suit filed by Smt. Kanauri Devi, who is one of the respondents before this Court, i.e., Civil Suit No. 131/81, titled Smt. Kanauri Devi Vs. Daulat Ram and others, the Court of learned Additional Sub Judge, Mandi vide judgment and decree dated 22.09.1981/24.09.1981, had granted the following relief in favour of the plaintiff therein:

> *"RELIEF: As a result of my above findings, the suit of the plaintiffs is decreed to the extent that the suit land forms the joint property of plaintiffs and defendants alongwith their other joint property and that the plaintiffs are in possession of the suit land and they are entitled to enjoy that possession till they are dispossessed in accordance with law. However, the parties are left to bear their own costs to the suit. Decree sheet be prepared in accordance with this judgment and on completion this file be consigned to the general record room."*

7. The present petitioner was also a defendant in the said suit. Now, in this background, when the order passed by the learned Divisional Commissioner, Mandi is perused, the same demonstrates that all that the said authority has directed is this that the entries be incorporated in the revenue records in consonance with the judgment and decree passed by the learned Additional Sub Judge, Mandi in Civil Suit No. 131/81. Relevant portion of the order so passed by the said authority is quoted hereinbelw:

> *"I have considered the arguments of both the parties and carefully perused the case file. A suit No. 131/81 for declaration and injunction filed by the petitioners before the Ld. Addl. Sub Judge, Mandi and the same was decided on 20.12.1982 in favour of the petitioners. The respondents went on appeal before the Ld. Addl. District Judge, Mandi and it was decided against them on 12.10.1995. For the execution of the order of learned court sent a letter to the Tehsildar vide letter No. 873 dated 01.07.1983 and from the perusal of copy of Khasra Girdwari of Mouza Katwandi/72 for year 1979-80 a note has been incorporated that as per order of Ld. Addl. Sub Judge, Mandi Kh. No. 563/1 measuring 1-10-0 bighas recorded in possession of Smt. Kinori Devi etc. The Tehsildar, Chachyot also sent compliance report vide No. 442, dated 18th December, 1984 mentioning therein that necessary entry in revenue record has been effected. This entry should also have been incorporated in the succeeding jamabandi but from the perusal of copies of jamabandi provided for the year 1979-80 and for year 1984-85 this entry has not been carried forward which is a mandatory provision under H.P. Land Revenue Act.*

On the above observations I accept this petition and order that the order dated 20.12.1982 given in suit No. 131/81 of Ld. Addl. Sub Judge, Mandi be implemented. The Tehsildar, Chachyot shall incorporate the entry as per orders and send compliance report to this Court also. Both the parties be called at the time of effecting the entries in revenue record. It is also ordered that send the names of revenue officials below who is in fault for not recording the entry in the succeeding jamabandi after the entry in Khasra Girdawari for the year 1979-80 in Muhal Katwandhi/72 so that suitable action can be taken against the defaulting officials. A copy of this order be sent to the Tehsildar, Chachyot with the copies of supporting documents for compliance and the file of this Court be consigned to General Record Room after due completion."

8. Before proceeding further, it is pertinent to mention that this Court has not been called upon to adjudicate as to whether the findings which stand returned by the learned Civil Court in Civil Suit No. 131/81 are sustainable in law or not. Now the grounds on which the petitioner has challenged the impugned order already stand decided against him by a Civil Court in Civil Suit No. 131/81. Findings so returned by the learned Civil Court against the present petitioner having attained finality is not in dispute. In this background, when it stands concluded against the petitioner that he is not in exclusive possession of the land, subject matter of the present petition, it cannot be said that the order which has been passed by the learned Divisional Commissioner is either perverse or not borne out from the records of the case. Not only this, in fact learned Divisional Commissioner, Mandi has only passed an order, whereby he has directed that the findings returned in Civil Suit No. 131/81 be implemented. Declaration given by a Civil Court obviously has to be implemented by the authorities concerned and this is all that has been ordered by the learned Divisional Commissioner, Mandi. Order so passed by the learned Divisional Commissioner, Mandi, therefore, does not calls for any interference. The genesis of the challenge to the said order is totally misconceived, as learned Divisional Commissioner has not returned any findings, which are not borne out from the records, as the said order is in harmony with the judgment and decree, dated 22.09.1981/24.09.1981, passed by the Court of learned Additional Sub Judge, Mandi in Civil Suit No. 131/81.

9. In view of the above discussion, as there is no merit in the writ petition, accordingly the same is dismissed, so also miscellaneous applications, if any. No order as to costs.

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

Sh. Deep Singh .... Petitioner

Versus

Union of India and others ... Respondents

CWP No. 4830 of 2009.
Date of decision:18.10.2017.

Constitution of India, 1950- Article 226- Petitioner was initially appointed as constable in Border Security Force - he was dismissed from service for the commission of offence punishable under Section 40 of Border Security Force Act for permitting three civilians to cross the border along with three pairs of cattle – an appeal was filed, which was disposed of with a direction to modify the sentence from dismissal to three months rigorous imprisonment – an order of fixation of pay was passed – aggrieved from the order, the present writ petition has been filed – held that appellate authority had commuted the sentence of dismissal to three months rigorous imprisonment and had ordered that period of absence excluding the period of sentence of three months rigorous imprisonment be regularized by granting the leave of kind due – the petitioner

cannot be granted any benefit which was not granted by the Appellate Authority – the order of Appellate Authority was not assailed and has become final – petition dismissed. (Para-11)

For the petitioner Mr. Onkar Jairath, Advocate.
For the respondents Mr. Vikas Rathore, Senior Panel Counsel.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

"i) That a writ in the nature of Mandamus may be issued directing the respondents to give the entire consequential benefits of service to the petitioner, like seniority, salary or arrears etc. w.e.f. 9.5.1989 to till date.

ii) That the respondents may further be directed to count the period of Extra Ordinary Leave of the petitioner i.e. 8.4.2000 to 3.1.2008 towards annual increments, seniority and pensionary benefits.

Iii) That the respondents may be further directed to pay the arrear of salary for the period he remained out of job.

iv) That the entire relevant record of the case may kindly be ordered to be summoned from the respondents for the kind perusal of this Hon'ble Court.

v) That the cost of the petition may kindly be awarded in favour of the Petitioner and against the respondents.

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

2. Brief facts necessary for adjudication of the present case are that the petitioner was initially appointed as Constable in Border Security Force (BSF) on 09.05.1989. Vide order dated 2nd June, 1999 (Annexure P-1), pursuant to a Summary Security Force Court trial, for an offence committed under Section 40 of the BSF Act, the petitioner was awarded the sentence of dismissal from service after he was found guilty of the charge alleged against him. The allegation against the petitioner was that while being posted at BOP Mora Ghatti in West Bengal in May, 1999, he had permitted three civilians to cross the border alongwith three pairs of cattle.

3. Feeling aggrieved by the order of dismissal from service, the petitioner filed an appeal. Vide order dated 10.12.2007, appellate authority disposed of the appeal in the following terms.

"I have gone through the service record of the petitioner, which reveals that he has rendered 10 years and 21 days of service at the time of trial and has got only one punishment that is under Section 19 (b) of the BSF Act for overstaying leave without sufficient cause. He has earned seven rewards during this short span of 10 years of service. Looking to the post service record of the petitioner, I am of the considered view that the ends of justice would be met if sentence of dismissal from service is commuted to that of 03 months Rigorous Imprisonment in Force custody and I order accordingly. The absence period that is 01-06-1999 till rejoining duty, excluding period of commuted sentence of 3 months RI in Force custody, be regularized by granting leave of kind due."

4. Pursuant thereto, order dated 1st February, 2008, was passed which reads as under.

"No. 89008117 CT Deep Singh of this unit who was dismissed from service w.e.f. 01 June 1999 for committing an offence U/Sec 40 of BSF Act tat is to way "

an act of prejudicial to good order and discipline of the force," vide this office order No. Estt/84 Bn./dismiss/99/6420-60 dated 02 June, 1999. Now, the sentence of dismissal from service of the individual has commuted to that of 03 months Rigorous Imprisonment in Force custody by DG BSF and also directed that the absence period that is 1.6.99 till rejoining duty excluding period of commuted sentence of 3 months in force custody be regularized by granting leave of kind due vide FHQ (D&L Branch) order No. 06/155/2002/GLO(1)&(L)/BSF/8813-18 Dated 10 Dec., 2007 in compliance of ibid order the said Constable reported to this nit on 03 Jan 2008 (A/N).

2. As approved by the commandant, the absence period of the above constable w.e.f. 1.6.99 to 3.1.2008 i.e. total 3137 days is hereby regularized as per details mentioned above:

a) 23 days absence period w.e.f. 1.6.1999 to 23.6.1999 by granting 23 days Earned leave.

b) 198 days absence period w.e.f. 24.6.99 to 7.1.2000 by granting 198 days Half Pay Leave.

c) 2916 days absence period w.e.f. 8.1.2000 to 3.1.2008 by granting 2916 days EOL.

*3. **Fixation of Pay**:*

Pay of the Indl is also hereby fixed as under:-

a) Indl was drawing basic pay Rs. 3275/-
at the time of dismissal of service (w.e.f. 1.10.98
i.e. 1.6.99. DNI 1.10.99)

b) DNI 1.10.99 notionally increased Rs. 3350/-
without financial benefit as indl was
not on duty at that time but absence
period has been regularized by granting HPL.

c) Indl will draw Rs. 3350 w.e.f. 4.1.2008 onwards i.e. date of joining service with next date of increment after completing 12 months i.e. on 28.9.2008 (03 months & 06 days w.e.f. 1.10.1999 to 7.1.2000 plus 08 months and 24 days w.e.f. 4.1.2008 to 27.9.208 total 12 months).

4. He is further posted to C.Coy. of this unit.

Distribution:

Sd/- 1.2.2008
(Sourabh)
Dy. Commandant/ADJT
For Commandant, 84 BN. BSF"

5. Feeling aggrieved by order dated 1st February, 2008, the petitioner vide communication Annexure P-9, called upon the authorities to confer upon him seniority and also to revise his wages as per his seniority and also to pay to him wages for a period of 8 ½ years, which service of his, according to him, had not been counted for the purpose of salary.

6. In response to the same, vide Annxure P-1, the petitioner was again provided details by the authority concerned as to how his leave was adjusted and how his salary was thereafter fixed. Petitioner was also informed that his salary stood correctly fixed and that he would also be entitled to his original seniority and period of duty minus extraordinary leave will also be taken into consideration for the purpose of pension.

7. Still feeling aggrieved, petitioner has filed the present petition praying for the reliefs already enumerated above.

8. In reply filed to the petition by the respondents, while denying the claim of the petitioner, it has been mentioned therein that against the order of dismissal from service, in the appeal, which was filed by the petitioner, the appellate authority commuted the sentence of dismissal from service, to three months imprisonment in force custody, and absence period i.e. period from 1st June, 1999, till the period of re-joining, excluding the period commuted sentence of three months, was ordered to be regularized by granting leave of kind due which order of the appellate authority was accordingly implemented. It is further mentioned in the reply that petitioner rejoined on 1.3.2008 after reinstatement and accordingly, absence period w.e.f. 1.6.1999 to 3.1.2008 i.e. total of 3,137 days was regularized vide order dated 16.01.2009 (Annexure R-III) as under.

> *"a) 90 days RI period w.e.f. 1.6.99 to 29.8.99.*
>
> *b) 23 days absence period w.e.f. 30.8.99 to 21.9.1999 by granting 23 days earned leave.*
>
> *c) 198 days absence period w.e.f. 22.9.99 to 7.4.2000 by granting 198 das half pay leave.*
>
> *d) 2826 days absence period w.e.f. 8.4.2000 to 3.1.2008 by granting 2826 days EOL."*

9. On these bases, the claim as put forth by the petitioner stands contested by the respondents. In his rejoinder, the petitioner has reiterated his claim.

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

11. The relief claimed by the petitioner is for grant of all consequential benefits like seniority, salary and arrears thereof w.e.f. 9.5.1989. He has also prayed that respondents be directed to count the period of his extraordinary leave for annual increments, seniority and pensionary benefits. Now a perusal of the order passed by the appellate authority demonstrates that it is not as if findings of guilt returned by the disciplinary authority were set aside by the appellate authority. All that learned appellate authority did was that it commuted the sentence of dismissal from service to that of three months rigorous imprisonment in force custody. It further ordered that the absence period of the petitioner w.e.f. 1.6.1999 till rejoining duty, excluding the period of commuted sentence of three months rigorous imprisonment in force custody, be regularized by granting leave of kind due. Now it is not in dispute that the order so passed by the appellate authority stands complied with by the respondents vide communication dated 1.2.2008. It is not even the case of the petitioner that what was ordered by the appellate authority had not been complied with by the respondents. However, he wants that he be granted all consequential benefits of being in service like seniority, salary, arrears, w.e.f. 09.05.1989. He also wants that the period of extraordinary leave from 8.4.2000 to 3.1.2008 be counted towards annual increment, seniority and pensionary benefits. In my considered view, this cannot be done. This is for the reason that respondents cannot be directed to confer upon the petitioner any benefit which has not been granted to him by the appellate authority. Now the factum of order passed by the appellate authority having been complied with in letter and spirit is also not in dispute. Learned Counsel for the petitioner during the course of arguments could not substantiate as to how the petitioner was entitled for grant of benefits like seniority, salary and arrears thereof w.e.f. 09.05.1989. He also could not substantiate that on what basis his prayer for counting the period of extraordinary leave of the petitioner w.e.f. 8.4.2000 to 3.1.2008 towards annual increment, seniority and pensionary benefits could be granted. Here is a case where the petitioner was tried by a Summary Security Force Court for commission of offence committed under Section 40 of the BSF Act and was awarded the sentence of dismissal from service after having been found guilty. In appeal, learned appellate authority has not set aside the order passed by the Summary Security Force Court on merit nor the petitioner has been exonerated of the charges of which he was found guilty by the Summary Security Force Court. In the absence of there being any order so passed by the appellate authority to the effect that the absence of period after regularization by

granting leave of kind due should be counted for all consequential benefits, in my considered view, this relief cannot be granted to the petitioner by this Court. When the petitioner has been found guilty of the charges alleged against him which findings have not been disturbed even by the appellate authority, the petitioner could also not be conferred benefits of service like seniority, salary or arrears of salary etc. w.e.f. 09.05.1989, as has been claimed by the petitioner. Incidentally, the order passed by the appellate authority dated 01.02.2008 has not been assailed by the petitioner in this writ petition. Therefore, taking into consideration the fact that the order so passed by the appellate authority stands complied with by the respondents in letter and spirit, the petitioner is not entitled for reliefs which are being claimed by way of this petition.

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

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

Deepak Kumar .....Petitioner.

Vs.

Cantonment Board .....Respondent.

CWP No.: 502 of 2011
Date of decision: 18.10.2017

Constitution of India, 1950- Article 226- Petitioner was appointed as a Class-IV employee in the respondent-Board in the 2004- the post of Sanitary Inspector/Male Health Supervisor was advertised for which the minimum prescribed qualification was Diploma in Sanitation- the petitioner was selected and appointed as Sanitary Inspector/Male Health Supervisor – he joined the post in the year 2007 – a complaint was made regarding his appointment on the ground that he did not possess the diploma in sanitation- FIR was registered and petitioner was dismissed from service – the petitioner filed the present writ petition pleading that no inquiry was conducted and mere registration of the FIR is not sufficient – respondent pleaded that verification was conducted from Chancellor, Maghadh University, Bihar, Director Health Services, Bihar and Director Health Services, Himachal Pradesh - it was found that no course of Sanitary Inspector was conducted nor any certificate was issued in favour of the petitioner- held that the appointment of the petitioner was on probation for a period of two years – it was specifically provided that if any declaration given by the petitioner is found to be incorrect- his services were liable to be dismissed by the Board – the petitioner was dismissed on the ground that certificate submitted by the petitioner was not found to be genuine – the order was passed during the period of probation- the order is in accordance with the terms and conditions of the employment – the act of the employer is duly protected by the appointment order – there is no infirmity in the order- petition dismissed. (Para-9 to 23)

Cases referred:

The State of Punjab Vs. Dharam Singh, AIR 1968 Supreme Court 1210.

High Court of M.P. through Registrar and others Vs. Satya Narayan Jhavar, (2001) 7 Supreme Court Cases 161.

Rajinder Singh Chauhan and others Vs. State of Haryana and others, (2005) 13 Supreme Court Cases 179

University of Rajasthan and another Vs. Prem Lata Agarwal, (2013) 3 Supreme Court Cases 705

For the petitioner: Mr. Bimal Gupta, Senior Advocate, with Mr. Vineet Vashisht, Advocate.
For the respondent: Mr. Desh Raj Thakur, Central Government Counsel.

The following judgment of the Court was delivered:

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

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

"(i) The order dated 07.10.2010 passed by the respondent may kindly be held wrong, illegal, violative of Articles 14, 16 of the Constitution of India and may kindly be set aside, quashed. Petitioner may kindly be held to be in continuous service of respondent as Sanitary Inspector/Male Health Supervisor and may kindly be held entitled to all benefits.

(ii) Records of the case may kindly be called for.

(iii) Costs of this petition may kindly be awarded in favour of the petitioner.

(iv) Any other writ, order or direction, which this Hon'ble Court deems just and proper may also be passed in favour of the petitioner and against the respondents."

2. Case of the petitioner is that he was appointed as a Class-IV employee in the respondent-Board in the year 2004 and he resumed his duties w.e.f. 14.07.2004. In the year 2007, the said Board advertised the post of Sanitary Inspector/Male Health Supervisor, for which the minimum qualification prescribed was Diploma in Sanitation. As the petitioner was duly qualified for being appointed to the said post, he applied for the same. He was selected and thereafter appointed as Sanitary Inspector/Male Health Supervisor, which post he joined in the year 2007. In the year 2010, a complaint was made qua his appointment as such on the ground that the petitioner did not possess the minimum requisite qualification, i.e., Diploma in Sanitation. An FIR was also registered against him at Police Station SPE Branch, CBI Shimla. Pursuant to the registration of the said FIR, the petitioner was dismissed from service vide letter, dated 07.10.2010. As per the petitioner, letter dated 07.10.2010, vide which his services have been terminated is not sustainable in law, as the same is violative of Article 14 of the Constitution of India and, therefore, the same is liable to be set aside. It is further the case of the petitioner that before his services were terminated, no proper inquiry was conducted under the Cantonment Fund Servants Rules, 1937, which Rules govern the service conditions of the petitioner. It is further the contention of the petitioner that a perusal of the impugned order demonstrates that what weighed with the employer while terminating his services was the factum of the registration of a case against him by CBI, Shimla, which case was still to be adjudicated upon by the Court of competent jurisdiction and as the guilt of the petitioner was not yet established, therefore also, the impugned order was bad in law.

3. No other point is urged.

4. On the other hand, respondent-Board in its reply has stated that in the year 2007, process was initiated by way of direct recruitment for appointment of Sanitary Inspector/Male Health Supervisor, for which essential qualification was 10+2 with Diploma in Sanitation from recognized institution. Five candidates were sponsored for the said post by the Employment Exchange and fourteen candidates directly applied for the same. Candidates were initially subjected to a written test and thereafter five candidates were short listed and interviewed on 5th March, 2008 including the petitioner. Vide appointment letter dated 13th March, 2008 (Annexure R-1), petitioner was offered appointment purely on temporary basis on the terms and conditions contained therein. Petitioner accepted the appointment vide his letter dated 14th March, 2008 (Annexure R-2) on the terms and conditions as were contained in the appointment letter. In order to ascertain the genuineness of the diploma certificate which was submitted by the petitioner, necessary verification was done by the respondent on 7th October,

2009 from (1) Vice Chancellor, Magadh University, Bodh Gaya (Bihar) (2) Director, Health Services Bihar, Patna; and (3) Director, Health Services Himachal Pradesh, Shimla. The relevant certificate which was submitted by the petitioner was issued by the Indian Institute of Health and Research, Health Institute Road, Beur (Near Central Jail) Patna-2. Replying respondent on 2nd August, 2010 took up the matter with Chairman and Director of Medical Education, India Institute of Health and Research, Health Institute Road, Beur (Near Central Jail) Patna-2 and Administrative Officer of the said Institute vide letter, dated 11th August, 2010 (Annexure R-6) informed that course of Sanitary Inspector was not conducted by their Institute nor they had issued any certificate in favour of the petitioner for having done Diploma in Sanitary Inspector. In the meanwhile, CBI examined the records of Cantonment Board, Khas Yol and the original record pertaining to the appointment of the petitioner as Male Health Supervisor was seized on 3rd August, 2010. Before this, CBI had already registered a case against him on 31st July, 2010 under Sections 420, 120-B, 467, 468, 471 of the Indian Penal Code and Section 13(b) read with Section 13(1)(d) of the Prevention of Corruption Act. It was in this background that a resolution was passed by the Board on 5th October, 2010, which ultimately led to the dismissal of the services of the petitioner vide communication dated 7th October, 2010 during the period when the engagement of the petitioner with the respondent-Board was only on temporary basis.

5. No rejoinder has been filed by the petitioner to the reply filed by the respondent.

6. Learned counsel for the parties have relied upon the following judgments:

"1. The State of Punjab Vs. Dharam Singh, AIR 1968 Supreme Court 1210.

2. High Court of M.P. through Registrar and others Vs. Satya Narayan Jhavar, (2001) 7 Supreme Court Cases 161.

3. Rajinder Singh Chauhan and others Vs. State of Haryana and others, (2005) 13 Supreme Court Cases 179.

7. During the course of arguments, learned Senior Counsel appearing for the petitioner had apprised this Court that the petitioner stood convicted in the criminal case which was registered against him and an appeal filed by the petitioner against the judgment of conviction is pending adjudication.

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

9. Petitioner has not appended with the petition either a copy of his appointment letter, nor the petitioner in so any words has spelled out as to what was the genesis of the registration of CBI case against him. Be that as it may, the appointment letter of the petitioner stands appended with the reply as Annexure R-1 and a perusal of the same demonstrates that the appointment of the petitioner *inter se* was subject to the terms and conditions that he was to be on probation for a period of two years and in the event of any declaration given by him being found to be incorrect at any point after appointment, his services were liable to be dismissed by the Board.

10. A perusal of the dismissal letter of the petitioner demonstrates that he was dismissed, during the period of probation while he was still working on temporary basis while no confirmation order stood issued in his favour, on the ground that the diploma certificate which was submitted by him for the purpose of obtaining employment was not found to be a genuine certificate, as the Administrative Officer of the Institute from which the petitioner claimed to have had obtained the diploma certificate, had informed that the Institute neither conducts diploma course of Sanitary Inspector nor they have issued any certificate in favour of the petitioner for having done diploma in Sanitary Inspector. Though there is also a reference of the registration of a criminal case against him by the CBI, but this alone is not the reason as to why his services were terminated, as the same was only an additional reason as can be easily made out from the order of dismissal from service.

11. Now, undoubtedly, the period of probation, as contained in the appointment letter, dated 13th March, 2008, is two years and the order of dismissal of service of the petitioner is dated 7th October, 2010, but during the course of arguments, this fact was not disputed by the learned Senior Counsel appearing for the petitioner that as on 7th October, 2010, the services of the petitioner had not yet been confirmed. As per the learned Senior Counsel for the petitioner, because the period of two years of probation had elapsed, therefore, there was an automatic confirmation of the service of the petitioner.

12. In my considered view, there is no infirmity with the order of dismissal, which has been passed by the respondent-Board against the petitioner. Undoubtedly, the order of dismissal was passed two years after the petitioner was appointed as Sanitary Inspector/Male Health Supervisor, but still, it remains a fact that his services were not confirmed as on 7th October, 2010 and there cannot be an automatic confirmation after the expiry of two years, as has been contended by the learned Senior Counsel for the petitioner, in the facts of this case. It is a matter of record that the appointment of the petitioner was subject to the condition that in case the declaration given by him was found to be incorrect at any time after his appointment, then his services were liable to dismissed on this count by the Board. Petitioner had accepted the terms and conditions so contemplated in the appointment letter without any objection. Now, here is a case where the Administrative Officer of the Institute from which the petitioner alleges to have had obtained his diploma in Sanitary Inspector has informed the respondent-Board that the said institution neither conducts any course of Sanitary Inspector nor it has issued any certificate in favour of the petitioner for Diploma in Sanitary Inspector. As I have already mentioned above, the petition is conspicuously silent with regard to the genesis which led to the registration of a criminal case against the petitioner by CBI. Not only this, there is no whisper in the entire petition that the diploma on the strength of which the petitioner had obtained the job, was duly obtained by him after undergoing the said diploma course, nor during the course of arguments learned Senior Counsel for the petitioner could convince the Court to this effect. It is also not in dispute that during the pendency of the petition, petitioner also stands convicted of the offences alleged against him by the CBI, though an appeal filed by him is pending adjudication.

13. Rule 8(5) of the Cantonment Fund Servants Rules, 1937, on which reliance has been placed by the learned Senior Counsel for the petitioner reads as under:

> *"8(5). A temporary servant or a servant on probation shall not, in the absence of a written contract authorizing him so to do and without reasonable cause resign his employment or absent himself from his duties without giving at least one month's notice to the Board and no other servant shall, without reasonable cause resign his employment or absent himself from his duties without giving three months' notice to the Board; and if notice as aforesaid is not given, the servant shall be liable to forfeit such sum not exceeding one month's or three months' salary, as the case may be, as the Board may, by general or special order, direct. The Board may recover such salary from any sum due from the Board to the servant or from the amount of subscription made by the servant to his Provident Fund account:*
>
> *Provided that a servant may, at any time after attaining the age of fifty-five years or completing thirty years of qualifying service, leave the service of the Board on giving three months' notice to the Board.*
>
> *Provided further that the service of a temporary servant shall be liable to termination at any time by a notice given by the appointing authority to the servant. The period of such notice shall be one month but notwithstanding the same the service of any such servant may be terminated forthwith. On such termination that servant shall be entitled to claim a sum equivalent to the amount of pay plus allowances for the period of the notice, at the same rates at which he was drawing immediately before the termination of service or as the case may be for the period by which such notice falls short of one month."*

14. Though there is a reference of the said Rule in the impugned order, but the fact of the matter still remains that the services of the petitioner have not been terminated but he has been dismissed from service for the reason that he has obtained the service by submitting a fake certificate. In fact, Rule 8(5) contemplates two situations, i.e., (a) a situation under which a temporary servant or a servant on probation can leave his duties and (b) as to how the services of a temporary servant can be terminated by the Board. In the present case, petitioner was dismissed from service as it was found that he had gained service on the strength of a fake certificate. In my considered view, the act of the employer is protected by the terms and conditions of the appointment letter of the petitioner, wherein it was clearly contemplated that in case the declaration given by him was found to be incorrect at any time after his appointment, then his services were liable to dismissed on this count by the Board. In fact, reference of Rule 8(5) of the said Rules is nothing but a misnomer and the same will not render the dismissal of the petitioner bad in law. No inquiry in fact was required to be conducted before dismissing the petitioner.

15. Now, I will refer to the judgments cited by the learned counsel for the parties. The Hon'ble Supreme Court in ***the State of Punjab*** Vs. ***Dharam Singh*****,** AIR 1968 Supreme Court 1210 has held as under:

> *"(5) In the present case, Rule 6(3) forbids extension of the period of probation beyond three years. Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."*

16. In **High Court of M.P. through Registrar and others** *Vs.* **Satya Narayan Jhavar,** (2001) 7 Supreme Court Cases 161 has held as under:

> *"11. The question of deemed confirmation in service Jurisprudence, which is dependent upon language of the relevant service rules, has been subject matter of consideration before this Court times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. Other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry order of termination has not been passed. The last line of cases is where though under the rules maximum period of probation is prescribed, but the same require a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor the person concerned has passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired."*

17. In ***Rajinder Singh Chauhan and others*** Vs. ***State of Haryana and others*** (2005) 13 Supreme Court Cases 179, the Hon'ble Supreme Court has held as under:

> *"11. The stand of the respondents was that the appellants were not confirmed employees. The appointment order of each of the appellants contains the stipulations which are as follows:*
>
> *"1. Your appointment as Sales man is purely temporary.2. During the period of probation, your services are liable to be terminated without giving any notice or assigning any reason.3. You shall be governed by the terms and conditions contained in the Staff Service Rules of the Federation, amended from time to time."*
>
> *This is a case where the period of probation is fixed having regard to Rule 4(b) read with Rule 10 as quoted above. Rule 10(6) no doubt provides that no employee shall be deemed to have been confirmed in the service unless specific order in this regard is issued. Relying on this provision, learned counsel for the fourth respondent submitted that there was no specific orders of confirmation and, therefore, the appellants should be deemed to have continued as probationers till the date of termination of their services. A similar stand was considered in Om Prakash Maurya v. U.P. Co- operative Sugar Factories Federation, Lucknow and Ors. (AIR 1986 SC 1844). A Constitution Bench of this Court in The State of Punjab v. Dharam Singh (AIR 1968 SC 1210) noted as follows:*
>
> *"Where as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended and an employee appointed or promoted to a post on probation is allowed to continue in the post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."*
>
> *12. In High Court of M.P. through Registrar and Ors. v. Satya Narayan Jhavar (2001 (7) SCC 161), this Court categorised the provisions for probation as follows:*
>
> *"11. The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject-matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite*

test, he cannot be deemed to have been confirmed merely because the said period has expired."

In above view of the matter, the stand of the appellants that they were deemed to have been confirmed at the end of 24 months and they were permanent employees is in terra firma. 'Salesmen' belong to Class III of the category of permanent employees. The definition of "Probationer" given in Rule 4(b) fully supports the appellants' stand that the probation period shall not exceed 24 months in all. Therefore as was held in Om Prakash's case, Satya Narayan Jhavar's case and Dharam Singh's case (supra) the appellants inferentially have to be treated as permanent employees, and consequently the benefits under Rule 35(b) were available to them. But the same shall not be in addition to what is payable under Section 25-F. The amount which is higher of the two i.e. of Section 25-F or Rule 35(b) shall be paid to the appellants. If any amount has already been paid in terms ofSection 25-F the same shall be adjusted while making the payment under Rule 35(L), which shall be made within three months. The appeal is allowed to the aforesaid extent. No costs."

18. Coming to the facts of the present case, Rule 6 of the Cantonment Fund Servants Rules, 1937 (hereinafter referred to as "the 1937 Rules") provides that all first appointments under the Cantonment Board shall be made on probation for a period of six months in the cases of lower grade servants and two years in the case of others. This Rule further provides that no person shall be confirmed in his first appointment till the appointing authority is satisfied that he is fit to hold such appointment and further that the appointing authority may extend the period of probation by a further period not exceeding one year for reasons to be recorded in writing. Rule 6 reads as under:

"6. All first appointments under the Cantonment Board shall be made on probation for a period of six months in the cases of lower grade servants and two years in the case of others:

Provided that no person shall be confirmed in his first appointment till the appointing authority is satisfied that he is fit to hold such appointment:

Provided further that the appointing authority may extend the period of probation by a further period not exceeding one year for reasons to be recorded in writing."

19. Admittedly, in the present case, no confirmation order was issued to the petitioner in his first appointment by the competent authority, as is envisaged in the first proviso to Rule 6. Now, the second proviso to this Rule, which further provides that the appointing authority may extend the period of probation by a further period not exceeding one year for reasons to be recorded in writing cannot be so construed that in case after completion of two years of probation, no such order of extension of probation is passed, then the same shall be construed to be deemed confirmation.

20. The Hon'ble Supreme Court in *High Court of M.P. through Registrar and others Vs. Satya Narayan Jhavar (supra)* has held that in cases where power to extend the period of probation is conferred upon the authority, and if the officer is continued beyond the prescribed or extended period, then he cannot be deemed to be confirmed. In the present case, the discharge of the petitioner has taken place though beyond the period of two years, but before the expiry of three years, as is envisaged in Rule 6 *(supra)* and therefore also, in my considered view, there is no infirmity with the order of dismissal of the petitioner.

21. Therefore, the judgments cited by the learned Senior Counsel for the petitioner thus do not further the cause of the petitioner. In the present case, it is not as if the petitioner was discharged from service beyond the maximum period of probation, as envisaged in Rule 6 (supra), though no order of confirmation stood issued in his favour.

22. At this stage, it is pertinent to refer to a judgment of the Hon'ble Supreme Court in ***University of Rajasthan and another*** Vs. ***Prem Lata Agarwal***, (2013) 3 Supreme Court Cases 705, in which the Hon'ble Supreme Court has held as under:

> *"43. The High Court, as has been stated earlier, has pressed into service Regulation 23 and relying on the same, it has held that the services of the respondents shall be deemed to have been confirmed as in the instant cases the University has never opined that their services were not satisfactory. The language of Regulation 23 is couched in a different manner. It fundamentally deals with the computation of the period of service of an employee. That apart, Regulation 23(b) uses the words "if he is confirmed". It is a conditional one and it relates to officiating services. Both the concepts have their own significance in service jurisprudence. The respondents were not in the officiating service and by no stretch of imagination, they could have been treated to be confirmed because the words "if he is confirmed" required an affirmative fact to be done by the University. The High Court, as we find, has applied the doctrine of deemed confirmation to the case at hand which is impermissible. In this context, we may, with profit, refer to the decision in Head Master, Lawrence School, Lovedale v. Jayanthi Raghu and another[11] wherein it has been ruled thus: -"38....A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed." Thus analyzed, the conclusion of the High Court which also rests on the interpretation of the regulations does not commend acceptation."*

23. In view of above discussion and law discussed above, as there is no merit in the petition, the same is accordingly dismissed, so also miscellaneous applications, if any. No order as to costs.

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

Rajesh Kumar Tekriwal ... Petitioner

Versus

State of Himachal Pradesh & Ors. ... Respondents

CWP No. 9607 of 2012
Date of decision: 18.10.2017

Constitution of India, 1950- Article 226- Respondent No. 2 had invited offers for flats which were to be raised at housing colony HIMUDA Apartment, Kasumpti- petitioner applied for allotment – flat No. 3 category II in Block No. 16 was allotted to the petitioner – the petitioner was told that the block was shifted to hill side – the petitioner claimed that location of flat was changed by respondent No. 2 without informing him– respondent No. 2 stated that the block was shifted as the construction on the earlier plan side was not feasible – the block numbers were also changed due to change in the entire block- respondent No. 3 objected and asked to restore the numbers as per the original plan- the flat numbers were maintained thereafter as per the original plan – held that the question raised by the petitioner involves highly disputed question of facts which cannot be adjudicated in exercise of jurisdiction under Article 226 of Constitution of India- the petition dismissed with liberty to approach the appropriate Court for the redressal of the grievance. (Para- 6 to 11)

Cases referred:
Dharam Dutt and Others Vs. Union of India and Others, (2004) 1 Supreme Court Cases 712
Sanjay Sitaram Khemka Vs. State of Maharashtra and Others, (2006) 5 SCC 255
State of Assam Vs. Bhaskar Jyoti Sarma and Others, (2015) 5 Supreme Court Cases 321
Bank of India Vs. Surendra Steel Industries Private Limited and Others, (2008) 17 Supreme Court Cases 672

For the petitioner: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the respondents: Mr. Vikram Thakur Deputy Advocate General, for respondent No.1.
Mr. Neeraj Gupta, Advocate, for respondent No. 2.
Mr. H.S. Rana, Advocate, for respondent No. 3.
Respondent No. 4 ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral):

The case of the petitioner in brief is that in the year 2009 respondent No. 2 had invited offers for flats which said respondent intended to raise at Housing Colony HIMUDA Apartment Kasumpti. Petitioner also applied for allotment of flat under Partially Self Financing Scheme in the said colony on 08.10.2009. Draw of lots was held on 06.04.2010 as per which, flat No. 3 Category-II in Block No. 16 stood allotted to the petitioner for which he also paid 2% choice money. The tentative cost of the flat was Rs.29,15,000/-. Allotment letter also stood issued to the petitioner dated 21.04.2010 (Annexure P-1). Vide Annexure P-4, the petitioner was informed by respondent No. 2 that Category-II Block No. 16 had been shifted to the hill side as the earlier proposed block was not feasible due to shifting of other blocks. It was also mentioned in the communication that due to shifting of the said block on hill side it will have garage instead of parking floors. Vide Annexure P-5 dated 18.08.2012, the petitioner was further informed that flat numbers have been kept as per allotment i.e. flat No. 1, 3 and 5 towards block and flat No. 2, 4 and 6 towards open side. As per the petitioner, as the location of the flats in Block No. 16 stood altered by respondent No. 2 without informing him, he sought requisite information under the Right to Information Act. According to him, information supplied to him demonstrated that respondent No. 3 had been allotted flat No. 2 which was at the back side of Block No. 16 towards the hill side and he had manipulated the things with respondent No. 2 regarding change of flat which request of his stood accepted without inviting any objections from other allottees. As per the petitioner, he visited the concerned authorities of respondent No. 2 on various occasions who had agreed that flat No. 3 would be allotted to him but the same was not done and accordingly, he was deprived the allotment of the flat which initially stood allotted in his favour. As per the petitioner, this entire exercise was undertaken by respondent No. 2 to confer undue benefit upon respondent No. 3. It is further alleged in the petition that sites for raising construction of flats stood altered without any actual change in the drawing. In this background, the petitioner has filed the present petition praying for the following reliefs:-

"(i) That the respondent No. 1 & 2 may be directed to produce total record of the case;

(ii) That the respondents No. 1 and 2 may kindly be directed to abide by terms and conditions of Scheme under Partially Self Financing Scheme in Housing Colony HIMJUDA Apartment Kausmpti Shimla-9 and accordingly allot flat No. 3 in Block No. 16 to the petitioner and the order which has been passed for allotting flat No. 3 in favour of respondent No. 4 may kindly be set-aside and quashed. The respondents No. 1 and 2 may also be directed to adhere to the terms and conditions of the Scheme.

(iii) That an inquiry may kindly be ordered to be initiated against erring officials of respondent No. 2 who have deviated from the original plan and are trying to give undue advantage to respondent No. 3 and 4.

(iv) That the writ petition may kindly be allowed with costs.

Any other suitable relief which this Hon'ble Court deems fit and proper under the given facts and circumstances of the case may also be passed in favour of the petitioner."

2. In its reply filed by respondent No. 2, the said respondent has denied the allegations levelled by the petitioner. Stand of respondent No. 2 is that as per the original location of Block No. 16, flats No. 1, 3 and 5 were shown adjoining to Block No. 15 and flats No. 2, 4 and 6 were reflected on the open side at the time when choice of flat, block and floor was sought vide Annexure P-3. It is further mentioned in the reply that Block No. 16 was shifted towards hill side as construction of the same was not feasible on the earlier plan site. Shifting of the Block also resulted in the change of the numbering of the flats. It is further mentioned in the reply that respondent No. 3 who was allottee of flat No. 2 in Block No. 16 vide communication dated 26.07.2012 (Annexure R-2/2) objected to the said change in the numbering of the flats and called upon for the restoration of the same as per the original plan. On examination, it was also found that numbering of the flats in Block No. 16 was not shown as per the original lay out plan and thereafter it was decided to change the numbering of the flats as per the original lay out plan and allottees of Block No. 16 were intimated all these facts vide letter dated 18.08.2012 (Annexure P-5). On these basis, it is denied by respondent No. 2 that respondent No. 3 had manipulated the change of flat as was alleged by the petitioner.

3. Respondent No. 3 in its reply has also denied the allegations of the petitioner and has mentioned therein that on account of shifting of Block his position had been altered by respondent No. 2 and in this background, he represented to respondent No. 2 to restore the flat numbers as per the original lay out plan, which was accordingly done by respondent No. 2.

4. These are the respective pleadings of the parties.

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

6. Primarily, the dispute involved is as to whether the petitioner was handed over the flat which in the draw of lots initially was allotted in his favour or with the change of location of the Block, respondent No. 2 in connivance or in order to confer undue advantage upon respondent No. 3, allotted said flat to respondent No. 3 instead of the petitioner as alleged.

7. In my considered view, issue which stands raised by the petitioner herein involves highly disputed questions of fact which cannot be adjudicated by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

8. The scope of interference by this Court under Article 226 of the Constitution of India in matters involving seriously disputed questions of fact stands settled by the Hon'ble Supreme Court. In ***Dharam Dutt and Others Vs. Union of India and Others***, ***(2004) 1 Supreme Court Cases 712***, it was held by Hon'ble Supreme Court that disputed questions of fact which cannot be determined except after taking of evidence are not fit to be taken up for the purpose of adjudication in exercise of writ jurisdiction.

9. Similarly in ***Sanjay Sitaram Khemka Vs. State of Maharashtra and Others***, ***(2006) 5 Supreme Court Cases 255***, it has been held by the Hon'ble Supreme Court that matters involving disputed questions of fact cannot be dealt with in exercise of its power of judicial review by the High Court. Paras 8 and 9 of the said judgment are quoted herein below:

"8. Having regard to the allegations and counter allegations made by the parties before us, we are of the opinion that no releif can be granted to the

Petitioner in this petition. The writ petition has rightly been held by the High Court to be involving disputed questions of fact. The petitioner has several causes of action wherefor he is required to pursue specific remedies provided therefore in law.

9. A Writ Petition, as has rightly been pointed out by the High Court, for grant of the said reliefs, was not the remedy. A matter involving a great deal of disputed questions of fact cannot be dealt with by the High Court in exercise of its power of judicial review. As the High Court or this Court cannot, in view of the nature of the controversy as also the disputed questions of fact, go into the merit of the matter; evidently no relief can be granted to the Petitioner at this stage. We are, therefore, of the opinion that the impugned judgment of the High Court does not contain any factual or legal error warranting interference by this Court in exercise of its jurisdiction under Article 136 of the Constitution.

10. In ***State of Assam Vs. Bhaskar Jyoti Sarma and Others***, ***(2015) 5 Supreme Court Cases 321***, Hon'ble Supreme Court has held as under:-

"19. In support of the contention that the respondents are even today in actual physical possession of the land in question reliance is placed upon certain electricity bills and bills paid for the telephone connection that stood in the name of one Mr Sanatan Baishya. It was contended that said Mr Sanatan Baishya was none other than the caretaker of the property of the respondents. There is, however, nothing on record to substantiate that assertion. The telephone bills and electricity bills also relate to the period from 2001 onwards only. There is nothing on record before us nor was anything placed before the High Court to suggest that between 7-12-1991 till the date the land in question was allotted to GMDA in December, 2003 the owner or his legal heirs after his demise had continued to be in possession. All that we have is rival claims of the parties based on affidavits in support thereof. We repeatedly asked the learned counsel for the parties whether they can, upon remand on the analogy of the decision in Gyanaba Dilavarsinh Jadega, adduce any documentary evidence that would enable the High Court to record a finding in regard to actual possession. They were unable to point out or refer to any such evidence. That being so the question whether actual physical possession was taken over remains a seriously disputed question of fact which is not amenable to a satisfactory determination by the High Court in proceedings under Article 226 of the Constitution no matter the High Court may in its discretion in certain situations enter upon such determination. Remand to the High Court to have a finding on the question of dispossession, therefore, does not appear to us to be a viable solution."

11. In ***Bank of India Vs. Surendra Steel Industries Private Limited and Others***, ***(2008) 17 Supreme Court Cases 672,*** Hon'ble Supreme Court has held:

"At the outset, we would like to emphasise that the High Court erred in at all entertaining the petition of Respondent 1 under Article 226. This was not an appropriate jurisdiction to decide what was essentially a matter of pure contract which involved disputed questions of fact."

12. From above it is clear that it is not appropriate for the High Court to entertain and adjudicate upon petitions which involve disputed questions of fact. In this writ petition the grievance which has been raised by the petitioner involves disputed questions of fact. Whether or not the flat which was initially allotted to the petitioner has been wrongly allotted to respondent No. 3 after the shifting of the Block is a disputed question of fact. Whereas, the petitioner by way of averments made in the petition has tried to justify that a wrong flat stands allotted to him, on the other hand, respondents No. 2 and 3 in their reply have tried to demonstrate that contention of the petitioner is incorrect as he has rightly been handed over the possession of the flat to which he was entitled after the shifting of the Block. All these contentions are undoubtedly

disputed questions of fact which need to be substantiated by the respective parties by leading their respective evidence which cannot be done before this Court in a writ petition.

13. In view of the above discussion, as this writ petition involves highly disputed questions of fact, the same is accordingly dismissed with liberty to approach the appropriate Court of law/forum for the redressal of his grievance which stands raised by way of this writ petition. Miscellaneous applications pending, if any, also stand disposed of.

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

State of Himachal Pradesh. ...Appellant

Versus

Ranjit Singh & Another. ....Respondents

Cr. Appeal No. 385 of 2008
Date of Decision: 18.10.2017

Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3(1)(x)- A complaint was filed stating that the accused entered into the premises of the complainant and demolished a portion of the kitchen constructed by her- they insulted, threatened and mentally harassed her in absence of her sons – the complaint was sent to the police for investigation and after the report was committed to the Special Judge – Special Judge acquitted the accused – aggrieved from the order, present appeal has been filed- held that the complainant had sent a written complaint to various authorities regarding the incident and when no action was taken, private complaint was filed – the witnesses of the complainant have given contradictory version and their statements cannot be relied upon – the Trial Court had rightly acquitted the accused- appeal dismissed. (Para- 6 to 9)

For the Appellant: Mr.Pankaj Negi, Deputy Advocate General.
For the Respondents: Mr.Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (oral)

This appeal has been preferred by State against acquittal of respondents vide judgment dated 29.2.2008 passed in Sessions case No. 8-G/VII/2007, by learned Special Judge, Kangra at Dharamshala in case under Section 3(1)(x) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 read with Section 34 of Indian Penal Code initiated by the complainant by filing a complaint in the Court and also police report filed in pursuance thereto.

2. I have heard learned Deputy Advocate General, for the State and learned counsel for the respondents and also gone through the record.

3. Brief facts of the case are that on 4th July, 2005 complainant PW-1 Smt. Biro Devi had sent an application/written complaint to various authorities including Superintendent of Police Kangra for taking action against Ranjit Singh, respondent No. 1 and his supporters for damaging her property and also to grant of Rs.13,000/- for loss caused to her kitchen by these persons. On 26.9.2005, a private complaint was preferred by PW-1 Biro Devi in the court of learned Sessions Judge (Special Judge exercising the power of Special Court under Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989) Kangra at Dharamshala against respondents Ranjit Singh and Karan Singh, stating therein that both of them, in presence of some police officials accompanying them, entered her premises during night hours and

demolished a portion of kitchen constructed by her and also insulted, threatened and mentally harassed her in absence of her sons by calling her "Tum Chamaro Na Gand Dala Hua Ha". Learned Special Judge had referred this complaint to learned Judicial Magistrate, Dehra for preliminary inquiry, who in turn, after inquiry and police report, committed the case to learned Special Judge against the respondents for commission of offence punishable under Section 3(1)(x) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 read with Section 34 of Indian Penal Code.

4. Learned Special Judge framed charges against the respondents for commission of offence supra, which were denied by the respondents and trial was commenced.

5. Prosecution has examined four witnesses to prove its case and after recording statement under Section 313 Cr.P.C., respondents have not examine any witness in their defence. On conclusion of trial, respondents stand acquitted, hence present appeal.

6. Complainant Smt. Biro Devi has been examined as PW-1. In support of her testimony, her daughter-in-law and daughter have been examined as PW-2 and PW-3. Plea of respondents to discard the evidence of PW-2 and PW-3 on the ground that they are closely related to each other and also with the complainant PW-1 and thus are highly interested witnesses, is not tenable as the statements of interested or related witnesses are not liable to be doubted and rejected outrightly only on the said reason. However, the testimony of such witnesses is required to be scrutinized more carefully.

7. In present case, it is case of the complainant that none else except family members and close relatives of the complainant were present on the spot at the time of alleged incident, therefore, PW-2 and PW-3, in these facts and circumstances, can be considered as most natural witnesses and therefore, their testimony, for having relation with complainant and interest in the subject matter, is not to be rejected. However, for the reasons discussed hereinafter, I find no merit in the appeal and it is liable to be rejected.

8. It is admitted case of PW-1 Biro Devi that immediately after incident on 4.7.2005, she had sent a written complaint to various authorities with respect to the alleged incident. Copy whereof has been proved on record as PW-1/A and for not taking any action on this complaint, she had filed a private complaint Ex. PW-1/D in the Court with respect to the same incident. Perusal of these documents indicates the falsehood of the case of the complainant. Complaint Ex. PW-1/A has been submitted against respondent Ranjit Singh and his supporters, but not against respondent No. 2, Karan Singh, who happens to be Forest Guard, Forest Beat Chhabar at that time. Whereas in complaint Ex. PW-1/D, there is no reference of supporters of Ranjit Singh, but the complaint has been filed against Ranjit Singh and Karan Singh (Forest Guard). No complaint has been filed against those police officials, who were alleged to be instrumental in commission of offence by respondents. Further complaint Ex. PW-1/A is silent about the commission of offence under the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989, as in the entire complaint there is not even a whisper about anything said by respondent No. 1 or his supporters to humiliate the complainant or her family members/relatives, so as to construe that respondents have committed an offence under Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act.

9. Though the delay in lodging complaint by complainant might have been explained on the ground that complainant had filed an application/complaint Ex. PW-1/A on 4.7.2005, immediately after the incident and it was for inaction on the part of authorities/police, the complainant was constrained to file private complaint Ex. PW-1/D on 26.9.2005. However, for material contradictions in these two complaints Ex. PW-1/A and PW-1/D, as discussed supra, testimonies of prosecution spot witnesses i.e. PW-1, PW-2 and PW-3 cannot be relied to convict the respondents for commission of offence charged against them, as these contradictions are basic in nature and affects the genesis of the prosecution story. Therefore, prosecution has failed to prove its case beyond reasonable doubt for want of cogent, reliable, trustworthy and convincing evidence against the respondents.

10. PW-4, Pushp Raj, Secretary Gram Panchayat has been examined to prove payment of house tax by family of complainant. His statement has become irrelevant to determine guilt of respondents for unreliable testimony of complainant.

11. Moreover, respondents have advantage of having acquitted by the trial Court, fortifying presumption of their innocence in their favour and the prosecution has failed to discharge its onus to lead sufficient evidence to rebut such presumption. On scrutiny of evidence on record, it can be said that learned trial Court has appreciated evidence on record completely and correctly. The acquittal of respondents has not caused any travesty of justice or has not caused miscarriage of justice. Therefore, no ground for interference is made out. The appeal is accordingly dismissed. Bail bonds, if any, furnished by or on behalf of respondents are discharged. Records of the Court below be sent back immediately.

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

Kamal Singh & others .....Petitioners.

Versus

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

Cr. Revision No. 222 of 2016
Decided on : 23.10.2017

Code of Criminal Procedure, 1973- Section 319- An application for impleading the accused was filed by the prosecution, which was allowed by the Trial Court- aggrieved from the order, the present petition has been filed contending that the names of the accused were not mentioned in the FIR and the statement made by the complainant in the Court against them cannot be accepted- held that husband of the complainant had written to the Superintendent of police for taking action against the petitioner – nothing was shown in the cross-examination of the complainant to falsify her statement in the examination-in-chief regarding the involvement of the petitioner – there is no infirmity in the order of Trial Court – petition dismissed. (Para-2 and 3)

For the petitioners: Mr. Ashwani Kaundal & Rahul Thakur, Advocates.
For the respondents: Mr. Vivek Singh Attri, Addl. A.G., for respondent No.1.
Mr. Maan Singh, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition is directed against the order recorded by the learned Additional Chief Judicial Magistrate, Nadaun, District Hamirpur, H.P. of 2.7.2016, upon an application preferred before him under Section 319 Cr.P.C., whereby, the State sought the arraying, of, in the array of co-accused, the names of Satish Kumari, Sudesh Kumari and Kamal Singh.

2. The learned counsel appearing for the petitioners has contended that with non occurrence of the names of the aforesaid, in the statement made by the complainant under Section 154 Cr.P.C., hence renders her testification, wherein, she ascribes an inculpatory role in the alleged offences vis-à-vis the petitioners herein, to be infirm, whereafter he proceeds to argue qua, thereupon the order impugned hereat being interfereable. However, the aforesaid contention lacks vigor, for the reasons: (a) A perusal of the record of the Investigating Officer, placed before this Court, by the learned Additional Advocate General, unfolding, the factum of the husband of the complainant, who is narrated in the statement made under Section 154 Cr.P.C.,

to eye witness the occurrence, proceeding to in prompt sequel vis-a-vis the eruption of the incident, make a telephonic communication to the Superintendent of Police concerned, for taking action against the petitioners herein, given their involvement in the relevant incident. (b) Even if the complainant has not proceeded to name the petitioners in the FIR, yet effect thereof is effaced by the aforesaid factum also is benumbed, by, the factum of her testification, occurring in her examination-in-chief, wherein, she unveils the name(s) of the petitioners, not, being concerted to be shred of its efficacy, by, the learned defence counsel comprised in the latter confronting her with her previously rendered statement in writing, whereupon the apt sequel is (c) of the defence conceding to the factum of the aforesaid disclosure being omitted to be scribed by the Investigating Officer and (d) of the previous statement recorded in writing of the complaint, being a sequel, of, the Investigating Officer in scribing it, his not intentionally including the name of the petitioners also his thereafter without reading its contents to the complainant, his obtaining her signatures thereon.

3. In view of the above, the present petition is dismissed. Impugned order stands maintained and affirmed. All pending applications stand disposed of accordingly.

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

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

Prem Dass (deceased) through LRs Dev Raj and others ...Appellant(s)

Versus

State of Himachal Pradesh and another ....Respondents

RSA No. 604 of 2005
Decided on: October 23, 2017

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession pleading that he was owner in possession of the suit land- PWD authorities constructed the Nadaun-Hamirpur highway through the suit land – when the plaintiff came to know about this fact, he requested the defendants to handover the possession but when the possession was not handed over, he filed the civil suit for possession- the defendants pleaded that they are in possession of suit land since 1964 and have become owners by way of adverse possession – the suit was dismissed by the Trial Court – an appeal was filed which was dismissed – held in second appeal that a specific plea of adverse possession was taken but no issue was framed on the basis of same – plaintiff admitted that road was constructed in the year 1960 and he had purchased the land in 1965 – the possession of the land over which the road was constructed was not delivered to him- the entry in the missal hakiyat was recorded in the year 1994-95 but no steps were taken to get the entry corrected – suit for possession was filed after 36 years whereas the suit for possession could have been filed within a period of 12 years – the Courts had properly appreciated the evidence – appeal dismissed. (Para-11 to 37)

Cases referred:

Jai Ram versus State of Himachal Pradesh, Latest Himachal Law Judgments 2005, Volume-II, 835

Vishwanath Bapurao Sabale versus Shalinibai Nagappa Sabale and others, (2009) 12 SCC 101

Pradyumna Mukund Kokil versus State of Maharashtra and others, (2015) 6 SCC 406

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

Prem Singh and Ors. v. Birbal and Ors. [2006 (5) SCC 353

Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161

For the appellants Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the respondents: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of instant Regular Second Appeal under Section 100 of the Code of Civil Procedure, challenge has been laid to judgment and decree dated 2.9.2005 passed by District Judge, Hamirpur, in Civil Appeal No. 6 of 2005, affirming judgment and decree dated 30.9.2004 passed by Civil Judge (Junior Division), Nadaun, District Hamirpur, Himachal Pradesh in Civil Suit No. 84/2001 (RBT No. 674/2003), whereby suit for possession by way of demolition of construction of road over land in dispute, having been preferred by the plaintiff-appellant (hereinafter, 'plaintiff') came to be dismissed.

2. Necessary facts as emerge from the record are that plaintiff filed a suit for possession by way of demolition of construction of road over the land in dispute, averring therein that he is owner-in-possession of the land comprised in Khata No. 2 min. Khatauni No. 5, Khasra No. 142 old, present Khasra No. 300 measuring 0-03-76 hectares and Khasra No. 300/1 measuring 0-00-18 hectares situated in Tika Saloa, Mauza Naunghi, Tehsil Nadaun, District Hamirpur, Himachal Pradesh (hereinafter, 'suit land'). Plaintiff further averred that the PWD authorities by mistake constructed Nadaun-Hamirpur Highway through suit land, instead of constructing aforesaid Highway through the land acquired by HPPWD for the said purpose. Plaintiff further averred that when he came to know about aforesaid mistake committed by HPPWD, he requested concerned Department to hand over the possession of suit land to him and to construct road over the land which was acquired for the purpose, but since defendants failed to hand over possession of the suit land to the plaintiff, he had no option but to file suit for possession by way of demolition of constructed road on the suit land. As per plaintiff, cause of action arose to him in August, 1998 onwards when factum with regard to construction of road over suit land owned and possessed by him came to his notice for the first time.

3. Defendants by way of written statement refuted the aforesaid claim of the plaintiff, raising therein preliminary objections of cause of action, non-joinder of necessary parties and limitation. Defendants further averred in the written statement that they are in possession of the land prior to the year 1964 and as such, they have become owner with the afflux of time. Defendants further claimed that the suit land is in possession of HPPWD as *Gair Mumkin Sadak*, since 1960 and at present same is part of NH No. 70 and entries in the revenue record reflect factual position on the spot. Defendants further claimed before the court below that at no point of time, plaintiff ever objected to the possession of the defendants. Moreover, their possession qua suit land is open, continuous and hostile to the knowledge of the plaintiff and as such, same has ripened into perfect title and they have become owners by way of adverse possession. Defendants specifically claimed before the Court below that the suit of the plaintiff is barred by limitation as road is existing over the suit land since 1964 and at no point of time, plaintiff or other cosharers raised objection qua the construction/alignment of road as such, suit is liable to be dismissed being not maintainable.

4. Plaintiff by way of replication reasserted his claim and denied the contents of written statement in toto.

5. Learned trial Court below on the basis of pleadings adduced on record by the respective parties, framed following issues on 1.8.2002:

"1. Whether the plaintiff is entitled for the relief of possession by way of demolition of the constructed road through the suit land as alleged? **OPP**

2. Whether the plaintiff has no cause of action to file the suit? **OPD**

3. Whether the suit is bad for non-joiner of necessary parties? **OPD**

4. Whether the suit is barred by limitation? **OPD**

5. Relief."

6. Learned trial Court, subsequently, vide judgment and decree dated 30.9.2004, on the basis of evidence adduced on record by the respective parties, dismissed the suit having been preferred by the plaintiff. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, plaintiff preferred an appeal under Section 96 CPC, before the learned District Judge. However, the fact remains that same was also dismissed, as a result of which, judgment and decree dated 30.9.2004 passed by learned trial Court came to be upheld. In the aforesaid background, plaintiff has approached this Court, by way of instant Regular Second Appeal, praying therein for decreeing the suit after setting aside the judgments and decrees passed by both the learned Courts below.

7. This Court, vide order dated 14.9.2007, admitted the instant Regular Second Appeal, on the following substantial questions of law:

"1. Whether there has been misreading of evidence by both the courts below?

2. Whether long possession of the defendants itself is not a bar for awarding decree for possession by plaintiff on the basis of title?"

8. Mr. G.D. Verma, learned Senior Advocate duly assisted by Mr. B.C. Verma, Advocate, vehemently argued that the impugned judgments and decrees passed by learned Courts below are not sustainable in the eye of law as such same are liable to be set aside. While referring to the judgments and decrees passed by the learned Courts below, Mr. Verma, learned Senior Advocate, contended that the inferences and conclusions drawn by the learned Courts below are neither supported by material on record, nor by any provisions of law. He further contended that both the learned Courts below have failed to appreciate real point of controversy and as such, findings returned by the learned Courts below are vitiated on account of misreading, misappreciation and misconstruction of pleadings of parties as well as oral and documentary evidence available on record. Mr. Verma, learned Senior Advocate, contended that since plea of adverse possession advanced by the defendants is/was not accepted by the learned Courts below, and plaintiff has been held to be owner-in-possession by the learned Courts below, as such, learned Courts below ought to have granted decree for possession in favour of the plaintiff on the basis of title qua the suit land. While referring to the findings returned by the learned Courts below with regard to limitation, learned Senior Advocate contended that there is no limitation for claiming possession of property on the basis of title, as such, observation/ finding returned by the learned Courts below that suit for possession could be filed within period of 12 years, is not sustainable and as such same deserve to be set aside. Learned Senior Advocate further contended that plea of estoppel as raised by the both the learned Courts below against the plaintiff is totally erroneous and illegal because plea of estoppel can not be allowed to be raised against legal right, especially when title of the plaintiff over the suit land has neither been disputed nor there is any material on record on the basis of which, plaintiff could be held debarred from getting relief of possession. While concluding his arguments, Mr. Verma, learned Senior Advocate, forcefully contended that in a welfare State, no citizen can be deprived of his property without following due process of law and it has been repeatedly held by this Court as well as Hon'ble Apex Court that acquisition proceedings should be started and amount of compensation should be paid to the individual if the land is utilized for any public purpose. Learned Senior Advocate, further contended that findings returned by the learned District Judge while upholding the judgment and decree of trial Court, are totally erroneous and wrong because same are not borne out of record. Learned Senior Advocate, further contended that decree for possession could not be denied merely on the ground of delay and laches because our own High Court in a judgment in case titled as **Jai Ram** versus **State of Himachal Pradesh**, Latest Himachal Law Judgments 2005, Volume-II, 835, has held that delay and laches would not be a

bar for grant of relief of possession, especially to the true owner of the property. In support of aforesaid arguments, Mr. Verma, learned Senior Advocate, placed reliance upon following judgments passed by the Hon'ble Apex Court as well as this Court:

i). Vishwanath Bapurao Sabale versus **Shalinibai Nagappa Sabale and others**, (2009) 12 SCC 101

ii). Pradyumna Mukund Kokil versus **State of Maharashtra and others**, (2015) 6 SCC 406

iii). Jai Ram versus **State of Himachal Pradesh**, Latest Himachal Law Judgments 2005, Volume-II, 835

9. Mr. M.L. Chauhan, learned Additional Advocate General, while refuting aforesaid submissions having been made by Mr. G.D. Verma, learned Senior Advocate, contended that there is no illegality or infirmity in the judgments and decrees passed by learned Courts below, as such, instant appeal deserves to be dismissed. While referring to the findings/ reasoning given by the learned Courts below while rejecting claim of the plaintiff, Mr. Chauhan contended that it is quite apparent from the reading of aforesaid judgment passed by learned Courts below that both the learned Courts below have carefully dealt with each and every aspect of the matter meticulously and there is no scope of interference, whatsoever, especially in view of concurrent findings of facts and law recorded by both the learned Courts below. Mr. Chauhan, learned Additional Advocate General, while referring to the statement of PW-1, strenuously argued that the plaintiff himself admitted before the learned trial Court that road on suit land came to be constructed in the year 1960, whereafter, traffic is plying on the road since the year 1964. He further contended that it has specifically come in the cross-examination of PW-1 that he had purchased suit land from the original owner after construction of road i.e. 1965 as such, learned Courts below rightly held him not entitled for relief of possession after dismantling the road constructed over the suit land. Mr. Chauhan, while inviting attention of this Court to the pleadings adduced on record by respective parties, vehemently argued that it stands duly proved on record that road came to be constructed on suit land in the year 1960 and at no point of time, objection if any, was either raised by the original owner or thereafter by the plaintiff as such, learned Courts below rightly rejected the plea of the plaintiff that he is entitled to possession of the suit land. Mr. Chauhan, further contended that as per plea set up by plaintiff, he came to know about change in revenue entry in the year 1998, but even thereafter, instant suit came to be filed in the year 2001 i.e. after three years, but perusal of the pleadings as well as evidence adduced on record by the plaintiff nowhere suggests that explanation, if any, is/was, rendered on record with regard to delay in filing the suit, especially when it has come in his cross-examination that he had purchased the suit land from the original owner after construction of road. While placing reliance upon ***Laxmidevamma and Others vs. Ranganath and Others,*** (2015)4 SCC 264, Mr. Chauhan, stated that in view of concurrent findings of facts and law recorded by both the learned Courts below, present appeal deserves to be dismissed outrightly.

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

11. This Court solely with a view to find answer to the aforesaid substantial questions of law, carefully examined the pleadings and evidence adduced on record by the respective parties vis-à-vis impugned judgments and decrees passed by learned Courts below, perusal whereof certainly does not persuade this Court to agree with the contentions having been raised by the learned counsel representing the plaintiff that both the learned Courts below have misread, misconstrued and misappreciated the evidence led on record by respective parties, as a result of which, erroneous findings have come on record, rather, this Court, after having perused entire record is convinced and satisfied that both the learned Courts below have dealt with each and every aspect of the matter meticulously and there is no scope left for this Court to interfere in the matter, especially in view of concurrent findings of facts recorded by the learned Courts below.

12. This Court finds from the record that though defendants, while refuting the claim of the plaintiff specifically raised plea of adverse possession, but no specific issue was framed in this regard by the courts below. Plaintiff, specifically claimed before the Courts below that he is owner of the suit land alongwith other cosharers and authorities of Public Works Department have constructed road from Nadaun to Hamirpur through suit land, without adopting due process of law. As per plaintiff, authorities, instead of constructing road through land acquired for the purpose, constructed the same through suit land by mistake, which fact came to his knowledge in August, 1998. Defendants claimed that they are coming in peaceful possession of suit land, since 1960 and they have become owner by way of adverse possession. Since, at no point of time, plaintiff objected to the construction of road, suit is barred by doctrine of acquiescence and laches.

13. Plaintiff, with a view to prove his case, examined himself as PW-1 and reiterated the contents of the plaint that he is owner-in-possession of the suit land. He also deposed before the Court below that in August, 1998, he came to know that PWD has constructed road through his land, whereafter, he requested department to hand over possession of the suit land to him and construct road through the land acquired by them for the purpose. Plaintiff, with a view to prove that factum with regard to PWD having constructed road through suit land came to his knowledge only in the year 1998, also placed on record *Missal Hakiyat* as Exhibit P1, wherein note came to be appended that suit land bearing Khasra No. 300/1 measuring 00-00-18 hectares has been ordered to be recorded in the possession of the HPPWD.

14. Interestingly, aforesaid witness in his cross-examination categorically admitted that road in question came to be constructed in the year 1960 and he had purchased suit land after construction of road in 1965. Most importantly, it has come in his cross-examination that he did not take possession of the land, over which road was constructed. Similarly, this witness admitted in cross-examination that he does not know whether PWD had paid compensation, if any, to the land owners, at the time of construction of road or not.

15. Leaving everything aside, this witness, in his cross-examination, admitted that since the time of construction of road, PWD is in possession of the suit land. To the contrary, defendants specifically proved on record by leading evidence in the shape of DW-1 i.e. Assistant Engineer, PWD that vehicles on the road are plying since the year 1964 and at not point of time, plaintiff ever raised any objection for the construction of this road through suit land. This witness further deposed before the Court below that in the year 1998, possession qua the suit land came to be entered in the name of PWD in the revenue record. During cross-examination, this witness admitted that during settlement operations, entries were effected as per spot position. Though, aforesaid witness feigned ignorance that plaintiff came to know of construction of road in the year 1998, but stated before Court below that road is in existence since 1960.

16. At this stage, it may be observed, at the cost of repetition, that no findings qua the plea of adverse possession taken by defendants are/were returned by the learned Courts below and no specific issue qua this plea is/was framed, rather, suit of the plaintiff came to be dismissed on the ground of delay and laches. Needless to add, suit for possession could be filed within 12 years from the date of knowledge, but in the case at hand, plaintiff was unable to place on record evidence, much less convincing evidence to demonstrate that he had no knowledge about construction of road through suit land, till the year 1998. As has been taken note above, it has specifically come in the cross-examination of PW-1 that road in question came to be constructed in the year 1960 and he had purchased suit land after construction of road in 1965.

17. It is not understood that when factum with regard to construction of road in the year 1960 was within knowledge of the plaintiff, how he could claim that he acquired knowledge about construction of road over the suit land in 1998.

18. Similarly, perusal of Exhibit P1 clearly suggests that entry of possession in favour of the defendants qua the suit land came to be reflected in *Missal Hakiyat* in the year 1994-95, but even thereafter, no steps, whatsoever were taken by the plaintiff to get the entry

corrected in the revenue record. Plaintiff himself admitted in his cross-examination that he purchased suit land after construction of road in the year 1965, but, interestingly, neither sale deed is/was placed on record nor original owner is/was examined to prove on record that no compensation, if any, was received by the original owner qua the land actually used by the defendants for the construction of road in question.

19. Interestingly, there is no suggestion put to DW-1 i.e. Assistant Engineer that road in question came to be constructed on the land other than the one acquired for the purpose of construction of the road. As per plaintiff, he purchased suit land after construction of road in the year 1965, but there is nothing on record suggestive of the fact that prior to purchase of suit land, effort if any was made by the plaintiff to verify the title of the suit land.

20. Mr. G.D. Verma, learned Senior Advocate, contended that evidence, if any, with regard to compensation, if any, to the original owner qua suit land was required to be adduced on record by the defendants to demonstrate that due and admissible compensation is/was paid to the original owner qua the suit land, but aforesaid plea deserves to be rejected outrightly on the ground that onus, if any, to prove that no admissible and due compensation is/was paid to the original owners/plaintiff by the defendants qua the suit land, is/was upon the plaintiff, who filed the suit for possession, by way of demolition of the road over the suit land.

21. True it is, that there is no specific finding returned by the learned Courts below with regard to plea of adverse possession raised by the defendants and qua the title of the plaintiff but, that could not be sole criteria for the learned Courts below to grant decree of possession in favour of the plaintiff that too after expiry of 12 years from the date of knowledge with regard to construction of road on the suit land. Since it stands duly proved on record that the plaintiff had purchased suit land after construction of the road, it was incumbent upon the plaintiff to examine original owner as witness to prove on record that he /they had not given any consent for construction of road through the suit land, but, interestingly, as has been taken note above, no endeavour is/was made on behalf of the plaintiff to examine the original owner.

22. Though, this court, after having carefully perused statements/ admissions made in the cross-examination is fully convinced and satisfied that the road in question came to be constructed in the year 1960, has no hesitation to conclude that plaintiff had full knowledge with regard to construction of road, prior to the year 1998, but, even otherwise, if this plea is accepted that he was unaware of the fact that road came to be constructed over suit land till the year 1998, even then there is no cogent and convincing evidence led on record by the plaintiff in this regard to demonstrate that he acquired knowledge with regard to construction of road only in the year 1998. It is not in dispute that road in question is in existence since 1960 and traffic is plying on road after 1964, there is no evidence adduced on record by the plaintiff to demonstrate that after having purchased suit land from the original owner, he raised objection, if any, with regard to existence of road over the suit land. Since as per own admission of the plaintiff, he had purchased suit land after construction of road in the year 1965, it is not understood that why he kept mum for such a long time and during this period why no steps were taken by him to either get revenue record corrected or to initiate proceedings, if any, against the defendants, for vacation of the suit land.

23. In the case at hand, suit for possession came to be filed in 2001, i.e. after 36 years, whereas suit for possession could only be filed within a period of 12 years from the date of knowledge. In the case at hand, plaintiff was not able to prove on record by leading cogent and convincing evidence that he had no knowledge about construction of road through suit land, till the year 1998 and as such, learned Courts below rightly held that it can be presumed that he had knowledge of existence of road through suit land, from the very beginning and he slept over the matter for years together.

24. This court, after having carefully gone through the evidence led on record by respective parties sees no illegality or infirmity in the findings returned by learned Courts below

that suit of the plaintiff is hopelessly barred by doctrine of acquiescence and laches as such, plaintiff is not entitled for possession of suit land, as claimed by him.

25. Mr. G.D. Verma, learned Senior Advocate, while placing reliance upon judgment passed by Hon'ble Apex Court in **Vishwanath Bapurao Sabale** versus **Shalinibai Nagappa Sabale and others**, (2009) 12 SCC 101, contended that there is no limitation for suit, if any, filed on the basis of title.

26. Hon'ble Apex Court, in the judgment referred herein above, while dealing with plea of adverse possession taken by the appellant-defendant held that for claiming title by way of adverse possession, it was necessary for the plaintiff to plead and prove *Animus Possidendi*. Peaceful, open and continuous possession being ingredients of adverse possession, long possession by itself would not be sufficient to prove adverse possession as contained in the maxim, *Nec vi, nec clam, nec precario*, long possession by itself was not sufficient to prove adverse possession.

27. In the aforesaid judgment, Hon'ble Apex Court further held that the suit of respondent-plaintiff was based upon title and his title was proved, as such, onus was upon the appellant-defendant to prove his adverse possession over the property in question. Hon'ble Apex Court, in the aforesaid judgment, taking note of judgment in **Prem Singh and Ors**. v. **Birbal and Ors**. [2006 (5) SCC 353], held that if the plaintiff is in possession of a property, he may file a suit for declaration that the deed is not binding upon him but if he is not in possession thereof, even under a void transaction, the right by way of adverse possession may be claimed. Thus, it is not correct to contend that the provisions of the Limitation Act would have no application at all in the event the transaction is held to be void. The Hon'ble Apex Court held as under:

> "20. The suit filed by Nagappa however was based on title. Once he proved his title the onus was on Laxmibai and consequently upon the appellant to prove that they started possessing adversely to the interest of Shivappa. For the purpose of arriving at a finding as to whether appellant and Laxmibai perfected their title by adverse possession, the relationship of the parties may have to be taken into consideration.
>
> 21. It must also be borne in mind that factum of execution of the documents being not in question, it was also expected that Bapurao and after his death Laxmibai would file a suit for cancellation of those documents in terms of Section 31 of the Specific Relief Act, 1963.
>
> 22. In Prem Singh and Ors. v. Birbal and Ors. [2006 (5) SCC 353], this court held :
>
> "20. If the plaintiff is in possession of a property, he may file a suit for declaration that the deed is not binding upon him but if he is not in possession thereof, even under a void transaction, the right by way of adverse possession may be claimed. Thus, it is not correct to contend that the provisions of the Limitation Act would have no application at all in the event the transaction is held to be void.
>
> 21. Respondent 1 has not alleged that fraudulent misrepresentation was made to him as regards the character of the document. According to him, there had been a fraudulent misrepresentation as regards its contents.
>
> 22. In Ningawwa v. Byrappa Shiddappa Hireknrabar this Court held that the fraudulent misrepresentation as regards character of a document is void but fraudulent misrepresentation as regards contents of a document is voidable stating: (SCR p. 801 C- D) "
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> > "5. The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable."

In that case, a fraud was found to have been played and it was held that as the suit was instituted within a few days after the appellant therein came to know of the fraud practised on her, the same was void. It was, however, held: (SCR p. 803 B-E)

> "7. ...Article 91 of the Limitation Act provides that a suit to set aside an instrument not otherwise provided for (and no other provision of the Act applies to the circumstances of the case) shall be subject to a three years' limitation which begins to run when the facts entitling the plaintiff to have the instrument cancelled or set aside are known to him. In the present case, the trial court has found, upon examination of the evidence, that at the very time of the execution of the gift deed, Ext. 45 the appellant knew that her husband prevailed upon her to convey Surveys Plots Nos. 407/1 and 409/1 of Tadavalga village to him by undue influence. The finding of the trial court is based upon the admission of the appellant herself in the course of her evidence. In view of this finding of the trial court it is manifest that the suit of the appellant is barred under Article 91 of the Limitation Act so far as Plots Nos. 407/1 and 409/1 of Tadavalga village are concerned."
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> 27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption.
>
> 28. If a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly conveyed thereunder. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial court.(emphasis in original)"

28. This Court, after having carefully perused the law laid down by the Hon'ble Apex Court in the aforesaid judgment is unable to accept the aforesaid contention of Mr. Verma, learned Senior Advocate that Limitation Act would have no application if suit is filed on the basis of title.

29. While placing reliance upon the judgment passed by Hon'ble Apex Court in **Pradyumna Mukund Kokil** versus **State of Maharashtra and others**, (2015) 6 SCC 406, Mr. G.D. Verma, learned Senior Advocate contended that it has been held that government should not raise plea of limitation. Law laid down by the Hon'ble Apex Court, in the aforesaid judgment is not applicable at all in the present case. Hon'ble Apex Court in the aforesaid judgment has not touched the aspect, if any, of plea of limitation, rather, Hon'ble Apex Court has held that it was not proper on the part of High Court to permit the Municipal Corporation to raise plea of adverse possession and Government body/State authority can not take possession of somebody's land, without due process of law. The Hon'ble Apex Court has held as under:

> "3. The only objection which the learned counsel for the appellant has raised is about the observation made in paragraph 27(b) of the impugned Judgment with regard to adverse possession of the Municipality. According to Respondent No.3–Municipal Corporation, the Corporation was in possession of the land belonging to the appellant.
>
> 4. The appellant claims to be the owner of the land in question and even as per the Revenue Records, the appellant appears to be the owner.
>
> 5. In our opinion, it was not fair on the part of the High Court to permit Respondent No.3 – Municipality to raise a plea with regard to adverse possession. It would not be proper on the part of the Government body or any state authority to take possession of somebody's land without following due process of law and

even if a citizen has permitted his land being used by a government authority, the authority should not take undue advantage thereof at the time of giving compensation when the said land is acquired."

30. Since, other judgments cited by Mr. Verma, learned Senior Advocate, directly relate to the plea of adverse possession as such, same are not required to be considered and looked into in view of no findings having been returned by both the learned Courts below qua plea of adverse possession raised by the defendants. In the case at hand, suit of plaintiff filed for possession came to be rejected on the doctrine of acquiescence and laches and as such, there is no occasion for this Court to go into question of adverse possession, which plea has been virtually not taken note by the learned Courts below, while dismissing the suit of the plaintiff.

31. In view of detailed discussion made herein above, this Court is not inclined to accept the contention of learned Senior Advocate representing the plaintiff that the learned Courts below misread, misconstrued and misappreciated the evidence while dismissing the suit of the plaintiff, rather, this Court is persuaded to hold that both the learned Courts below have appreciated evidence in its right perspective and have dealt with each and every aspect of the matter meticulously.

32. Since, plea of adverse possession as raised by the defendants has not been taken note by the learned Courts below, this Court, is not called upon/required to answer substantial question of law No.2, which directly relates to long possession of the defendants. Otherwise also, as has been discussed herein above, defendants have successfully proved on record that they are coming in possession of the suit land since the year 1960 and no steps whatsoever are/were taken by the plaintiff to get the suit land vacated in accordance with law till the year 2001, i.e. when suit for possession by way of demolition of road constructed over suit land, came to be filed after 36 years. Substantial question of law No.1 is answered accordingly.

33. Before adverting to the merits of the case, it would be appropriate to deal with the specific objection raised by the learned counsel representing the respondents with regard to maintainability and jurisdiction of this Court, while examining the concurrent findings returned by both the Courts below. Mr. Chauhan, 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)***

34. 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, but as emerges from the case referred above,

there is no complete bar for this Court to upset the concurrent findings of the Courts below, if the same appears to be perverse.

35. In this regard reliance is placed upon judgment passed by Hon'ble Apex Court in ***Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161*** wherein the Court held:

> ***"35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)***
>
> ***"24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:***
>
> ***(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.***
>
> ***(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.***
>
> ***(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."***
>
> ***We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same."*** (pp.174-175)

36. 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.

15) It is more so when these findings were neither found to be perverse to the extent that no judicial person could ever record such findings nor these findings were found to be against the evidence, nor against the pleadings and lastly, nor against any provision of law."

37. 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, same deserve to be upheld.

38. In view of the detailed discussion and law as referred to above, there is no merit in the present appeal, which is accordingly dismissed. Judgments and decrees passed by the learned Courts below are upheld. Pending applications, if any, are also disposed of. Interim directions, if any, are vacated.

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

Hitender Walia ...Petitioner

Versus

Ashok Kumar ...Respondent

Cr. MMO No. 167 of 2017
Decided on : 25.10.2017

Code of Criminal Procedure, 1973- Section 311- An application for allowing the accused to confront the complainant with the document was filed after recording the statement under Section 313 Cr.P.C., which was rejected – held that the documents were exhibited in the presence of the accused and his counsel – no objection was raised at that time and the application was rightly rejected – it was further stated that the question regarding the financial capacity could not be put to the complainant , therefore permission be granted to put the question regarding the financial status of the complainant – the accused was accompanying the advocate at the time of cross examination – mere change of counsel cannot given a right to recall the evidence – the application was rightly rejected- the order of the Court upheld, however, liberty granted to file an application for comparison of the signatures. (Para-1 and 2)

For the petitioner : Mr. Ashok K. Tyagi, Advocate.
For the respondent : Ms. Shalini Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The petitioner/accused is facing charges for committing an offence punishable under Section 138 of the Negotiable Instruments Act. The respondent/complainant had adduced

his evidence upon the charge. The learned counsel for the petitioner/accused, had, also cross-examined the complainants' witnesses. However, after completion of proceedings drawn under Section 313 Cr.P.C., an application was instituted before the learned trial Magistrate, application whereof is cast under the provisions of Section 311 Cr.P.C., wherein a prayer was made, of, the petitioner/accused being permitted to confront the complainant, with documents borne in Ext. in CW-1/B to CCW-1/E and in CW-1/F-1 to CW-1/F-2. Since the tendering(s), of, all the aforesaid documents also embossing(s) thereupon of exhibition marks, occurred, in the presence of the learned defence counsel who, (i) as evident from a perusal of the zimani orders, thereat, remained accompanied by the petitioner/ accused, thereupon with neither the defence counsel nor the petitioner/accused, making, any protests qua tendering(s) of the aforesaid documents nor making any protest, for, exhibition marks being made thereon, thereupon the prayer made in the application for the accused being permitted to confront the complainant with the aforesaid exhibits, stands aptly rejected. Significantly, also for the reason, of, the apposite documents, purportedly signatured by the accused, not, amenable of being proved to be not signatured by the accused, merely upon, his being permitted to confront therewith, the complainant, (ii) rather dehors tendering thereof(s) besides embossing(s) of exhibition marks thereon, the best evidence in respect of the accused, proving of, the apposite documents being not signatured by him would, (iii) erupt evidently upon a reference being made to the hand writing expert, (iv) especially when in respect thereof, the petitioner/accused has made a statement in proceedings drawn under Section 313 Cr.P.C. Since the aforesaid remedy, is still available for being canvassed by the petitioner/accused, by, his motioning the learned trial Magistrate, thereupon the refusal of relief in respect of the respondent/complainant being re-summoned, for, his being confronted with the aforesaid documents, is, to be concluded to be not wanting in any illegality.

2. The further relief claimed in the application, cast, under the provisions of Section 311 Cr.P.C., was, for the petitioner/accused being permitted to re-cross-examine the respondent/complainant, in respect of his financial capacity, to defray a loan vis-à-vis the petitioner/accused. The reason(s) for making the aforesaid prayer, is, a sequel of one Sandeep Aggarwal, Advocate along with petitioner/accused while conducting the cross-examination, of, the respondent/ complainant, his thereat omitting to put suggestions apposite thereto vis-a-vis the respondent/complainant. Since, as aforestated Mr. Navneet Aggarwal, Advocate at the stage of his holding the respondent/complainant, to cross-examination, was accompanied by the petitioner/accused, also when he thereat omitted to put questions appertaining to his financial capacity to defray a loan vis-à-vis the accused renders omissions thereof being construable to arise not from any indiligence or incompetence, of ,one Mr. Sandeep Aggarwal, Advocate, rather being construable, to, arise from a mis-communication inter-se both besides (i) omission(s) in respect thereto rather are to be construed to through, the instant application beget untenable curings thereof, from, hence a sheer afterthought, on the part of the petitioner/accused. Also, the reason as made out in the application, of, one Mr. Sandeep Aggarwal, Advocate, who conducted the cross-examination of the respondent/complainant AND who upon holding him to cross-examination, thereat omitted to put the aforesaid suggestions, of, hence thereupon his lacking the legal capacity, cannot be accepted on the ground, of, it being also engendered by afterthought, given nowat, also Mr. Sandeep Aggarwal, Advocate, representing the accused. Consequently the impugned order is affirmed and maintained. However, liberty is reserved to the petitioner/accused, to, through an appropriate application filed before the learned trial Magistrate, under, Section 45 of the Evidence Act, seek in accordance with law, determination of veracity(s) of his authoring the apposite documents, purportedly carrying his signatures. All pending applications stand disposed of accordingly.

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

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J

Smt. Phullu Devi & another ....Petitioners
Versus
Piare Lal Sharma & others ....Respondents

Execution Petition No.7 of 2017
Decided on: 27.10.2017

High Court of Himachal Pradesh (Original Side) Rules, 1997- Rule 16(i)- Present petition has been filed for execution of the judgment passed by the High Court in FAO – it has been stated that award was modified by the High Court and the execution lies before the High Court – held that execution of the decree or order passed in the appeal is to be carried out by the court exercising original jurisdiction at the first instance- petition dismissed. (Para-4 to 6)

For the petitioners : Mr. G.R. Palsra, Advocate.
For the Respondents: None.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. *(Oral)*

Heard.

2. This petition has been filed under Rule 16(i) of Part-C of the High Court of Himachal Pradesh (Original Side) Rules, 1997, for execution of judgment dated 07.04.2017, passed by this Court in FAO No. 431/2010, titled as Piare Lal Sharma versus Smt. Phullu Devi and others, arising out of award 26.10.2002, passed by the Motor Accident Claims Tribunal-II, Mandi, in Claim Petition No. 64 of 1998, titled as Smt. Phullu Devi and another versus Sh. Piare Lal Sharma and others.

3. Mr. G.R. Palsra, learned Counsel appearing on behalf of the petitioner submits that as the aforesaid award was modified by this Court, the execution lies in this Court.

4. The plea of the learned Counsel for the petitioner is mis-conceived, as Rule 16(i) of Part-C of the High Court of Himachal Pradesh (Original Side) Rules deals with the execution of orders passed by this Court, exercising its original side jurisdiction under Section 226 of the Constitution of India. Rule 16(i) of Part-C of the aforesaid Rules reads as under.

> ***" Application for Execution of order how made—((i) Any party to a proceeding under Art. 226 of the Constitution of India desiring to obtain execution of any order passed under Art. 226 of the Constitution of India, including any order as to costs, shall apply to the court by a stamped application which shall be supported by an affidavit of the applicant regarding the non-satisfaction of the order and shall also be accompanied by a certified copy of the order."***

5. It is settled that the execution of the decrees or orders, even passed in an appeal, are to be executed by the Court having the original jurisdiction, at the first instance.

6. Therefore, execution in an award passed under the Motor Vehicles Act, 1988 by a Motor Accident Claims Tribunal is to be filed before the concerned Motor Accident Claims Tribunal.

7. Accordingly, the present petition is dismissed.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. ...Appellant.
Versus
Raj Kumar ...Respondent.

Cr. Appeal No.432 of 2010
Judgment reserved on: October 10, 2017
Date of Decision: October 27, 2017

Indian Penal Code, 1860- Section 498-A and 306- Deceased and accused were married to each other for more than 18 years – the deceased set herself on fire after pouring kerosene oil – she was taken to hospital where she succumbed to her injury – the accused was tried and acquitted by the Trial Court- held in appeal that the statement of the deceased was recorded by the I.O. after obtaining fitness from the Medical Officer – the Medical Officer deposed that the deceased was admitted with the history of suicidal burns by pouring kerosene oil on her body after she had an argument with her husband- PW-14 also proved that accused was standing outside and the deceased was lying on the road – accused was asking the deceased to go home – the deceased committed suicide afterwards – the deceased had lodged a complaint with the women police cell but the same was not pressed – it was also established that sum of Rs. 5 lacs was paid by the parents of the deceased to the accused- dying declaration clearly implicated the accused – minor contradictions are not sufficient to doubt the prosecution version – Trial Court had wrongly held that dying deceleration was not voluntary – the prosecution version was proved beyond reasonable doubt – appeal allowed – accused convicted of the commission of offences punishable under Section 498-A and 306 of I.P.C. (Para-7 to 74)

Cases referred:
M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200
Madan Gopal Makkad v. Naval Dubey and another, (1992) 3 SCC 204
Munnu Raja and another v. The State of Madhya Pradesh, (1976) 3 SCC 104
Ramawati Devi v. State of Bihar, (1983) 1 SCC 211
Sohan Lal alias Sohan Singh and others vs. State of Punjab, (2003) 11 SCC 534
State of Karnataka vs. Shariff, (2003) 2 SCC 473
Dayal Singh vs. State of Maharashtra, (2007) 12 SCC 452
Kanti Lal vs. State of Rajasthan, (2009) 12 SCC 498
Gulam Hussain and another vs. State of Delhi, (2000) 7 SCC 254
Jaishree Anant Khandekar vs. State of Maharashtra, (2009) 11 SCC 647
Tapinder Singh vs. State of Punjab & another, AIR 1970 S.C. 1566
Khushal Rao vs. State of Bombay, AIR 1958 SC 22
Harbans Singh and another vs. The State of Punjab, AIR 1962 SC 439
Ram Nath vs. State of Madhya Pradesh, AIR 1953 SC 420
Paniben (Smt.) vs. State of Gujarat, (1992) 2 SCC 474
Jayabalan vs. Union Territory of Pondicherry, (2010) 1 SCC 199
Krishan vs. State of Haryana, (2013) 3 SCC 280
Mohanlal Gangaram Gehani vs. State of Maharashtra, (1982) 1 SCC 700
Puran Chand vs. State of Haryana, (2010) 6 SCC 566
Dandu Lakshmi Reddy vs. State of A.P. (1999) 7 SCC 69
Sanjay vs. State of Maharashtra, (2007) 9 SCC 148]
State of Rajasthan v. Shravan Ram and another, (2013) 12 SCC 255
Jai Karan vs. State of Delhi (MCT), (1999) 8 SCC 161

Sham Shankar Kankaria vs. State of Maharashtra, (2006) 13 SCC 165
Mohammed Asif vs. State of Uttaranchal, (2009) 11 SCC 497.
Laxman vs. State of Maharashtra, (2002) 6 SCC 710
Paparambaka Rosamma vs. State of A.P. (1999) 7 SCC 695
Koli Chunilal Savji vs. State of Gujarat, (1999) 9 SCC 562
Ravi and another vs. State of T.N. (2004) 10 SCC 776
Kamalavva and another vs. State of Karnataka, (2009) 13 SCC 614.
Shaik Nagoor vs. State of Andhra Pradesh represented by its Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2008) 15 SCC 471
Sukanti Moharana vs. State of Orissa, (2009) 9 SCC 163
Nallapati Sivaiah vs. SDO, (2007) 15 SCC 465
Lakhan vs. State of Madhya Pradesh, (2010) 8 SCC 514
Ram Bihari Yadav Vs. State of Bihar and others, (1998) 4 SCC 517
K.Ramachandra Reddy and another vs. The Public prosecutor, (1976) 3 SCC 618
Mohan Lal and others vs. State of Haryana (2007) 9 SCC 151
Maiben D/o Danabhai Tulshibai Maheria vs. State of Gujarat, (2007) 10 SCC 362
Ramakant Mishra @ Lalu & others vs. State of Uttar Pradesh, (2015) 8 SCC 299
State of West Bengal Vs. Orilal Jaiswal (1994) 1 SCC 73
Arun Vyas & anr. Vs. Anita Vyas (1999) 4 SCC 690
Kundula Bala Subrahmanyam and Anr. Vs. State of Andhra Pradesh (1993) 2 SCC 684
Mohd. Hoshan A.P. & Anrs. Vs. State of A.P. (2002) 7 SCC 414
State of A.P. Vs. M. Madhusudhan Rao (2008) 15 SCC 582
Balram Prasad Agrawal Vs. State of Bihar & Ors. (1997) 9 SCC 338
Arvind Singh Vs. State of Bihar (2001) 6 SCC 407,
Ramesh Kumar vs. State of Chhatisgarh, (2001) 9 SCC 618
Gananath Pattnaik vs. State of Orissa, (2002) 2 SCC 619
Baljinder Kaur v. State of Punjab, (2015) 2 SCC 629
Rajinder Singh v. State of Punjab, (2015) 6 SCC 477
Bhim Singh and another v. State of Uttarakhand, (2015) 4 SCC 281

For the Appellant	:	Mr. Shrawan Dogra, Advocate General, with Mr. J.K. Verma, Deputy Advocates General.
For the Respondent	:	Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

In relation to FIR No.26/09, dated 24.1.2009, registered at Police Station Jawali, District Kangra, Himachal Pradesh, for having committed an offence under Section 498-A of the Indian Penal Code, accused-respondent Raj Kumar (hereinafter referred to as the accused) was charged for having subjected his wife Usha Devi (deceased) to cruelty, as also abetted her to commit suicide, punishable under the provisions of Sections 498-A and 306 of the Indian Penal Code.

2. Trial Court acquitted the accused, discarding dying declaration (Ex.PW-2/A) made by the deceased not to be voluntary in nature, and disbelieving the testimonies of her parents, Sh. Karam Chand (PW-2) and Smt. Preeto Devi (PW-3), and brother Sh.Amandeep (PW-5) as also co-villager Sh. Vinay Verma (PW-14) being not worthy of credence. While holding the prosecution to have established its case of the deceased having visited the shop of her husband in the morning of 24.1.2009, the fateful day, but finding no evidence as to what transpired there, between the deceased and the accused, which prompted her to set herself on fire by pouring

kerosene oil, Court found the prosecution not to have proven the charged offence. Trial Court found the deceased to be a person not only of hypersensitive nature but also unable to bear extreme pressures of day-to-day life. The court did not find any convincing evidence, direct or circumstantial, establishing the guilt of the accused, of having subjected his wife to cruelty or abetted her to commit suicide. Conduct of the accused in helping extinguish fire on the body of the deceased and getting her immediate medical aid by taking her to the hospital, was a circumstance, relevant in establishing his concern for the deceased. Hence, assailing those findings the present appeal by the State.

3. A Constitution Bench of the Hon'ble Supreme Court of India in *M.G. Agarwal v. State of Maharashtra,* AIR 1963 SC 200, has held that in dealing with an appeal against the judgment of acquittal, normally the appellate Court should be slow in disturbing findings of fact recorded by the trial Court. However, there is a caveat to such principle. Such findings have to be based on proper and complete appreciation of evidence. Also jurisdiction and power of the appellate Court is to reappreciate the evidence but with caution, yet the Court is not to substitute its own opinion with that of the trial Court.

4. In *Madan Gopal Makkad v. Naval Dubey and another,* (1992) 3 SCC 204, the Apex Court held the scope of the Court in an appeal against acquittal to be "wide as in appeals from convictions" and "that an appeal from acquittal need not be treated different from an appeal from conviction".

5. Certain facts are not in dispute. Deceased and the accused were married for more than 18 years. They were residing at village Nera Kotla, Tehsil Jawali, District Kangra, Himachal Pradesh. Also, they had fully grown up children. In the morning of 24.1.2009, in the matrimonial house, after pouring kerosene oil, deceased set herself on fire. Immediately, accused took her to Sukh Sadan Hospital, Pathankot (State of Punjab), where she was administered medical treatment and remained admitted till her last breath, which was on 31.1.2009. Deceased died as a result of burn injuries.

6. It has come on record that on 24.1.2009, at about 11.20 a.m., Dr. Avinish Kumar (PW.6) of Sukh Sadan Hospital informed officials of Police Station Jawali about admission of the deceased, having sustained burn injuries. Ex.PW-2/A is evidently clear to such effect.

7. Inspector Parkash Chand (PW-12), SHO of the concerned Police Station, who also conducted the investigation, immediately rushed to the hospital and after obtaining permission and certificate of fitness, recorded statement (Ex.PW-2/A) of the victim, which reads as under:

> "States that I am resident of the abovestated address and is an Anganwari worker. My marriage took place in the year 1990. I have two sons and a daughter. Since after the marriage, my husband used to beat me and ask me to bring money from my parental house. My husband was having illicit relations with some lady. Last night dated 23.1.2009 my husband was not at home. I doubted that he was with that lady during night. Today dated 24.1.2009, in the morning at 6, to know about whereabouts of my husband, I went to the shop, where servant Kishore and Lala were present. I asked them about whereabouts of my husband, on which they said that he had left for home at 11 in the night, on which I stated that he had not reached home, and I sat in the shop waiting for my husband. At about 7½ O'clock, he came to the shop. I asked my husband where he had gone, on which he said that who was she to ask. On this, he started beating her in the bazaar. My husband then made me sit on the scooter of Vinay Verma. I deboarded the scooter near the shop of Shoko uncle (Tau) and then went to my house on foot. Due to the maltreatment by my husband, after going into the kitchen of the house, I poured kerosene oil from a can on my body. On this, both my sons went out to call their father. In the meantime, I set myself on fire with the help of a matchstick and came to the verandah. By then, my husband and both my sons reached home. My both sons

ran towards the kitchen and brought a bucket of water and poured the same on me, because of which the fire was extinguished. Due to fire my entire body has burnt. Thereafter, I fell down the verandah and thereafter my husband and my elder son took me in car of Kamal to Pathankot Hospital. This incident I have done due to maltreatment of my husband."

8. At this juncture, it be observed that prosecution has tried to establish its case of cruelty and abetment to suicide, on the basis of (a) dying declaration (Ex.PW-2/A), (b) previous complaint of the deceased, dated 11.11.2008 (Ex.PW-8/B), (c) ocular version of father Karam Chand (PW-2), mother Preeto Devi (PW-3), independent witness Narinder Kumar (PW-4), witness to the dying declaration, Dr. Avinish Kumar (PW-6), and Vinay Verma (PW-14), witness to what transpired immediately prior to the deceased taking the unfortunate and drastic step of setting herself on fire.

9. In the instant case, deceased was just 34 years of age. In the morning of 24.1.2009, she set herself on fire. She was admitted in the hospital at about 11.20 a.m. Dying declaration (Ex.PW-2/A) was recorded in the hospital on 24.1.2009.

10. Inspector Prakash Chand (PW-12), on receiving information, reached the hospital and moved an application dated 24.1.2009 (Ex.PW-12/A) for recording statement of the deceased. From his unrebutted testimony, it is evidently clear that at about 5 p.m., victim was certified fit to give her statement and pursuant thereto it was so recorded and her thumb impression appended thereupon. Investigating Officer is categorical that statement was recorded in the presence of two independent witnesses, as also parents of the deceased.

11. What stands stated in the dying declaration, we have already referred to supra.

12. It is true that in his testimony, Dr. Avinash Kumar (PW-6) does not refer to the dying declaration. But crucially he does state, which version, we do not find to be incorrect or false, that "*The patient was admitted by her husband and she was giving a alleged history of suicidal burns by pouring kerosene oil on her body after she had an argument with her husband*". Thus, one fact is clear that on the fateful day, argument had taken place between the deceased and her husband.

13. At this point in time, we may also take note of the testimony of Vinay Verma (PW-14), who uncontrovertedly states that in the morning of 24.1.2009, when he came to his shop, he saw the accused standing outside and the deceased lying on the road. Accused was asking the deceased to go home. Further on the asking of the accused, he lifted the deceased and took her to his shop, where she sat for few minutes, but left for her house. Lateron at about 9.30 a.m., he saw flames of fire coming from the house of the accused. Both he and the accused ran to the spot, where he saw son of the accused running out of the house. Thereafter, both of them went inside the house and after few minutes accused took the deceased, who was suffering from burn injuries, to the hospital. From his statement also it is evidently clear that all was not well between the accused and the deceased. Significantly it is not a case of murder and there is no complicity of any one of the children of the accused in the crime.

14. We may also take note of the fact that on 11.11.2008, which is just two months prior to the incident, deceased had lodged a complaint (Ex.PW-8/B) with the Women Police Cell, Dharamshala, District Kangra, but was subsequently not pressed. On 5.12.2008, she had sent a written application (Ex.PW-8/C) that she was not interested to carry on with the proceedings.

15. Now, all this reveals that notwithstanding the fact that parties were married for more than 18 years and that deceased was working as an Anganwari Worker, all was not well between the parties.

16. Here, we may also observe that from the testimony of Karam Chand (PW-2) and Preeto Devi (PW-3), parents of the deceased, it is quite evident, in fact stands established, that a sum of Rs.5,00,000/- stood paid to the accused. Though suggestion of denial has been put to these witnesses, but one fact, which remains uncontroverted, as has come in the testimony of

Karam Chand, is that in the morning of the unfortunate incident, accused had given beatings to the deceased outside his shop. Significantly, shops of Vinay Verma and that of accused are nearby, so also the house of the accused. Vinay Kumar does not state that relationship between the accused and the deceased were cordial. He also does not state that nothing happened between the accused and the deceased. In fact, from his unrebutted testimony, it is clear that in front of the shop, deceased was lying on the road and that accused had asked him to take her away.

17. It is in this backdrop, we are of the considered view that contents of the dying declaration cannot be ignored.

18. Let us first examine the law on the issue.

19. It is a settled principle of law that dying declaration is just a piece of evidence and is to be treated like any other evidence.

20. Dying declaration can be made any time, in the presence of anyone. It need not to be a Doctor, a Government Officer or an Executive Magistrate. So long as the victim is aware and fully conscious of what is being done and said, any statement made by her can be treated as a piece of evidence, it being a different matter, as to whether it requires corroboration or not. [*Munnu Raja and another v. The State of Madhya Pradesh,* (1976) 3 SCC 104; *Ramawati Devi v. State of Bihar,* (1983) 1 SCC 211, *Sohan Lal alias Sohan Singh and others vs. State of Punjab,* (2003) 11 SCC 534, *State of Karnataka vs. Shariff,* (2003) 2 SCC 473, *Dayal Singh vs. State of Maharashtra,* (2007) 12 SCC 452 and *Kanti Lal vs. State of Rajasthan,* (2009) 12 SCC 498 and *Gulam Hussain and another vs. State of Delhi,* (2000) 7 SCC 254].

21. In *Jaishree Anant Khandekar vs. State of Maharashtra,* (2009) 11 SCC 647, a comparative study of laws of various countries on the point of dying declaration was done by the Apex Court. It was held that:

> "17. The law relating to dying declaration is an exception to the hearsay rule. The rationale behind admissibility of a dying declaration was best expressed, not in any judgment, but in one of the soliloquies in Shakespeare's King John, when fatally wounded Melun wails:
>
> 'Have I met hideous
> death within my view,
> Retaining but a quantity of life,
> Which bleeds away
> even as a form of wax,
> Resolveth from his figure
> 'gainst the fire?
> What in the world should
> make me now deceive,
> Since I must lose the use of all deceit?
> Why should I then be false
> since it is true
> That I must die here
> and live hence by truth?'
>
> (See King John, Act V, Scene IV.)
>
> 18. Both Taylor and Wigmore in their treatise on Evidence took refuge to the magic of Shakespeare to illustrate the principles behind admissibility of dying declaration by quoting the above passage.

19. Among the judicial fraternity this has been best expressed, possibly by Lord Chief Justice Baron Eyre (See. R. Vs. Woodcock, (1789) 1 Lea.502, and which I quote (ER p.353): -

> "...That such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice."

20. The test of admissibility of dying declaration is stricter in English Law than in Indian Law. Sir James Fitzjames Stephen in 1876 brought out a 'Digest of the Law of Evidence' and its introduction is of considerable interest even today. The author wrote that English Code of Evidence is modelled on the Indian Evidence Act of 1872. In the words of the author:

> "In the autumn of 1872 Lord Coleridge (then Attorney General) employed me to draw a similar code for England. I did so in the course of the winter, and we settled it in frequent consultations. It was ready to be introduced early in the Session of 1873. Lord Coleridge made various attempts to bring it forward, but he could not succeed till the very last day of the Session. He said a few words on the subject on the 5th August, 1873, just before Parliament was prorogued. The Bill was thus never made public, though I believe it was ordered to be printed.
>
> It was drawn on the model of the Indian Evidence Act and contained a complete system of law upon the subject of evidence."

21. In that book, Article 26 sums up the English law relating to dying declaration as under:-

> "Article 26. Dying Declaration as to Cause of Death . - A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant only in trials for the murder or manslaughter of the declarant; and only *when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.*
>
> Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular." (emphasis supplied)

22. In Section 32(1) of the Indian Evidence Act the underlined portion is not there. Instead Section 32 (1) is worded differently and which is set out:

> "32. Cases in which statement of relevant fact *by person who is dead or cannot be found, etc., is relevant - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:-*
>
> *(1) When it relates to cause of death - When the statement is made by a person as to the cause of his death, or to any of the*

circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be he nature of the proceeding in which the cause of his death comes into question." (emphasis supplied)

23. The Privy Council in the case of Nembhard Vs. The Queen, 1982 (1) The All England Law Reports 183 (Privy Council), while hearing an appeal from the Court of Appeal of Jamaica, made a comparison of the English Law and Indian Law by referring to the underlined portions of Section 32(1) of the Indian Evidence Act at page 187 of the report. Sir Owen Woodhouse, speaking for the Privy Council, pointed out the different statutory dispensation in Indian Law prescribing a test of admissibility of dying declaration which is distinct from a common law test in English Law.

24. Apart from an implicit faith in the intrinsic truthfulness of human character at the dying moments of one's life, admissibility of dying declaration is also based on the doctrine of necessity. In many cases victim is the only eye witness to a crime on him/her and in such situations exclusion of the dying declaration, on hearsay principle, would tend to defeat the ends of justice. American Law on dying declaration also proceeds on the twin postulates of certainty of death leading to an intrinsic faith in truthfulness of human character and the necessity principle.

25. On certainty of death, the same strict test of English Law has been applied in American Jurisprudence. The test has been variously expressed as 'no hope of recovery', 'a settled expectation of death'. The core concept is that the expectation of death must be absolute and not susceptible to doubts and there should be no chance of operation of worldly motives. (See Wigmore on Evidence page 233-234).

26. This Court in Kishan Lal Vs. State of Rajasthan, AIR 1999 SC 3062, held that under English Law the credence and the relevance of the dying declaration is admissible only when the person making such statement is in hopeless condition and expecting imminent death. Justice Willes coined it as a "settled hopeless expectation of death" (R Vs. Peel, (1860) 2 F. & F. 21, which was approved by the Court of Criminal Appeal in R Vs. Perry, (1909) 2 KB 697). Under our Law, the declaration is relevant even if it is made by a person, who may or may not be under expectation of death, at the time of declaration. (See para 18,page 3066). However, the declaration must relate to any of the circumstances of the transaction which resulted in his death."

22. The apex Court in *Tapinder Singh vs. State of Punjab & another,* AIR 1970 S.C. 1566 has held that if the dying declaration is acceptable as truthful then even in the absence of other corroborative evidence, the Court can act upon it and convict the accused.

23. In *Khushal Rao vs. State of Bombay,* AIR 1958 SC 22, the Apex Court has further held that:-

"Sometimes, attempts have been made to equate a dying declaration with the evidence of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not retracted. But in our opinion, it is not right in principle to do so. Though under S. 133 of the Evidence Act, it is not illegal to convict a person on the uncorroborated testimony of an accomplice, illustration (b) to S. 114 of the Act, lays down as a rule of produce based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars

and this has now been accepted as a rule of law. The same cannot be said of a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. If a dying declaration has *been made by a person whose antecedents are as doubtful as in the other cases that may be a ground for looking upon it with suspicion, but generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver*."

"*It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made*; it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence that other pieces of evidence; a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as for as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the lying man for observation, for example, whether there was sufficient light if the crime was committed at night; *whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties*."

"In order to pass the test of reliability, a dying declaration has to be *subjected to a very close scrutiny*, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. *If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then without corroboration it cannot form the basis of a conviction.* Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that particular dying declaration was not free from the infirmities." (Emphasis supplied)

24. The aforesaid decision came up for consideration before the Constitution Bench of the Apex Court in *Harbans Singh and another vs. The State of Punjab,* AIR 1962 SC 439 and after taking into account its earlier decision in *Ram Nath vs. State of Madhya Pradesh,* AIR 1953 SC 420**,** affirmed the aforesaid view.

25. In *Paniben (Smt.) vs. State of Gujarat,* (1992) 2 SCC 474, the Court has further reiterated and laid down the following principles:-

"A dying declaration is entitled to great weight. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of

law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring-corroboration is merely a rule of prudence."

> "However, since the accused has no power of cross-examination, which is essential for eliciting the truth, the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail".
>
> "Merely because a dying declaration does not contain the details as to occurrence, it is not to be rejected. Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. But a dying declaration which suffers from infirmity cannot form the basis of conviction. Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon."
>
> "(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of U.P. (1976) 2 SCR 764) (AIR 1976 SC 2199).
>
> (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration (State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164).
>
> (iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (Rama Chandra Reddy v. Public Prosecutor, AIR 1976 SC 1994).
>
> (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264 : (AIR 1974 SC 332).
>
> (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P., AIR 1982 SC 1021).
>
> (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P., 1981 SCC (Crl) 581).
>
> (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).
>
> (viii) Equally, merely because it is a brief statement it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505).
>
> (ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit

> and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State, AIR 1988 SC 912).
>
> (x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan, AIR 1989 SC 1519).
>
> 19. In the light of the above principles, we will consider the three dying declarations in the instant case and we will ascertain the truth with reference to all dying declarations made by the deceased Bai Kanta. This Court in Mohan Lal v. State of Maharashtra, AIR 1982 SC 839 held:
>
> "where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred."
>
> Of course, if the plurality of dying declarations could be held to be trust-worthy and reliable, they have to be accepted."

26. In *Jayabalan vs. Union Territory of Pondicherry,* (2010) 1 SCC 199, the Apex Court was dealing with the case of an accused who after pouring kerosene oil had set his wife on fire. The husband was held guilty of having committed an offence punishable under Section 302, IPC. The accused assailed the findings of conviction on the ground that prosecution had examined only interested witnesses and also dying declaration was tutored, promoted and product of the imagination of deceased. In the proven facts of that case repelling the contention, it was held as under:-

> "We are of the considered view that in case where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim." (Emphasis supplied)

27. In *Krishan vs. State of Haryana,* (2013) 3 SCC 280, even where the witnesses had turned hostile, solely on the basis of dying declaration, the Court convicted the accused.

28. There can be more than one dying declarations and if there is no inconsistency between them, all can be used against the accused for proving the guilt. [*State of Karnataka vs. Shariff,* (2003) 2 SCC 473 and (1982) 1 SCC 700, *Mohanlal Gangaram Gehani vs. State of Maharashtra,* (1982) 1 SCC 700].

29. This view further stands reiterated *in Jaishree Anant Khandekar vs. State of Maharashtra,* (2009) 11 SCC 647, where the Apex Court was dealing with five dying declarations, which were found not to be in variance with each other.

30. Further in *Puran Chand vs. State of Haryana,* (2010) 6 SCC 566, Apex Court has again summarized its view in the following terms:-

> "The Courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in replying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. When there are more than one dying declarations, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration

> which supports the prosecution alone can be accepted while the other innocuous dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. The courts must bear in mind that each criminal trial is an individual aspect. If after careful scrutiny the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it a basis of conviction, even if there is no corroboration.
>
> (Emphasis supplied)"

31. However, where there is variation in the dying declaration (two in question), the Apex Court has held any conviction to be bad in law. [*Dandu Lakshmi Reddy vs. State of A.P.* (1999) 7 SCC 69 and *Sanjay vs. State of Maharashtra*, (2007) 9 SCC 148].

32. Further, where the prosecution version differs from the statement of deceased, dying declaration cannot be used for convicting the accused [*Paniben (supra)* and *State of Rajasthan v. Shravan Ram and another,* (2013) 12 SCC 255].

33. The aforesaid view has been reiterated in Jai *Karan vs. State of Delhi (MCT)*, (1999) 8 SCC 161, *Sham Shankar Kankaria vs. State of Maharashtra*, (2006) 13 SCC 165 and *Mohammed Asif vs. State of Uttaranchal,* (2009) 11 SCC 497.

34. The Constitutional Bench of the Apex Court in *Laxman vs. State of Maharashtra,* (2002) 6 SCC 710, while considering the conflict in *Paparambaka Rosamma vs. State of A.P.* (1999) 7 SCC 695 and *Koli Chunilal Savji vs. State of Gujarat,* (1999) 9 SCC 562, came to the conclusion that law laid down in the latter was the correct law and simply because the Doctor has not recorded/made endorsement that the deceased was in a fit state of mind to make the statement in question, other material on record to indicate that the deceased was fully conscious and capable of making statement cannot be ignored. This view has been reiterated in *Ravi and another vs. State of T.N.* (2004) 10 SCC 776; and *Kamalavva and another vs. State of Karnataka,* (2009) 13 SCC 614.

35. In *Shaik Nagoor vs. State of Andhra Pradesh represented by its Public Prosecutor, High Court of Andhra Pradesh, Hyderabad,* (2008) 15 SCC 471, the Apex Court held that where the Judicial Magistrate and the Police officer had given detailed description and the witnesses were not cross-examined on the point of fitness of the deceased, plea taken by the accused that the deceased was not fit to make the statement in the given circumstances was untenable.

36. In *Sukanti Moharana vs. State of Orissa,* (2009) 9 SCC 163, the Court was dealing with a case where the dying declaration was challenged on the ground that it did not contain thumb impression or signatures of the deceased. The challenge was repelled on the ground that medical evidence proved that the deceased was having 90% burn injuries on the thumb and therefore was in no position to sign the dying declaration. The Apex Court further reiterated its decision in Nallapati Sivaiah vs. SDO, (2007) 15 SCC 465, in the following terms:-

> "18. …This Court in more than one decision cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion."

37. The apex Court in *Lakhan vs. State of Madhya Pradesh,* (2010) 8 SCC 514 had an occasion to deal with two contradictory dying declarations made by the deceased. Finding the first

one to have been recorded in presence of the close relatives of the accused, even though by an Executive Magistrate, the Court by ignoring the same, relied jupon the second dying declaration recorded by the police officer in holding the accused guilty of the crime charged for.

38. Dying declaration need not be in the form of question and answer. Principles required to be adopted for recording the statement of deceased stand reiterated in *Ram Bihari Yadav Vs. State of Bihar and others,* (1998) 4 SCC 517**,** *State of Karnataka vs. Shariff* (2003) 2 SCC 473 and *K.Ramachandra Reddy and another vs. The Public prosecutor,* (1976) 3 SCC 618.

39. The apex Court in *Dandu Lakshmi Reddy vs. State of A.P.,* (1999) 7 SCC 69 has held that when the sphere of scrutiny of the dying declaration is a restricted area, the Court cannot afford to sideline such a material divergence relating to this very occasion of the crime.

40. In *Mohan Lal and others vs. State of Haryana* (2007) 9 SCC 151, the Court disbelieved the statement made by the wife of the accused on the ground that not only it was vague but also there was no contemporaneous documentary or other material to prove dowry demands prior to the incident.

41. In *Maiben D/o Danabhai Tulshibai Maheria vs. State of Gujarat,* (2007) 10 SCC 362, the Court was dealing with a case where death took place 25 days subsequent to the recording of the statement of the deceased, yet the same was taken to be a dying declaration.

42. In *Ramakant Mishra @ Lalu & others vs. State of Uttar Pradesh,* (2015) 8 SCC 299 the Court cautioned the prosecution to establish that every step for recording the dying declaration must be diligently complied with including alerting the Jurisdictional Magistrate of the occurrence of the incident.

43. The question, which arises for consideration, is as to whether the dying declaration is believable or not.

44. No doubt, the doctor has not deposed anything with regard to fitness of the witness, but then from the testimony of Inspector Parkash Chand, it is clear that despite burn injuries, deceased was able to speak and her statement recorded by the police.

45. It be only observed that after reaching the hospital, Inspector Parkash Chand, moved an application for recording statement of the deceased. At 4 p.m., the victim was found not fit, but lateron at 5 p.m., she was declared fit and accordingly statement (Ex.PW-2/A) recorded and the deceased put her thumb impression. Now, on this issue, defence taken by the accused, as is apparent from the cross-examination part of the testimonies, is twofold – (a) that application (Ex.PW-12/A) was prepared in "connivance" with the doctor, (b) it was written when both the father and the mother of the deceased were present.

46. Parents Karam Chand and Preeto Devi are also categorical in their deposition of the deceased having made statement (Ex.PW-2/A) to the police in their presence. They are signatories to the document. Also, one finds even Narinder Kumar (PW-4), so associated by the police during investigation, to have corroborated such version. He clarifies that it was police and not the mother of the deceased, who was putting the questions. In his unrebutted testimony he states that "*Usha had said that accused was beating her on account of dowry. She had also told that accused had been demanding money. Usha had also told that accused was having illicit relations with some other lady. Usha had not stated anything about her suspicion*".

47. Thus, in our considered view, prosecution has been able to establish the factum of the deceased having made statement (Ex.PW-2/A).

48. At this juncture, we may also take note of certain contradictions pointed out by the learned counsel for the accused, which, according to him render the factum of dying declaration to be doubtful. Karam Chand states that the deceased was in pains and not in a position to say anyting and that at the time of recording of statement (Ex.PW-2/A) he was outside the room. No doubt, the document records his presence, but then this fact alone, in our considered view, is not sufficient enough to either impeach credit of the witnesses or render the

dying declaration to be false. One cannot forget that this witness is a rustic villager and his statement came to be recorded in Court after a period of seven months. The contradiction, minor in nature, in our considered view, needs to be ignored. Also, Preeto Devi has explained that her husband was suffering from heart problem. Significantly it is not the suggested case that the parents exercised undue influence or pressurized the deceased to make the statement.

49. Learned counsel for the accused also invites our attention to the previous complaint (Ex.PW-8/B), only to highlight that previously allegations were made not against the husband but the in-laws. Even this would not make any difference, for one thing is clear that in the morning of the unfortunate incident, accused had fought and given beatings to the deceased, for why else would the accused allow his wife to lie on the road and ask his neighbour to pick and drop her home.

50. Next, it is contended that prosecution concealed and suppressed relevant information. They ought to have associated sons of the accused, who would have thrown light on what really transpired in the morning. Well prosecution witnesses have already established such fact. Equally, it was open for the accused to have adduced evidence in support of his defence.

51. Significantly, all these witnesses have withstood the test of cross-examination, establishing authenticity and genuineness of the dying declaration.

52. Still further, Mr. Rajesh Mandhotra, learned counsel for the accused, submits that dying declaration is nothing but a waste paper and requires corroboration. Well, we are unable to persuade ourselves to accept such a contention. Dying declaration stands corroborated by the witnesses, so also its contents and as we notice, allegations of the accused having illicit relationship with another lady, which apparently was the reason for the fight stands duly corroborated from the unrebutted testimony of Preeto Devi who states that "*it is correct that my daughter was suspicious that accused was having relations with some other lady. Self-stated that on two occasions my daughter had brought back accused from the company of that lady".*

53. Thus, in our considered view, trial Court erred in concluding that the dying declaration was not voluntary in nature and that testimonies of relatives and the co-villagers were uninspiring in confidence. Trial Court ventured into the realm of conjecturing, by holding the deceased to be of "hypersensitive nature unable to bear extreme pressures of day-to-day life". The Court below got swayed with the conduct of the accused, who undoubtedly took steps for extinguishing the fire and taking the deceased to the hospital, but then these facts relate to post incident, for it has come on record that soon before the deceased set herself on fire, accused had subjected her to cruelty, prompting her to take away her life.

54. "Cruelty" for the purpose of the crime in question would mean, willful conduct of the accused, which is of such a nature as is likely to drive the deceased to commit suicide or harassment with a view to coerce her to meet any unlawful demand of property or valuable security. Also, harassment on account of failure to meet such demand would also amount to cruelty. Also, for proving the charge of abetment to suicide, it has to be proved that the accused treated the deceased with cruelty and drove her to commit suicide.

55. In *Ramesh Kumar vs. State of Chhattisgarh, (2001) 9 SCC 618,* the Apex Court has also held that "Sections 498-A and 306 IPC are independent and constitute different offences. Though, depending on the facts and circumstances of an individual case, subjecting a woman to cruelty may amount to an offence under section 498-A and may also, if a course of conduct, amounting to cruelty is established leaving no other option for the woman except to commit suicide, amount to abetment to commit suicide. However, merely because an accused has been held liable to be punished under section 498-A IPC it does not follow that on the same evidence he must also and necessarily be held guilty of having abetted the commission of suicide by the woman concerned."

56. In *State of West Bengal Vs. Orilal Jaiswal (1994) 1 SCC 73*, the Apex Court has held as under:

> "In a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. The requirement of proof beyond reasonable doubt does not stand altered even after the introduction of S. 498A, I.P.C and S. 113A of Indian Evidence Act. Although, the court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record. The doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject matter.
>
> The conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law."
>
> (Emphasis supplied)

57. The Apex Court further cautioned that the court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

58. In *Arun Vyas & anr. Vs. Anita Vyas (1999) 4 SCC 690*, the Apex Court has held that the essence of offence in Section 498-A is cruelty. It is a continuing offence and on each occasion on which the wife is subjected to cruelty, she would have a new starting point of limitation.

59. In Kundula *Bala Subrahmanyam and Anr. Vs. State of Andhra Pradesh (1993) 2 SCC 684*, the Apex Court has held as under:-

> "The role of courts, under the circumstances assumes greater importance and it is expected that the courts would deal with such cases in a more realistic manner and not allow the criminals to escape on account of procedural technicalities or insignificant lacune in the evidence as otherwise the criminals would receive encouragement and the victims of crime would be totally discouraged by the crime going unpunished. The courts are expected to be sensitive in cases involving crime against women."

60. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact. The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the

social background, the environment, education etc. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether the mental cruelty was established or not. [*Mohd. Hoshan A.P. & Anrs. Vs. State of A.P. (2002) 7 SCC 414*].

61. In State *of A.P. Vs. M. Madhusudhan Rao (2008) 15 SCC 582*, the Apex Court has held as under:

> "It is plain that as per clause (b) of the Explanation, which, according to learned counsel for the State, is attracted in the instant case, every harassment does not amount to "cruelty" within the meaning of Section 498-A I.P.C. The definition stipulates that the harassment has to be with a definite object of coercing the woman or any person related to her to meet an unlawful demand. In other words, for the purpose of Section 498-A I.P.C. harassment simpliciter is not "cruelty" and it is only when harassment is committed for the purpose of coercing a woman or any other person related to her to meet an unlawful demand for property etc., that it amounts to "cruelty" punishable under Section 498-A I.P.C."

62. In *Balram Prasad Agrawal Vs. State of Bihar & Ors. (1997) 9 SCC 338*, the Apex Court has held cruelty to mean torture to be so unbearable in the common course of human conduct that a young lady having commitments to life could take a drastic steps to end her life leaving behind her infant children in the lurch and at the mercy of the accused husband who was found to be in contemplation of remarrying.

63. In *Arvind Singh Vs. State of Bihar (2001) 6 SCC 407*, the Apex Court has held as under:-

> "The word 'cruelty' in common English acceptation denotes a state of conduct which is painful and distressing to another. The legislative intent in Section 498-A is clear enough to indicate that in the event of there being a state of conduct by the husband to the wife or by any relative of the husband which can be attributed to be painful or distressing. The same would be within the meaning of the section. Torture is a question of fact. There must be a proper effort to prove it."

64. Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The accused must by his acts or omission or by a continued course of conduct create such circumstances that the deceased is left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. [*Ramesh Kumar vs. State of Chhatisgarh, (2001) 9 SCC 618*]

65. The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case. [*Gananath Pattnaik vs. State of Orissa, (2002) 2 SCC 619*]

66. The Apex Court in *Naresh Kumar v. State of Haryana and others,* (2015) 1 SCC 797, has observed that "as regards the claim for parity of the case of the Appellant with his mother and brother who have been acquitted, the High Court has rightly found his case to be distinguishable from the case of his mother and brother. The husband is not only primarily responsible for safety of his wife, he is expected to be conversant with her state of mind more than any other relative. If the wife commits suicide by setting herself on fire, proceeded by dissatisfaction of the husband and his family from the dowry, the interference of harassment

against the husband may be patent. Responsibility of the husband towards his wife is qualitatively different and higher as against his other relatives".

67. *With* regard to dowry death, the Apex Court in *Baljinder Kaur v. State of Punjab*, (2015) 2 SCC 629, held that:

> "21. In our view, there is force in the submission of the learned counsel for the appellant. In cases related to dowry death, the circumstances showing the cruelty or harassment are not restricted to a particular instance, but normally refer to a course of conduct. Such conduct of cruelty or dowry harassment must be "soon before death". There should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her."

68. The Apex Court in *Rajinder Singh v. State of Punjab,* (2015) 6 SCC 477, in the following words, explained the meaning of "dowry", as under:

> "8. A perusal of this Section shows that this definition can be broken into six distinct parts:
>
> (1) Dowry must first consist of any property or valuable security - the word "any" is a word of width and would, therefore, include within it property and valuable security of any kind whatsoever.
>
> (2) Such property or security can be given or even agreed to be given. The actual giving of such property or security is, therefore, not necessary.
>
> (3) Such property or security can be given or agreed to be given either directly or indirectly.
>
> (4) Such giving or agreeing to give can again be not only by one party to a marriage to the other but also by the parents of either party or by any other person to either party to the marriage or to any other person. It will be noticed that this clause again widens the reach of the Act insofar as those guilty of committing the offence of giving or receiving dowry is concerned.
>
> (5) Such giving or agreeing to give can be at any time. It can be at, before, or at any time after the marriage. Thus, it can be many years after a marriage is solemnised.
>
> (6) Such giving or receiving must be in connection with the marriage of the parties. Obviously, the expression "in connection with" would in the context of the social evil sought to be tackled by the Dowry Prohibition Act mean "in relation with" or "relating to"."

69. In the very same decision, after examining the intent of the Legislators for enacting the special enactment, by applying the principle of "force and life", the Court held that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise. Also, that the word "soon" would not mean immediate and each case had to be judged on the given facts. There has to be proximity and link between the impact of dowry demand and the consequential death and there cannot be any straitjacket formula for determining such factor. "Soon before" was held not to be synonymous with "immediately before".

70. The guilt or innocence of the accused has to be deduced from the material on record. And, what is required to be kept in mind by the court, while appreciating the evidence, stands reiterated by the Apex Court in *Bhim Singh and another v. State of Uttarakhand,* (2015) 4 SCC 281, as under:

> "22. In the present case, the guilt or innocence of the accused has to be adduced from the circumstantial evidence. The law regarding circumstantial evidence is more or less well settled. This Court in a plethora of judgments has held that

when the conviction is based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances. If there is a snap in the chain, the accused is entitled to benefit of doubt. *Gurpreet Singh v. State of Haryana*, (2002) 8 SCC 18 is one of such cases. On the question of any reasonable hypothesis, this Court has held that if some of the circumstances in the chain can be explained by any other reasonable hypothesis, then the accused is entitled to benefit of doubt. But in assessing the evidence, imaginary possibilities have no place. The Court considers ordinary human probabilities."

71. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

72. Hence, in our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

73. Thus, the findings returned by the trial Court cannot be said to be based on correct and complete appreciation of material on record, which are reversed. The appeal is allowed and we hold the accused guilty and convict him for having committed offences, punishable under the provisions Sections 498-A & 306 of the Indian Penal Code, for causing cruelty to the deceased and thereby abetted her co commit suicide.

74. Bail bonds furnished by the accused-convict stand cancelled. For the purpose of hearing him on the quantum of sentence, the appeal be listed on 13.11.2017. He be produced in the Court on the said date. Copy of the judgment be supplied to the accused, free of cost.

Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. SANDEEP SHARMA, J.

Suraj Bali ....Petitioner
Versus
State of H.P. and others ....Respondents

Cr. MMO No. 270 of 2016
Decided on : 27.10.2017

Code of Criminal Procedure, 1973- Section 482- FIR was lodged for the commission of offences punishable under Sections 353 and 332 of IPC against respondent No. 4 – respondent No. 4 filed a complaint before the Court after one month of the registration of FIR – The Court took cognizance and summoned the petitioner- petitioner filed the present petition for quashing the proceeding – held that once the commission of cognizable offence was disclosed by the complaint , the Court had no option but to take cognizance – registration of FIR is no bar for filing of the complaint – the Court cannot look into the merits of the case- petition dismissed. (Para-7 to 11)

Case referred:
C.P. Subhash Versus Inspector of Police, Chennai and others, reported in (2013) 11 Supreme Court Cases 559

For the petitioner Mr. R.L. Chaudhary, Advocate
For respondents Mr. P.M. Negi and Mr. M. L. Chauhan, Additional Advocate Generals.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Being aggrieved and dissatisfied with impugned summoning order dated 26.05.2016, passed by learned Chief Judicial Magistrate, Chamba, District Chamba, H. P. in Criminal Complaint filed under Sections 323, 500, 506-II of the Indian Penal Code, petitioner has approached this Court in the instant petition filed under Section 482 of the Code of Criminal Procedure,praying therein for setting aside impugned summoning order. Before adverting to the factual matrix of the case, it may be noticed that this Court had called for record of the Court below for its perusal, which has been perused.

2. Necessary facts as emerged from record are that FIR dated 21.06.2012 came to be lodged at Police Station, Chamba at the behest of Deputy Director (Education), Chamba, who alleged that on 21.06.2012, respondent No. 4 Mr. Mohammad Safi unauthorisedly entered into school premises and gave beatings to petitioner, who happened to be Lecturer in Government Senior Secondary School, Bakani, Tehsil and District Chamba, H.P. As per petitioner, he was saved from the clutches of the respondent No. 4 by his colleagues teaching in the School. On the basis of aforesaid FIR, investigation was carried out by the police and finally challan came to be presented in the Court of learned Chief Judicial Magistrate, Chamba, H.P. against respondent No. 4 for having committed offence punishable under Sections 353 and 332 of the Indian Penal Code. Exactly, after one month of lodging of aforesaid FIR by petitioner, respondent No. 4 preferred a complaint under Section 200 of the Code of Criminal Procedure in the Court of learned Chief Judicial Magistrate, Chamba, District Chamba, H.P. alleging therein that on 21.06.2012, when he had gone to Government Senior Secondary School, Bakani, Tehsil and District Chamba, H.P. for collecting his marks sheet and character certificate, he was insulted and humiliated by petitioner in presence of other students namely Mr. Manoj Kumar and Mr. Vijay Kumar, who had also gone to the school for collecting their marks sheets and character certificates. In the aforesaid complaint, respondent No. 4 also alleged that petitioner asked him to bring a bottle of liquor because they are meant for this purpose only. Since respondent No. 4 refused to oblige petitioner, he was insulted and humiliated by the petitioner, who called him “Untouchable creature”. Taking cognizance of the averments contained in the aforesaid complaint filed by respondent No. 4, learned Chief Judicial Magistrate recorded preliminary evidence adduced on record by respondent No. 4 and thereafter proceeded to issue summoning order against the petitioner calling upon him to appear in the Court on 18th July, 2016. In the aforesaid background, instant petition came to be filed before this Court.

3. Mr. Chaudhary while referring to impugned summoning order, issued by learned Chief Judicial Magistrate contended that the complaint filed by respondent No. 4 is nothing but a counter blast to FIR lodged by the petitioner, which was admittedly filed on 21st June, 2012. Mr. Chaudhary further contended that respondent No. 4 while approaching learned Chief Judicial Magistrate under Section 200 of the Code of Criminal Procedure, failed to disclose the factum with regard to lodging of FIR by the petitioner and as such true facts qua the dispute, if any, inter-se parties never came to the knowledge of the learned Magistrate, who merely on the basis of one sided storey put-forth by respondent No. 4, proceeded to issue summoning order to petitioner. While concluding his arguments, Mr. Chaudhary forcibly contended that this Court taking note of factual aspect of the matter, as is evident from the documents adduced on record,

has wide power under Section 482 of the Code of Criminal Procedure to quash the impugned summoning order issued by learned Chief Judicial Magistrate.

4. Mr. N.K. Thakur, learned Senior Advocate, duly assisted by Ms. Jamuna, Advocate, while refuting the aforesaid submissions having been made by learned counsel representing the petitioner, vehemently contended that there is no scope of interference what-so-ever, of this Court in view of cognizance taken by learned Chief Judicial Magistrate on the complaint having been filed by respondent No. 4 under Section 200 of the Code of Criminal Procedure. While inviting attention of this Court to Ex. CW-1/A adduced on record by respondent No. 4, Mr. Thakur contended that on 21.06.2012 i.e. the date of alleged incident, the matter was immediately brought to the notice of District Magistrate, with a request to issue direction to police to initiate proceedings against the petitioner. But since no action was taken by the District Magistrate or police on his complaint dated 21.06.2012, respondent No. 4 had no option but to file complaint under Section 200 of the Code of Criminal Procedure.

5. Mr. Thakur further invited attention of this Court to provisions contained under Section 200 CrPC to demonstrate that Magistrate taking cognizance on a complaint, if any, filed under Section 200 CrPC on behalf of victim, had two options i.e. first to grant opportunity to adduce preliminary evidence, if any, in support of his or her complaint, secondly; to hand over the matter to police for investigation. In the case at hand, since respondent No. 4 i.e. complainant, was able to adduce on record preliminary evidence in support of his claim, there was no occasion, as such for learned Magistrate to refer the matter to police for investigation. Mr. Thakur further submitted that it is evident from the statements of witnesses adduced on record by respondent No. 4 in support of his claim that on 21.06.2012, he was insulted and humiliated and was also called 'Untouchable creature' and as such there is no illegality or infirmity in the summoning order issued by learned Chief Judicial Magistrate. Mr. Thakur further argued that correctness of material adduced on record by respondent cannot be adjudicated by this Court, rather, petitioner shall have opportunity before the learned trial Court below to cross examine the complaint. Lastly, Mr. Thakur invited attention of this Court to Judgment in case C.P. Subhash Versus Inspector of Police, Chennai and others, reported in ***(2013) 11 Supreme Court Cases 559*** to suggest that where complainant makes out a prima facie case for alleged commission of offence, High Court in ordinary course should not invoke its powers to quash such proceedings, except in rare and compelling circumstances.

6. I have heard learned counsel for parties and have perused the record.

7. Though, it is apparent from perusal of annexure P-3 that FIR dated 21.06.2012 came to be registered against respondent No. 4 at the behest of Deputy Director (Education), Chamba, who on the basis of complaint received by him from petitioner alleged that on 21.06.2017, respondent No. 4 unauthorisedly entered the school premises and thereafter gave beatings to the petitioner, but perusal of complaint i.e. annexure P-5, which admittedly came to be filed on 20th July, 2012 i.e. after one month of lodging of FIR, discloses altogether different facts. Complainant in his complaint filed under Section 200 of the Code of Criminal Procedure, alleged that on 21.06.2017, when he had gone to collect his certificate from school, he was insulted and humiliated by the petitioner. Respondent No. 4 in support of his claim also examined two witnesses, who supported the version put-forth by the complainant.

8. Now question, which remains to be decided by this Court is whether learned Court was estopped from taking cognizance on the complaint filed by respondent No. 4 under Section 200 of the Code of Criminal Procedure in light of FIR lodged by the petitioner on 21st June, 2012. It is not in dispute that factum with regard to lodging of FIR by petitioner was not brought to the knowledge of learned Chief Judicial Magistrate, by petitioner, but bare perusal of provisions as contained under Section 200 of the Code of Criminal Procedure, no where persuade this Court to agree with the contention raised by Mr. R.L. Chaudhary, learned counsel representing petitioner that summoning order issued by learned Chief Judicial Magistrate below deserves to be quashed on this sole ground. At the cost of repetition, it may be reiterated that the learned Chief Judicial Magistrate while exercising power under Section 200 of the Code of

Criminal procedure had no option but to take cognizance of the complaint, if he had found that there prima facie case is made out, as also of the view that the allegations contained in complaint are true. In case at hand, as is evident from bare reading of preliminary evidence adduced on record, respondent No. 4 was successful in satisfying the Court below that on 21.06.2012, he was insulted and humiliated and as such learned Court below rightly proceeded to summon the petitioner, who shall definitely have opportunity to cross examine the respondent-complainant during trial. This Court finds no force in the argument made by Mr. R.L. Chaudhary, learned counsel representing the petitioner that factum with regard to non-filing of FIR/complaint, if any, immediately after alleged incident by respondent-complainant itself falsify the story put-forth by respondent No. 4 in the complaint lodged by him under Section 200 of the Code of Criminal Procedure. Perusal of Ex. CW-1/A as has been taken note above, clearly suggest that on 21.06.2012, the respondent immediately approached learned District Magistrate and made a request to direct the police authorities to investigate the matter. This court need not go into the question that why respondent No. 4 had not gone to police directly immediately after the alleged incident, especially when he had approached District Magistrate as is evident from perusal of Ex. CW-1/A. Otherwise also, there is/was no bar for the respondent-complainant to file complaint, if any, under Section 200 of the Code of Criminal Procedure. This court after having carefully perused the record of Court below, is convenienced and satisfied that the respondent No.4-complainant made out a prima facie case for alleged commission of offence, which would justify the impugned summoning order.

9. This Court sees no reason to interfere with the order passed by learned Chief Judicial Magistrate by exercising powers under Section 482 of the Code of Criminal Procedure, which otherwise requires to be exercised sparingly and cautiously, that too to meet the ends of justice. Needless to say, the petitioner shall have reasonable opportunity to cross examine the petitioner as well as evidence adduced on record by him during trial and as such no prejudice what-so-ever shall be caused to the petitioner in case he appears before the Court below.

10. In this regard reliance is placed upon judgment passed by the Hon'ble Apex Court in case titled C.P. Subhash Versus Inspector of Police, Chennai and others, reported in ***(2013) 11 Supreme Court Cases 559***. The relevant paras are as under:-

> "7. The legal position regarding the exercise of powers under Section 482 Cr.P.C. or under Article 226 of the Constitution of India by the High Court in relation to pending criminal proceedings including FIRs under investigation is fairly well settled by a long line of decisions of this Court. Suffice it to say that in cases where the complaint lodged by the complainant whether before a Court or before the jurisdictional police station makes out the commission of an offence, the High Court would not in the ordinary course invoke its powers to quash such proceedings except in rare and compelling circumstances enumerated in the decision of this Court in State of Haryana and Ors. v Ch. Bhajan Lal.
>
> 8. Reference may also be made to the decision of this Court in Rajesh Bajaj v. State, NCT of Delhi (1999) 3 SCC 259 where this Court observed: (SCC p.262 para 9).
>
> 9" ...If factual foundation for the offence has been laid down in the complaint the Court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence."
>
> 9. To the same effect is the decision of this Court in State of Madhya Pradesh v. Awadh Kishore Gupta (2004) 1 SCC 691 where this Court said: (SCC p.700. para 11)
>
> 11"...The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest Court of a State should

> normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code…"

10. Decisions of this Court in V.Y. Jose and Anr. v. State of Gujarat and Anr. (2009) 3 SCC 78 and Harshendra Kumar D. v. Rebatilata Koley etc. (2011) 3 SCC 351 reiterate the above legal position.

11. Coming to the case at hand it cannot be said that the allegations made in the complaint do not constitute any offence or that the same do not prima facie allege the complicity of the persons accused of committing the same. The complaint filed by the appellant sets out the relevant facts and alleges that the documents have been forged and fabricated only to be used as genuine to make a fraudulent and illegal claim over the land owned by complainant. The following passage from the complaint is relevant in this regard:

> "…..Thus evidently these two sale deeds being produced by GWL i.e. 1551/1922 dated: 10th March 1922 and 1575/1922 dated 27th June 1922 are forged and fabricated and after making the false documents they were used as genuine to make fraudulent and illegal claim over our lands and go grab them. The representatives of GWL Properties with dishonest motive of grabbing our lands having indulged in committing forgery and fabrication of documents and with the aid of the forged documents are constantly attempting to criminally trespass into our lawful possessed lands and have been threatening and intimidating the staffs of our company in an illegal manner endangering life and damaging the land. The representatives of GWL properties also have been making false statements to the Government Revenue Authorities by producing these forged and fabricated documents with dishonest intention to enter their name in the Government Records. The present Director-in-charge and responsible for the affairs of the GWL Properties Limited is Mrs. V.M. Chhabria and all the above mentioned acts and commission of offences have been committed with the knowledge of the Directors of GWL Properties Ltd., and connivance for which they are liable. Mr. A.V.L. Ramprasad Varma representing M/s GWL Properties Limited has registered a civil suit in the District Court, Chengalpet using the forged documents. Mr. Satish, Manager (Legal), Mr. Shanmuga Sundram, Senior Manager, (Administration), have assisted in fabricating the forged documents and used the same to get patta from Tahsildar, Tambaram, thus cheating the Govt. Officials. Hence we request you to register the complaint and to investigate and take action in accordance with law as against the said company M/s GWL Property Limited represented by Mr. Satish, Manager (Legal) Mr. Shanmudga Sundaram, Senior Manager (Administration), A.V.L. Ramprasad Varma,

Directors, and their accomplice who have connived and indulged in fabricating and forging documents for the purpose of illegally grabbing our lands and for all other offences committed by them."

11. Consequently, in view of detailed discussion made hereinabove, as well as law laid down by the Hon'ble Apex Court, this Court sees no reasons to interfere with the orders passed by learned Chief Judicial Magistrate, which otherwise appears to be based upon proper appreciation of material adduced before it by respondent-complainant. Hence, there is no force in the instant petition, the same is dismissed alongwith pending application (s), if any.

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

Budhu .....Appellant.
Versus
Lal Man & another .....Respondents.

RSA No. 397 of 2005
Reserved on: 24.10.2017
Decided on: 30.10.2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for injunction pleading that P is owner in possession of the suit land- the defendants encroached upon the suit land and raised construction of a single room without any right to do so- hence, the relief of injunction was sought- the defendants pleaded that no construction was raised on the suit land and the house existing on abadi deh was renovated – the suit was decreed by the Trial Court- an appeal was filed, which was allowed- held that the ownership of the plaintiff was not disputed - the defendants relied upon an agreement showing the exchange of the land but the same is not connected to the suit land- the person who carried out demarcation was not examined and the encroachment has not been proved – the Appellate Court had rightly dismissed the suit- appeal dismissed. (Para-9 to 14)

For the appellant: Mr. G.R. Palsra, Advocate.
For the respondents: Mr. Bhupinder Gupta, Sr. Advocate with Mr. Janesh Gupta and Ms. Rinki Kashmiri, Advocates.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal has been maintained by the appellant/plaintiff (hereinafter referred to as "the plaintiff"), laying challenge to the judgment and decree, dated 02.07.2005, passed by the learned District Judge, Mandi, District Mandi, H.P., in Civil Appeal No. 116 of 2003, whereby the appeal filed by the respondents/defendants (hereinafter referred to as "the defendants") against the judgment and decree, dated 31.10.2003, passed by the learned Civil Judge (Junior Division), Chachiot at Gohar, District Mandi, H.P., in Civil Suit No. 33 of 2002, decreeing the suit filed by the plaintiff, was allowed.

2. The key facts of the case can tersely be summarized as under:

The plaintiff by maintaining a suit for permanent prohibitory and mandatory injunction averred that he is exclusive owner-in-possession of the land comprised in Khewat Khatauni No. 122 min/146, Khasra No. 1384, measuring 0-1-8 bighas, situated in Mauja Chachiot/54, Tehsil Chachiot, District Mandi, H.P. (hereinafter referred to as "the suit land"). As

per the revenue record, there was an entry qua existence of a *gaimumkin* house on the suit land, but the same had fallen and the suit land is in ownership and possession of the plaintiff. The plaintiff has further averred that the defendants/respondents (hereinafter referred to "the defendants") without having any right, title and interest forcible encroached some portion of the suit land and during the pendency of the suit they succeeded in raising the construction of a single room over khasra No. 1384/1, measuring 0-0-16 bighas. As per the plaintiff, the construction, so raised, and possession of the defendants over the above land is wholly wrong, illegal and unauthorized, as they have no right, title and interest over the suit land, thus the plaintiff sought that his possession be restored by demolition of the unauthorized construction of a room and the possession of the land be also restored to the plaintiff.

3. The defendants, by way of filing written statement, contested and resisted the suit of the plaintiff. They raised preliminary objections, viz., maintainability, locus standi, cause of action and valuation. On merits, the defendants contended that as per the revenue record their residential house had been existing on the suit land, thus the allegations of the plaintiff are baseless and vague. The existence of the residential house of the defendants belies the plea of the plaintiff that the defendants are interfering over the suit land. As per the defendants they carried out renovation of their old house, which was existing over *abadi deh* land, bearing khasra No. 1385, which is adjoining to the suit land and no construction had been raised on the suit land. The defendants further averred that only on the basis of apprehension the plaintiff filed the suit.

4. The learned Trial Court on 03.08.2002 framed the following issues for determination and adjudication:

> ***"1. Whether the plaintiff is entitled for relief of permanent prohibitory injunction, as prayed for? OPP***
>
> ***2. Whether the plaintiff is entitled for relief of mandatory injunction? OPP***
>
> ***3. Whether the plaintiff has no locus-standi to file the present suit? OPD***
>
> ***4. Whether the plaintiff has no cause of action to file the present suit? OPD***
>
> ***5. Whether the suit of the plaintiff is not maintainable in the present form as alleged? OPD***
>
> ***6. Whether the suit of the plaintiff is bad for the purpose of valuation of Court fee and jurisdiction, as alleged? OPD***
>
> ***7. Relief."***

5. After deciding issues No. 1 and 2 in favour of the plaintiff, issues No. 3 to 5 against the defendants and issue No. 6 in favour of the defendants, the suit of the plaintiff was decreed. Subsequently, the defendants preferred an appeal before the learned Lower Appellate Court, which was allowed, vide impugned judgment dated 02.07.2005, hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

> ***"1. Whether the learned First Appellate Court has committed grave and manifest error by setting aside the judgment and decree of Ld. Trial Court ignoring the spot map and testimony of PW-4, which has resulted in mis-carriage and failure of justice to the appellant?***
>
> ***2. Whether the judgment and decree of Ld. First Appellate Court are not justified under law by not appointing Local Commissioner or remanding the case back for appointment of Local Commissioner in order to ascertain the encroachment made by the respondents, which has materially prejudiced the case of the appellant as a whole?***
>
> ***3. Whether the judgment and decree of Ld. First Appellate Court is perverse to the fact that the plaintiff can file a fresh suit for demolition of***

encroachment, if any, made by the defendants, which has materially prejudiced the case of the appellant as a whole?"

6. I have heard the learned Counsel for the appellants and the learned Senior Counsel for the respondents.

7. The learned Counsel for the appellant has argued that the judgment of the learned Lower Appellate court is against law and fact and has been passed only on surmises and conjectures. He has further argued that the learned Lower Appellate Court has mis-interpreted, mis-appreciated and mis-construed the oral as well as documentary evidence, especially the spot map and statement of PW-4, Shri Amar Singh. He has argued that the appeal be allowed and the judgment of the learned Lower Appellate Court be set aside and that of the learned Trial Court be restored. Conversely, the learned Senior Counsel for the respondents has argued that the learned Lower Appellate Court has not committed any error and rightly appreciated the material on record. He has further argued that the judgment of the learned Lower Appellate Court is the result of proper appreciation of evidence to its true and correct perspective. He has prayed that the appeal be dismissed.

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

9. At the very outset, it is seen that the defendant was son of the brother of maternal grand father of the plaintiff and he is now owner-in-possession alongwith the plaintiff, as the maternal grand father of the plaintiff was having no issue and it is only the plaintiff who inherited him. Admittedly, the plaintiff is owner of land comprised in Khasra No. 1384, measuring 0-1-8 bighas and the defendants, in their written statement, did not specifically deny this fact. Jamabandi for the year 1999-2000, Ex. PA, also demonstrates this fact. Precisely, the defendants' stand is that they have not raised any construction of new house or room and their construction is on adjoining Khasra No. 1385. The defendants have relied upon agreement, Ex. D-1, to show that the dispute was amicably settled on 13.03.1984 inter se the parties, whereby the land underneath the cowshed of defendant, Shri Lal Man etc. was left and in exchange adjoining house was given, but examination of this document nowhere reveals the Khasra No., which was given by the plaintiff to the defendant and also there is no mention of area, which was exchanged *inter se* the parties. It is indeed difficult to ascertain whether agreement, Ex. D-1, is qua the suit land or to some other land. Thus, the agreement, Ex. D-1, cannot be connected to the suit land.

10. The plaintiff has appeared in the witness-box as PW-1 and he has deposed that the defendants have encroached upon the suit land. The plaintiff has stated that he got the land demarcated, but the order of the Tehsildar has not been produced on record. As per the plaintiff, agreement, Ex. D-1, was signed by him, but he has not entered any such agreement. He has also admitted that his house and the house of the defendants are single room houses and he has a cow-shed adjoining the same. PW-2, Shri Om Chand, Patwari, has deposed that he demarcated the suit land and prepared *tatima,* Mark 'X'. Similar is the statement of PW-3, Shri Sanjay Vardhan. PW-4, Shri Amar Singh, Kanungo, has deposed that on 04.07.2002 he, alongwith Patwari, visited the spot and prepared *tatima,* Mark 'X' and found that a room has been raised by the defendant over the suit land. He has further deposed that he gave note Mark 'X' on Ex. PW-4/A. This witness admitted in his cross-examination that said note was prepared on 10.07.2002. Similar is the version of PW-5, Shri Khem Chand, Halqua Patwari.

11. Apparently, the above discussion of the evidence, which has come on record, shows that as per the plaintiff, the defendants, after encroaching the suit land, have raised construction over 0-0-16 bighas, which approximately comes to 18 square meters. This has been ascertained on the basis of demarcation report, Mark 'X', where the Kanungo has depicted encroachment, but there is nothing on record that how and on whose orders PW-4, Shri Amar Singh, Kanungo, has conducted the demarcation and in whose presence, meaning thereby that

the encroachment was not proved on record at all. The testimonies of PW-4 and PW-5 also make it clear that no demarcation report was prepared on the spot or lateron. Neither the Kanungo has given any demarcation report in presence of the defendants nor there is anything on record, which is suggestive of the fact that defendants were present on the spot when the demarcation was conduct by PW-4, Shri Amar Singh, Kanungo, on 04.07.2002. Now, in the absence of any report by Kanungo or order of Tehsildar qua conferment of said report, it cannot be said that the defendants have encroached upon the suit land by covering 0-016 bighas of Khasra No. 1384/1. The statements of PW-4, Shri Amar Singh, Kanungo and PW-5, Shri Khem Chand, Patwari, which show that the newly constructed room is over Khasra No. 1384/1 and is 0-0-16 bighas, are baseless and cannot be relied upon. At the same point of time, there is nothing that the plaintiff ever moved any application before the Court for appointment of Local Commissioner to ascertain the encroachment, as he alleged. Further, there is nothing on record to show that the Kanungo was competent or he was appointed under some order of the Tehsildar, he followed any procedure and he summoned the parties before preparing report, Mark 'X'. On the other hand, defendant, Shri Lal Man, while appearing as DW-1 has denied the case of the plaintiff. He has deposed that he did not raise any construction on the suit land and he only replaced roof of the old house. Similar are the statements of DW-2, Shri Rajinder Pal, DW-3, Shri Shankar Dass and DW-4 Shri Maya Ram. In nitty gritty, the dispute is a boundary dispute and oral and documentary evidence do not establish encroachment by the defendants. Certainly, the relief of injunction cannot be granted on surmises and conjectures and only because the plaintiff has proved his title over the suit landhe cannot be held entitled for the relief of equitable injunction.

12. In these circumstances, it is clear that the plaintiff has failed to prove his case. The learned counsel for the appellant has argued that this Court may appoint Local Commissioner so that the encroachment could be ascertained, but I do not find any merit in the submission of the learned counsel for the plaintiff, as when there was opportunity with the plaintiff, no application was moved and now the court cannot be used to create evidence. It is the plaintiff, who has to stand on his own legs. Further, in view of the facts discussed hereinabove, this Court does not find any necessity to appoint Local Commissioner, when there is nothing on record to even suppose that the defendants have encroached upon the land of the plaintiff.

13. From the above, it is clear that the judgment passed by the learned Lower Appellate Court is after appreciating the evidence to its true and correct perspective and the documents have also been properly appreciated and no illegality has been committed by the learned Lower Appellate Court. There is no error, so the substantial question of law No. 1 is answered accordingly. Substantial question of law No. 2 is answered holding that as the plaintiff has failed to bring anything on record that there is any encroachment by the defendants, the Court is not required to appoint Local Commissioner on its own just because the plaintiff alleged something. In the present case, the evidence has been properly appreciated by the learned Lower Appellate Court, as there was no necessity to appoint Local Commissioner.

14. As far as the judgment and decree of the learned Lower Appellate Court are concerned, the learned Lower Appellate Court has appreciated each and every aspect of the matter and the evidence on record to its true and correct perspective. There is nothing on record to show that the learned Lower Appellate Court has not considered any material evidence to its true perspective, therefore, the judgment and decree have been passed by the learned Lower Appellate Court in accordance with law. Substantial question of law No. 3 is answered accordingly.

15. In view of what has been discussed hereinabove, the appeal, which sans merits, deserves dismissal and is dismissed accordingly. However, keeping in view the relationship of the parties, they are left to bear their own costs. The appeal, so also pending application(s), if any, stand(s) disposed of.

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

Hima Devi (deceased) through LR's Bimla Devi and others ...Appellant(s)
Versus
State of Himachal Pradesh and another ...Respondents

RSA No. 197 of 2006
Decided on: October 30, 2017

Specific Relief Act, 1963- Section 5**-** Land was allotted to the plaintiff and she was put in possession – however, the defendants forcibly obtained the possession without any right to do so- a legal notice was served upon the defendants – the defendants filed an appeal before Deputy Commissioner who ordered the resumption of land – the plaintiff filed a civil suit seeking possession – the defendants pleaded that plaintiff had failed to break up the land within the prescribed period and the land remained as forest land – the work of the construction of building of Range Office was started without any objection- when the defendants came to know about the allotment, they filed an appeal against the order, which was allowed – the suit was dismissed by the Trial Court - an appeal was filed, which was also dismissed- held in second appeal that the High Court can interfere with the concurrent finding of facts when the same is shown to be perverse or the Courts have ignored material evidence or acted on no evidence or the Court have drawn wrong inferences from the facts by applying the law erroneously – the allotment is not disputed - as per Rule 22 the land can be resumed, if it is not put to the purpose for which it was granted within two years – the prescribed period of limitation is 60 days but the power was exercised after 14 years – no sanction was obtained by the Deputy Commissioner to review the order of grant of nautor passed by Tehslidar –the Courts had not properly appreciated this position of law- the appeal allowed – judgments and decrees passed by Appellate Court and Trial Court set aside. (Para-7 to 34)

Cases referred:
Narendra Gopal Vidyarthi vs. Rajat Vidyarthi, (2009)3 SCC 287, (2000)3 SCC 708
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Chandna Impex Private Limited vs. Commissioner of Customs, New Delhi, (2011)7 SCC 289
D.R. Rathna Murthy vs. Ramappa, (2011)1 SCC 158
Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs., (2001)3 SCC 179
Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161

For the appellant(s) Mr. Digvijay Singh, Advocate.
For the respondents: Mr. P.M. Negi, Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant appeal having been filed under Section 100 CPC is directed against judgment and decree dated 2.1.2006 passed by the learned Presiding Officer, Fast Track Court, Mandi, District Mandi, Himachal Pradesh in Civil Appeal No. 30/2003, 63/2005, affirming the judgment and decree dated 30.12.2000 passed by learned Senior Sub Judge, Mandi, District Mandi, in Civil Suit No. 159/96/91, 97/2000/96/91.

2. Undisputed facts, as emerge from the record are that Hima Devi plaintiff-appellant (hereinafter, 'plaintiff') was granted land under "Himachal Pradesh Nautor Land Rules, 1968", (hereinafter, 'Rules") under the Scheme known as "The Himachal Pradesh Grant of Nautor Land to Landless persons and Other Eligible Persons Scheme 1975" (hereinafter, 'Scheme'), vide

File No. 69 dated 12.2.1975, comprising of Khasra No. 1427/1, 1432/1 and 1611/1, measuring 2-4-16 Bigha on 20.1.1976. As per the plaintiff, she was put in physical possession of the suit land and mutation No. 411 was also attested on 23.12.1977 and since then, she is owner-in-possession of the land. Consequently, in the month of August, 1990, suit land comprised in Khasra No. 1050 measuring 1-1-15 Bigha was forcibly taken into possession by the defendants, through their field official, without any right, title or interest over the same, at the back of the plaintiff. plaintiff further alleged before the Court below that in the last week of November, 1990, she returned to her home and noticed that defendants have started construction work on the suit land. Plaintiff got defendants served with legal notice under Section 80 CPC on 3.4.1991 but since defendants failed to restore the piece of the land to the plaintiff, she was compelled to prefer instant suit before the learned Senior Sub Judge, Mandi, District Mandi. At this stage, it may be noticed that during pendency of the above mentioned suit, defendants filed an appeal under Section 28 of the Rules before Deputy Commissioner, who vide order dated 20.1.1992 (Exhibit DA), allowed the appeal and ordered for resumption of land in favour of the defendants. Since aforesaid order came to be passed by Deputy Commissioner, during pendency of the suit, plaintiff amended her plaint and while praying for decree for possession also sought quashing of aforesaid order dated 20.1.1992 passed by Deputy Commissioner (Exhibit PA). While admitting claim of the plaintiff that land comprised in Khasra No. 2699/1427, 2701/1432 and 2703/1611, Kita 3, measuring 4-4-16 Bigha, situate in Riwalsar, Elaka Bagera, Tehsil Sadar, District Mandi, was granted as *Nautor* land to the plaintiff on 20.1.1976, defendants emphatically denied that the possession of land was handed over to the plaintiff. Defendants further claimed before the Court below that mutation, if any, in favour of the plaintiff does not confer any right, title or interest over the suit land. Defendants while denying allegations with regard to forcible possession taken by them of the suit land, alleged that suit land was declared by the HP Government vide Notification No. 8-3/74-SF Part-II dated 15.10.1976 as Demarcated Protected Forest (in short, 'DPF'), after having afforded due opportunity of being heard to the right holders of the area, whereafter, Forest Department constructed boundary pillars all around area of new DPF. Defendants further alleged that since plaintiff failed to breakup land within prescribed period of one year for agricultural purpose hence, land remained as forest land and same deserved to be resumed to the Forest Department. Defendants further claimed that it had started construction work over the suit land during August, 1989, for the construction of building of Range Office and residence and they have spent Rs.1,50,000/- and, at no point of time, objection, if any, was ever raised by the plaintiff. Apart from above, defendants further claimed that immediately after having come to know about factum with regard to allotment of *Nautor* land to the plaintiff, it preferred an appeal against the same before the Deputy Commissioner, Mandi, who vide order dated 20.1.1992, cancelled the grant made in favour of the plaintiff. Learned trial Court in Civil Suit No. 159/1996 of 1991, vide judgment and decree dated 30.9.1996, decreed the suit of the plaintiff, after giving its findings on following issues:

"1. Whether the order dated 20.1.1992 of the Deputy Commissioner, Mandi is illegal and null and void and liable to be set aside? O.P.P.

2. If issue No.1 is proved, whether the plaintiff is entitled to the possession of the suit land as alleged? O.P.P.

3. Whether the suit is not maintainable in the present form? O.P.D.

4. Whether this Court has no jurisdiction to try the present suit? O.P.D.

5. Whether the suit is within limitation? O.P.P.

6. Whether the suit has been properly valued for the purpose of Court fee and jurisdiction? O.P.P.

7. Whether no valid notice under section 80 CPC has been issued, if so, its effect? O.P.D.

8. Whether the plaintiff has no locus-standi to file the present suit? O.P.D.

9. Whether the plaintiff is estopped to file the present suit? O.P.D.

10. Whether the suit land was D.P.F. before its allotment to the plaintiff, if so, its effect? O.P.D.

11. If issue No. 10 is not proved, whether the suit land declared as D.P.F. after the allotment of the suit land to the plaintiff, if so, its effect? O.P.D.

12. Relief."

3. However, fact remains that subsequently, learned District Judge, Mandi, in appeal having been preferred by the defendants remanded the case back to the trial court, for deciding the same afresh. Pursuant to aforesaid remand order passed by District Judge, Mandi, trial court reheard the matter and vide judgment dated 30.12.2000, dismissed the suit of the plaintiff (Civil Suit No. 159/96/91, 97/2000/96/91). plaintiff feeling aggrieved and dissatisfied with aforesaid dismissal of her suit, preferred an appeal under Section 96 CPC before the Presiding Officer, Fast Track Court, Mandi, who vide judgment and decree dated 2.1.2006, dismissed the appeal, as a result of which, judgment and decree passed by trial court, came to be upheld. In the aforesaid background, plaintiff approached this Court in the instant proceedings praying therein for decreeing her suit, after setting aside judgments and decrees passed by the learned Courts below.

4. This Court vide order dated 21.6.2007, admitted the Regular Second Appeal, on the following substantial questions of law:

"(1) Whether the Deputy Commissioner was competent to have cancelled the grant made to the appellant?

(2) Whether respondent No.3, who has been held trespasser in previous litigation between the parties, is liable to restore possession of the land to the appellant and whether the findings of the two Courts below contrary to these facts can be sustained on the basis of evidence on record?

5. Learned counsel, while inviting the attention of this Court to the judgment passed by Hon'ble Apex Court in **Narendra Gopal Vidyarthi** vs. **Rajat Vidyarthi**, (2009)3 SCC 287, (2000)3 SCC 708 and **Laxmidevamma and Others** vs. **Ranganath and Others**, (2015)4 SCC 264, forcibly contended that present appeal is not maintainable, in view of concurrent findings of fact recorded by learned Courts below and as such same deserves to be quashed and set aside.

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

7. Since specific objection with regard to maintainability of present appeal, in view of concurrent findings of fact recorded by Courts below, has been taken by the defendants, this Court deems it necessary to deal with the same at first instance before exploring answer, if any, to the substantial questions of law formulated hereinabove. Though learned counsel representing the defendants has placed reliance upon the judgments, as have been taken note above, this Court deems it proper to take into consideration latest judgment passed by Hon'ble Apex Court in **Laxmidevamma's** case supra, wherein it has been held as under:-

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

findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)

8. Perusal of the aforesaid judgment 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. This Court, after having taken note of observations made by Hon'ble Apex Court in judgment supra, sees no reason to differ with the argument having been made by learned counsel representing the defendants that in normal circumstance concurrent findings of fact recorded by Courts below should not be interfered with by the High Courts, rather, High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record. But, aforesaid judgment passed by Hon'ble Apex Court, nowhere suggests that there is complete bar for High Courts to upset the concurrent findings of the Courts below, especially when finding recorded by Courts below appears to be perverse.

9. It is well settled by now that a finding of fact itself may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said findings, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. In this regard, reliance is placed upon the judgment of Hon'ble Supreme Court in **Chandna Impex Private Limited** vs. **Commissioner of Customs, New Delhi**, (2011)7 SCC 289, wherein the Hon'ble Apex Court has held as under:-

> "14. In Hero Vinoth Vs. Seshammal, (2006)5 SCC 545, referring to the Constitution Bench decision of this Court in Sir Chunilal V. Mehta & Sons Ltd. Vs. Century Spg. & Mfg. Co.Ltd., AIR 1962 SC 1314, as also a number of other decisions on the point, this Court culled out three principles for determining whether a question of law raised in a case is substantial. One of the principles so summarised, is : (Hero Vinoth case, SCC p.556, para 24)
>
> > "24.(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding". (p.294)

10. Hon'ble Apex Court in **D.R. Rathna Murthy** vs. **Ramappa,** (2011)1 SCC 158, has specifically held that High Court can interfere with the findings of fact even in the second appeal, provided the findings recorded by Courts below are found to be perverse. It has further been held in the case supra that there is no absolute bar on the re-appreciation of evidence in those proceedings; however, such a course is permissible in exceptional circumstances. The Hon'ble Apex Court has held as under:-

> "9. Undoubtedly, the High Court can interfere with the findings of fact even in the Second Appeal, provided the findings recorded by the courts below are found to be perverse i.e. not being based on the evidence or contrary to the evidence on record or reasoning is based on surmises and misreading of the evidence on record or where the core issue is not decided. There is no absolute bar on the re-appreciation of evidence in those proceedings, however, such a course is permissible in exceptional circumstances. (Vide Rajappa Hanamantha Ranoji v. Mahadev Channabasappa, (2000)6 SCC 120; Hafazat Hussain v. Abdul Majeed, (2001) 7 SCC 189 and Bharatha Matha & Anr. v. R. Vijaya Renganathan, (2010)11 SCC 483.)" (p.162)

11. Hon'ble Apex Court in **Santosh Hazari** vs. **Purushottam Tiwari (Deceased) By LRs.,** (2001)3 SCC 179, has held that appellate Court ought not to interfere with the findings of trial Judge on a question of fact unless the latter has overlooked some peculiar feature connected with evidence of a witness or such evidence on balance is sufficiently improbable so as to invite displacement by appellate Court.

12. Careful reading of aforesaid law laid down by Hon'ble Apex Court clearly suggests that there is no blanket bar for High Courts to upset the concurrent findings of Courts below, especially when it emerge from the record that (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. Hon'ble Apex Court in **Sebastiao Luis Fernandes (Dead) through LRs and Others** vs**. K.V.P. Shastri (Dead)** through LRs and Others, (2013)15 SCC 161, has held as under:

> "35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555- 56)
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> > "24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:
> >
> > (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
> >
> > (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.
> >
> > (iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."
>
> We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC,

and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same." (pp.174-175)

13. It is quite evident from the aforesaid exposition of law that even concurrent findings of fact recorded by Courts below can be interfered with/upset by the High Courts, while exercising power under Section 100 CPC, if it is convinced that findings recorded by Courts below are not based upon any evidence and same are perverse. At this stage, it may be noticed that during the proceedings of the case, learned counsel representing the appellant-plaintiff was able to point out certain material irregularities/illegalities committed by Courts below, while examining/analyzing the evidence adduced on record by both the parties and as such this Court deems it proper to examine the pleadings/evidence adduced on record by the respective parties in support of their respective claim so that correctness and genuineness of arguments made by learned counsel to the effect that judgments passed by Courts below are wholly perverse, is ascertained.

14. Keeping in view the contents and text of substantial questions of law, reproduced hereinabove, this Court intends to take all substantial questions of law together as they are interconnected.

15. Factum with regard to allotment of suit land under the Rules, in favour of the plaintiff is not in dispute, as has been taken note above. It is also not in dispute that aforesaid allotment was made in favour of the plaintiff on 20.1.1976, whereafter mutation No. 411 came to be attested on 23.12,1977, reflecting plaintiff to be owner-in-possession of the land as is evident from Jamabandi for the year 1989-90 (Exhibit PA). It is also not in dispute that suit land came to be allotted to the plaintiff under Clause-5 of the Scheme, 1975, wherein *Nautor* land upto 1 Acre for the purpose of agriculture/horticulture can be granted to landless persons on simple application in the revenue estate, in which he/she resides or in nearby revenue estate. Clause-7 of the Scheme empowers Sub Divisional Officer(Civil) of the Sub Division and Tehsildar of the Tehsil, in which land is situate, to sanction/grant *Nautor* land. Clauses-5 and 7 of the Scheme, 1975 are reproduced hereunder:

"5. Grant of Nautor Land. –

(1) Nautor Land upto l acre for the purpose of Agriculture/ Horticulture shall be granted to a landless person on a simple application in the Revenue estate in which ordinarily resides or in a nearby revenue estate as far as possible in the following order:-

(i) in the revenue estate;

(ii) in the Patwar circle if no land is available in the Revenue estate;

(iii) in the Kanungo circle if no land is available in the Patwar circle;

(iv) in the Tehsil, if no land is available in the Kanungo circle.

2(2) The allotment of land to eligible persons under the scheme shall be made in the following order of preference.

(i) members of Scheduled castes/Scheduled Tribes, ex-servicemen, Freedom fighters and Ex-MLA personnel, covered under the Govt. of India scheme and also those freedom fighters who hove been awarded commendation certificates by the State Government;

(ii) landowners or tenants whose holdings as a result of implementation of Section 104 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 are reduced below one acre; and

(iii) to remaining eligible persons;

Provided that no land containing more than 40 trees of valuable species per acre shall be granted under this scheme.

(3) If there are trees on the land granted under this scheme and the grantee is not in a position to pay the price of the trees at market rate, the trees shall be Cleared by the Forest Department within a month from the date of grant of the land.

7. Sanctioning Authority.-The Sub-Divisional Officer (Civil) of the Sub-Division and the Tehsildar of the Tehsil in which the land is situated shall be the sanctioning authority for the purpose of this scheme. The sanction order of nautor land shall be made by the Tehsildar on the application and its operative part entered in the register to be maintained for the purpose in the Tehsil. Issue of Patta under the scheme will not be necessary."

16. Pursuant to aforesaid sanction, detailed procedure is provided under Rules-18 and 19 of the Rules, 1968, for the grant of *Patta* in favour of the allottee, containing therein terms and conditions. Rule-22 of the Rules, 1968, is also reproduced herein below:

"22. In the case of nautor land granted for agricultural or horticultural purposes, the Patwari of the area shall report immediately on the expiry of two years from the grant of the nautor land, whether the land has been brought under cultivation/plantation by the grantee. In the case of nautor land granted for a water mills shall be reported immediately on the expiry of two years whether the mill has been started and if not, yet whether at least construction of the mill has substantially begun. In other case, he shall report at the expiry of two years, whether any substantial start has been made for the use of the land for the purpose it was granted giving details thereof. The date on which the above report is due from the Patwari shall be entered in the appropriate column of the missal Band Register.

Explanations: -- The Patwari shall at the time of inspection of each harvest (girdawari) make specific entries about the use to which each field number granted as nautor land ahs been put to."

17. As per aforesaid Rule, in case, entire land granted for horticultural/agricultural purpose is not put to use for the purpose for which it was granted, within a period of two years, from the grant, Patwari concerned shall at the time of inspection of each harvest (Girdawari) make specific entry about use to which the field number is granted as *Nautor* land has been put to. Subsequent to aforesaid report submitted by Patwari concerned under Rule-22, Sub Divisional Officer(Civil), if is satisfied that grantee has committed breach of conditions of grant, shall order resumption under the Rules, after affording opportunity of being heard to the allottee/ grantee. Rule 25 further authorizes Deputy Commissioner to pass order regarding resumption of possession on receipt of report submitted to him under sub-rule (b) of Rule 24. Needless to say, before passing order, if any, under Rule 25, Deputy Commissioner is required to afford opportunity of hearing to the allottee/grantee. Rules 24 and 25 of the Rules, 1968 are reproduced hereinbelow:

"24. Report by the Range Forest Office regarding defaulter to be called before resumption.-When the Sub-Divisional Officer (Civil) is satisfied that a grantee has committed a breach of the conditions of his grant, he shall before ordering resumption under these rules, give the grantee an opportunity to appear and state his objections to the cancellation and resumption, and having recorded the statement, he may either (a) extend the period for the fulfillment of the conditions of the grant by one year for valid reasons to be recorded in writing or (b) recommend to the Deputy Commissioner that a longer extension of time may be granted within which to fulfill the conditions 'or, that the 'breach of conditions may be condoned with or without payment of penalty or that the grant be resumed."

25. Deputy Commissioner to pass orders regarding resumption of possession.-The Deputy Commissioner, may on receipt of a report submitted to him under Sub-Rule (b) of the last foregoing rules, pass such orders as he deems fit after giving an opportunity to the person affected to be heard."

18. In the case at hand, allotment of suit land was made in favour of the plaintiff on 20.1.1976 by Tehsildar under the Scheme 1975. Mutation was also attested in favour of the plaintiff on 23.12.1977 as is evident from Jamabandi for the year 1989-90 (Exhibit PA). But, after fourteen years of allotment, defendants, as has been admitted in their written statement, fixed barbed wires for boundary purpose around the suit land and thereafter raised construction of building for office/residence of Range Officer. Though, defendants, in their reply have stated that suit land which was granted to the plaintiff under the Scheme was subsequently declared by Himachal Pradesh Government as DPF on 15.10.1976, after, affording due opportunity of hearing to the right holders of the area but this Court was unable to lay its hand on any document save and except order dated 15.10.1976, suggestive of the fact that plaintiff was afforded opportunity of hearing by the authorities concerned before passing aforesaid order. Defendants have also admitted in their written statement that they started raising construction work over the suit land during August, 1989, for the construction of building of Range Office i.e. after thirteen years of allotment. Defendants in their written statement set up a case that since plaintiff failed to break up land within prescribed period of one year for agricultural purpose, they preferred an appeal under Section 28 of the Rules, before Deputy Commissioner, Mandi. Rule 28 of the Rules, provide as under:

> "28. An appeal from the order of the S.D.O.(C) under rule 16 shall lie to the Deputy Commissioner within 60 days from the date of the order. A further appeal from the appellate order of the Deputy Commissioner shall lie to the Commissioner within 60 days from the date of the order. In the case of original grant mode by the Deputy Commissioner, an appeal from his order shall lie to the Commissioner within 60 days from the dote of order.'
>
> Provided that no second appeal shall lie when the original order is confirmed on first appeal.
>
> 29. Review. The Financial Commissioner or the Commissioner or the Deputy Commissioner or the Sub-Divisional Officer (C) may either of his own motion or on application of any party interested, review, and modify, reverse or confirm any order . passed by himself or any of his predecessors in office: provided as follows:-
>
> (a) when the Sub-Divisional Officer (C) thinks it necessary to review any order, he shall first obtain the sanction of the Deputy Commissioner;
>
> (b) when the Commissioner or the Deputy Commissioner think it necessary to review any order which he has not himself passed, he shall first obtain the sanction of the Financial Commissioner in the case of the Commissioner and the Commissioner in the case of the Deputy Commissioner;
>
> (c) the application for review of order shall not be entertained unless it is made within 90 days from the passing of the order and unless the applicant satisfied the Financial Commissioner or the Commissioner or the Deputy Commissioner or the Sub-Divisional Officer (Civil) as the case may be, that he had sufficient cause for not making the application within that period;
>
> (d) an order Shall not be modified or reversed in review unless reasonable notice has been given to the parties affected thereby to appear and be heard in support of the order;
>
> (e) on order against which an appeal has been preferred shall not be reviewed."

19. Mr. Digvijay Singh, learned counsel representing the plaintiff, while inviting attention of this Court to Rule 28 of the Rules, 1968, vehemently argued that appeal, if any, from the order of Sub Division Collector/Tehsildar, who had allotted the land under Scheme could be

filed within 60 days from the date of order, but, in the instant case, as is evident from the admission made by the defendants in their written statement as well as appeal (Exhibit PX) that the appeal came to be filed on 26.7.1991, i.e. after fifteen years of allotment, as such, Deputy Commissioner had no power to cancel the allotment made in favour of the plaintiff under the Scheme.

20. At this stage, Mr. P.M. Negi, learned Additional Advocate General, while refuting aforesaid submissions having been made by the learned counsel representing the plaintiff, contended that the order dated 20.1.1992 Exhibit DA, passed by Deputy Commissioner, is not under Section 28 of the Rules, rather Deputy Commissioner, while exercising powers under Rule 29, reviewed the order passed by Tehsildar, who had made allotment in favour of the grantee/allottee, vide order dated 20.1.1976. Mr. Negi, learned Additional Advocate General further contended that bare perusal of averments contained in the plaint as well as statement made by the plaintiff before the court clearly suggests that the plaintiff was not able to breakup the land after allotment for almost fifteen years, whereafter in the year 1991, defendants fenced the suit land, as such, there is no illegality or infirmity in the order of resumption passed by Deputy Commissioner.

21. As far as power of Deputy Commissioner to pass order of resumption under such Rules is concerned, same is not in dispute. Under Rule 25 of the Rules, Deputy Commissioner can pass order with regard to resumption of possession on the basis of report submitted to him under Sub-rule (b) of Rule 24. Similarly, Deputy Commissioner can entertain appeal from the order of Sub Divisional Officer(Civil) passed under Rule 16, whereby he/she is authorized to grant *Nautor* land upto the maximum as prescribed under Rule-5, but in both the situations, Deputy Commissioner can only act upon the report, if any, submitted by Sub Divisional Officer(Civil) or for that matter Tehsildar, who, under Rule-5 also enjoys power to grant *Nautor* land to landless persons.

22. It is none of the case of the defendants that Deputy Commissioner cancelled allotment made in favour of allottee/grantee while exercising powers under Rule 25, rather, specific case of the defendants is that order dated 20.1.1992 has been passed by Deputy Commissioner while exercising power under Rules-28 and 29 of the Rules. But, aforesaid contention/submission made by learned Additional Advocate General is totally contrary to record as well as Rules occupying the field.

23. First of all, perusal of Exhibit PX i.e. appeal filed by the defendants itself suggests that they being aggrieved by allotment of land in favour of the plaintiff under Scheme, preferred an appeal under Rule 28 of the Rules, 1968. Mr. P.M. Negi, learned Additional Advocate General, while referring to Exhibit DA, order dated 20.1.1992, passed by Deputy Commissioner, contended that before passing order under Rule 28, Deputy Commissioner called for the report of Tehsildar, who had granted land in favour of plaintiff, but bare perusal of Rule 28 itself suggests that power, if any, under Section 28 can/could be exercised by Deputy Commissioner, to ascertain correctness and legality of order, if any, passed by Sub Divisional Officer(Civil) or for that matter, Tehsildar, but, in the case at hand, as has been taken note, no order of Sub Divisional Officer(Civil)/Tehsildar granting land under the Scheme was challenged, rather, challenge is/was on the ground that since suit land subsequently came to be declared as DPF and it was never put to specific use as was required in terms of the *Patta*/grant made in favour of the plaintiff, allotment/grant deserves to be cancelled.

24. Leaving everything aside, Mr. P.M. Negi, learned Additional Advocate General, was unable to dispute that appeal filed under Rule 28 by defendants was not within prescribed period of 60 days from the date of grant of allotment. Perusal of order dated 20.1.1992 (Exhibit DA) compels this Court to agree with the contention of Mr. Digvijay Singh learned counsel representing the plaintiff that appeal having been preferred by the defendants was accepted by Deputy Commissioner, without condoning delay, which he otherwise was not competent to condone. There is no mention as such in the order passed by Deputy Commissioner with regard to explanation, if any, rendered by the defendants, for not laying challenge to grant made in

favour of the plaintiff for more than fourteen years, as such, order passed by Deputy Commissioner deserves to be set aside, on this sole ground.

25. Another contention raised by Mr. P.M. Negi, learned Additional Advocate General, is also not tenable that order dated 20.1.1992 passed by Deputy Commissioner came to be passed under Rule 29, whereby Deputy Commissioner can/could modify, reverse or affirm any order passed by himself or any of his predecessor in office, because Rule 29(b) categorically provides that if Deputy Commissioner thinks it necessary to review any order, which he has not himself passed, he shall first obtain sanction of the Commissioner.

26. Admittedly, in the case at hand, order of grant in favour of plaintiff was passed by Tehsildar, under Clause-5 of the Scheme as is evident form order passed by Deputy Commissioner itself, and as such, Deputy Commissioner could only review the order passed by above named authority after obtaining sanction from the Commissioner. But in the case at hand there is nothing available on record suggestive of the fact that prior sanction was ever obtained by Deputy Commissioner to review order of grant passed by Tehsildar.

27. After having carefully perused pleadings adduced on record, as well as Rules applicable to the facts and circumstances of the case, this Court has no hesitation to conclude that both the learned Courts below erred in not appreciating the fact that Deputy Commissioner had no power to cancel grant made in favour of plaintiff after prescribed period of limitation i.e. 60 days. Deputy Commissioner could only cancel grant/allotment of land while exercising power under Rule 28, if he/she had received appeal from the order of Sub Divisional Officer(Civil) or for that matter Tehsildar, within 60 days from the date of order. In the case at hand, as is clearly evident from the pleadings as well as evidence adduced on record by respective parties that no steps, whatsoever were taken by the Forest Department to approach Deputy Commissioner either under Rule 25 or under Rule 28, for more than fourteen years seeking therein resumption of land on the ground that plaintiff failed to break up the land for agricultural purpose within the prescribed period of two years.

28. Similarly, while exercising power under Rule 29, Deputy Commissioner could only order resumption of suit land after obtaining prior sanction from the Commissioner. In the case at hand, no due procedure as is envisaged under Rules 25, 28 and 29 of the Rules was followed by Deputy Commissioner, before passing order dated 20.1.1992 and as such same can not be termed to be sustainable.

29. As far as another argument having been made by Mr. P.M. Negi, learned Additional Advocate General that land subsequently came to be declared as DPF, is concerned, that can not be accepted solely for the reason that suit land came to be allotted to plaintiff on 20.l1.1976 i.e. prior to issuance of Notification dated 15.10.1976, whereby Government declared part of suit land as DPF. If, for the sake of argument, aforesaid contention of the learned Additional Advocate General is accepted that no land declared as DPF could be granted to the plaintiff, in that eventuality, it is not understood how defendants could be allowed to raise construction on DPF, without there being any clearance/sanction from the Government of India. It has specifically come in the statement of DW-1, Daleep Singh, retired Range Officer that no prior sanction/clearance from Central Government was obtained by the Department before raising construction of office of Range Officer on the DPF. Substantial question of law No.1 is answered accordingly.

30. At this stage, both the learned counsel fairly stated that substantial question of law No.2 does not appear to be based upon the pleadings as well as evidence adduced on record by the respective parties as such same is not required to be answered in light of finding given by this Court qua the substantial question of law No.1, above.

31. This Court after having perused pleadings and evidence adduced on record by the respective parties as well as Rules occupying the field, has no hesitation to conclude that the findings returned by both the learned Courts below are not based upon correct appreciation of evidence adduced on record by the respective parties as well as Rules/Scheme occupying the

field. Both the learned Courts below have drawn wrong inferences from the proved facts by applying law erroneously, as such, have ended up in returning erroneous findings, which are wholly perverse and can not be allowed to be sustained. Since findings recorded by the learned Courts below are not based upon any evidence and are contrary to the Rules, as such, same being perverse can be interfered with by this Court, while exercising power under Section 100 of the Code of Civil Procedure.

32. Though this court, has held on the basis of material available on record as well as Rules occupying the field that Deputy Commissioner had no power to cancel the grant made in favour of the plaintiff after fourteen years of the grant/allotment, while exercising power under Rule 28 but this Court can not lose sight of the fact that some portion of land has been already declared as DPF and same can not be put to non-forestry use, as has been held in case titled as **T.N. Godavarman Thirumulkpad vs Union Of India & Ors** decided on 12.12.1996 by the Hon'ble Apex Court.

33. Mr. Digvijay Singh, learned counsel representing the plaintiff, while inviting attention of this Court to the appeal preferred by the defendants before Deputy Commissioner, (Exhibit PX) fairly submitted that land comprising of Khasra No. 1432/1 and 1611/1 measuring 1-03-01 Bigha, which is separate from land declared as DPF, can be handed over to the plaintiff as was offered by the defendants in the appeal. Bare perusal of Exhibit PX, appeal filed by the defendants suggests that Forest Department has no objection in case land other than DPF is handed over to the plaintiff, who is admittedly grantee of entire chunk of land allotted by Tehsildar under the Scheme, 1975.

34. Consequently, in view of detailed discussion made herein above as well as law laid down by Hon'ble Apex Court, judgments and decrees passed by the first appellate court as well as trial Court are set aside being contrary to the Rules governing the field. Suit of the plaintiff is decreed to the extent that she shall be entitled to possession of land measuring 1-03-01 Bigha comprising of Khasra Nos. 1432/1 and 1611/1, whereas land comprising of Khasra No. 1427/1 measuring 1-01-15 Bigha, which has now been converted into DPF, shall remain in the possession of the Forest Department.

Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

****

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

Hukmi Devi & another .....Appellants.

Versus

Madan .....Respondent.

RSA No. 387 of 2007
Reserved on: 09.10.2017
Decided on: 30.10.2017

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit for declaration and injunction pleading that his father S and B were real brothers, who were co-owners of the suit land - B executed a Will in favour of the plaintiff – the Will propounded by the defendant is null and void - the defendant pleaded that he was looking after B and B had executed a Will in his sound disposing state of mind - the suit was dismissed by the Trial Court - an appeal was filed, which was partly allowed – held in second appeal that the plaintiff had not examined any witness to prove the veracity and authenticity of the Will – the plaintiff was ill and confined to the bed – he could not serve B – he could not perform the last rites of the B - B had cancelled the Will executed in favour of the plaintiff- B died in the house of the defendant - Will propounded by the defendant was duly proved - mere presence of beneficiary at the time of execution of the Will does

not affect its authenticity – the Appellate Court had rightly concluded that B had executed a Will in his sound disposing state of mind- appeal dismissed. (Para-11 to 27)

Cases referred:
Kalyan Singh vs. Smt. Chhoti and others, (1990) 1 SCC 266
Sea Lark Fisheries vs. United India Insurance Company and another, (2008) 4 SCC 131
Bharpur Singh & others vs. Shamsher Singh, (2009) 3 SCC 687
S.R. Srinivasa & others vs. S. Padmavathamma, (2010) 5 SCC 274
Ramrameshwari Devi & others vs. Nirmala Devi & others, (2011) 8 SCC 249
A. Shanmugam vs. Ariya Kshstriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, represented by its President, & others, (2012) 6 SCC 430
M.B. Ramesh (Dead) by LRs vs. K.M. Veeraje URS (Dead) by LRs & others, (2013) 7 SCC 490

For the appellants: Mr. G.D. Verma, Sr. Advocate, with Mr. B.C. Verma, Advocate.
For the respondent: Mr. Anupinder Rohal, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal has been maintained by the appellants, who are legal representatives of Shri Dhani Ram (since dead), the original plaintiff, (hereinafter referred to as "the plaintiffs"), laying challenge to the judgment and decree, dated 10.05.2007, passed by the learned Additional District Judge, Shimla, District Shimla, H.P., in Civil Appeal No. 1-S/13 of 2004, whereby the appeal filed by the plaintiffs against the judgment and decree, dated 21.04.2004, passed by the learned Civil Judge (Junior Division), Court No. 1, Shimla, H.P., in Civil Suit No. 107/1 of 2002, dismissing the suit of the original plaintiff, Shri Dhani Ram, was partly allowed.

2. The key facts of the case can tersely be summarized as under:

The original plaintiff maintained a suit seeking declaration with consequential relief of permanent prohibitory injunction against the respondent/defendant (hereinafter referred to as "the defendant") qua land comprising in Khata No. 60, Khatauni No. 135, Kitta 5, measuring 1-20-76 hectares, situated in Mauja Jaisi, Pargana Saraj, Tehsil Suni, District Shimla, as depicted in jamabandi for the year 1996-97 and the land comprising in Khata No. 84, Khatauni No. 170 to 171, Khasra Kitta 11, measuring 0-54-14 hectares, situated in Mauja Bharara, Pargana Saraj, Tehsil Suni, District Shimla, as depiected in jamabandi for the year 12997-98 (hereinafter referred to as "the suit land").

As per the original plaintiff, his father, Shri Shibu and one Shri Burfia were real brothers living together in Village Jaishi, Tehsil Suni, District Shimla. The original plaintiff further contended that Shri Shibu and Shri Burfia were sons of Shri Sugru and co-owners of the suit land. After the death of Shri Shibu, the original plaintiff succeeded his half share and became co-owner in the suit land alongwith Shri Burfia. The original plaintiff has further contended that Shri Burfia was issueless and he was being looked after by him, so Shri Burfia executed a Will, dated 23.01.1990, bequeathing his property in favour of original plaintiff. Shri Burfia died on 27.07.2002 without any issue otherwise also the original plaintiff, being only legal heir, had succeeded the estate of Shri Burfia. As per the original plaintiff, as he alone succeeded the share of Shri Burfia, he is exclusive owner-in-possession of the suit land and the defendant has no right and interest in the same. The original plaintiff further contended that the defendant was not related to Shri Burfia, so there was no occasion to execute any Will in his favour. As per the original plaintiff, Will dated 19.10.2000, as alleged by the defendant, is null and void. Shri Burfia was not physically capable to execute a Will on that date. The defendant cannot fetch any benefit under Will dated 19.10.200. The cause of action arose in favour of the original plaintiff

when the defendant on the basis of Will threatened to interfere in plaintiff's exclusive possession over the suit land. Therefore, the original plaintiff, maintained a suit seeking a decree of declaration with consequential relief of injunction.

3. The defendant, by way of filing written statement, contested and resisted the suit of the plaintiff. He raised preliminary objections, viz., cause of action, valuation, non-joinder of necessary parties, maintainability, etc. On merits, the defendant admitted that Shri Shibu was father of the original plaintiff and Shri Burfia was real brother of Shri Shibu having lands in two revenue estates. He has further admitted that Shri Burfia had died. The defendant contended that Shri Shibu had settled in Village Bharara and Shri Burfia got settled in Village Jaishi and he himself was looking after his property there. As per the defendant, Village Jaishi is about four kilo meters from Village Bharara and the original plaintiff or his father did not visit village Jaishi. He has further averred that the plaintiff was suffering from paralysis for six-seven years and he was bed ridden and he was taken care by others. The plaintiff did not have any male issue, therefore, Shri Burfia executed a due and valid Will, dated 19.10.2000, in favour of the defendant, just to look after the plaintiff properly and after his death his final rites could be performed. As per the defendant, Shri Burfia has given possession of land in Village Jaishi prior to his death. He has succeeded the estate of Shri Burfia, as per the Will. The defendant refuted and denied other allegations of the original plaintiff and prayed for dismissal of the suit.

4. The learned Trial Court on 26.04.2003 the following issues for determination and adjudication:

> ***"1. Whether the plaintiff is the owner in possession of the suit land, as alleged? OPP***
>
> ***2. Whether the plaintiff is entitled for relief of permanent prohibitory injunction, as prayed? OPP***
>
> ***3. Whether the suit is not maintainable? OPD***
>
> ***4. Whether the suit is not property valued for the purpose of Court fee and jurisdiction if so what is correct valuation? OPD***
>
> ***5. Whether the plaintiff has no cause of action? OPD***
>
> ***6. Relief."***

5. After deciding issues No. 1 and 2 against the original plaintiff and issues No. 3 to 5 against the defendants, the suit of the original plaintiff was dismissed. Subsequently, the legal heirs of the original plaintiff, who are appellants herein, preferred an appeal before the learned Lower Appellate Court, which was partly allowed, vide impugned judgment dated 10.05.2007, hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

> ***"1. Whether Will Exhibit DW-4/A, dated 23.01.90 set up by respondent is shrouded by suspicious circumstances and the same is not legal and valid?***
>
> ***2. Whether Will Exhibit DW-2/A, dated 19.10.2000 has not been prepared according to the prescribed procedure in as much as that the same was not prepared with the consent and knowledge of the deceased Shri Burfia and it was not executed nor signed by him in the presence of marginal witnesses nor they put their signatures on it in the presence of late Shri Burfia.***
>
> ***3. Whether Exhibit DW-2/A is rendered invalid and unlawful on account of active participation of respondent?***
>
> ***4. Whether the findings as recorded by learned trial court as well as by learned lower Lower Appellate Court to the extent same are against appellants are vitiated on account of mis-reading, mis-construction and mis-interpretation of the oral as well as documentary evidence on record?***

5. Whether alleged Will Exhibit DW-2/A has not been prepared at the instance of deceased Shri Burfia Ram and the marginal witnesses being interested persons cannot be relied upon and therefore, alleged Will is not legal and valid especially when there are material contradictions in the statements of the witnesses.

6. Whether Lower Appellate Court failed to consider the grounds of appeal which were set up and urged and thus, jurisdiction has not been exercised by him in accordance with law?"

6. I have heard the learned Senior Counsel for the appellants and the learned Counsel for the respondent.

7. At the very outset this Court finds that substantial question No. 1 is required to be reframed. Thus, on the basis of the pleadings the same is reframed as under:

"1. Whether Will Exhibit DW-2/A, dated 19.10.2000, set up by the respondents is shrouded by suspicious circumstances and the same is not legal and valid?"

8. The learned Senior Counsel for the appellants has argued that the judgments passed by the learned Courts below are against law and the same are required to be set aside and the appeal of the appellants is required to be allowed in totality. He has further argued that there was no occasion for Shri Burfia (testator) to execute a Will in favour of the respondent (defendant). In contrast to what has been argued by the learned Senior Counsel for the appellants, learned Counsel for the respondent has argued that the Will was validly executed by Shri Burfia in favour of the defendant (respondent herein) for the simple reason that the original plaintiff, Shri Dhani Ram, who was to lookafter Shri Burfia, in whose favour earlier Shri Burfia executed a Will, remained himself paralytic for many years and he was not having any male child to lookafter him or Shri Burfia. Therefore, Shri Burfia executed a Will in favour of the original plaintiff to lookafter Shri Burfia and to perform his last rites. In rebuttal, the learned Senior Counsel for the appellants has argued that the Will is shrouded by suspicious circumstances and as settled by Hon'ble Courts, such Will is required to be declared null and void. To support his arguments, the learned Senior Counsel has relied upon the following judicial pronouncements:

1. Kalyan Singh vs. Smt. Chhoti and others, (1990) 1 SCC 266;

2. Sea Lark Fisheries vs. United India Insurance Company and another, (2008) 4 SCC 131;

3. Bharpur Singh & others vs. Shamsher Singh, (2009) 3 SCC 687;

4. S.R. Srinivasa & others vs. S. Padmavathamma, (2010) 5 SCC 274;

5. Ramrameshwari Devi & others vs. Nirmala Devi & others, (2011) 8 SCC 249;

6. A. Shanmugam vs. Ariya Kshstriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, represented by its President, & others, (2012) 6 SCC 430; and

7. M.B. Ramesh (Dead) by Lrs vs. K.M. Veeraje URS (Dead) by LRs & others, (2013) 7 SCC 490.

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

10. The learned Trial Court vide its judgment dated 21.04.2004 carved out following undisputed facts and this Court also finds that these are still undisputed facts:

"1. Shibu, the plaintiff's father and Burfia were real brothers and were co-owners in joint possession of the suit land. Each of them was having half share in it and this is evident from copies of jamabandies Ex. PW-1/B, Ex. PW-1/C, Ex. DW-1/C and Ex. DW-1/C and Ex. DW-1/E.

2. It is also an admitted fact that Burfia was not having an issue. And though he was an old man, yet he was hale and hearty and remained active during his lifetime till death. He remained active and used to visit his relatives till death. This is evident from the cross-examination of PW-1 Smt. Khemawati, daughter-cum-general power of attorney of plaintiff as well of PW-5 Parmanand.

3. It is also an admitted fact that Burfia died issueless on 27.07.2002 without leaving any issue and the death certificate is Ex. DW-1/F.

11. Smt. Khemawati (PW-1) deposed that Shri Dhani Ram (the original plaintiff) was her father and he was ill from the year 2001 and Shri Burfia, who was real uncle of Shri Dhani Ram, was not having any child, so, as a matter of caution, Shri Burfia executed a will in favour of her father, though otherwise also her father would have inherited his estate in a natural course and the Will executed in her father's favour in the year 1990 was his last Will. In her cross-examination, she has admitted that Shri Burfia was living in another village and he was hale and hearty, but she further stated that he used to remain puzzled. She has shown ignorance to the fact that grand father of his father and the grand father of the defendant were real brothers. This witness has admitted that her father was ill. In these circumstances, the Court has a reason to believe that Shri Burfia was interested in his welfare in his old age and that is why earlier he executed a Will in favour of the father of PW-1, but when the father of PW-1 was having no male issue and he fell ill, Shri Burfia executed a fresh Will in favour of the defendant.

12. Shri Satya Parkash (PW-2) has only produced the record of the Panchayat. Shri Ganga Ram (PW-3) has deposed that Shri Dhani Ram was owner-in-possession of the land and Shri Burfia executed a Will in favour of Shri Dhani Ram in the year 1990. This witness in his cross-examination could not tell khasra No. of the land, but he has admitted that Shri Dhani Ram was ill for 2-3 years. Shri Hem Singh (PW-4) has proved the registration of the Will dated 23.01.1990 in favour of Shri Dhani Ram. Shri Parma Nand (PW-5) has deposed that he know the parties. This witness, in his cross-examination, deposed that Shri Dhani Ram was ill for the last 2-3 years and was suffering from paralysis and unable to walk. On the other hand, defendant himself stepped into the witness-box as DW-1 and he has deposed that Shri Burfia got a Will executed in his favour after cancelling his earlier Will for the reason that Shri Dhani Ram (the original plaintiff) was unable to lookafter him due to his illness. This witness, in his cross-examination, has deposed that Shri Dhani Ram etc. are not allowing him to take possession of the land. Shri Mushu Ram (DW-2) is a witness to the Will dated 19.10.2000, Ex. DW-2/A. He has deposed that the Will was executed by Shri Burfia in a sound state of mind and in presence of the witnesses. He has further deposed that Shri Burfia signed the Will after understanding the same. The statements of DWs, 3, 4 and 5, i.e., Shri Bhagat Ram, Shri Sewa Dutt and Shri Hem Singh, respectively, have proved the registration of the Will in presence of the Registrar. From this evidence, which has come on record, it is crystal clear that Shri Burfia was all alone and he neither had wife nor any issue. In fact, he was in need of someone to look after him in his old age, therefore, he executed a Will in favour of the original plaintiff, but he himself was paralytic and was confined to bed, so he again executed a Will in favour of the defendant. The execution of a Will in favour of the defendant draws support from the fact that the plaintiff himself was confined to bed.

13. The plaintiff did not examine any marginal witness to prove the veracity and authenticity of the Will, Ex. PW-4/A, dated 23.1.1990, and it is beaten law of the land that to establish execution and attestation of Will, at least one marginal witness, who is alive and is subject to jurisdiction of the Court, has to be examined. Therefore, the plaintiff has failed to prove the execution of Will dated 23.01.1990 in his favour. The next leaf of the plea of the plaintiff is that he has succeeded the estate of Shri Burfia under the law of succession, as he was his nephew. On an overall examination of the material on record, it is unearthed that this question of natural succession came into picture only when Will, dated 19.10.2000, executed in favour of the defendant is not proved. Therefore, it is incumbent upon the defendant to prove

Will, dated 19.10.2000, and for this purpose he has placed on record Will, dated 19.10.2000, Ex. DW-2/A.

14. Shri Bhagat Ram (DW-3), Document Writer, scribed the Will dated 19.10.2000. He specifically deposed that he, at the instance of Shri Burfia, scribed the Will as well as the cancellation deed and marginal witnesses were also present there. He further deposed that he read the Will and the cancellation deed to Shri Burfia and he also admitted the correctness of the same, thereafter he put his thumb impression on the documents that too in presence of the witnesses. As per this witness, Shri Burfia was mentally fit at that relevant time. Shri Mushu Ram and Shri Sewa Dutt, DW-2 and DW-4, respectively, who are the marginal witnesses, have deposed in the same manner. Both these witnesses have specifically deposed that the Will and the cancellation deed were written by DW-3 (Shri Bhagat Ram) and the same were explained to Shri Burfia by Shri Bhagat Ram, who put his thumb impression on the documents in their presence. As per the versions of these witnesses, Shri Burfia was at that relevant time was mentally and physically fit. Shri Bhagat Ram (DW-3), Scribe, has further deposed that the testator and the marginal witnesses put their thumb mark/signatures on Will, Ex. DW-2/A, in each others' presence. Thus, manifestly, the execution, attestation and recitals of Will, Ex. DW-2/A, stands fully proved. Further it is specifically written in the Will that testator, i.e., Shri Burfia, was hale and hearty and in a sound state of mind at the time of execution of the Will. PWs 1 and 5, i.e., Smt. Khemawati and Shri Parma Nand, respectively, have also admitted this fact.

15. Shri Burfia executed the earlier Will in a hope that the plaintiff would perform his final rites after his death. In the cancellation deed, Ex. DW-2/B, Shri Burfia (testator) specifically mentioned that he is revoking his earlier Will, which was made in favour of the plaintiff, as Shri Dhani Ram (the original plaintiff) is suffering from paralysis for the last one year and he is unable to maintain him and his property. As the cancellation deed was written on 19.10.200, so the plaintiff could have suffered paralysis during October, 1999. This fact also stands substantiated and proved by PW-1, Smt. Khemawati, and PW-5, Shri Parma Nand, who have deposed that plaintiff is confined to bed for the last two to two and half years. The statements of PW-1 and PW-5 were recorded on 14.08.2003 and the same closely correspond with the period, so mentioned in the cancellation deed, Ex. DW-2/B.

16. Noticeably, the plaintiff was ill and confined to bed and he could not even participate the funeral of Burfia. In fact, Shri Burfia wanted that after his death his last rites should be performed by the plaintiff, however, the plaintiff was not in a position to perform the last rites of Shri Burfia due to his illness, therefore, earlier Will, so executed by Shri Burfia, was cancelled. Shri Burfia, throughout his life, remained hale and hearty. In fact, there existed a valid and plausible reason for Shri Burfia to cancel his earlier Will, executed in favour of the original plaintiff. The distance between the houses of Shri Burfia and defendant was only 100 meters and Shri Burfia died in the defendant's house and he performed his last rites. The available evidence clearly demonstrates that Shri Burfia executed his last Will, Ex. DW-2/A, dated 19.10.2000, in favour of the defendant and the same is not shrouded with suspicious circumstances, as the recitals made therein stand convincingly proved. The presence of beneficiary, i.e., the defendant, at the time of execution of Will in his favour by the testator does not mar the veracity and authenticity of the Will and thus, it cannot be termed as suspicious circumstance, as no other evidence has come on record, which could proved ancillary circumstances influencing the testator. The minor contradictions and discrepancies do not affect the authenticity and genuineness of the Will, Ex. DW-2/A, dated 19.10.2000. As per the Will (Ex. DW-2/A) defendant succeeded half share of Shri Burfia in the suit land, so he stepped into his shoes and thus he became co-sharer with the plaintiff.

17. The learned Senior Counsel for the appellants has placed reliance on a decision of Hon'ble Supreme Court rendered in ***Kalyan Singh vs. Smt. Chhoti and others, (1990) 1 SCC 266,*** wherein it has been held that the factum of execution and validity of the will cannot be

determined merely by considering the evidence produced by the propounder. Relevant para of the judgment is extracted hereinbelow:

> ***"20. It has been said almost too frequently to require repetition that a will is one of the most solemn documents known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the will. It must be stated that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by the propounder. In order or judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. it would be also open to the court to look into surrounding circumstances as well as inherent improbabilities; of the case to reach a proper conclusion on the nature of the evidence adduced by the party."***

The learned Counsel for the defendant has argued that the facts of the present case and the evidence produced by the defendant clearly show that Shri Burfia executed a valid Will in favour of the defendant in sound disposing mind and the Will was signed by the witnesses and testator in each others' presence. Shri Burfia was of sound disposing mind and he executed the Will on 19.10.2000 for the reason that Shri Dhani Ram (the original plaintiff) was unable to look after him. Shri Dhani Ram was not having male issue, who could have looked after Shri Burfia. In these circumstances, the judgment (supra) is not applicable to the facts of the present case.

18. The learned Senior Counsel for the appellants further placed reliance on a decision rendered by Hon'ble Supreme Court in ***Sea Lark Fisheries vs. United India Insurance Company and another, (2008) 4 SCC 131,*** wherein it has been held that the where plea is not raised in the plaint, the Court cannot accept it. Apt para of the judgment is extracted hereunder:

> ***"11. The submission of the learned counsel that the appellant was not allowed to furnish information cannot be accepted as such a plea was not raised in the plaint."***

In the present case, the defendant has raised all the pleas in his written statement, therefore, the judgment (supra) is not applicable to the facts of the present case.

19. In ***Bharpur Singh & others vs. Shamsher Singh, (2009) 3 SCC 687,*** the Hon'ble Supreme Court has held 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 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 Iyengar vs. B.N. Thimmajamma, AIR 1959 SC 443, t 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:-

"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."

... ...

24. The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the Will had duly been proved or not. It may be true that

the Will was a registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with."

In the case in hand the testator, i.e., Shri Burfia, certainly took interest in executing Will, Ex. DW-2/A, dated 19.10.2000 in favour of the defendant and he also annulled his earlier Will, through a cancellation deed, executed in favour of the original plaintiff, therefore, the judgment (supra) is not applicable to the facts of the present case.

20. In ***S.R. Srinivasa & others vs. S. Padmavathamma, (2010) 5 SCC 274,*** the Hon'ble Supreme Court has held that suspicious circumstances surrounding the Will have to be explained. Apposite para of the judgment (supra) is extracted hereunder for ready reference:

"57. Since there were suspicious circumstances, it was necessary for the defendants to explain the same. The registration of the Will by itself was not sufficient to remove the suspicion. The first appellate court also notices that even in cases where the execution of the Will is admitted, at least one attesting witness of the Will has to be examined to receive the Will in evidence. DW2, who has been examined is the scribe of the Will, has given no plausible reasons as to why the Will was presented twice before the Sub Registrar for registration. Nor is it stated by this witness as to why the Will was not registered on the first occasion."

Applying the above law, it is clear that the defendant as proved the execution of the Will, Ex. DW-2/A, dated 19.10.2000, in his favour by Shri Burfia, as per the law and there is no suspicious circumstance surrounding the same, so the judgment (supra) is also not applicable to the facts of the present case.

21. In ***Ramrameshwari Devi & others vs. Nirmala Devi & others, (2011) 8 SCC 249,*** the Hon'ble Supreme Court has held that while framing issues in civil litigation the Courts must proceed with due care, caution, diligence and attention. Apposite para of the judgment (supra) is extracted hereunder for ready reference:

"41. Framing of issues is a very important stage in the civil litigation and it is the bounden duty of the court that due care, caution diligence and attention must be bestowed by the learned Presiding Judge while framing of issues."

However, in the case in hand, all the necessary issues were framed by the learned Trial Court, so the judgment (supra) is not applicable to the facts of the present case.

22. In ***A. Shanmugam vs. Ariya Kshstriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, represented by its President, & others, (2012) 6 SCC 430,*** the Hon'ble Supreme Court has held that dishonest and unscrupulous litigants have no place in law courts. It has also been held that pleadings must inspire confidence and credibility. The Hon'ble Supreme Court has further held that pleadings are the foundation of litigation but experience reveals that sufficient attention is not paid to the pleadings and documents by the judicial officers before dealing with the case. Relevant paras of the judgment (supra) are extracted hereunder:

"26. As stated in the preceding paragraphs, the pleadings are foundation of litigation but experience reveals that sufficient attention is not paid to the pleadings and documents by the judicial officers before dealing with the case. It is the bounden duty and obligation of the parties to investigate and satisfy themselves as to the correctness and the authenticity of the matter pleaded.

27. The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If

false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands.

... ...

43.2 Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts."

As the defendant has pleaded his case in the written statement, so filed by him before the learned Trial Court, and he has proved the execution of Will, Ex. DW-2/A, in his favour beyond all probabilities and suspicions, the judgment (supra) is not applicable to the facts of the present case.

23. In ***M.B. Ramesh (Dead) by LRs vs. K.M. Veeraje URS (Dead) by LRs & others, (2013) 7 SCC 490,*** the Hon'ble Supreme Court has held that the construction of a document of title or of a document which is the foundation of the rights of parties, necessarily raises a question of law. Relevant para of the judgment (supra) is as under:

"16. We may, however, note in this behalf that as held by a Constitution bench of this Court in Chunilal Mehta Vs. Century Spinning and Manufacturing Company, 1962 AIR(SC) 1314, it is well settled that the construction of a document of title or of a document which is the foundation of the rights of parties, necessarily raises a question of law. That apart, as held by a bench of three judges in Santosh Hazari Vs. Purushottam Tiwari, 2001 3 SCC 179, whether a particular question is a substantial question of law or not, depends on the facts and circumstances of each case. When the execution of the will of Smt. Nagammanni and construction thereof was the subject matter of consideration, the framing of the question of law cannot be faulted. Recently, in Union of India Vs. Ibrahim Uddin, 2012 8 SCC 148, this Court referred to various previous judgments in this behalf and clarified the legal position in the following words:-

"67. There is no prohibition to entertain a second appeal even on question of fact, provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse.".

After considering the judgment (supra), it is clear that the Will, which was executed in favour of the defendant was proved by the defendant beyond all suspicions and further, as discussed hereinabove, the First Appellate Court below has also rightly concluded that Shri Burfia executed Will, Ex. DW-2/A, in sound disposing mind, as Shri Dhani Ram (the original plaintiff) was unable to maintain Shri Burfia and the original plaintiff was confined to bed due to paralysis. Therefore, the judgment (supra) is not applicable to the facts of the present case.

24. In view of what has been discussed hereinabove, the substantial question of law No.1, as reframed in earlier part of the judgment, is answered holding that Will, Ex. DW-2/A, dated 19.10.2000 is not shrouded by suspicious circumstances and the same is legally tenable and valid. Substantial question of law No. 2 is answered holding that Will, Ex. DW-2/A, dated 19.10.2000 was prepared and executed by Shri Burfia in sound and disposing mind.

25. Will, Ex. DW-2/A, has not become invalid and unlawful on account of participation of beneficiary thereof, i.e., the defendant. The testator executed the Will in sound disposing mind knowing fully well that it is the defendant who can look after him and the original plaintiff (Shri Dhani Ram) was suffering from paralysis and he was unable to lookafter Shri Burfia (testator), therefore, substantial question of law No. 3 is answered accordingly. Substantial question of law No. 4 is answered holding that the findings, as recorded by the learned Courts

below, are not the result of mis-reading, mis-construction and mis-interpretation of oral and documentary evidence and the findings have been recorded after properly appreciating the evidence to its true and correct perspective, therefore, the findings cannot be said to be perverse.

26. Substantial question of law No. 5 is answered holding that Will, Ex. DW-2/A, was, in fact, executed by Shri Burfia in sound disposing mind. Lastly, substantial question of law No. 6 is answered holding that the learned Lower Appellate Court has dealt with the appeal, so filed by the plaintiffs (LRs of the original plaintiff), properly, therefore, no interference by the hands of this Court is required.

27. The net result of the above discussion is that the appeal, which sans merits, deserves dismissal and is accordingly dismissed. However, taking into consideration the relationship of the parties and their status and other peculiar facts, which have come on record, the parties are left to bear their own costs.

28. In view of the disposal of the appeal, pending application(s), if any, shall also stand(s) disposed of.

****

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

Kuldip Singh .....Appellant
Versus
Bali Ram & others .....Respondents

RSA No. 399 of 2006
Reserved on : 25.10.2017
Decided on 30.10.2017

Specific Relief Act, 1963- Section 34- Plaintiff sought declaration that he is joint owner in possession of the suit land to the extent of half share – he pleaded that the suit land is joint Hindu family property – mutation in favour of the grand-mother of the plaintiff is wrong as she had no right to the joint Hindu family property – the suit was decreed by the Trial Court – an appeal was filed, which was allowed – held in the second appeal that plaintiff has admitted in cross-examination that his grand-father had purchased the property – it was not proved that he had inherited the property from his immediate three ancestors – D being a widow was entitled to succeed to the property – she had executed a Will in her sound disposing state of mind in favour of the defendants – the Appellate Court had properly appreciated the evidence – appeal dismissed. (Para-12 to 30)

Cases referred:
S.R. Srinivasa and others versus S. Padmavathamma, (2010) 5 SCC 274
Gian Chand & others versus Smt. Shiv Dei & another, 2014 (2) Shimla Law Cases, 667

For the Appellant : Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj Vashisht, Advocate.
For the Respondents: Ms. Ruma Kaushik, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

By way of the present appeal, the appellant has challenged the judgment passed by the learned District Judge, Bilaspur, District Bilaspur, H.P. in Civil Appeal No. 101 of 2004, dated 12.07.2006, vide which the learned lower Appellate Court has set aside the judgment and

decree passed by the then learned Civil Judge (Senior Division), Bilaspur, District Bilaspur, H.P. in Civil Suit No. 85/1 of 2000, dated 10.11.2004.

2. Material facts necessary for adjudication of this Regular Second Appeal are that appellant/plaintiff (hereinafter referred to as 'plaintiff') maintained a suit against the respondents/defendants (hereinafter referred to as 'defendants') seeking declaration to the effect that the plaintiff is joint owner-in-possession alongwith defendant No. 5/proforma defendant No. 5 Sukh Ram (hereinafter referred to as 'proforma defendant No. 5') to the extent of half share with the defendants of the suit land being the Joint Hindu Family Property and for restraining the defendants from interfering with the half share of the plaintiff and proforma defendant No. 5. The plaintiff has alleged that the entries in the name of deceased Dhanni Devi qua the suit land are null and void and the plaintiff and proforma defendant No. 5 are owners-in-possession to the extent of half share of the suit land. The plaintiff has further alleged that the suit land is Joint Hindu Family Property except few land, which has been given to defendant No. 1 and proforma defendant No. 5 by way of gift by Smt. Nardu. The grand father of the plaintiff, i.e. Shri Sunder is stated to have enjoyed the suit property belonging to H.U.F. The plaintiff has also alleged that he and defendants, being male Hindu members of H.U.F., have got right in the suit property by way of their birth. Dhanni Devi, being female, is stated to have no right, title or interest in the property left by deceased Sunder. She never remained in possession of any land during her life time. Mutation No. 57 is stated to be a mere paper entry and the plaintiff is not bound by such mutation. Dhanni Devi, the grand mother of the plaintiff and the mother of defendant No. 1 and proforma defendant No. 5, is alleged to have died on 19.04.2000 and her last rites were performed by the plaintiff and she was maintained out of the income of the H.U.F. property. The plaintiff has further alleged that defendants No. 2 to 4 are claiming themselves to be the sole legal heirs of deceased Dhanni Devi and have wrongly got attested mutation No. 57 in their favour and are causing interference and they have no right to interfere with the suit land, owned and possessed by the plaintiff and proforma defendant No. 5. The plaintiff has also alleged that at the time of filing the suit, proforma defendant No. 5 was not available and in case he supports the defendants, then the plaintiff has also prayed for decree against him.

3. Defendants No. 1 to 4 resisted and contested the suit by filing written statement, in which it was denied that the plaintiff and proforma defendant No. 5 have half share in the suit land. The defendants have averred that the entire suit land was owned and possessed by Sunder, the grand father of the plaintiff and father of defendant No. 1 & proforma defendant No. 5. Said Sunder Singh died in the year 1993 and his entire moveable and immovable property was inherited by Dhanni Devi being his widow and defendant No. 1 and proforma defendant No. 5, i.e. Bali Ram and Sukh Ram, being his sons. Mutation No. 57 dated 02.02.1994 to that effect was stated to be sanctioned in the presence of Bali Ram and Sukh Ram. The defendants have averred that Dhanni Devi had inherited this property from her husband. All mourning ceremonies were stated to be performed by defendant No. 1 Bali Ram, with whom she was residing. The defendants have also averred that defendants No. 2 to 4 have inherited the property of Dhanni Devi in accordance with a Will, which was executed by her in their favour vide registered Will dated 24.08.1983.

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

5. On the pleadings of the parties, the learned trial Court framed the following issues on 01.04.2004:

> ***"1. Whether the plaintiff and proforma defendant are co-owners in possession to the extent of half share in the suit land with the defendants, as alleged? ...OPP***
>
> ***2. If issue No. 2 is proved in affirmative, whether the plaintiff is entitled to the relief of injunction, as prayed for? ...OPP***

3. Whether the plaintiff is entitled to the relief of mandatory injunction in the alternative? If so, to what extent and in what manner?...OPP

4. Whether the suit is not maintainable in the present form, as alleged? .....OPD

5. Whether the plaintiff has no cause of action to file the present suit, as alleged? ....OPD

6. Whether the act and conduct of the plaintiff are bar to the present suit? .....OPD

7. Whether the property in suit is not Joint Hindu Family Property? If so, its effect? ....OPD

7-A Whether Dhanni Devi executed a valid Will dated 24.08.1993 in favour of defendants? ....OPD

8. Relief."

6. The learned trial Court after deciding Issues No. 1 & 2 in favour of the plaintiff, issue No. 3 against the plaintiff and issues No. 4 to 7-A against the defendants, decreed the suit to the effect that the plaintiff and proforma defendant No. 5 are owners-in- possession of the suit land to the extent of half share and the entries in the revenue record to the contrary are wrong, illegal and void. The defendants were further restrained from interfering with the half share of the plaintiff over the suit land in any manner.

7. Feeling aggrieved by the judgment passed by the learned trial Court, defendants No. 1 to 4 maintained first appeal before the learned District Judge, Bilaspur, assailing the findings of the learned trial Court below being against the law and without appreciating the evidence and pleadings of the parties to its true perspective. The learned lower Appellate Court set aside the findings returned by the learned trial Court below. Now, the appellant has maintained the present Regular Second Appeal, which was admitted for hearing on 21.12.2006 on the following substantial question of law:

> ***"Whether the first appellate Court has not appreciated the evidence correctly and in the right perspective while setting aside the finding of the trial Court that the Will set up by the respondents/defendants is not genuine."***

8. Mr. Ajay Kumar, learned Senior Counsel appearing on behalf of the appellant/plaintiff has argued that learned lower Appellate Court has passed the judgment without appreciating the evidence on record. He has further argued that the son-in-law of the propounder was a witness to the Will and it was a suspicious circumstance. He has relied upon the judgment passed by the Hon'ble Supreme Court in case titled as **S.R. Srinivasa and others versus S. Padmavathamma,** reported in (**2010) 5 SCC 274** and the judgment passed by this Court in case titled as **Gian Chand & others versus Smt. Shiv Dei & another,** reported in **2014 (2) Shimla Law Cases, 667.** He has further argued that registration of the Will is not proof of its due execution. He has prayed that as the Will has not been proved, the judgment passed by the learned lower Appellate Court is liable to be set aside and that of the learned trial Court is required to be restored.

9. Ms. Ruma Kaushik, learned Counsel appearing on behalf of respondents/defendants No. 1 to 4 argued that the Will was a genuine document and the case of the plaintiff was only that Dhanni Devi could not bequeath her property as she has no right in the property as it was coparcenary property and Dhani Devi being female could not acquire any right in the property. She has further argued that the Will is proved beyond suspicion and prayed that the appeal be dismissed.

10. In rebuttal, learned Counsel appearing on behalf of the appellant has argued that the Will is full of suspicion.

11. To appreciate the arguments of the learned Counsel appearing on behalf of the parties, I have gone through the record in detail.

12. At the very outset, it is seen that initially the case of the appellant-plaintiff was that Dhanni Devi could not inherit the property, as the same was coparcenery property and it was only the male member, who could have share in the said property. As Dhanni Devi was not having any share in the property, she could not have executed a Will. Thereafter, the case of the plaintiff was that even if a Will is executed, the same is suspicious and has not been proved in accordance with law and in that case also, the property will go to all the legal heirs of Dhanni Devi.

13. The defendants have also placed on record Ext. D-1, copy of mutation No. 37, dated 01.10.1964, vide which the ownership rights were conferred upon Sunder. Ext. D-2 is the copy of mutation No. 32, vide which the mutation was sanctioned and attested in favour of Sunder on 23.05.1964, being the purchaser of the land. Ext. D-3 is the copy of mutation No. 48, which was attested and sanctioned on 13.06.1975, vide which the property rights were conferred upon Sunder being the tenant of the land.

14. The plaintiff himself has placed on record Ext. P-3, copy of Jamabandi, in which Sunder, son of Sh. Gusaun, son of Chanchal, the grand father of the plaintiff, has been recorded as owner-in-possession of a part of the suit land in Khatoni No. 6 and recorded as owner-in-possession as co-sharer in Khatoni No. 7 alongwith defendant-Bali Ram and Sukh Ram, his sons. Similarly, in Khata No. 7 and Khatoni No. 8, Sunder has been recorded as owner to the extent of his share alongwith other co-sharers Premi Devi etc. Ext. P-4 is the copy of Jamabandi for the year 1986-87, in which the same entry is repeated. Ext. P-5 is the copy of Jamabandi for the year 1980-81, wherein the name of Sunder is recorded as owner-in-possession in few Khatonies and in few Khatonies, he is recorded as co-owner alongwith other co-sharers including his sons. In Ext. P-6, the copy of Jamabandi for the year 1975-76, the same revenue entries are shown and Sh. Sunder has been recorded as owner-in- possession. Ext. P-8 is the copy of Jamabandi for the year 1971-72 and Ext. P-9 is the copy of Jamabandi for the year 1966-67, in which again Sunder, the father of the plaintiff, has been recorded as owner-in-possession alongwith other co-sharers. The last Jamabandi filed on the record is the copy of Jamabandi for the year 1958-59 pertaining to the suit land, in which Pritam Singh etc. have been recorded in the column of ownership and in the column of possession Sunder, son of Gusuan, has been recorded as non-occupancy tenant. Ext. P-7 is the copy of the mutation which was attested and sanctioned on 09.06.1968 on the basis of partition ordered by Assistant Collector 1st Grade, Bilaspur. Ext. P-11 is the copy of mutation of exchange, vide which Chaudhary, brother of Sudner, son of Gusaun, got exchanged 2-3 bighas of land with Kanshi etc. The mutation was attested and sanctioned on 18.01.1964. Ext. P-12 is the copy of mutation dated 23.05.1964, vide which mutation of 'Hibba' was attested and sanctioned in favour of Bali Ram and Sukh Ram, sons of Sunder. Vide Ext. P-13 on 01.10.1964, 20.05.1967 and 12.02.1966, respectively, the proprietary rights were sanctioned in favour of Sunder being the tenant of the land.

15. The plaintiff, while appearing in the witness box as PW-1, has testified that Sunder was his grand-father and Gusaun was the father of Sunder. After the death of Sunder, half of the property was inherited by the plaintiff and Sukh Ram and half of the property by defendants No. 1 to 4 and Dhanni Devi has not inherited any property, as it was a coparcenery property. However, in the cross-examination, he has admitted that Sunder had purchased 32 bighas and 15 biswas of land from Juanu and Gangi Devi. He has also admitted that Sunder had also purchased land measuring 16-17 bighas from Prem Lal. He showed his inability to tell the Court that his grand father Sunder had also purchased 10 bighas and 5 biswas of land from Gopi. He has further admitted that at present, the land is recorded in the name of his father.

16. The father of the plaintiff-Sukh Ram has neither filed written statement nor appeared in the witness box to support the claim of the plaintiff.

17. Bali Ram-defendant has appeared as DW-1 and stated that the entire land was purchased by his father Sunder. In the cross-examination, the defendant has stated that the land was purchased by Sunder from Prem Lal and Gopi Ram and some of the land was in possession of his father as tenant. The plaintiff himself has admitted in his cross-examination that the suit land was purchased by his father from different persons and a part of the suit land was given to defendant No. 1 and proforma defendant No. 5 by way of gift by one Smt. Nardu. It has nowhere come in the evidence that Sunder has inherited this property from his immediate three ancestors.

18. In the instant case, Dhanni Devi inherited the property from her husband Sunder. The plaintiff has failed to prove that it was a coparcenery property. There is no documentary evidence on the record to prove that the property was inherited by Sunder from his male ascendants. In these circumstances, it can safely be said that Dhanni Devi has succeeded the property of Sunder Singh and the plaintiff has failed to prove that Dhanni Devi has not succeeded the property being class-I heir. As Dhanni Devi was Class-I heir, the property acquired by her, was her absolute property.

19. Now, coming to the question-whether the Will is genuine and free from suspicious circumstances?

20. It has come on the record that Dhanni Devi took the attesting witnesses alongwith her to the office of the Sub-Registrar, Bilaspur, got registered Will Ext. DW-3/A in the name of defendants No. 2 to 4 in the presence of the attesting witnesses, she was duly identified by Advocate Budhi Singh Kaundal and the thumb impression of Dhanni Devi were having resemblances as per the report of expert. As far as the non-signing of the Will and putting thumb impression is concerned, Dhanni Devi has clarified that as she was having feeble eyesight, she has put her thumb impression instead of signing the Will. In these circumstances, it can safely be held that Will Ext. DW-3/A executed by Dhani Devi in favour of defendants No. 2 to 4 is free from all suspicious circumstances.

21. It is not disputed that Smt. Dhanni Devi, widow of Sunder had two sons, namely Bali Ram-defendant No.1 and Sukh Ram-proforma defendant No. 5. It is also not disputed that defendants No. 2 to 4 are the sons of Bali Ram-defendant No. 1. It is proved on record that Smt. Dhanni Devi was the absolute owner of the suit land to the extent of her share alongwith Bali Ram and Sukh Ram, her sons. In the event of death of Dhanni Devi as intestate, defendant No. 1 and proforma defendant No. 5 would be entitled to inherit her share as class-1 heirs. It was vehemently argued by the learned counsel for the appellants that Smt. Dhanni Devi, mother of defendant No. 1 & proforma defendant No. 5 and grand-mother of defendants No. 2 to 4, had already executed a valid Will Ext. DW-3/A, dated 24.08.1993, which was registered on the same day before the Sub-Registrar, Bilaspur. Therefore, on the death of Smt. Dhanni Devi on 19.04.2000, the share of the suit land has been inherited by defendants No. 2 to 4 on the basis of said Will to the exclusion of defendant No. 1 and proforma defendant No. 5. The plaintiff, being the grand-son of Dhanni Devi, was even otherwise not entitled to inherit the property of his grand-mother, when his father-defendant No. 5 was alive. As such, the question of succeeding said Dhanni Devi by the plaintiff, does not arise.

22. The Will Ext. DW-3/A, dated 24.08.1993 is the registered Will registered at Sr. No. 98 on 24.08.1993 by the Sub Registrar, Bilaspur, executed by Smt. Dhanni Devi in favour of defendants No. 2 to 4. Shri Amar Nath (DW-2) the Petition Writer, is the scribe of the said Will, whereas it has been attested by Chhota Lal (PW-3) and Ram Lal. Smt. Dhani Devi was identified before the Sub Registrar by Budhi Singh Kaundal, Advocate. The manner of execution of the unprivileged Will has been provided under Section 63 of the Indian Succession Act, 1925, which is reproduced below:-

> ***"(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 of mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person, and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

23. Though, only the registration of the Will does not give presumption that it is validly executed, but in the present case, the Will stands proved by the propounder that the Will is free from all suspicious circumstances.

24. The learned counsel for the appellant-plaintiff has relied upon the judgment passed by the Hon'ble Supreme Court in case titled as **S.R. Srinivasa and others versus S. Padmavathamma,** reported in (**2010) 5 SCC 274.** It is apt to reproduce para-36 of the aforesaid judgment herein:

"36. As noticed earlier by virtue of Section 15(2)(a) of the Act, the appellants would inherit the property in dispute. This right is sought to be defeated by Defendant No. 1 on the basis of the will dated 18.6.1974, allegedly executed by Puttathayamma. Defendant 1 being the sole beneficiary under the will claims that the plaintiffs cannot claim to "inherit" the property on the basis of intestate succession. Undoubtedly, therefore, it was for Defendant 1 to prove that the will was duly executed, and proved to be genuine."

25. The aforesaid judgment is of no help to the appellant/plaintiff as the defendants have proved the due execution of the Will and it is also proved that it is free from all suspicious circumstances.

26. The learned counsel for the appellant-plaintiff has also relied upon the judgment passed by this Court in case titled as **Gian Chand & others versus Smt. Shiv Dei & another,** reported in **2014 (2) Shimla Law Cases, 667**. It is profitable to reproduce para-14 of the aforesaid judgment herein:

"14. The "will" has been registered at Mandi. According to DW-1 Ramesh Chand, the distance between Baldwara and native place of plaintiff is 3 KMs. The distance between Tarandol and Sarkaghat is 20 KMs. Defendants have not explained why the "will" was not registered either at Baldwara or Sarkaghat. It has also come on record that Narain Lal was not in sound disposing mind. Ex.DW-4/A has been signed by Narain Lal in Hindi. However, he has signed the "will" in English. Narain Lal was identified by DW-6 Netar Singh. He could not explain how he knew Narain Lal. DW-4 Kashmir Singh has admitted that he was marginal witness in as many as 18 to 36 "will". According to him, he has signed the "will" first and thereafter it was signed by the testator. The "will" was to be signed by the testator first and thereafter marginal witness had to sign the "will". The presence of Narain Lal at the time of execution of "will" is doubtful. DW-4 Kashmir Singh is a stock witness. It has also come on record that Sub-Registrar, Baldwara has refused to sign the "will" and in these circumstances, the "will" was got registered at Mandi. DW-5 Jeet Ram has also not deposed that he put his signatures on the "will" in presence of testator Narain Lal. Defendants have failed to prove that the

"will" dated 1.1.1998 was executed in accordance with law. Merely that the "will" is registered will not make it valid. A person will not be taken to a distance of 70 KMs, if he is suffering from dysentery when he could be taken to a nearby Government Dispensary".

27. The aforesaid judgment is of no help to the plaintiff as in the present case, alongwith the registration of the Will, it has also to be proved on record that it is validly executed. Dhanni Devi has executed Will Ext. DW-3/A out of her free will after taking the attesting witnesses alongwith her to the Office of Sub-Registrar, Bilaspur and she was duly identified by Budhi Singh Kaundal, Advocate. Further, it has also come on the record that Dhanni Devi was being looked after by the defendants and the plaintiff was residing at a distant place.

28. Coupled with all these factors, it has come on the record that the father of the plaintiff, who was the son of Dhanni Devi, has neither filed written statement nor appeared in the witness box, meaning thereby, the presumption goes in favour of defendants No. 1 to 4 that Dhanni Devi had executed a valid Will.

29. In view of the above, the substantial question of law is answered accordingly holding that the learned First Appellate Court has appreciated the evidence correctly and the documents which have come on record, have been interpreted correctly and law has been applied correctly.

30. The net result of the above discussion is that the appeal is devoid of any merit and deserves dismissal. Accordingly, the same is dismissed.

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

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

Tara Chand & anr. ...Appellants.

Versus

Daulat Ram (Deceased) & Ors. ...Respondents.

RSA No.343 of 2005.
Reserved on: 23.10.2017.
Decided on : 30.10.2017.

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for permanent prohibitory injunction for restraining the defendants from raising any construction over the suit land- it was pleaded that suit land was in possession of father of plaintiffs as Hissadar and he was having his abadi on the same – part of the suit land was being used as courtyard/bartan- the defendants got deleted the name of the plaintiffs from the possessory column in connivance with the consolidation authorities – the plaintiffs have installed water tank and stacked building material over the suit land – the defendants threatened to take forcible possession of the suit land – the defendants pleaded that plaintiffs have no concern with the suit land and defendants are exclusive owners in possession of the same – the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that part of the suit land was allotted to the defendants during consolidation- entry was recorded in the missal Hakiat to this effect –a presumption of correctness is attached to the acts of the public officials – there is a presumption of truth to the entries in the jamabandi- evidence of the plaintiff has not rebutted this presumption – the Appellate Court had rightly relied upon the missal hakiat – appeal dismissed.

(Para-11 to 13)

Case referred:

Damodar Lal vs. Sohan Devi and others, 2016 (3) Supreme Court Cases 78

For the appellants Mr. Ajay Sharma, Advocate.
For the respondent Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh Advocate, for respondents No.2 to 6.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

At the very outset, it has been brought to the notice of this Court that the appeal stands abated against respondent No.1-Daulat Ram, vide order, dated 5.5.2016.

2. By way of the present appeal, the appellants have challenged the judgment passed by the Court of learned District Judge, Una, District Una, (H.P), in Civil Appeal No.48 of 2004, dated 3.5.2005, vide which, the learned lower Appellate Court has set aside the judgment and decree passed by the learned Civil Judge (Senior Division), Una, District Una, in Case No.73 of 2000, dated 30.6.2004.

3. Material facts necessary for adjudication of this Regular Second Appeal are that appellants/plaintiffs (hereinafter referred to as 'plaintiffs') maintained a suit for permanent injunction restraining the respondents/defendants (hereinafter referred to as 'defendants') from raising any type of construction or forcibly ousting the plaintiffs over the land measuring 0-01-69 hectares, bearing Khewat No.72 min, Khatauni No.161 min. Khasra No.1827, situated in village Ajnoli, Tehsil and District Una, (H.P) (hereinafter referred to as 'suit land). As per the plaintiffs, suit land was in possession of the father of the plaintiffs as '*Hissadar*' co-owner and father of the plaintiffs was having his '*abadi*' over Khasra No.2190 and Khasra No.2192, was used as courtyard/'Bartan'. Khasra No.2192 was denoted by new Khasra No.1827 and defendants got deleted the name of the plaintiffs from the possessory column illegally in league with consolidation officials. The plaintiffs have installed water tank and stacked building material over the suit land. The possession of the plaintiffs was since forefathers. Thereafter, defendants started threatening the plaintiffs to take forcible possession of the suit land and also raising construction over the same, despite repeated requests, as made by the plaintiffs not to do so.

4. Defendants contested the suit by raising preliminary objections qua maintainability, cause of action and locus standi. On merits, they denied whole case of the plaintiffs by asserting that the plaintiffs have no concern of any kind with the suit land, which is exclusively owned and possessed by the defendants.

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

"1. Whether plaintiffs are entitled to the relief of injunction, as prayed ? OPP.

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

3. Whether the plaintiffs have no cause of action ? OPD.

4. Whether plaintiffs have no locus standi to file this suit ? OPD.

5. Whether suit has not been properly valued for the purpose of Court fee and jurisdiction? OPD.

6. Relief ."

6. The learned trial Court after deciding Issue No.1 in affirmative, Issues No.2 to 5 in negative, decreed the suit.

7. Feeling aggrieved thereby defendants maintained first appeal before the learned District Judge, Una, District Una, (H.P), assailing the findings of learned trial Court below being against the law and without appreciating the evidence and pleading of the parties to its true perspective. The learned lower Appellate Court set aside the findings of the learned Court below. Now, the appellants have maintained the present Regular Second Appeal, which was admitted for hearing on 14.7.2005 on the following substantial questions of law:

" 1. Whether learned District Judge below erred in law and facts in attaching presumption of truth as per provisions of Section 45 of the H.P. Land Revenue Act to the entries in Ex.P-3, more particularly having been made without there being any orders of the competent authority and contrary to the position as available in Ex.P-2, thereby vitiating the impugned judgment and decree ?

2. Whether there being no proof qua delivery of possession as per provisions of Section 32 of the Act, admittedly earlier possession being of plaintiffs, contrary view as taken by the learned District Judge below vitiated the impugned judgment and decree as there is complete misreading of Section 32 of the Act?"

8. Mr. Ajay Sharma, learned counsel appearing on behalf of the appellants has argued that Khasra No.2190 was *'Gairmumkin abadi'* and Khasra No.2192 was '*Barani Abal'* and in possession of the appellants-plaintiffs, so the judgment and decree passed by the learned lower Appellate Court is required to be set aside.

9. On the other hand, Mr. N.K. Thakur, learned Senior Counsel appearing on behalf of respondents No.2 to 6 has strenuously argued that the land came in possession of the defendants in the consolidation proceedings and possession was delivered to the defendants and those proceedings attained finality, the suit is otherwise also not maintainable. To support his contention, he has also relied upon the judgment in ***2016 (3) Supreme Court Cases 78,*** titled ***Damodar Lal vs. Sohan Devi and others.***

10. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the record in detail.

11. To support its case, plaintiffs have examined PW-1, Tara Chand, who deposed that Khasra No.2190 and 2192, were in possession of his father as '*Hissadar*' and Khasra No.2192, was being used as courtyard, which has now changed to Khasra No.1827. Their names have been deleted from the possessory column whereas they are in possession at the spot over this land where their water tank exists and construction material is also lying there. He has further stated that the defendants never took possession of the suit land. In his cross-examination, he has admitted that suit land was under consolidation in the year 1991-1992 and land was allotted, as per the scheme of consolidation. The land was given by consolidation officials to Daulat Ram etc. He has also stated that consolidation is over and denied that they have no concern with this land. He has also denied that the defendants are owners-in-possession of the land and they are not in possession over the suit land. The defendant Som Nath, while appearing in the witness box has deposed that the suit land is exclusively owned and possessed by him and other defendants and plaintiffs have no concern either proprietary or possessory. In his cross-examination, he has stated that he knows father of the plaintiffs, Munshi Ram and denied that he was in possession as 'Hissdar' over the suit land. He has stated that consolidation occurred in the village, but denied that there is '*abadi'* and courtyard over the suit land. He has denied that they got incorporated entries in league with the consolidation officials wrongly. He further stated that possession of the suit land was not delivered in their presence and claimed that they are coming in possession over the suit land since ancestors time. He has further admitted that the parties are maintaining the same position regarding possession before the consolidation. In his cross-examination, he has stated that possession of the land was not handed over in his presence, but the documents on record shows that the Misal Hakiat was prepared after holdings were consolidated and re-delivered after re-partition among the estate holders, so even the possession was not handed over in the presence of Som Nath, it deem to have been delivered on the basis of Missal Hakiat. Admittedly, Khasra No.2192, during the course of consolidation stood allotted to the defendants as is clear from Misal Hakiat for the year 1991-1992, Ex.P-3. In these circumstances, the onus was upon the plaintiffs to lead cogent and reliable evidence so as to prove that possession of the land comprised in Khasra No.2192, was not delivered, as per scheme of the consolidation in favour of the defendants. There is always

presumption attached to the acts done in discharge of official duty and entry in latest jamabandi, which has been prepared during the course of consolidation carries a stronger presumption under Section 45 of the H.P. Land Revenue Act and the party challenging the validity of such an entry must lead reliable evidence so as to rebut such presumption. The evidence led by the plaintiffs regarding their exclusive possession over the suit land is not of such a high quality so as to lead to the irresistible conclusion that it is the plaintiffs, who are in possession of the suit land. The testimony of Tara Chand, who has tendered in evidence his affidavit, has stated that Khasra No.2192, is being used as Sehan/courtyard. The defendants got the name of plaintiffs deleted from the possessory column in collusion with consolidation staff. Now, the plaintiffs have constructed water tank over this khasra number. However, in cross-examination, the plaintiff has admitted that the suit land was under consolidation in the year 1991-1992 and land was allotted, as per the scheme of consolidation. The plaintiff made a vital admission that the suit land was allotted in favour of defendant Daulat Ram etc. and consolidation operation is complete. This clearly shows that defendants are fully aware regarding the manner in which the consolidation was done and said consolidation proceedings are complete. The consolidation proceedings are complete and revenue record is prepared and possessions are delivered to the holders, as per the scheme of the consolidation. There is no evidence to conclude that there was a courtyard of the plaintiffs over the suit land. The plaintiff while appearing in the witness box has admitted that allotment of the land was in favour of the defendants. In these circumstances, this Court finds that the findings recorded by the learned lower Appellate Court cannot be said to be perverse, so substantial question of law No.1, is decided accordingly holding that the presumption of truth is attached to the Misal Hakiat and delivery of possession on the basis of Misal Hakiat, prepared after the consolidation in the year 1991-1992. The learned lower Appellate Court has not committed any illegality in relying upon the Misal Hakiat. So far as substantial question of law No.2 is concerned, it is admitted case that before consolidation, possession of all the parties looses his significance after the consolidation proceedings, the estate holders were delivered the possession after re-partition the entire estate on the basis of Misal Hakiat, so it cannot be said that the possession of land remained with the plaintiffs.

12. Hon'ble Apex Court in ***2016 (3) Supreme Court Cases 78, titled Damodar Lal vs. Sohan Devi and others,*** wherein it has been held as under :

> ***"12. Be that as it may, the question whether there is a structural alteration in a tenanted premises is not a fact limited to the personal knowledge of the owner. It can be proved by any admissible and reliable evidence. That burden has been successfully discharged by the plaintiff by examining PWs 1 and 2. The defendants could not shake that evidence. In fact, that fact is proved partially from the evidence of the defendants themselves, as an admitted fact. Hence, only the trial court came to the definite finding on structural alteration. That finding has been endorsed by the first appellate court on reappreciation of the evidence and therefore, the High Court in second appeal was not justified in upsetting the finding which is a pure question of fact. We have no hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out of a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity."***

13. Applying the ratio of law to the facts and circumstances of the present case, it is clear that the findings arrived at by the learned lower Appellate Court are just, reasoned and

after appreciating the evidence, which has come on record to its true perspective and law has been applied correctly. Hence, needs no interference by this Court.

14. In view of the above discussion, the appeal of the appellants is without merit, deserves dismissal and is accordingly dismissed. In the peculiar facts and circumstances of the case, parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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

The Himachal Pradesh State Electricity Board ....Appellant

Versus

Smt. Nardu and others ....Respondents

RFA No. 251 of 2010 along with RFA Nos. 248, 249, 250, 252, 253, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 366 to 368 and 404 of 2010
Judgment Reserved on 25.10.2017
Date of Decision 30th October, 2017

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Larji Hydel Project- Land Acquisition Collector awarded compensation on the basis of classification of land – land owners filed a reference petition – reference Court enhanced the compensation and awarded the same irrespective of the classification – aggrieved from the award, present reference petition has been filed- held that land owners have proved on record the sale deeds as well as the previous award passed by District Judge regarding the land of adjoining village – respondents also relied upon the sale deeds pertaining to the year 1984- land was acquired in the year 1988 - sale deeds were not proximate in time and were rightly disregarded by the Trial Court – sale deed relied upon by the petitioner was executed six months prior to the publication of the notification – the market value of the land was reflected as Rs. 1,60,000/- per bigha – two other sale deeds were executed within six months and the market value of the land was Rs. 2 lacs per bigha – after making deduction of 25%, the value of the land comes to Rs. 1,50,000/- per bigha- District Judge had also awarded the compensation of Rs. 1,60,000/- per bigha irrespective of classification for the land acquired by way of separate notification for the same project – reference Court had not committed any error in awarding compensation @ Rs. 1,60,000/- per bigha in a previous reference petition – land owners also relied upon the evaluation reports prepared in the year 1997, whereas, Land Acquisition Collector had relied upon evaluation report prepared on the basis of cost of construction in the year 1987- Reference Court had rightly relied upon the same and had rightly awarded increase of 10% after taking into consideration the increase of price index – the market value of the land was assessed on the basis of Harbans Singh Formula evolved in the year 1966- the land was acquired in the year 1988 and Reference court had rightly allowed four times the increase – no error was committed by the Reference Court- there is no error in the judgment passed by the Reference Court – appeal dismissed. (Para-9 to 21)

Case referred:

Union of India and others vs. Khajana Ram and others 1998(1) Shim.L.C. 479

For the Appellant: Mr. Satyen Vaidya, Sr. Advocate with Mr.Vivek Sharma, Advocate.

For the Respondents: Mr. Ashwani K. Sharma, Sr. Advocate with Mr.Jeevan Kumar Advocates for private respondents in RFA Nos. 248, 252, 253, 255, 256, 260, for private respondents No.1, 4 to 12 in RFA No.261 of

2010, for private respondents 3,10 to 13, 28, 42, 43 & 44 in RFA No.265 of 2010, for respondents No.6,8,25,26,31 in RFA 268 of 2010, for private respondents in RFA No.376 of 2010, for private respondents No. 1 and 6 in RFA No. 368 of 2010, and for respondents in RFA No. 404 of 2010.

Mr. G.R.Palsara, Advocate, for private respondents in RFA No. 249 of 2010, 259 of 2010, 264 of 2010, 366 of 2010.

None for private respondents in RFA No. 250 of 2010, 258 of 2010, 262 of 2010, 263 of 2010, 266 of 2010, 267 of 2010.

None for respondents No. 2 and 3 in RFA No. 261 of 2010.

None for respondents No. 2 to 5 in RFA No. 368 of 2010.

Mr. Pankaj Negi, Deputy Advocate Genral, for the respondent(s)-State.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

These appeals, arising out of a common award passed by learned District Judge in reference petitions No. 9 of 2002, 12 of 2002, 13 of 2002, 14 of 2002, 17 to 19 of 2002, 22 of 2002, 23 of 2002, 28 of 2002, 30 of 2002, 36 to 38 of 2002, 40 of 2002, 43 of 2002, 44 of 2002, 49 of 2002, 50 of 2002, 51 of 2002, 53 of 2002, 54 of 2002, 56 of 2002, 61 of 2002 under Section 18 of the Land Acquisition Act 1894 (hereinafter referred to as the Act), are being decided by this common judgment, as common question of facts and law is involved in these appeals and also reference petitions, out of which these appeals have arisen, were also clubbed in the Reference Court and evidence was led only in one Reference Petition No. 56 of 2002 titled Mohinder Pal vs. Land Acquisition Collector and RFA No. 265 of 2010 titled HPSEB vs. Mohinder Pal and others arising out of the said Reference Petition is also amongst these appeals, evidence wherein only is available for appreciation.

2. For construction of Larji Hydel Project, Government of Himachal Pradesh had issued notification dated 5.2.1988 under Section 4 of the Act which was published in local daily newspapers on 3.4.1988 and in Rajpatra on 30.4.1988 to acquire land in village Thalot, District Kullu. Land Acquisition Collector, after completion of procedure and codal formalities under the Act, had announced Award No. 57 of 1990 dated 6.10.1990 and had assessed market value of acquired land on the basis of classification of land as under:-

Classification of land	Rates per bigha
Barani Awal	Rs.18,106/-
Barani Dom	Rs.13,577/-
Kharyatar	Rs. 3,771/-

Some of the land owners were also having structures of their houses/shops/local industries on the land under acquisition, for which separate compensation on the basis of assessment of Civil Engineer of HPPWD was awarded.

3. For loss of fruit bearing trees standing on the acquired land, separate compensation, calculated on the basis of Harbans Singh's formula, evolved in the year 1966, was also awarded.

4. Being dissatisfied with compensation awarded by the Land Acquisition Collector, land owners had preferred land reference petitions under Section 18 of the Act, which were filed in the Court in the year 1997. But considering these reference petitions improper, the same were returned to the Land Acquisition Collector to refile those petitions in proper manner as directed vide order 17.11.2000 passed by learned District Judge. Petitions were re-filed on 27.2.2002. Record of earlier petitions was also requisitioned by learned District Judge for consideration at the time of final adjudication of these reference petitions.

5. After considering the evidence led by parties, learned District Judge has assessed market value of land under acquisition at the rate of Rs.1,60,000/- per bigha irrespective of classification and nature of land and enhancement at the rate of 10%, to the value of structures assessed by the department, was also awarded and further four times increase to the compensation awarded for fruit bearing trees was also allowed. In addition, compensation on account of loss of goodwill and earnings was also granted by learned District Judge to some of the land owners whose business had affected adversely on account of acquisition and displacement.

6. I have heard learned counsel for the parties and have also gone through the evidence on record.

7. It is contended on behalf of learned counsel for the appellant that there was no evidence on record so as to award compensation at the rate of Rs.160,000/- per bigha and learned District Judge has committed a mistake in relying upon the award No. 53 of 1993 dated 20.1.2001 (Ext.PW4/A) for assessing the market value of land under acquisition in the present case. It is also argued that enhancement of 10% to the value of structure assessed by the department and four times increase to the value of fruit trees assessed on the basis of Harbans Singh's formula is also illegal for want of sufficient material on record.

8. On contrary, learned counsel for the respondents have supported the impugned award on the grounds stated therein and contended that compensation enhanced by learned District Judge is on the lower side and as per settled law of land and also evidence on record, land owners were entitled for compensation at the rate of Rs. 2 lac per bigha and much higher amount of compensation for structure(s) on the basis of unrebutted evaluation reports proved on record by land owners. However, it is fairly submitted by them that for want of filing of cross appeals/objections, the land owners are not agitating for further enhancement of compensation.

9. Besides leading oral evidence, land owners have proved on record sale deeds Ext.PW4/C, Ext.PW4/D (which is also again proved on record as Ext.PW11/B and Ext.P-2), Ext.PW11/A (agained proved on record as Ext.P-3) and Ext.PW11/C (also proved on record as Ext.P-1). Land owners have also relied upon award Ext.PW4/A dated 20.1.2001 passed by learned District Judge with respect to land of adjoining village acquired for the same purpose during the same period. Reliance has also been placed on an order Ext.PW4/B passed in RFA No. 44 of 1988 pertaining to the land under acquisition in the same village for construction of National Highway-22 in the year 1982.

10. Land owners have also relied upon site plans Ext.PW2/A, Ext.PW3/C, Ext.PW3/E, Ext.PW3/G and Ext.PW3/J, evaluation reports/abstract of costs/estimates Ext.PW2/B to Ext.PW2/L, Ext.PW3/A, Ext.PW3/B, Ext.PW3/D, Ext.PW3/F, Ext.PW3/H and Ext.PW13/A for enhancement of amount of compensation for structures standing on the land under acquisition.

11. Respondents have proved on record sale deeds Ext.R-I, Ext.R-II, Ext.R-III pertaining to the instances of sale in the same village i.e. Thalot however in the year 1984. Sale deeds Ext.R-I, Ext.R-II and Ext.R-III relied upon are dated 15.2.1984, 24.2.1984 and 7.6.1984. Land in the present case was acquired in the year 1988. Therefore, these sale deeds though pertaining to the same village Thalot, but are not proximated to the time of acquisition of land in question and therefore, learned District Judge has rightly discarded these sale deeds at the time of determining the market value of land under acquisition.

12. Instance of acquisition involved in case RFA No. 44 of 1988 copy of order wherein along with judgment in RFA No. 72 of 1988 has been placed on record, is not proximated to the time of acquisition in present case. Sale deeds and award of contemporary period are available on record and therefore this document has no relevance for determination of market value of land under acquisition in the present case.

13. Sale deed Ext.PW4/D (Ext.PW11/B and Ext.P-2) pertaining to the same village i.e. Thalot was executed on 18.3.1987. In this transaction, land was sold at the rate of

Rs.10,000/- per biswa i.e. Rs. 2 lac per bigha but the sale deed is dated 18.3.1987, which is more than one year old to the date of last publication of the notification under Section 4 of the Act and therefore, learned District Judge had rightly ignored this sale deed.

14. Sale deed Ext.PW4/C was executed on 23.10.1987 i.e. about six months prior to the last publication of notification under Section 4 of the Act. According to this transaction, market value of land, pertaining to the same village, comes to Rs.1,60,000/- per bigha. Two other sale deeds Ext.PW11/A (Ext.P-3) dated 27.2.1988 and Ext.PW11/C (Ext.P-1) dated 30.1.1988, were executed within six months of the issuance as well as last publication of notification under Section 4 of the Act. These sale deeds pertain to the same village and in these transactions, land was sold at the rate of Rs. 2 lac per bigha. Learned District Judge has also taken into consideration sale deed Ext.PW4/D wherein market value of land comes to Rs.2 lac per bigha. However after making a deduction of 25% for the reason that sale deed in question was for a small chunk of land, he had calculated market value of land at the rate of Rs.1,50,000/- per bigha.

15. No doubt, it is also settled that issue with respect to small chunk or large chunk of land under acquisition for one purpose, is not to be considered on the basis of total area being acquired, but it is also to be considered with reference to the area of the individual land owner under acquisition and in case there is evidence on record to prove that area under acquisition was having the proximity and the same potential so as to land involved in an exemplar transaction, the deduction on account of sale deeds being of a small chunk, is not permissible. However, in present case no such evidence has been produced by land owners.

16. Market value of the land on the basis of sale deeds Ext.PW11/A (Ext.P-3) dated 27.2.1988 and Ext.PW11/C (Ext.P-1) dated 30.1.1988 also comes out to Rs. 2 lac per bigha and for want of evidence with respect to the proximity and of same potential, if deduction of 25% is made then value of land comes to Rs.1,50,000/-.

17. Land owners have also proved on record an award Ext.PW4/A passed in reference petition No. 53 of 1993 by learned District Judge pertaining to the acquisition for the same project in the same village but by issuing the separate notification dated 22.12.1987 under Section 4 of the Act it was published on 7.5.1988. In the present case, notification under Section 4 of the Act was issued on 5.2.1988 and lastly published in Rajptra on 30.4.1988. There is close proximity in issuance of notification and publication thereof in both cases. Proximity of location, being land of the same village, is also there. Nothing has been placed on record by the appellant to prove that award Ext.PW4/A was ever disturbed by Higher Court. In the said award learned District Judge had determined market value of land at the rate of Rs.1,60,000/- per bigha irrespective of classification of land.

18. On the basis of sale deeds Ext.PW11/A and Ext.PW11/C after deduction of 25%, market value of land comes out to Rs.1,50,000/- per bigha. There is no straight-jacket formula for making deduction. Depending upon facts and circumstances of the given case, it may vary and in case 20% deduction is made to the rate proved by exemplar sale deeds, market value of land under acquisition comes to Rs.1,60,000/- per bigha. Even otherwise, the best evidence pertaining to land of adjoining village having similarity of location and potential acquired for the same purpose during the same period is available on record. Therefore, learned District Jduge, in view of award Ext.PW4/A, has not committed any mistake in determining the market value of land at the rate of Rs.1,60,000/- per bigha.

19. Land owners, having structures upon the land under acquisition, have relied upon evaluation reports/abstract of costs/estimates Ext.PW2/B to Ext.PW2/L, Ext.PW3/A, Ext.PW3/B, Ext.PW3/D, Ext.PW3/F, Ext.PW3/H and Ext.PW13/A for enhancement of compensation for their structures existing on the land under acquisition. It has come on record that these evaluation reports were prepared in the year 1997 on the basis of cost of construction prevailing in the year 1997 in towns. Whereas, structures under acquisition were situated in the village and were acquired in the year 1988. It has also come on record that these structures were

not in good condition. Land Acquisition Collector had relied upon the evaluation report prepared by the Civil Engineer of HPPWD on the basis of cost of construction prevailing in the year 1987. Learned District Judge has rightly considered the evaluation report relied upon by Land Acquisition Collector and has committed no mistake in awarding the enhancement of 10% to the valuation carried out by the department as these structures were acquired in the year 1988. This enhancement, allowed by learned District Judge after taking into consideration the increase in price index of 1988 in comparison to 1987, is genuine.

20. It is also admitted fact that market value of the trees was assessed by the Land Acquisition Collector on the basis of Harbans Singh's formula which was evolved in the year 1966 and the land in present case was acquired in the year 1988. Learned District Judge has relied upon the judgment of this Court passed in ***Union of India and others vs. Khajana Ram and others 1998(1) Shim.L.C. 479*** wherein, relying upon the price index, five times increase to the valuation carried out by the department on the basis of Harbans Singh's formula, was allowed in a case of land acquisition in the year 1989. In the present case acquisition has taken place in the year 1988 and therefore, learned District Judge has not committed any mistake in allowing four times increase to the market value of the fruit bearing trees assessed by the Land Acquisition Collector on the basis of Harbans Singh's formula.

21. Learned District Judge has also awarded compensation, ranging from Rs.600 to Rs.50,000/-, on account of goodwill, loss of earnings and loss of rent to some of the land owners. On scrutiny of evidence on record, it is found that there is no perversity in calculation of amount of compensation under these heads. Learned couns

el for the appellant has also failed to point out any ground for interference.

22. No other point urged or argued.

23. In view of above discussion, there is no illegality, irregularity, or perversity in the award passed by learned District Judge, who has appreciated the evidence on record completely and correctly and in consonance with the settled law of land. Therefore, all appeals are dismissed. All pending miscellaneous application(s), if any, also stands disposed of accordingly. There shall be no order as to costs. Record be sent back.

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

Anita Sood & others .....Petitioners.

Versus

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

Cr.MMO No. 51 of 2017.
Reserved on: 23rd October, 2017.
Date of Decision: 31st October, 2017.

Indian Penal Code, 1860- Section 304-A and 336 read with Section 34- Charge-sheet was presented against the petitioner for causing death by negligence – it was asserted that the petitioners had administered intravenous injection causing death – the petitioners filed the present petition for quashing the proceedings – held that the intravenous administration of the injection was in accordance with prevalent medical opinion mentioned in the medical text books – the petition allowed and the proceedings against the petitioners dropped.(Para- 3 to 6)

For the petitioners: Mr. Pratap Singh Goverdhan, Advocate.
For respondent No.1: Mr. Vivek Singh Attri, Addl. A.G.
For respondentS No.2 &3: Ms. Ratika Jassel vice to Mr. Anil Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through the instant petition cast under the provisions, of, Section 482 of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C.), the petitioners pray for quashing of orders pronounced on 10.08.2016 by the learned trial Court upon Criminal Misc. Application No. 168/4 of 2016, whereby, the learned trial Court refused to accord relief vis-a-vis the petitioners, for dropping of proceedings. Furthermore, a prayer is also made in the instant petition, for quashing and setting aside, of the summoning orders, pronounced, by the learned Judicial Magistrate 1st Class (II), Solan, upon Criminal Case No.502 of 2015.

2. In the report filed under Section 173 of Cr.P.C. by the Investigating Officer concerned, before the learned trial Court, he had made ascriptions of incriminatory role(s) vis-a-vis the accused/petitioners, for theirs committing offences constituted under the provisions of Section 304-A and 336 read with Section 34 of the IPC. Ascriptions of the aforesaid incriminatory role(s) vis-a-vis the accused/petitioners, arose, from occurrence of demise of, one, Asgari at Him Medicare Centre, The Mall Solan, manned by co-petitioners No.1 and 2. As unfolded by Annexure P-7/A, the aforesaid Asgari was diagnosed, for Hysterosalpingogram test (for short hereinafter referred as "HSG Test"). It is also borne in Annexure P-7/A, of, hers being administered injections, named, atropine and buscopan. However, she remained unresponsive to the aforesaid medication(s) purveyed to her, rather as reflected by Annexure P-14, she met her end upon, hers being beset with acute haemodynamic pulmonary Odema.

3. The prosecution alleges, of, intravenous administration, by the concerned, of, injections, namely atropine and buscopan, begetting the sequel of Agsari, being entailed with acute haemodynamic pulmonary Odema. For the prosecution, to, succeed in making any espousal before this Court, of, the concerned, in making intravenous administration, of, atropine and buscopan injections vis-a-vis deceased Asgari, theirs being hence penally liable for committing gross negligence, was, enjoined to display (I) qua, upon references being made to revered medical texts and upon an allusion being made to opinion(s) recorded by the expert(s) concerned, of therein an absolute interdiction, occurring, against the accused, intravenously administering the aforesaid injections vis-a-vis deceased Asgari, (ii) nor the aforesaid intravenous administration, constituting the practice acceptable to medical profession. Suffice to extract hereinafter, the relevant paras, of, the verdict of the Hon'ble Apex Court pronounced in ***Jacob Mathew versus State of Punjab and another, reported in (2005)6 SCC 1***, especially the apt extracted portion thereof, directly appertaining, to the trite pivotal aspect, of intravenous administration of the aforesaid injections, by the concerned vis-a-vis Asgari, wherein stand propounded, the exculpating tenets, vis-a-vis prosecutorial ascription, of, penally inculpable negligence upon the accused, (iii) more so, when in tandem therewith "both" medical texts "AND" expert opinion, hence vindicate their intravenous administration by the concerned vis-a-vis Asgari, hence render corroboration thereto. The apt underlined portion of the relevant verdict stands extracted hereinafter:-

> "Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. The classical statement of law in Bolam Case, (1957)2 All ER 118, at page 121 D-F [set out in para 19 herein] has been widely accepted as decisive of the standard of care required both of professional men

generally and medical practitioners in particular. It has been invariably cited with approval before Courts in India and applied to as touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. It is not necessary for every professional to possess the highest level of expertise in that branch which he practises. Three things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used. Thirdly, when it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to be given or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency.

At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are; (I) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that may incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation, the person holding “smoking gun”.”

(p.8 & 9)

4. The petitioners/accused for deriving benefit of the apt exculpatory extracted portion(s), of, the verdict rendered by the Hon'ble Apex Court, rely upon an opinion of the expert borne in Annexure P-6, wherein, it stands underscored, of intravenous administration, of atropine and buscopan injections vis-a-vis deceased Asgari being embodied in the apt medical texts, to constitute a norm for enabling the patient concerned, to, beget alleviation from spasms also reliance is placed upon the relevant hereinafter extracted portion, occurring in Annexure P-8, wherein, the relevant intravenous administration stands prescribed for patient(s) advised to undergo Hysterosalpingogram. The relevant apt portion whereof reads as under:

“HYSTEROSALPINGOGRAPHY

The examination outlines the uterine cavity and Fallopian tubes. The indications are:

1. Infertility: to demonstrate normal patency of the Fallopian tubes and their communication with the peritoneal cavity.

2. Recurrent abortion: to demonstrate congenital abnormalities of the uterine cavity or incompetence of the internal os of the uterus.

3. To monitor the effects of tubal surgery, e.g. occlusion in a sterilization procedure; or to demonstrate patency after a sterilization reversal, or after surgical intervention to restore patency of pathologically obstructed tubes.

The procedure of hysterosalpingography was used more extensively in the past and the appearance of a large variety of gynaecological conditions have been described (Foda et al., 1962). Since the indications for the examination are now almost entirely restricted to those given above, only a brief description of other abnormalities which may be encountered incidentally are given. The contraindications to this examination are;

1. Active pelvic sepsis. The examination may result in spread infection.

2. Severe renal or cardiac disease.

3. Sensitivity to contrast media.

4. Recent dilatation and curettage.

5. Pregnancy.

6. The week prior to, and the week folling menstruation.

The examination is best performed at about middle of the menstrual cycle.

Patients should be advised to abstain from intercourse, or to use some contraceptive method, in the interval from the last menstrual period up to the examination to avoid the possibility of irradiating an early pregnancy. If the examination is then carried out late in the cycle a diagonostic curettage can usefully follow the salpingogram.

Technique. The injunction of contrast medium is made through a cannula (or a small self-retaining catheter). The cannula is placed in the cervix, and two kinds are available. The Leech-Wilkinson pattern has a screw-threaded olive at its distal end which enables a water tight fit to be made easily into the cervix, and this prevents the reflux of contrast medium into vagina. It has some liability to produce cervical laceration. The everard-Williams pattern has a smooth olive near the distal end and the tip of the cannula is bent to allow easy introduction into the cervical canal. This is a satisfactory cannula, but the operator must be careful to maintain a good seal at the cervix and prevent reflux of contrast medium. In addition, contrast medium can be satisfactorily injected using a plastic cap which is held onto the cervix by suction and through which a small tube passes to enter the cervical canal.

The patient is placed in the lithotomy position at the end of the screening table. A speculum is introduced into the vagina and the canula is introduced into the cervix. The speculum is then removed and the patient carefully moved up the table so that she lies in a supine position, and the contrast medium is injected while the radiologist screens the procedure. This allows films to be taken at the most opportune time or to note if any contrast medium is refluxing into the vagina due to a poor seal between the injecting device and cervical canal. One or two films may be necessary to show the cervical canal, the body of the uterus, the Fallopian tubes and the spread of contrast medium on to the peritoneum.

Any water-soluble contrast medium otherwise used for intravenous urography is satisfactory in this context.

Complications. *Pain.* Two types of pain can occur. The first is a hypogastric colic and is probably related to distension of the uterus. The second is more continuous generalized lower abdominal pain, most likely due to peritoneal irritation. Both are transient and are usually of nuisance value only.

Venous Intravasation. The contrast medium is accidentally injected through the endometrium and taken up by the interstitial veins which outline the thickness of the uterine wall and are seen draining through the iliac and ovarian veins.

Intravasation is said to occur; a. due to excessive injection pressure; b. due to traumatization of the endometrium by the tip of the cannula; and c. if the examination is performed when the endometrium is deficient as after curettage or menstruation.

Intravasated water- soluble contrast medium is entirely harmless. The main objection is that it obscures the picture. It is suggested that should venous intravasation occur, a delayed picture can be taken after a few minutes when the intravasated medium has cleared, in the hope that tubal filling and any spill onto the peritoneum nay then be visible.

Exacerbation of pelvic infection. Care should be taken not to perform the examination in the presence of any active inflammatory process. It is considered advisable to give prophylactic antibiotics after a hysterosalpingogram in a patient with chronic pelvic infection.

The Normal hysterosalpingogram.

The normal uterine cavity is approximately triangular, with sides of 3.7 c.m (1.5 in). The cervical canal has a length of about 2.5 cm (1 in) or less. The cornua of the uterus are often seen to have a constriction, possibly a sphincter, at each cornuotubal junction. On the screen the isthmic part of the Fallopian tubes may be difficult to identify, but their broader ampullar and infundibular parts are usually clearly seen. When spill occurs the contrast takes on an amorphous shape around the end of the tube. The medium then smears the pelvic peritoneum, producing a series of curvilinear opacities in the recesses. The pouch of Douglas is often identifiable and the elliptical outlines of the ovaries can sometimes be distinguished. Care should be taken not to confuse residual contrast medium lying in the vaginal fornices.

Failure of contrast medium to pass through the tunes to the peritoneum may occasionally be due to cornual or tubal spasm. Inhalation of amyl nitrate has been recommended to relieve the spasm, but its effect is dubious. Gentle injection pressure and patience, giving the spasm time to relax are probably the most important factors in overcoming the tubal spasm. Iv. Buscopan may also be used"

With categorical echoings, respectively, occurring in Annexure P-6 and in the relevant portion of Annexure P-8, hence, falling absolutely in line and in tandem, with, the trite proposition culled by the Hon'ble Apex Court, in its verdict rendered in **Jacob Mathew's case supra**, wherein, (i) adherence by the doctor concerned vis-a-vis textually prescribed acceptable medical practices, is propounded, to exculpate his purported incriminatory/inculpable medical negligence, (ii) significantly also with the prosecution for benumbing the aforesaid procedure, hence, failing to adduce textual material of more vigorous worth, nor its placing on record any material personificatory, of, there being any misdiagnose(s) at Him Medicare Centre, The Mall Solan of deceased Asgari, by the accused concerned, specifically vis-a-vis hers being enjoined to undergo Hysterosalpingogram test, whereas, an ailment other than hers undergoing HSG test, befalling upon her. (iii) hence, renders open a firm conclusion of the accused, prima facie not being penally liable in intravenously administering buscopan AND atropine vis-a-vis the deceased Asgari.

5. Be that as it may, the learned Additional Advocate General has placed on record a text, propagating, adherence by the concerned, of certain precaution(s) in respect of intravenous administration of atropine and of buscopan onto the blood of the patient concerned, the relevant portion whereof stands extracted hereinafter:

> "A hysterosalpingogram usually is done by a radiologist in the x-ray room of a hospital or clinic. A radiology technologist and a nurse may help the doctor. A gynecologist or a doctor who specializes in infertility (reproductive endocrinologist) also may help with the test."

the prescription(s) held therein are (i) of the HSG test being conducted by a radiologist in the x-ray room of the hospital or clinic, during course whereof a technologist and a nurse may help the doctor. He contends that when in infraction thereof, the test was conducted by one Madan Lal also with the latter intravenously administering atropine and buscopan vis-a-vis Asgari; (ii) thereupon, he proceeds to contend qua hence accused No.1 and 2, not, adhering to the standards of due care and caution, thereupon, theirs along with co-accused No.3, hence, rendering themselves vicariously liable for penally inculpable medical negligence. However, the aforesaid submission wanes, for the reason(s) (a) it not being bed-rocked upon any hard evidentiary strata comprised in ascriptions thereof finding graphic communications, in the previous statement of Smt. Shabana; (b) the Investigating Officer belatedly rather with an inordinate delay of an year elapsing since his recording the previous statement of the complainant, hence recording her supplementary statement under Section 161 of the Cr.P.C., with ascriptions therein, of, the aforesaid incriminatory role(s) vis-a-vis the accused and (c) thereupon, it being evident, of, the Investigating Officer, by sheer contrivance, hence, concerting to falsely implicate the accused/petitioners.

6. Fore the foregoing reasons, the instant petition is allowed and the impugned orders are quashed and set aside, especially, when the prosecution of the accused would encumber injustice upon them also would tantamount to gross abuse of process of law. Consequently, Cr.M.A. No. 168/4 of of 2016 is allowed and the proceedings initiated against the accused/petitioners herein in Criminal Case No. 5-2 of 2015 are dropped. Records be sent back forthwith. All pending applications also stand disposed of.

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

Charan Dass ....Petitioner.
Versus
State of Himachal Pradesh. ....Respondent.

Cr. MP(M) No. 1220 of 2017
Decided on: 31st October, 2017

Code of Criminal Procedure, 1973- Section 439- An FIR was registered for the commission of offences punishable under Sections 302, 341, 323, 325 and 504 read with Section 34 of IPC against the petitioner – the petitioner has filed the present petition seeking bail – held that the there is a likelihood that petitioner may tamper with the prosecution evidence and may flee from justice- the petitioner is involved in a heinous offence and cannot be enlarged on bail- petition dismissed. (Para-6 and 7)

Cases referred:
Bhagirathsinh Judega vs. State of Gujarat, AIR 1984 SC 372
Amar Chand vs. State of H.P., Latest HLJ 2015 (HP) 1347

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondent: Mr. Virender K. Verma, Addl. AG, with Mr. Rajat Chauhan, Law Officer.
ASI Hoshiar Singh, I.O. P.S. Rampur Bushehar, District Shimla, 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. 228 of 2016, dated 08.12.2016, under Sections 302, 341, 323, 325 and 504 IPC read with Section 34 IPC, registered at Police Station Rampur, District Shimla, H.P.

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

3. Police report stands filed. As per the prosecution, on 08.12.2016 police recorded the statement of injured Ram Singh, who was admitted in MGMSC, Khaneri. He, in his statement, alleged that on 08.12.2016 he went to the orchard of one Shri Durga Singh for pruning. In the evening, when he was returning and reached near Serigad *nalla*, the petitioner started abusing him. In the interregnum, his brother, who is a shepherd, reached there and the petitioner continued to abuse them from his house. The son of the petitioner gave beatings to them with a stick and the petitioner pelted stones on them. Due to the beatings they received injuries. The police got the complainant and his brother (Shri Shyam Singh) medically examined. Police also prepared the spot map and took into possession stones stained with blood. The statements of the witnesses were also recorded. As per the medical report qua injured Shyam Singh, it was opined by the doctor that ***"injury sustained is dangerous to life",*** so section 307 was added. The age of the son of the petitioner, who is co-accused, on the day of occurrence was 16 years nine months and sixteen days. The petitioner was arrested on10.12.2016. It was unearthed during the examination that the petitioner and his son gave beatings to the complainant and his brother (Shri Shyam Singh) and to rescue them sister and father of the complainant intervened. The petitioner bit the finger of the sister of complainant and he also bit the ear of father of the complainant. On 12.12.2016 the brother of the complainant, Shri Shyam Singh, succumbed to his injures, so section 302 was added. As per the prosecution, during the course of investigation, scientific evidence was collected and the same was subjected to chemical examination at SFSL, Junga, and the report wherefrom is as under:

> ***"1. Human blood was detected on exhibit-1 (blood stained stone) and exhibit-5c (Sweater, Ram Singh) but the result was inconclusive in respect of blood group,***
>
> ***2. Blood was not detected on exhibit-2 (Button), exhibit-3b (Topi, Shyam Singh) and Exhibit-4 Wooden Piee/Danda)***
>
> ***3. Human Blood of group 'AB' was detected on exhibit-3a (zipper, Shyam Singh), Exhibit 5a (pants, Ram Singh), exhibit-5b (zipper, Ram Singh, exhibit-6 (blood sample, Ram Singh), exhibit 11(blood sample, Shyam Singh and exhibit-13 (shirt, Shyam Singh."***

The DNA analysis is yet to received. As per the Medico Legal Certificate issued by Medical Officer, MGMSC, Khaneri, the deceased Ram Singh died due to injury No. 1, which was grievous in nature. The viscera of the deceased was also sent for forensic analysis and as per the final opinion, the deceased died due to Homicidal Cranio-cerebral trauma (Brain injury) and the same is possible with linear blunt object. As per the prosecution, the *challan* stands presented in the learned Trial Court and the case is listed for 20.11.2017 for consideration on charge. The petitioner is a dangerous person and he committed the crime alongwith his son, i.e., co-accused. Lastly, the prosecution has prayed that the offence committed by the petitioner is heinous and there is likelihood that he may tamper with the prosecution evidence and flee from justice, so his bail application may be dismissed.

4. Heard. The learned counsel for the petitioner has argued that the petitioner is innocent and he is resident of the place neither in a position to tamper with the prosecution

evidence nor in a position to flee from justice. He has further argued that there is no case made out against the petitioner and even as per the allegations, which have come on record, no cause under Section 302 IPC is made out. Conversely, the learned Additional Advocate General has argued that the petitioner has committed heinous crime and taking into consideration the fact that the petitioner is in a position to tamper with the prosecution evidence, his bail application may be dismissed. In rebuttal, the learned counsel for the petitioner has argued that the *'rule is bail not jail',* and that the petitioner may be released on bail. The learned counsel for the petitioner has relied upon the following judicial pronouncements:

1. ***Bhagirathsinh Judega vs. State of Gujarat, AIR 1984 SC 372; &***
2. ***AmarChand vs. State of H.P., Latest HLJ 2015 (HP) 1347.***

5. In order to appreciate the rival contentions of the parties, I have gone through police report in detail.

6. In ***Bhagirathsinh Judega vs. State of Gujarat, AIR 1984 SC 372,*** the Hon'ble Supreme Court has held that power to grant bail is not to be exercised as if the punishment before trial is being imposed and the material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tempering with evidence. Apposite para of the judgment is extracted hereinbelow for ready reference:

> *"5. It appears that the State of Gujarat field Miscellaneous Criminal Application No. 1724 of 1983 in the High Court of Gujarat seeking cancellation of the order granting bail to the appellant. A learned single judge of the High Court held that once a prima facie case is established the learned Sessions Judge ought to have taken into consideration the nature and gravity of the circumstances in which the offence is committed. The charge against the appellant is that he has committed an ofence punishable under Section 307, IPC and Section1 35 of the Bombay Police Act and even on the date of hearing of this appeal before us on November 18, 1983, the Court was informed that the victim is alive and at present there is no danger to his life. Nearly 3 months have rolled by from the date of the offence. We fail to understand what the learned Judge of the High Court desires to convey when he says that once a prima facie case is established, it is necessary for the court to examine the nature and gravity of the circumstances in which the offence was committed. If there is no prima facie case there is no question of considering other circumstances. But even where a prima facie case is established, the approach of the court in the matter of bail is not that of punishment but whether the presence of the acused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with evidence. We would have certainly overlooked this aspect of the matter if the approach of the learned judge was otherwise one which would commend to us. It however appears that the learned judge was impressed by some of the most irrelevant considerations which prima facie emerge from the following observations of the learned Judge which permeates his whole order running into about 13 pages. Says the learned Judge:*
>
> > *"The learned Judge ought to have seen the fact that the helpless victim had gone to the hospital for pre-operation checkup. He was a leading social and political worker. He was a leading social and political worker. He was an active worker and Secretary of "Gundagiri Nivaran Samiti" which had raised a campaign against the atrocities allegedly having been committed by the Rajputs of Girasiya community. Admittedly the respondent is Girasiya and the complainant who was an active worker and Secretary of Gundagiri Nivaran Samiti ahd become a victim at the hands of the respondent. The learned Judge ought to have taken into consideration the material fact tht the incident had taken place in the premises of the Hospital which may terrorize a number of sick persons who might be getting treatment in the hospital."*

At another place, the learned Judge has observed that the learned Sessions Jude has ignored the fact that a social and political worker was attacked in the hospital premises with a knife having 9" blade and as many as 11 injuries were caused to a helpless victim."

In the case in hand, there is likelihood that the petitioner may tamper with the prosecution evidence. Likewise, there are chances that the petitioner may also flee from justice, therefore, the judgment (supra) is not applicable to the present case.

6. In ***Amar Chand vs. State of H.P., Latest HLJ 2015 (HP) 1347,*** a co-ordinate Bench of this Hon'ble High Court has held as under:

"6. However, suffice it to say that the accused, who was just 18 years of age, has been behind bars for more than one year. Investigation is complete. Challan stands filed and the prosecutrix, who is elder in age (23 years) as compared to the accused, cannot be influenced by the accused. He is a permanent resident of District Kullu; lives with his family and is not likely to flee away from the jurisdiction of the Court. No evidence can be tampered with by him. Medical evidence produced on record is an additional factor, which weighs with the Court. Whether the accused was known to the prosecutrix from before; having intimacy; the alleged act was consensual or not; are matters left to be decided by the trial Court after appreciation of evidence."

However, the judgment (supra) is again not applicable to the facts of the present case.

7. After going through the record in detail, this Court finds that as per the prosecution story the deceased has died because of the injury inflicted by the petitioner. Therefore, the argument of the learned counsel for the petitioner that no case is made out against the petitioner under Section 302 IPC has no force. The case is at the initial stage and in case the petitioner is enlarged on bail, in such a heinous offence, he will definitely tamper with the prosecution evidence and there are chances that he will flee from justice. Considering the guidelines laid down by the Hon'ble Supreme Court, this Court comes to the conclusion that as the petitioner is in a position to flee from justice and he can tamper with the prosecution evidence, as the case is at its initial stages and also taking into consideration the heinousness of the crime, 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.

8. In view of the above, the petition, which sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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

Gadku Ram .....Appellant/defendant.
Versus
Krishani Devi & others .....Respondents/Plaintiffs.

RSA No. 508 of 2007.
Reserved on : 06.10.2017.
Decided on : 31st October, 2017.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land- the defendants forcibly entered into the suit land and started digging it – they have managed to occupy 9 biswansis of land during the pendency of the suit – the defendants opposed the suit pleading that plaintiff had sold 4 biswas of land in favour of defendant No.2 for a consideration of Rs.11,000/- and had delivered the possession of four

biswas of land on the same day- the defendants are in possession of the suit land – the construction was raised with the consent of the plaintiff- the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that four biswas out of 6-6 bighas of land bearing khasra No. 1364/494 was purchased by the defendants- however, they have raised construction upon the land, which was beyond 4 biswas purchased by them- a Local Commissioner was appointed to conduct the demarcation- he submitted a report in which encroachment to the extent of 9 biswansis was detected – mere fact that the construction was in existence for more than 15 years cannot lead to an inference of estoppel against the plaintiff- the plaintiff came to know about the encroachment only on the demarcation – the Courts had rightly granted the injunction in these circumstances- appeal dismissed. (Para-8 to 12)

For the Appellant: Mr. Rajnish K. Lall, Advocate.
For Respondent No.1: Mr. Naresh K. Sharma, Advocate.
Nemo for proforma respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff instituted a suit against the defendants, claiming therein a decree for permanent prohibitory injunction, as also, a decree for mandatory injunction. The suit of the plaintiff stood decreed by the learned trial Court. In an appeal carried therefrom by the defendant/appellant herein before the learned First Appellate Court, the latter Court dismissed the appeal. In sequel thereto, the defendant/appellant herein is driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiff is owner in possession of the suit land measuring 6.6 bighas, comprised in Khasra No.1364/494, Khata Khatoni No.89 min/114 min, situated in village Gehrwin, Pargana Geharwin, Tehsil Jhanduta, District Bilaspur, H.P. over which the defendants have got no right, title or interest. However, on 20.2.1997, they forcibly entered the suit land and started digging it. When she objected, they threatened to forcibly occupy the suit land by raising construction thereon. It was further averred that during the pendency of the suit, the defendants managed to forcibly occupy land measuring 9 biswansies by constructing boundary wall and shed covered with tin on the part of the suit land comprised in Khasra No.1364/494/2/1 as shown in the Tatima attached with the report of Local Commissioner/Tehsildar of 6.11.2001. Consequently, she prayed that a decree for permanent prohibitory injunction restraining the defendant from causing interference in the suit land, measuring 6.6. bighas, in any manner including to change its nature and cut tress therefrom and a decree for vacant possession of land measuring 9 biswansies comprised in Khasra N.1364/494/2/1 occupied, forcibly by the defendants during the pendency of the suit, by demolishing the boundary wall and shed covered with tin, be passed in her favour and against the defendants.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections inter alia maintainability, valuation and estoppel. ON merits, it was asserted that the plaintiff had sold land measuring 4 biswas out of the suit land comprised in Khasra No.1364/494/1 vide registered sale deed dated 11.1.1991 in favour of replying defendant No.2 for a consideration of Rs.11,000/- and also delivered the possession of aforesaid 4 biswas of land to him on same day. The defendants have got no concern with the remaining suit land. As far as the land is concerned, they have got every right, title or interest in the same which was purchased by replying defendant No.2 from the plaintiff for valuable consideration, as they are in possession of the same. It is further submitted that there is no question to cause interference, in any manner, over the rest of the suit land. It is submitted that when the land was purchased, a spot tatima was also prepared and in consequence thereof, its possession had been delivered to replying defendant No.2, who constructed a shop thereon besides installing welding set etc. The

aforesaid had been done with the consent of the plaintiff and also to her notice and knowledge. At that the time, the plaintiff not doubted that replying defendant No.2 was going to raise construction on land comprising khasra No.1364/494/2/1, nor at that time, she had claimed the aforesaid land, belonging to her. Rather she had allowed the plaintiff to raise construction thereon. It was further pleaded that the plaintiff had already constructed her house on the side of the land purchased by replying defendant No.2, who also raised constructing touching the wall of the house of the plaintiff. The aforesaid facts and circumstances clearly got to show that the plaintiff is guilty of acquiescence. It was further averred that since the plaintiff had also encroached upon the land measuring 9 biswansies comprising khasra No.1364/494/1/2, for this reason, he filed a separate suit against her in order to seek the possession of the above said encroached land.

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

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

1. Whether the plaintiff is entitled to the relief of permanent injunction, as prayed for?OPP.
2. Whether the plaintiff is entitled to vacant possession of the suit land, as alleged?OPP.
3. Whether the suit is not maintainable?OPD.
4. Whether the plaintiff is estopped from filing the present suit?OPD.
5. Whether the plaintiff has no locus standi to file the present suit?OPD.
6. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction?OPD.
7. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom by the defendants/appellants before the learned First Appellate Court, the latter Court dismissed the appeal, whereby, it modified the findings recorded by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 24.09.2008, admitted the appeal instituted by the defendant(s)/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether in view of the fact that the appellant had purchased the land from the plaintiff more than 15 years back and had raised construction thereon without objection or protest, the suit of the plaintiff for permanent and mandatory injunction and possession could have been decreed?
b) Whether the trial Court has acted with illegality in exercise of jurisdiction in not affording the appellant an opportunity to file objections against the report of the local commissioner which report obviously was vitiated as demarcation had not been carried out in accordance with the High Court Rules and Orders and instructions of the Financial Commissioner and the Local Commissioner having held that both the parties made encroachments on each of the land?

c) Whether the suit of the plaintiff was not within limitation and the defendant had acquired title by way of adverse possession in the facts and circumstances of the case and the suit ought to have been dismissed?

Substantial questions of Law No.1 and 3:

8. Uncontrovertedly, from the total tract of suit land, measuring 6-6 bighas borne on khasra No. 1364/494, 4 biswas of land, stood purchased, from the plaintiff by the contesting defendant/appellant herein. Since, the contesting defendants, purportedly, by their overt acts, hence, concerted to, other than upon 4 biswas of land, make encroachment upon land comprised in suit khasra No. 1364/494, measuring 6-6 bighas, thereupon, the plaintiff was led, to, institute a suit for permanent prohibitory injunction and for vacant of possession of land measuring 9 biswansies, comprised in khasra No.1364/494/2/1, area whereof stood purportedly encroached upon by the contesting defendant. Since, during the pendency of the suit before the learned trial Court, the contesting defendant, purportedly, beyond the area of four biswas sold to him under a registered deed of conveyance, hence, raised construction, thereupon, a Local Commissioner was appointed, for, ascertaining the extent of encroachment(s), by way, of construction, made, upon khasra No.1364/494, by the contesting defendant(s). The Local Commissioner proceeded to hold demarcation of the adjoining estates of the parties at contest, whereafter he tendered his report borne in Ex.PW4/B. In his report, he elaborates the factum of encroachment to the extent of 9 biswansies occurring upon khasra No.1364/494/2/1. Both the learned Courts below accepted the report of the Local Commissioner, hence, proceeded to render decrees for permanent prohibitory injunction also for mandatory injunction, comprised, in the defendants being directed to demolish the boundary wall and shed covered with tin, erections whereof occurred upon suit khasra No.1364/494/2/1. Construction, if any, raised by the defendants concerned upon land measuring 4 biswas, purchased by him from the plaintiff, under a registered deed of conveyance, in respect whereof a tatima was carved also (a) with existence thereon lasting since 15 years, especially when at the stage of its commencement no demur or portest emanated from the plaintiff, would obviously spur an inference of statutory estoppel operating against the plaintiff. (b) Nonetheless, interdictory effect(s) of the principle of estoppel operating against the plaintiff, (c) spurrings whereof emanating from lack of any demur or protest made by the plaintiff, at the time of commencement of construction, by the contesting defendant, would subside or would also wane (d) upon firm evidence pronounced, by, validly conducted demarcation(s) articulating (e) that the contesting defendant(s) had beyond the tract of four biswas alienated to him/them, by the plaintiff, under a registered deed of conveyance, obviously holding construction upon, tracts of land exclusively owned by the plaintiff. (f) Consequently, the factums aforesaid would surface only upon a valid demarcation being conducted by a competent revenue officer.

9. Further sequel(s) of the aforesaid inferences, are, (i) of the mere fact of the plaintiff, not, making any loud protests or remonstrances, at the time, of the defendants raising construction upon or purportedly beyond an area of four biswas, alienated to him under a registered deed of conveyance, executed inter se him/them and the plaintiff, ipso facto, not barring, the plaintiff to institute a suit for permanent prohibitory injunction or for mandatory injunction, if, (ii) a validly carried demarcation vividly pronounces, of, encroachment(s) being made by the contesting defendant(s), upon suit land(s) in respect whereof he/they had no right, title or interest, (iii) thereupon, with the plaintiff acquiring knowledge in respect of encroachments, made, by the defendant, upon, land exclusively owned by the plaintiff, only upon, the Revenue Officer holding a valid demarcation of the suit khasra number(s), (iv) thereupon, the bar of limitation commencing from the time of raising of purported illegal construction(s) by the defendants, till, the institution of the suit, would not obviously non suit the plaintiff, imperatively when knowledge in respect of the relevant fact, emanated, only upon a valid demarcation report, being prepared, by the competent Revenue Officer, whereat reiteredly alone knowledge in respects thereof, stood hence acquired, by the plaintiff. (iv) Sequels thereof are, of, lack of objection(s) or protest(s), by, the plaintiff qua the commencement of construction by the defendants, upon suit kahsra numbers, not, holding any interdictory effect against the institution of the plaintiff's suit, for, permanent prohibitory injunction also for mandatory injunction, besides the institution of a

suit by the plaintiff, after 15 years since the completion of purported illegal construction(s) upon suit khasra number, not, rendering the plaintiff's suit, to entail its dismissal.

10. Be that as it may, the concurrently recorded decrees of permanent prohibitory injunction besides mandatory injunction, would, hold an aura of validation, only when imputation(s) of sanctity(ies) by both the learned Courts vis-a-vis the report of the Local Commissioner, borne in Ex.PW4/A, withstand(s) the scrutiny of the relevant rules appertaining to the demarcation of land, rules whereof are borne in the Himachal Pradesh Land Records Manual. The apposite provisions of the H.P. Land Records Manual, occurring, at Chapter 10 thereof, Rule 10.3, at page 204, read as under:

> "10.3 An interested person shall submit an application for demarcation in duplicate. The following documents shall be filed with the original application.
>
> 1. A copy of latest jamabandi.
>
> 2. A copy of previous settlement map.
>
> 3. A copy of map prepared during consolidation, if consolidation operations have been conducted in the estate.
>
> 4. A copy of tatima Shajra if the demarcation of sub-divided khasra number is involved.
>
> 5. Process fee as prescribed under the rules."

The aforesaid apposite provisions enjoin upon the applicant, seeking demarcation, to, with the apposite application, append, amongst other documents, a, copy of the previous settlement map. Nowat, for, determining whether the demarcating officer at the time of his holding demarcation of the suit khasra number, his thereat also holding possession of a copy of the previous settlement map, an allusion is imperative to his deposition recorded on oath. An allusion thereto, underscores, of in his cross-examination, his admitting, a suggestion put to him, of his, at the relevant time, not possessing, a copy of the previous settlement map, rather his at the relevant time possessing, a copy of "Istmal musabi". Since, the hereinabove extracted rule voice the (a) mandatoriness of the demarcating officer, at the relevant time, possessing, a copy of the previous settlement map, thereupon, the mandatoriness of the phraseology occurring in the apt portion of the apposite Rules, enjoin him to beget strict compliance therewith. (b) Any departure therefrom would render open an inference (c) of the demarcation carried by the Revenue Officer concerned being in infraction of mandatory statutory provision(s), hence, rendering, it, nonest besides vitiated. Further corollary whereof is of any imputation of reliance vis-a-vis the report of the Local Commissioner, by both the learned Courts below, being bereft of vigour. The upshot of the above discussion is, of, the concurrently recorded decrees of permanent prohibitory injunction and mandatory injunction, by both the learned Courts below, hence, suffering from a gross perversity, absurdity, of, gross mis-appreciation of the apt documentary evidence, whereupon, this Court is constrained to reverse the concurrent pronouncement recorded by both the learned Courts below. All the substantial questions of law are answered in favour of the appellant and against the respondent(s).

11. The above discussion unfolds the fact 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.

12. In view of the above discussion, the present Regular Second Appeal is allowed. In sequel, the judgements and decrees rendered by both the learned Courts below are set aside. Consequently, the suit of the plaintiff is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Hans Raj and others .....Appellants/Plaintiffs.
Versus
Shayam Lal and others .....Respondents/Defendants.

RFA No. 269 of 2003.
Reserved on : 16th October, 2017.
Decided on : 31st October, 2017.

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit seeking declaration that plaintiff No. 1 is the mohtmim and sole owner of the property and defendants No. 1 to 7 are not the owners of the property – sale deed executed in favour of defendant No.8 is illegal, unauthorized and ineffective - the suit was dismissed by the Trial Court- held that suit land was held to be a trust property by the Courts in the earlier proceedings- the plaintiff H had instituted a suit, which was dismissed as withdrawn –no liberty was granted to institute a fresh suit – the present suit was barred under Order 23 Rule 1 – appeal dismissed. (Para-7 to 11)

For the Appellant(s): Mr. Ajay Sharma, Advocate.
For respondent No.1, 3 to 7. Mr. K.D. Sood, Sr. Advocate with Mr. Rajnish K. Lal, Advocate.
Nemo for other respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs instituted a suit against the defendants claiming therein a decree for declaration, that plaintiff No.1, is, Mohtmim and sole owner of the suit property and defendants No.1 to 7 were not owners of the suit property, consequently, sale deed of 24.8.1990 executed qua the land comprised in Khata No.295, Khatauni No. 621, Khasra No.460 min, by deceased Puran Chand and defendant No.2 Siri Krishan, vis-a-vis defendant No.8, being wrong, illegal, unauthorised and ineffective. The suit of the plaintiffs was dismissed by the learned trial Court. Upon standing aggrieved by the verdict rendered by the learned trial Court, the plaintiffs/appellants herein, concert to assail it, by preferring therefrom the instant appeal.

2. The plaintiffs' case in brief is that the suit property was owned by Duni Chand Shah, who was succeeded by widow of Roop Devi. Rood Dvi created Trust, qua the suit property on 1.5.1946, known, as Sha Duni Chand Bhardial Trust, Pragpur. She appointed herself as President of the Trust and nominated Pt. Jaishi Ram, Roop Lal, Palu Ram, Khusi Ram, Pohlo Ram and Kanhahya as trustees. Now defendants No.1 to 7 are trustees of the Trust. Puran Chand, trustee died on 14.11.1998 and in place, defendant No.7 is acting as trustee. Claimed, that plaintiff is successor of Roop Devi, original owner of the trust property, which he succeeded vide mutation No.672 of 10.07.1949 to the extent of ½ share and remaining half was succeeded by Jagan Nath and Baikunthi Devi. After death of Balak Ram, father of the plaintiffs, plaintiff No.1 was appointed as Mohtmim. Further claimed that Khushi Lal etc., trustees had filed civil suit No.237/52 against Jagan Nath etc., successors of Roop Devi, which was decreed for possession qua the trust property. But trustees, in collusion with revenue staff got transferred the property of trust though they were only trustees and not owners of its property. Defendant No.8 was never inducted as tenant by Roop Devi nor defendants No.1 to 7 trustees had any authority to induct him as tenant over the trust property, as they were not owners and were trustees, to maintain the property and keep its accounts. Further pleaded that defendants No.1 to 7, trustees are not managing the trust property properly and they were not authorised to change its nature and sale of the trust property by trustee Puran Chand,deceased and defendant

No.2 Siri Krishan in favour of defendant No.8 vide sale deed of 21.8.1990 is illegal, unauthorised and not binding upon the plaintiff being Mohtmim. Trustees have not discharged their duties properly and consequently not entitled to continue as trustees and liable to be removed from the trust. So, defendant No.8 gets no title or interest in the trust property, sale being illegal, unauthorised and ineffective. Defendants No.8 to 10, consequently, liable to be prohibited from cutting any tree from the trust property or raising any construction thereon.

3. The defendants No.1 to 5 and 7 contested the suit and filed joint written statement, wherein they have taken preliminary objections qua maintainability, locus standi, cause of action, resjudicata, valuation, non joinder of necessary parties, limitation, barred under Order 2, Rule 2 of the CPC. On merits, it was denied that plaintiff No.1 is owner or Mohtmim of the trust property. However, it is admitted that Roop Devi being owner of the trust property created trust vide deed dated 1.5.1946 and nominated trustees and herself as President of the trust. It is also admitted that defendants No.1 to 6 at the moment are trustees of the trust created by Roop Devi. It is averred that after creating of trust, Roop Devi ceased to be owner of the trust property and her heirs on death succeeded to her property which was not donated by her to the trust. Mutation No.672 never operated qua trust property. It is submitted that Roop Devi owned about 1011 kanals of land out of which only 40 kanals and some shops were donated to the trust. It is denied that Balak Ram, father of the plaintiffs was ever a trustee or Mohtmim of trust and after his demise, Plaintiff No.1 became its Mohtmim. It is admitted that civil suit No.237/52 filed by the trust against Jagan Nath and others for possession was decreed. It is averred that defendant No.8 was never inducted tenant by them over the suit property, however, it is submitted that predecessor-in-interest of defendant No.8, namely, one Kanu Ram was already tenant of the land at the time of creation of the trust and tenancy devolved upon defendant No.8. It is further submitted that all the trustees of the trust are honestly and sincerely running the affairs of the trust. All accounts of the trust are properly and regularly maintained. Sale of the trust property to defendant No.8 was an act of prudence of good management, to avoid unnecessary and unfruitful expenditure by way of litigation qua trust property. The land was thus sold to avoid litigation for a consideration of Rs.42,000/- and the sale consideration was deposited with Central Bank of India, Pragpur. No written statement to the plaint was filed by defendant No.8 to 10.

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

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

1. Whether the plaintiff No.1 is the Mohtmim and sole owner and successor-in-interest of Smt. Roop Devi wd/o Duni Chand, of the suit property, as per the trust deed dated 1.5.1946?OPP.

2. Whether the entries in the revenue record in favour of defendants No.1 to 7 as trustees are wrong, illegal, unauthorised, ineffective on the rights of the plaintiffs and are null and void?OPP

3. Whether sale deed dated 24.8.1990 by Puran Chand deceased and defendant No.2, in favour of defendant No.8 is wrong, illegal and ineffective?OPP.

4. Whether the plaintiffs are entitled to the relief of possession and permanent injunction as against defendants No.8 to 10?OPP.

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

6. Whether the plaintiffs have no locus standi to sue?OPD.

7. Whether the plaintiffs have no cause of action to file the present suit?OPD.

8. Whether the suit is barred under the principles of resjudicata?OPD.

9. Whether the suit is not correctly valued?OPD.

10. Whether the suit is bad for non joinder of necessary parties?OPD.

11. Whether the suit is not within time?OPD.

12. Whether the suit is barred under Order 2, Rule 2, CPC?OPD.

12.A. Whether defendants No.1 to 7 are liable to be removed as trustees, as they have not managed the trust property, according to the trust deed, as alleged?OPP.

13. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, it proceeded to dismiss the suit of the plaintiffs.

7. Under conclusive judicial verdicts, respectively borne in Ex.P-12 and in Ex.P-63, the suit land was pronounced to be holding all the characteristics, of, hence its being classified, as, trust property. The conclusive renditions borne in the aforesaid exhibits, are thereupon open for forming of an apt inference, of, the suit property being a trust property.

8. Be that as it may, prior to the institution of the extant suit, the plaintiff in both, one, Hans Raj, the successor-in-interest of one Balak Ram, arrayed as co-defendant in Civil Suit No.116/91, instituted qua the suit khasra numbers borne therein before the learned Sub Judge, Dehra, holding, complete analogity with the suit khasra numbers borne in the extant suit bearing Civil Suit No. 2-G/1 of 1999 also in both, the earlier and in the extant suit, there is a visible conformity in respect of arraying of litigants, "thereupon", as depicted by Ex. D-6, the learned Sub Judge, Dehra, on, anvil of the apposite statement recorded before him, proceeded to dismiss as withdrawn, civil suit No.116 of 91. However, no liberty for its re-institution was accorded vis-a-vis the plaintiffs. Consequently, the learned trial Court, concluded, that with (I) Ex.D-6, not, making any graphic echoings or visible articulations, in respect of dismissal, as withdrawn, of the plaintiffs' previous suit, being, also with a liberty granted to the plaintiff for its reinstitution, thereupon, (ii) rendered attractable vis-a-vis the extant suit, the bar enshrined in the provisions of Order 23, Rule 1 CPC, provisions whereof stand extracted hereinafter:-

> **"1. Withdrawal of suit or abandonment of part of claim.-** (1) At any time after the institution of a suit the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.
>
> Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned Without the leave of the court.
>
> (2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.
>
> (3) Where the court is satisfied,—
>
> a) that a suit must fail by reason of some formal defect, or
>
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,
>
> it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.
>
> (4) Where the plaintiff,—
>
> (a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

9. For testing the validity of the pronouncement made by the learned trial Court, specifically, in respect of the extant suit being hit by the principle of estoppel, contemplated in the provisions of Order 23, Rule 1 (4)(b) of the CPC, besides for attracting their mandate vis-a-vis the extant suit, it is necessary to cull out from (a) the memo of parties; (b) suit property embodied in the previous suit and in the extant suit ; (c) the relief(s) claimed in the earlier suit and in the extant suit, qua hence emanations upsurging therefrom , (d) of apparent analogities or similarities, on all facets aforesaid, eminently occurring inter se the previous suit vis-a-vis the extant suit; (e), whereupon, alone attraction by the learned trial Court, of, the principle of estoppel enshrined in Order 23, Rule 1 of the CPC, would hence be construed to be validly drawn. In the aforesaid endeavour, the plaint in the previous suit bearing Mark-A reveals, of, (i) it being inter se the plaintiff(s) herein vis-a-vis alike plaintiff(s) therein; (ii) it being instituted against alike co-defendants therein vis-a-vis co-defendant(s) herein; (iii) the suit khasra numbers embodied therein uncontrovertedly, holding, analogity vis-a-vis the suit khasra numbers embodied in the extant plaint and (iv) the relief(s) canvassed therein, tritely, in respect of quashing and setting aside of the sale deed executed by the defendant(s) concerned vis-a-vis co-defendant No.8, also holding affinity in both suits. (v) It being specifically averred in both the suit(s), of, the aforesaid alienation being a vivid display, of, palpable mismanagement, of, the trust property by the defendants concerned. Cullings of the aforesaid similarities, by this Court, tritely, in respect of existence of the imperative statutory para meters inter se the previous plaint vis-a-vis the extant plaint, hence, begetting satiation, does thereupon foster, an inference, of, attraction vis-a-vis the extant suit, by the learned trial Court, of the principle of the statutory estoppel, not, suffering from any vice of any invalidity.

10. Reinforced vigour to the aforesaid conclusions, stand galvanized from the factum, of, the rendition, dismissing as withdrawn, the previous suit, pronounced by the learned Sub Judge, Dehra, order whereof is borne in Ex-D-6, not, visibly granting any leave to the plaintiff, to, institute a fresh suit on cause(s) of action, holding, absolute similarity inter se the ones borne therein vis-a-vis the one(s) canvassed herein. There occurs a recital in Ex.D-6, of, the dismissal of the previous suit, as withdrawn, by the learned Sub Judge, Dehra, being, a sequel to a statement recorded by the concerned. However, a perusal of the apt statement, recorded by the learned counsel appearing for the plaintiff, in the previous suit, reveals of his not seeking the liberty of the court concerned, to institute a fresh suit, thereupon, it is not open for the learned counsel appearing for the appellants/plaintiffs herein to contend, of, the litigant concerned, or his counsel in hence making a statement, wherein, permission of the Court concerned, for withdrawal of the previous suit, was sought, both therein also seeking leave, from, the Court concerned, for,re-instituting it afresh. Contrarily, hence, the fiat of Ex.D-6 is expansive, for, excluding the plaintiff, from, contending that hence there was an implied leave to the plaintiff(s), for, instituting afresh, the extant suit, also he is forestalled from contending that attraction vis-a-vis the extant suit, of the principle of estoppel embodied in Order 23, Rule 1 of the CPC, being both unfounded and misfounded.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned trial Court have not excluded germane and apposite material from consideration.

12. In view of the above discussion, there is no merit in the instant appeal, which is accordingly dismissed. The impugned judgment and decree is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

****

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

Major Som Nath Palde ...Petitioner
Versus
Pooja Kashyap ...Respondent

Cr. MMO No. 228 of 2016
Decided on : 31.10.2017

Protection of Women from Domestic Violence Act, 2005- Section 21- An application for custody of minor was filed, which was opposed on the ground that wife is suffering from psychiatric disorder and is unable to take care of the minor- wife filed a certificate in which it was mentioned that she was not suffering from any psychiatric disorder – held that that the certificate has not been approved in accordance with law – hence, the case remanded to the Magistrate to enable the wife to prove the certificate and till then the custody of the minor entrusted to the wife with a right of visitation. (Para-2)

For the petitioner : Ms. Neelam W. Bakshi, Advocate.
For the respondent : Mr. Atul Jhingan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant petition is directed against the orders, concurrently pronounced by the learned courts below, whereby the interim custody of minor child Adhrit, was directed to be retained by the respondent herein.

2. The parties contested their respective capacities to take the optimum befitting care of male minor Adhrit. The petitioner/complainant had contended before the learned courts below that given the respondent being beset with a psychiatric disorder, thereupon she stood precluded to take an appropriate care of the male minor. However, the respondent had with her reply to the application, appended a certificate issued by a doctor, wherein an echoing occurred, of hers being not beset with any psychiatric disorder, whereupon it was concluded that the misgiving of the applicant of the respondent being beset with a psychiatric disorder also hers lacking the befitting capacity to take an optimum care of the minor child, hence stood effaced. However, any imputation of reliance upon the certificate issued by the doctor concerned, with a pronouncement therein, of the respondent not suffering any psychiatric disorder, may not, render her to hold the appropriate *locus parentis*, given it being neither tendered into evidence nor it being proven in accordance with law. Consequently, both the learned courts below in imputing credence thereto, have committed a gross illegality besides an impropriety. In aftermath, the impugned orders are quashed and set aside. The matter is remanded to the learned Judicial Magistrate concerned, to, in accordance enable the respondent to prove the apposite certificate also to enable the petitioner/non-applicant, to adduce rebuttal evidence thereto, whereafter he shall, within three months, from 23.11.2017, make a pronouncement, upon an application cast under the provisions of Section 21 of Protection of Women from Domestic Violence Act. However, till a pronouncement is made upon the aforesaid application, the respondent/applicant shall continue to retain the interim custody of the minor child. The petitioner/non-applicant shall in

accordance with law, hold rights to visit the minor child. It is also clarified that both the contestants shall be permitted to adduce best documentary evidence, in respect of each, hence affirmatively proving the issue appertaining to each holding the befitting capacity, to take the optimum care, of the minor child. All pending applications also stand disposed of.

3. Records be sent back forthwith. The parties are directed to appear before the learned Judicial Magistrate on **23.11.2017.**

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

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

Ming Ching Dorje .....Petitioner.
Versus
State of H.P. ....Respondent.

Criminal Revision No. 121 of 2017.
Reserved on: 23.10.2017.
Date of Decision: 31st October, 2017.

Code of Criminal Procedure, 1973- Section 397- Charge was framed for the commission of offences punishable under Sections 420 and 120-B of IPC and 13(2) of Prevention of Corruption Act, 1988 - case of the prosecution is that K had executed a Will – the petitioner made a wrong declaration that he is a citizen of India – the certificate is found to be fake on which the charge sheet was filed – held that the petitioner was born in Ladakh and is a Tibetan national as per the form submitted for registration of foreigners – his year of birth was mentioned in the form as 1967, whereas, it was mentioned as 1960 in the identity card issued by Election Commission of India and 1960 in the passport – the school record collected by Investigating Officer has not been connected to the petitioner – as per Citizenship Act, a person born in India after 26th January, 1950 but before 1st day of July, 1987 is a citizen of India – the petitioner is to be treated as a citizen of India – the petition allowed- the order of framing charge set aside. (Para- 2 to 7)

For the petitioner: Mr. Anoop Chitkara, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Criminal Revision Petition is directed against the orders pronounced by the learned Special Judge, Mandi, on 19.01.2017, whereby, the petitioner along with other co-accused were charged for theirs committing offences punishable under Section 120-B and 420 of the IPC and under Section 120-B IPC and 13(2) of the Prevention of Corruption Act, 1988.

2. One Kushok Bakula, made, a testamentary disposition, whereby, he bequeathed, the property embodied therein vis-a-vis one Ming Chung Dorje. Accused/petitioner herein claimed himself to be the legatee under the testamentary disposition executed by late Shri Kushok Bakula. The petitioner is alleged, to, by making a false declaration vis-a-vis his being a citizen of India, hence, within the domain of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972, sought according, of, statutory permission. On the Investigating Officer concerned, making investigation(s) vis-a-vis a complaint, lodged with respect to the validity of the

statutory permission accorded to the petitioner herein, he detected, of the apposite certificate issued by the Tehsildar, Leh with respect to the residence of Ming Chung Dorje, on basis whereof, he produced a fake certificate, of, his being an Indian National, whereupon, he obtained the apposite permission, being false, thereupon, an ensuing conclusion was formed by him, of, all official acts, in pursuance thereto, performed by all the officials concerned, being ingrained with pervasive elements of penally inculpable offences embodied in Section 420 read with Section 120-B of the IPC and Section 13(2) of the Prevention of Corruption Act.

3. The prosecution, may succeed, in clinching the charge against the accused, upon its, standing evidently proven (a) of the petitioner being not entitled to the benefit of Section 3 of the Citizenship Act, provisions whereof stand extracted hereinafter:

> "**3. Citizenship by birth**.- (1) Except as provided in sub-section (2), every person born in India,-
>
> (a) on or after the 26th day of January, 1950, but before 1st day of July, 1987;
>
> (b) on or after the 1st July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth;
>
> (c) on or after the commencement of the Citizenship (Amendment) Act, 2003, where-
>
> (I) both of his parents are citizens of India; or
>
> (ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth,
>
> shall be a citizen of India by birth.
>
> (2) A person shall not be a citizen of India by virtue of this section if at the time of his birth-
>
> (a) either his father or mother possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and he or she, s the case may be, is not a citizen of India; or
>
> (b) his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy." (p.1893)

dis-entitlement(s) thereof standing spurred, by his, evidently not being born in India, in, the interregnum commencing from 26th January, 1950 and ending on 1st July, 1987, (b) firm evidence making upsurgings vis-a-vis the petitioner herein, faking his identity vis-a-vis the legatee, under a testamentary disposition executed, by late Sh. Kushok Bakula.

4. The learned Additional Advocate General has contended with vigour, of, with the petitioner, in the apposite form, prescribed, under the Registration of Foreigners Rules, 1939, for registration of foreigners, hence scribing entries therein, in respect of his nationality being "Tebetan" also in respect of his being born on 1967 at Ladakh; (b) whereas, in contradistinction thereto, in his election identity card issued by the Election Commission of India, his propagating, his date of birth, to be 1961; (c) in the passport issued by the Government of India vis-a-vis the petitioner, his unfolding therein, his date of birth as 3.4.1960. (d) Thereupon, the aforesaid contradictory reflections occurring in the afore referred documents, stand espoused by him to (i) render vulnerable to grave skepticism, the affinity of identity of the petitioner vis-a-vis the legatee, under the testamentary disposition executed by late Sh. Kushok Bakula; (ii) with the concomitant effect of the prosecution being empowered, to, clinchingly prove the charge against the accused.

5. Be that as it may, the Investigating Officer concerned, during the course of his holding investigations vis-a-vis the allegations made against the petitioner, in the apposite complaint, had collected from, the Tebetan SOS Children's Village School located at Leh Ladakh, a certificate, bearing consonance with the apposite register maintained at the aforesaid school, wherein, reflections are held, of, the petitioner being born on 03.04.1960. In the relevant leaf, of, the school register, the father of the accused/petitioner herein is disclosed to be one Tashi. The

Investigating Officer concerned, has not been, able to collect any firm evidence, in respect of the reflections occurring in the relevant leaf of the school register, being unrelatable to the petitioner herein, rather all the descriptions finding occurrence therein, bearing affinity with the identity of a person other than the petitioner. Absence of collection(s) of the aforesaid firm evidence vis-a-vis all the reflections occurring in the apposite leaf of the school register, not, bearing congruity with the description(s) of the petitioner herein, cannot, firmly nail any prima facie conclusion of the petitioner faking his identity. Contrarily, non collection thereof, spurs a firm derivative, of, the petitioner studying at Tibetan SOS Children's Village School, located at Ladakh also entry(ies) in respect of his date of birth reflected therein, to be 03.04.1960, hence, holding accuracy. The effect of this Court imputing accuracy to the reflections vis-a-vis the date of birth of the petitioner, occurring, in the relevant leaf of the school register, maintained, at Tibetan SOS Children's Village School, hence, render contradictory therewith occurrence(s), in the documents alluded to by the Additional Advocate General, especially with respect to the date of birth of the petitioner, to be thereupon subsumed also theirs being rendered inefficacious. The reason for so concluding, is, of, (i) the reflections in the relevant leaf of the school register, holding consonance with the recital(s) vis-a-vis the date of birth, of the petitioner, borne in the pass port issued by the Government of India, (ii) corollary whereof, is, of any reflections in contradiction thereof, borne in the voter Identity Card issued by the Election Commission of India AND also borne in the apposite form scribed by the petitioner under the Registration of Foreigners Rules also getting benumbed, given all the reflections borne therein, hence, arising from unawareness of the petitioner with respect to his exact date of birth. More so, when for reasons aforesaid, the Investigating Officer has been unable to delink, the identity of the petitioner, as, unfolded in the relevant leaf of the school register vis-a-vis the identity of the petitioner herein.

6. In aftermath, with the petitioner being evidently proven to be born on or after 26th January, 1950 but before 1st day of July, 1987, thereupon, he is entitled to the statutory mandatory provisions engrafted in Section 3 of the Citizenship Act, 1955, also thereupon he is to be firmly concluded to be a citizen of India. With a further sequel of the apposite statutory permission obtained by the petitioner, being not, shrouded with any element of fraudulence or any element of suspicion.

7. For the foregoing reasons, the instant petition is allowed and the order rendered by the learned Special Judge concerned, on 19th January, 2017 is quashed and set aside. All the pending applications stand disposed of. Records be sent back forthwith.

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

Raman Kumar ....Petitioner.

Versus

Jyoti Parkash ....Respondent

Civil Revision No. 48 of 2017
Date of decision : 31.10.2017

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction and mandatory injunction was passed by the Trial Court, which was put to execution seeking the civil imprisonment of the J.D.- the Court held that J.D. had violated the judgment and decree willfully – aggrieved from the order, present revision has been filed- held that the version of the D.H. is duly corroborated by his witness and by the suggestions made to them – the Court had rightly concluded that J.D. had violated the judgment and decree – petition dismissed. (Para-3)

For the petitioner: Mr. Amardeep, counsel for the petitioner.

For the Respondent: Mr. Arun K. Sharma, vice Mr. Amandeep Sharma counsel for the respondents

The following judgment of the Court was delivered:

Sureshwar Thakur, J.*(oral)*

The learned Sub Judge 1st Class-IV, Hamirpur upon Civil Suit No. 32 of 1998 pronounced a decree of permanent prohibitory injunction and also a decree of mandatory injunction whereby the defendant was restrained from dispossessing the plaintiff, demolishing any portion and causing any damage to the shop shown as ABCD in the site plan measuring 1.65 x 6.38 Mts. Comprised in Khata No. 88, Khatoni No. 103, Khasra No. 283 measuring 3 Kanals 19 Marlas, situated in Tika Kot, Mouza Kohla, Tehsil Nadaun, District Hamirpur.

2. The aforesaid decree has attained conclusivity. Since the mandate of the afore extracted decree, pronounced by the learned Civil Court, was purportedly infracted, comprised in the JD threatening to demolish the walls of the suit shop and upon his on 30.8.2009 proceeding to remove the tin sheets laid upon the roof of the shop, thereupon the DH cast a petition under the provisions of Order 21 Rule 32 CPC, before the learned trial Court, wherein a relief was claimed of the JD/defendant being ordered to be committed to civil imprisonment. The execution petition was contested by the defendant/JD, wherein, he contended of his not willfully breaching the mandate of the apposite conclusive decree. Both the plaintiff/decree holder and the Judgement debtor/defendant led their respective evidence upon the apposite issue(s). The learned Executing Court on appraising the evidence, concluded, of, its unveiling the trite factum of the JD/defendant willfully disobeying the apposite decree, pronounced with respect to the suit shop. Thereafter, the petitioner herein/JD has motioned this Court.

3. The execution petition carries an averment of the defendant willfully breaching the mandate of the apposite decree, comprised, in his threatening to demolish the walls of the suit shop and in his changing its hitherto tin roof, to bamboo(s) being cast thereon, whereon tarpaulin sheets being laid. However, in respect of the JD/defendant threatening the decree holder/plaintiff, to demolish the wall of the shop, he omitted to make any testification, thereupon the defendant has to be held to in the aforesaid manner, hence not willfully breach the mandate of the apposite decree. The plaintiff/decree holder in respect of the defendant infracting the mandate of the decree aforesaid, comprised, in his replacing the tin sheets carried on the roof of the shop, by, his erecting bamboos thereon, whereon he laid Tarpaulin sheets has rendered a testification, borne in his examination in chief. Also in his examination in chief, he has tendered photograph Ext.PW-1/A wherein tin sheets are displayed to be occurring on the ground in front of the suit shop. Even though upon the solitary testification of the decree holder in respect of the defendant, thereupon willfully infracting the mandate of the apposite decree, it would be unbefitting to form a firm conclusion qua its veracity. (i) Nonetheless when PW-2 a shopkeeper holding a commercial shop in vicinity viz-a-viz the suit shop, has deposed in corroboration thereof; (ii)Furthermore with affirmative suggestions being put by the learned counsel for the JD upon his subjecting the latter to cross examination, wherein echoings occur, of, a carpenter being employed, for removing the relevant tin sheets, suggestion whereof stood acquiesced by PW-2; (iii) Apart from the above, with another affirmative suggestion being also put by the counsel for the JD while holding PW-2 to cross examination, with echoings therein qua at the time, when tin sheets borne on the roof were removed, there being several persons present thereat, suggestion whereof also evoked an acquiescing response from PW-2; (iv) fillips an inference of hence the defendant/JD concomitantly conceding qua the factum of removal of tin sheets carried on the roof of the suit shop hence occurring on 30.8.2009 (v) thereupon since apparently the mandate of the apposite decree stands infracted (vi) renders hence the judgement debtor to be entailed with the ensuing consequence of his openly breaching the mandate of the apposite decree, comprised, in his being amenable for being ordered to be committed to civil imprisonment, as aptly done by

the learned trial Court. I find no merit in the petition. The impugned order is maintained and affirmed. The petition alongwith all pending applications are disposed of accordingly.

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

Sanjeev Sood (Bhagra) .....Petitioner/tenant.
Versus
Raj Kumar Sood & others .....Respondents/landlords.

Civil Revision No. 100 of 2014.
Reserved on : 9th October, 2017.
Decided on : 31st October, 2017.

H.P. Urban Rent Control Act, 1987- Section 14- Landlord filed an eviction petition on the ground that the premises had become unsafe and unfit for human habitation and on the ground of bona-fide requirement of the landlord for rebuilding and reconstruction- the petition was allowed by the Rent Controller – an appeal was filed, which was dismissed – held that the building is located in a core area where a ban has been imposed on the construction – however, the approval can be granted by the State Government for reconstruction- landlord has already submitted building plan for approval –the eviction cannot be denied on the ground that it is not permissible to carry out the construction in the core area- the Courts had rightly ordered the eviction- petition dismissed.(Para-10 to 14)

Cases referred:
Naresh Kumar and others versus Surinder Paul, 2001(2) Shim.L.C. 337
Jaswinder Singh and another versus Kedar Nath and another, Latest HLJ (2012) (HP) 1452
Chaman Lal Bali versus State of H.P. and another, ILR 2016 (HP) 1450

For the Petitioners : Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashist, Advocate.
For the Respondent: Mr. Ashok Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Under concurrently recorded verdicts, both the learned Courts below, ordered for the eviction of the tenant/petitioner herein from the demised premises. However, the learned Appellate Authority set aside the condition imposed by the learned Rent Controller, of, the order of eviction being executed only upon requisite approval(s) being meted vis-a-vis the apposite building plan(s). The tenants/petitioners herein being aggrieved therefrom, hence for begetting their reversal have instituted the instant Civil Revision Petition before this Court.

2. Briefly stated the facts of the case are that the landlord/respondent herein filed an application under Section 14 of the H.P. Urban Rent Control Act, 1987 (hereinafter referred as the Act), for eviction of the tenant/petitioner herein, on his being tenant in the ground floor of the three storeyed building bearing building No.41/1, situated in Lower Bazar, Shimla, wherein, he is running a shop, on the grounds of the building being unsafe and unfit for human habitation as well as the bonafide requirement of the landlord for rebuilding and reconstructing the demised premises. It has been pleaded that the building is more than 100 years old and it has virtually outlived its life span. On account of its age, foundation of the building has settled down. The building is situated in the heart of the town. Owing to its present condition, the petitioners

intend to raise a RCC structure in place of the present one with modern technique to exploit its economic potentiality. The proposed reconstruction cannot be carried out without vacation of the building.

3. The petitioner herein/tenant contested the petition and filed reply thereto, wherein, he had taken preliminary objection qua maintainability, malafide, locus standi, non joinder of necessary parties and estoppel etc. On merits, it is denied that the building is in dilapidated condition or is an old one. It is also denied that the building is required bonafide by the landlords for rebuilding and reconstruction. On the other hand, it is pleaded that the building in question is situated in the core area of the town and that no construction could be undertaken therein without prior permission of the government of Himachal Pradesh. No requisite permission is pleaded to have been obtained by the petitioner. Furthermore, the land underneath the building is owned by the State of H.P. and in the absence of the necessary consent of State of Himachal Pradesh, petitioners are not entitled to demolish the present structure and reconstruct a new building.

4. The landlords/respondents herein filed rejoinder to the reply of the tenant/petitioner herein, wherein, they denied the contents of the reply and re-affirmed and re-asserted the averments, made in the petition.

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

1. Whether the building housing the demised premise has become unsafe and unfit for human habitation, as alleged? OPP
2. Whether the building housing the demised premises is bonafide required by the petitioners for rebuilding/reconstruction which cannot be carried out without the building being vacated, as alleged? OPP.
3. Whether the petitioners have no locus standi to file the present petition, as alleged? OPR.
4. Whether the petition is not maintainable, as alleged? OPR.
5. Whether the petition is bad for non joinder of necessary parties in the absence of State of H.P., as alleged?OPR.
6. Whether the petitioners are estopped by their own acts and conducts from filing the petition, as alleged?OPR.
7. Relief.

6. On an appraisal of evidence, adduced before the learned Rent Controller, the learned Rent Controller partly allowed the petition of the landlord/respondent herein. In an appeal, preferred therefrom by the tenants/petitioners herein before the learned Appellate Authority, the Appellate Authority dismissed the appeal and modified the order(s) recorded by the learned Rent Controller.

7. Now the tenant/petitioner herein has instituted the instant Civil Revision Petition before this Court for hence assailing the findings recorded in its impugned order by the learned Appellate Authority.

8. The learned Rent Controller had ordered, for, the eviction of the tenant from the demised premise(s), on count, of it being cogently proven of their(s) being bonafide required by the landlords, for rebuilding and reconstruction of the building wherein, it stands housed, reconstruction activity whereof, being not possible unless the entire building is vacated. The learned Rent Controller had, however, returned disaffirmative finding upon the issue appertaining to the demised premises being unsafe and unfit for human habitation. The findings rendered by the learned Rent Controller upon the aforesaid issue, stood not, assailed by the landlords, by theirs carrying an appeal therefrom before the learned Appellate Authority, thereupon, the findings rendered thereon acquire conclusivity. The tenants being aggrieved by the affirmative

findings returned by the learned Rent Controller, upon the issue, appertaining to the demised premises, being bonafide required by the landlords, for the apt rebuilding and reconstruction activity(ies), hence, carried an appeal therefrom before the learned Appellate Authority. The learned Appellate Authority dismissed the appeal, however, it set side the condition imposed by the learned Rent Controller qua the order of eviction of the tenant from the demised premises, holding binding operative clout, only upon, necessary sanction(s) or approvals being meted by the competent authorities concerned vis-a-vis the landlords. Though, yet the tenant is aggrieved therefrom, hence, has instituted the instant civil revision before this Court.

9. The learned counsel appearing for the tenant/petitioner herein has vehemently argued before this Court that the imposition of a precondition by the learned Rent Controller for thereupon the order of eviction taking operative binding force, condition precedent whereof is comprised in relevant sanctions being meted vis-a-vis the building in portion whereof the demised premises exist, being both valid also just, whereas, setting aside thereof by the learned Appellate Authority being in discordance with (i) the existing location of the building in a part whereof the demised premises exist, within, the limits of the Municipal Corporation, Shimla; (ii) occurrence therein, enjoin play of all the mandatory statutory provisions, appertaining to meteing of statutory sanction(s) vis-a-vis the building plans, with proposals therein, for rebuilding and reconstruction of the relevant building, (iv) thereupon, the imposition of a condition precedent, for hence the order of eviction taking conclusive binding force, condition whereof is comprised in the apposite sanction being meted vis-a-vis the relevant building by the Municipal Corporation, Shimla, being both lawful as well as valid.

10. Undisputedly, the building in portion whereof, the demised premises exist, is located in a core area. The contention of the counsel, for the petitioner herein/tenant, that given the relevant building being located in a core area, whereat there being a complete interdiction against approval(s) being meted vis-a-vis rebuilding(s) and reconstruction(s) of the relevant building, thereupon, the ground reared by the landlords, of, theirs bonafide requiring "it" for rebuilding and reconstructing it, renders it to beget a stain of malafides, hence, this Court being constrained to render dis-affirmative finding(s) upon the aforesaid issue. However, the aforesaid submission warrants rejection, as it stands propounded by this Court in a judgment recorded in ***Naresh Kumar and others versus Surinder Paul, 2001(2) Shim.L.C. 337,*** that the mere location of the apposite building in a core area not per se dis-entitling the landlord, to seek eviction of the tenant holding occupation in a part thereof, especially when even in core areas, approval(s) for holding reconstruction or rebuilding activities, "can be" granted by the State Government. Since, the site plan is pending for approval before the authorities concerned also when the State Government may grant approval to the apposite plan submitted by the landlord, thereupon, it would be unbefitting to conclude that merely given the apposite building existing in a core area, thereupon, the site plan submitted by the landlords, to the authorities concerned, ipso facto suffering the ill-fate of its rejection, not, per se holding any strength, nor therefrom any inference being derivable, that per se thereupon the petition for eviction hence standing stained with a vice of malafide(s). Since, the relevant building is evidently located within the jurisdiction of Municipal Corporation, Shimla, thereupon with a statutory obligation standing entailed upon the landlords, "to" prior to his holding it, to reconstruction or rebuilding activity(ies), his receiving consent in respect thereto "from" the appropriate government, whereas, with the apposite building plan, still awaiting sanction being purveyed thereon, by the authorities concerned, thereupon till the authorities concerned purvey/mete sanction upon the relevant building plan, the concurrently recorded verdicts may not be put to execution.

11. The learned Appellate Authority has misled itself in erroneously concluding, that, the meteing(s), of apposite sanctions by the authorities concerned, being not statutorily imperative, for rendering the order of eviction, to take full effective finding force, fallacious misconstruction whereof ensues, from the learned Appellate Authority remaining oblivious, to the fact of the relevant building existing, in a core area, whereat also sanctions are purveyable also its remaining unmindful to the operation of statutory provisions, qua the location of the apt building, whereby the landlords are statutorily enjoined, to before proceeding to carry rebuilding

activity(ies), obtain sanction(s), from the competent authorities concerned. The learned Appellate Authority has further mislead itself, to, fallaciously construe, that non meteing(s) of apposite approvals also not engendering any inference of no bonafide(s) inhering in the landlords, for theirs seeking eviction of the tenant, on the ground of the relevant building being hence bonafide required for rebuilding and reconstruction activity(ies). More so, when unless the relevant building approvals stand meted by the competent authorities, the reconstruction(s) and rebuilding(s) of the building concerned, in part whereof, the demised premises occur, would not obviously take effect, whereupon, (i) the natural effect, would be, of, the landlord(s) contriving specious and spurious ground, for seeking eviction of the tenant, on the purported ground of his bonafide requiring the building, in portion whereof the tenant is residing, for his carrying out rebuilding and reconstruction activity(ies), (ii) importantly when for the aforesaid ground to carry traits of bonafides, the meteing(s) of statutory approval(s) by the authorities concerned, was peremptory.

12. Furthermore, the tenants/petitioners, if they nowat evidently hold possession of the demised premises they in accordance with law also within the permissible ambit of the decisions of this Court reported in ***Jaswinder Singh and another versus Kedar Nath and another, Latest HLJ (2012) (HP) 1452 and Chaman Lal Bali versus State of H.P. and another, ILR 2016 (HP) 1450***, "shall" upon the relevant building being reconstructed/rebuilt, be entitled to re-induction therein in an area equivalent to the area of the nowat demised premises.

13. The above discussion unfolds qua the conclusions arrived by both the learned Courts below with respect to the imperativeness, of, eviction of the tenant/petitioner from the demised premises, on count of bonafide requirement of the landlord of the building, in part whereof, the demised premises exist, to rebuild it, being based upon a proper and mature appreciation of evidence on record. While rendering the apposite findings, both the learned Courts below have not excluded germane and apposite material from consideration. However, the verdict rendered by the learned Appellate Authority, whereby it set aside the apt condition precedent imposed by the learned Rent Controller, for hence the eviction order to take force, is as aforestated thereupon modified.

14. In view of above discussion, the present petition is dismissed and the eviction of the petitioner/tenant from the demised premises on the ground of the building being bonafidely required by the landlords for its rebuilding and reconstruction, is affirmed, yet subject to the condition that the petitioner/tenant shall be evicted from the demised premises only upon production of necessary statutory sanctions/approvals granted by the competent authorities concerned. All pending applications also stand disposed of. No order as to costs.

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

State of Himachal Pradesh .....Appellant
Versus
Muni Lal .....Respondent

Cr. Appeal No. 707 of 2008
Decided on 31.10.2017

Indian Penal Code, 1860- Section 279 and 337- **Motor Vehicles Act, 1988-** Section 187- Informant was returning to her house along with her daughter – the accused came driving his scooter in a rash and negligent manner and hit the right leg of the informant – she was taken to hospital- the accused was tried and convicted by the Trial Court- an appeal was filed, which was

allowed- held that the witnesses had given contradictory version regarding the place of incident – the Appellate Court had rightly acquitted the accused in such situation- appeal dismissed.

(Para-8 to 13)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008 1 SCC 258)
T.Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415

For the Appellant :	Mr. Virender Kumar Verma, Additional Advocate General with Mr. Rajat Chauhan, Law Officer.
For the Respondent:	Mr. Rajnish K. Lall, Advocate vice Mr. Rakesh Dogra, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge *(oral)*

The present appeal has been preferred by the State-appellant (hereinafter referred to as 'the appellant') against the judgment, dated 20.08.2008, passed by the learned Sessions Judge, (Forest), Shimla, in Criminal Appeal No. 48-S/10 of 08/04, whereby the judgment of conviction, dated 24.07.2004, as passed by the learned Additional Chief Judicial Magistrate, Court No. 1, Shimla, H.P., in Case No. 69/2 of 2004/02, against the respondent/accused (hereinafter referred to as 'the accused'), was set aside.

2. In brief, the facts giving rise to the present appeal, as per the prosecution, are that on 08.05.2001, at about 11.30 a.m., complainant Smt. Shakuntla Goel, (hereinafter referred to as the 'complainant') was returning to her house alongwith her daughter Kumari Rohini Goel after visiting Kaliwari Temple via A.G. Chowk, Bawa Market, Shimla. At that time, the accused came driving his scooter, bearing registration No. HPS-4506, in a rash and negligent manner in the wrong side and was going towards Bawa Market. The scooter struck against the right leg of the complainant, as a result of which, she suffered injury. However, the accused fled away from the spot. Thereafter, the complainant was taken to hospital and the matter was reported to the police. After completing the investigation, the accused was challaned for the offences under Sections 279 and 337 of the Indian Penal Code (for short 'the IPC') and Section 187 of the Motor Vehicles Act (for short 'the MV Act').

3. The prosecution, in order to prove its case, examined as many as seven witnesses. Statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, wherein he denied the prosecution case and claimed innocence, however, he did not examine any defence witness.

4. The learned Trial Court, vide judgment dated 24.07.2004, convicted the accused for the offences punishable under Sections 279 and 337 of the IPC and Section 187 of the MV Act and sentenced him to pay fine of Rs.1,000/- for the offence punishable under Sections 279/337 of the IPC and in default of payment of fine, to further undergo simple imprisonment for 15 days. The accused/convict was also sentenced to pay fine of Rs. 200/- for the offence punishable under Section 187 of the MV Act and in default of payment of fine, to further undergo simple imprisonment for 15 days.

5. The accused laid challenge to the judgment of conviction, passed by the learned Trial Court by maintaining an appeal in the learned First Appellate Court and the learned First Appellate Court, vide impugned judgment, dated 20.08.2008, set aside the judgment of the learned Trial Court and acquitted the accused, hence the present appeal.

6. Learned Additional Advocate General has argued that the learned First Appellate Court without appreciating the facts, which have come on record, and without appreciating that

the prosecution has proved the guilt of the accused beyond the shadow of all reasonable doubts, just on the basis of surmises and after misreading the evidence, acquitted the accused. He prayed that after appreciating the evidence, the accused be convicted for the offences, he was charged with. On the other hand, learned vice Counsel appearing on behalf of the accused argued that the prosecution has miserably failed to prove the guilt of the accused beyond the shadow of all reasonable doubts and so, the judgment of the learned Lower Appellate Court needs no interference.

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

8. From the perusal of the record, it is evident that FIR was recorded on the basis of the statement of the complainant, Ext. PW-1/A. According to Ext. PW.1/A, it appears that at the time of the accident, the complainant was going towards Cart Road via A.G. Chowk, through Bawa Market. While appearing in the witness box as PW.1, complainant-Smt. Shakuntala Goel, has not stated about the spot of the accident, but she has admitted that her statement, Ext.PW/1/A, was correctly recorded. In her examination-in-chief, she has simply stated that when she was going down through the A.G. Office, accused came driving his scooter from the Cart Road side. Thus, this Court finds that according to PW-1, Smt. Shakuntala Goel, FIR, Ext. PW-7/A, was registered on the basis of her statement, Ext. PW-1/A, and the accident can be said to have taken place in the Bawa Market. PW-4- Kumari Rohini Goel, has stated that the accused came driving his scooter from the side of railway station and struck it against her mother. PW-1, Smt. Shakuntala Geol, has admitted, in her cross-examination that at the spot of accident, she had gone a little down from the crossing. The site map also suggests that the spot of accident was at a considerable distance from the crossing.

9. Shri Chet Ram, in whose presence, the scooter was taken into possession, has not been examined by the prosecution. At the same point of time, PW-1 Smt. Shakuntala Goel, in her statement recorded by the police, has stated the place of accident as Bawa Market and PW-4, Kumari Rohini Goel, has given the spot of accident, different from Bawa Market. The road coming from the Railway Station is entirely different from the road coming from Bara Market, which is clear from the spot map. Thus, it can safely be held that with respect to the spot of accident, there are material discrepancies in the statements of PW-1 Smt. Shakuntala Goel and PW-4, Kumari Rohini Goel. PW-6, Head Constable Jai Singh, has stated that from the spot of accident, constable on duty at A.G. Office Chowk, could not be seen.

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

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

12. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415***, the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal:

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***1. An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
>
> ***2. The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the***

evidence before it may reach its own conclusion, both on questions of fact and of law.

3. Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

4. An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

5. If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court."

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

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

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