Sham Chaner Paul Singh Ors. vs. Nain Tara Paul Singh a/w connected matter

RSA Nos.290 and 303 of 2012

Reserved on 21.05.2024

19.06.2024 **Present:** Mr.G.D. Verma, Senior Advocate with Mr Sumit Sharma, Advocate, for the applicants/ appellants/ defendant in both the appeals.

Mr. Pranjal Munjal, Advocate, for the non-applicants/ respondent/plaintiff in both the appeals.

CMP No.14732 of 2023 in RSA No.290 of 2012

The applicants/appellants/defendants have filed the present application seeking a direction to the non-applicant/respondent/plaintiff to place on record the plaint in Civil Suit No.107/1 of 1988, titled '*Rana Ram Chander Pal Singh vs. Shyam Chander Pal Singh etc.*' which was decided by the learned Sub-Judge, Court No.3, Shimla, on 02.03.1989. It has been asserted that the plaintiff-Late Rana Ram Chander had instituted Civil Suit No.107/1 of 1988 in the Court of learned Sub-Judge, Court No.3, Shimla. The suit was valued at ₹2,00,000/- for the purpose of Court fee and jurisdiction. The learned Sub-Judge, Court No.3, ordered to return the plaint for presentation before this Court on 02.03.1989. The applicants obtained attested the copy of the plaint, which was filed before this Court on 13.04.1999, however, the

original plaint, which was returned by the learned Sub-Judge, Court No.3, Shimla along with endorsement, which was required to be filed by the plaintiff, does not appear to have been filed before this Court. The original plaint filed before the learned Sub-Judge was required to be presented before this Court along with the endorsement by that Court and a copy of order dated 02.03.1989. The plaint dated 13.04.1989 is not correct as per the original, as initially the civil suit was registered as Civil Suit No.107/1 of 1988 and the plaint has been substantially changed without permission. Therefore, it has become necessary to place the original plaint on record. The applicants had also raised an objection in the written statement regarding the non-filing of the original plaint; hence, it was prayed that the application be allowed and a necessary order be passed directing the respondents to file the original plaint.

2. The application is opposed by filing a reply, denying the contents of the application. It was asserted that the Civil Suit was originally instituted before the Court of learned Sub-Judge, Court No.2, Shimla, by the predecessor-in-interest of the replying respondent in the year 1984, which was bearing Civil Suit No.320/1 of 1984. This suit was assigned to the Court of learned Sub-Judge, Court No.2, Shimla, on 31.07.1985 and a new number bearing Civil Suit

No.61/1 of 1987 was assigned to it. The said suit was again transferred to the Court of learned Senior Sub-Judge, Shimla, on 18.07.1986 and further assigned to learned Sub-Judge, Court No.3, on 14.12.1988 and a new number bearing Civil Suit No.107/1 of 1988was assigned to it. An application under Order 6 Rule 17 of the Civil Procedure Code, 1908, was filed on 31.12.1988 which was allowed. The learned Sub-Judge, Court No.3, Shimla, held vide order dated 02.03.1989 that the suit was valued for more than ₹2,00,000/- and the Court did not have the jurisdiction to try the suit; hence, the Court ordered the return of the plaint. This amended plaint was presented before this Court.The proceedings in the suit have been conducted on this amended plaint. The application has been wrongly filed. The applicants participated in the proceedings after the presentation of the plaint and did not object to the presentation of the plaint on its return by the learned Sub-Judge, Court No.3, Shimla. The applicants are seeking a roving enquiry into a fact that has lost its significance. The objection sought to be raised at this stage, should have been taken at the earliest. The application is filed to delay the disposal of the Regular Second Appeal. Therefore, it was prayed that the present application be dismissed.

3. I have heard, Mr G.D. Verma, learned Senior Advocate, assisted by Mr Sumit Sharma, learned counsel for the applicants/appellants/defendants and Mr Neeraj Gupta, learned Senior Advocate, assisted by Mr Pranjal Munjal, learned counsel for non-applicants/respondents/plaintiffs.

4. Mr. G.D. Verma, learned Senior Advocate submitted that the predecessor in interest of applicants/appellants/defendants was required to present the plaint before this Court, which was returned to him; however, he had failed to do so, which has vitiated the proceedings. The Court should have conducted the proceeding from the stage where these were left by the learned Sub-Judge, Court No.3, before returning the plaint. He relied upon the judgment of the Hon'ble Supreme Court in ***Joginder Tuli* v. *S.L. Bhatia*, *(1997) 1 SCC 502***and***Oriental Insurance Co. Ltd.* v. *Tejparas Associates & Exports (P) Ltd.*, *(2019) 9 SCC 435.*** He submitted that a different view was taken by the Hon'ble Supreme Court in ***ONGC Ltd. Vs. M/s Modern Construction and Co. 2014 (1) SCC 648.*** However, this question has been referred to the Larger Bench by the Hon'ble Supreme Court in ***EXL Careers v. Frankfinn Aviation Services (P) Ltd., (2021) 13 SCC 215.*** Therefore, the earlier view that the suit has to proceed from the stage when the plaint was ordered to be returned has to be preferred. Since the

original plaint was not filed before this Court; therefore, he prayed that a direction be issued to the respondents to produce the original plaint returned by the Court.

5. Mr. Neeraj Gupta, learned Senior Advocate submitted that the plaint was permitted to be amended and that is how the Court lost its jurisdiction. The amended plaint was returned to the predecessor-in-interest of respondents/plaintiffs which was filed by him before the Court. No objection was raised to this effect; therefore, it was prayed that the application be dismissed.

6. I have given considerable thought to the submissions at Bar and have gone through the records carefully.

7. A perusal of the record shows that the amended plaint with the initials of the learned Presiding Officer dated 01.01.1989, filed before the learned Sub Judge, Court No.3 has been annexed to the record. Para -13 of the plaint reads that the suit for the purpose of Court fee and jurisdiction in respect of the relief for possession was valued at ₹2,00,000/-for damages, by way of use and occupation charges was valued at ₹72,000/- and additional Court fee of ₹5028/- was affixed on the amended plaint. The Court had passed an order dated 02.03.1989 that since the plaintiff had valued the suit for jurisdiction at ₹ 2,00,000/-, therefore,

the Court had no jurisdiction to try the suit and the plaint was ordered to be returned to the plaintiff for presentation before this Court. The plaint along with court fees and documents be returned to the plaintiff and the remaining record be consigned to the Record Room. Thus, it is apparent that the Court had considered the valuation as given in the amended plaint. The Court had returned the plaint, court fee and the documents. The Court fees attached to the plaint also bear the name of the Court as Court of learned Sub Judge, Court No.3, Shimla. It also bears the endorsement of filing by learned Senior Sub Judge 31.10.1984 and the initial of Presiding Officer with date 16/1, the same date which has been put below the initials in the plaint. This fortifies the submission made on behalf of the respondents that the amended plaint was ordered to be returned and it was filed before the Court. Otherwise, it was not possible for the Court fee to bear the endorsement of the learned Senior Sub Judge and the plaint and some of the court fees to bear the initials of the learned Presiding officer with the date 16/1. Hence, the plea that the returned plaint was not filed before this Court is not acceptable.

8. It was submitted that the Court was required to make an endorsement on the plaint in accordance with Order 7 Rule 10 (2) of CPC, which endorsement is missing; hence, it

cannot be concluded that the plaint is the same plaint that was presented before the learned Sub Judge, Court No.3. It is true that the plaint does not bear the endorsement as required under Order 7 Rule 10(2) of CPC. However, there is no proof that the Court had made the endorsement. Learned Sub Judge, Court No.3 had not ordered in its order dated 02.03.1989 that the plaint along with the Court fee be returned to the plaintiff with the endorsement. Had any endorsement been made, the Court would have specified it in its order. Secondly, the respondent cannot be penalized for the omission of the Court to make the endorsement. Hence, the submission that the plaint is not the same because it does not bear the endorsement cannot be accepted.

9. It was submitted that production of the original plaint is necessary to ensure that the plaint is not amended by the plaintiff on his own and secondly to ensure that the proceedings continue from the stage where they were pending before the Court ordering the return of the plaint. Both of these submissions are not acceptable.

10. The question whether the plaintiff can amend the plaint after it has been returned to him has been considered by various High Courts from time to time.

11. In ***Thadi Chandrayya v. Vaitla Seethanna, 1939 SCC OnLine Mad 394,*** the plaintiff filed the suit on 30th

October 1929. The valuation of the plaintwas objected by the defendant. Ultimately it was held that the plaint was undervalued and the Court had no jurisdiction. Hence, the Court ordered the return of the plaint on 6th August 1930. The plaintiff omitted some of the property and struck off his claim for possession in respect of those properties. He presented it before the Court ordering the return of the plaint on 14th August 1930. The Court held that the suit was barred by limitation on the date of presentation and the original date of presentation could not be availed by the plaintiff. It was observed: -

> The question which arises in this appeal is one of limitation. The suit was filed by the first respondent in the Court of the District Munsif of Ramachandrapur. He was the reversioner to the estate of one Ramanna, which after Ramanna's death devolved upon his daughter Pullamma. The reversion opened on the 3rd of July 1916, when Pullamma died. The first respondent was born on the 1st of November 1908 and therefore attained his majority on the 1st November 1926, which gave him until the 1st November 1929 in which to file the suit. On the 30th October 1929, he filed a plaint in the Court of the District Munsif and asked for possession of the suit properties from the appellants, who were in possession under the alienations created by Pullamma. In the plaint, the properties were described in two schedules A and B. The properties in Schedule A were valued at ₹ 693 and the mesne profits thereof at ₹ 2040. The properties in Schedule B were valued at ₹ 250. In their written statement the appellants challenged the correctness of the valuation of the properties in B schedule. They contended that there had been gross undervaluation. The consequence was that the District Munsif

directed the appointment of a Commissioner to estimate the value of the properties. But the plaintiff deliberately abstained from taking out the commission, and from this conduct the District Munsif drew the legitimate inference that the aggregate value of the properties mentioned in the plaint was over ₹ 3,000 and he therefore held that he had no jurisdiction to entertain the suit. On 6th August 1930, the District Munsif accordingly returned the plaint to the first respondent for presentation to the Court of the Subordinate Judge. The first respondent took the plaint away, amended it by striking out his claim for possession of the properties mentioned in B schedule, and later in the day re-presented it to the District Munsif. On the 11th of August 1930, the District Munsif again returned the plaint to the first respondent as he considered that it was a new suit and which necessitated the filing of a new vakalat. On the 14th of August 1930, the first respondent's pleader re-presented the plaint without filing a fresh vakalat. He contended that the plaint was a continuation of the plaint which was presented on the 30th of October 1929. On the 15th of August 1930, the Court once more returned the plaint to the first respondent, intimating that it must be treated as a fresh suit. On that date, the first respondent's pleader re-presented it with an application that, the amendment which he had made might be allowed and the plaint approved. He also asked that the plaint should retain its old number. The District Munsif agreed to this course and passed a formal order of the nature indicated.

The only question which arises now is whether the suit must be deemed to have been instituted on the 30th of October 1929, when the original plaint was presented, or on the 6th of August 1930, when the plaint was re-presented after it had been returned by the District Munsif for filing in the proper Court and had been amended by the elimination of Sch. B and the relief claimed in respect of the properties therein mentioned. The District Munsif held that the suit must be deemed to have been filed on the 6th of August 1930 and therefore was barred by the law of limitation. On appeal, the Subordinate Judge of Rajahmundry held that the suit was in time, as in his

opinion the correct date was 30th October 1929. On the second appeal, Wadsworth J. agreed with the Subordinate Judge but gave a certificate for a further appeal under Cl. 15 of the Letters Patent. The learned Judge considered that the filing of the amended plaint on the 6th of August 1930 must be deemed to be a continuation of the suit which was filed on the 30th of October 1929 and therefore was in time.

We are of the opinion that the District Munsif was right and that the date of the institution of the suit must be taken to be 6th August 1930. In ***Kannuswami Pillai* v. *Jagathambal41 Mad. 701 = 8 L.W. 145*** Sadasiva Ayyar J. held that when a Court of first instance has decided that a suit is beyond its jurisdiction it has no power to pass any other judicial order, except those which statute expressly empowers it to pass, such as an order returning the plaint for presentation to the proper Court under O. 7, R. 10, of the Code of Civil Procedure or an order awarding costs under S. 35 of the Code. We agree with this statement. A Court which has no jurisdiction cannot pass orders in the suit beyond directing the plaint to be presented to the proper Court and giving a direction with regard to the costs incurred up to the time of the return of the plaint. The opinion of Sadasiva Ayyar J. was shared by Venkata Subba Rao J. in ***Govindaraja Naicker v. Kassim Sahib54 M.L.J. 409 = 27 L.W. 291***.

In ***Nayinakamen Bhattar v. Madureswarsa Bhattar5 M.L.J. 58***, a Bench of this Court, consisting of Collins C.J. and Parker J. had to deal with a case on all fours with the present one. The Court there held that the date of the suit was the date when the plaintiff presented to the Court a plaint which accorded with its jurisdiction. In that case, the plaintiffs filed their suit in the Court of the District Munsif for certain offices in a temple and their emoluments. The case was carried to this Court which ordered the plaint to be returned for presentation to the proper Court, namely, the Court of the Subordinate Judge. Instead of presenting the plaint to the Subordinate Judge the plaintiffs abandoned part of their claim so as to bring it within the jurisdiction of the Munsif's Court and re-presented the plaint to the District Munsif's Court. The Bench agreed with the Subordinate Judge that the plaintiffs were not entitled to the benefit of

S. 14 of the Limitation Act in the circumstances of the case. The first plaint was returned as the suit as framed was beyond the jurisdiction of the District Munsif's Court. The plaintiffs had then abandoned part of their claim and had sued again in the same Court which they might have done at first. In the circumstances, it was held that the suit was barred.

In the course of his judgment, Wadsworth J. referred to***KarumbayiraPonnapundv.AuthimoolaPonnapundan 33 Mad. 262,KommareddiRamachandrayyav.VoduryVenkataratnam22 L.W. 582***and***Varada Pillai v.Thillai Govindaraja Pillai59 M.L.J. 953 = 32 L.W. 694***. The judgment in these cases is not really in point.

In***KarumbayiraPonnapundv.AuthimoolaPonnapundan 33 Mad. 262***, the plaintiff filed a plaint in the District Munsif's Court and it was returned to him as he had under-valued the properties claimed. If they had been properly valued the value would have exceeded the pecuniary jurisdiction of the Court. After the plaintiff had obtained possession of the plaint he struck out part of the relief claimed and in this way brought the value of the suit within the pecuniary jurisdiction of the District Munsif's Court. He then presented it to the District Munsif who accepted it. On an application for revision, Abdur Rahim J. held that there was nothing illegal in the amendment and that it was competent to the Court to accept the amended plaint. But in this case, there was no question of limitation. The Court was not called upon to decide whether the date of the presentation was the date when the plaint was originally filed or when the plaint was re-presented after amendment. Therefore we cannot regard this decision as conflicting with the opinion which I have just expressed.

In ***KommareddiRamachandrayyav.VoduryVenkataratnam 22 L.W. 582***the plaintiff was allowed to amend his plaint to bring it within the jurisdiction of the District Munsif's Court where he had filed it, instead of having the plaint returned to him for presentation to the Court of the Subordinate Judge. The District Munsif allowed the plaint to be amended, and the question was whether his order was passed without

jurisdiction. Odgers J. held that the District Munsif had jurisdiction. It is unnecessary to consider whether this decision is right. Here again there was no question of limitation***Varada Pillai v.Thillai Govindaraja Pillai 59 M.L.J. 953 = 32 L.W. 694***calls for no comment.

On behalf of the respondent, a further case has been quoted to us, namely the decision of Jackson J. in*WuppuluruNeelachalam*v.*Narasinga Dass34 L.W. 252* There the plaintiff had not paid the proper court feeand he was ordered to provide the additional stamp required. Instead of doing so, he reduced the amount of his claim. By doing this the relief claimed was covered by the stamp. The question was whether the date of the suit should be taken to be the date of the filing of the plaint in the first instance or the date when it was amended and re-presented by the plaintiff. Here the Court had jurisdiction throughout and the only question was whether the plaintiff should pay the additional court fee or whether he should reduce his claim and thus avoid the necessity of paying the additional court fee. We do not regard this case as having any bearing, but even if it has, it is not binding on us.

We hold that the suit was instituted on the 6th of August 1930 when the Court was presented with the plaint which it had jurisdiction to accept. The hardship that the first respondent is now experiencing is of his own making. He cannot claim the benefit of S. 14 of the Limitation Act, because he deliberately undervalued his relief in the first instance. If he had not done this we should have had no hesitation in granting relief under that Section. He has, however, put himself out of Court. We have to decide the case on the technical objection which the appellants have raised. The objection is sound in law and therefore must be accepted.

12. In ***Parvathi Ammal v. Meenakshi Ammal, AIR 1951 Mad 841,*** the Court ordered the return of the plaint. The plaintiff made the amendment and presented it before the Court. The Court accepted the plaint with an endorsement

"filed at party's risk". It was held that the plaintiff was competent to re-present the plaint after making the amendment to bring it within the jurisdiction of the Court. It was observed:

> **2.** Thereafter the resp's advocate who had originally appeared in O.S. No. 41 of 1948, re-presented the plaint which had been returned by the Ct. of the Subordinate Judge, after amending it by the inclusion of additional claims & prayers for additional reliefs which resulted in the valuation of the suit being fixed at the sum of ₹ 6285. The plaint, as amended & enlarged, was re-presented to the Sub Ct. itself. The learned Subordinate Judge made an endorsement on the plaint dated 10-8-1948 to the effect, "file at party's risk". The re-presented plaint was numbered as O.S. No. 70 of 1948 on the file of the Ct. of the Subordinate Judge, Tiruneveli. The petnr. filed a written statement on 5-10-1948, wherein she pleaded, 'inter aila', that the "suit had not been properly instituted. On 6-1-1949 the resp. filed I.A. No. 11 of 1949, purporting to be under O. 33, Rr. 1 & 8 & Section 151 of the CPC praying that the Ct. should accord permission to her to institute the suit, O.S. No. 70 of 1948, 'in forma pauperis'. This appln. was ordered by the learned Subordinate Judge & the permission sought was granted.
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> **3.** The only question that was argued in I.A. No. 11 of 1949 in the Ct. below was, whether the plaint, which was numbered as O.S. No. 70 of 1948, should have been presented by the resp. in person, or whether the advocate, who had already appeared for her in O.S. No. 41 of 1948, was competent to re-present the plaint, which was eventually numbered as O.S. No. 70 of 1948. O. 33, R. 2 of the CPC requires that every appln. for permission to sue as a pauper should contain the particulars required in regard to plaints in suits. O. 33, R. 3 requires that the appln. shall be presented to the Ct. by the appct. in person unless he is exempted from appearance in Ct. These provisions are mandatory. The plaint, which was presented to the Ct. of the Subordinate Judge of Tirunelveli, &

which was numbered as O.S. No. 70 of 1948, contained many additions to, & alterations of, the plaint as originally filed in that Ct., which was returned to be presented to the Ct. of the District Munsif. There was a claim for additional maintenance & for the recovery of the value of jewels deposited with the father of the petnr. The value of the reliefs sought in the amended plaint was nearly twice the value of the claim as originally laid. The contention on behalf of the resp. is that she was entitled after the return of the plaint, to make such alterations & amendments in the plaint as she thought fit, to bring the suit within the pecuniary jurisdiction of the Subordinate Judge's Ct. & re-present the plaint in that Ct. without the necessity of a personal presentation in accordance with O. 33, R. 3 of the CPC This is an untenable contention. The plaint as originally presented had been returned by the Ct. of the Subordinate Judge, for presentation to the Dist. Munsif's Ct., as the suit was within the pecuniary jurisdiction of the latter Ct., & had to be filed there under Section 15 of the CPC After the plaint was so returned, the suit ceased to be pending in the Ct. of the Subordinate Judge. The plaint, as subsequently amended after the return, included other reliefs not originally claimed but whose value brought the suit within the jurisdiction of the Ct. of the Subordinate Judge. This was in substance a fresh plaint, though the old plaint had been amended in many respects & presented 10 the same Ct., which had previously returned the plaint as unamended. I am unable to accept the contention of the resp. that the same old suit in the Ct. of the Subordinate Judge, which was numbered as O.S. No. 41 of 1948, was again given a fresh number O.S. No. 70 of 1948, & therefore there was no need for any fresh presentation of the plaint by the resp., as required by O. 33, R. 3 of the CPC It cannot be maintained that the additional reliefs sought in the amended plaint must be deemed to have been sought when the plaint was originally filed & that the amendments introduced by the resp. herself without any order or direction of the Ct. relate back to the date of the filing of the plaint in the first instance. By professing to re-present the old plaint, with new claims & reliefs added ‘suo motu’ so as to bring the suit within the jurisdiction of the Sub

Ct., the resp. cannot claim that it is a continuation of the 'old suit', O.S. No. 41 of 1948. That suit had come to an end when the plaint was returned under O. 7, R. 10 of the CPC by the Subordinate Judge, & that order was upheld on appeal. The same plaint could not therefore again be represented to the Ct. of the Subordinate Judge. In fact, the plaint as re-presented was substantially different both with reference to the reliefs sought & the pecuniary values of those reliefs.

4. I therefore proceed on the basis that the plaint as amended was a new plaint & should have been presented to the Ct. of the Subordinate Judge by the pltf. herself in person, in conformity with the provisions of the O. 33, R. 3 of the CPC The learned Subordinate Judge, instead of insisting upon compliance with the provision of the rule, numbered the amended plaint as O.S. No. 70 of 1948. When the deft, filed a written statement objecting to the procedure adopted by the learned Subordinate Judge & raising a plea, that the suit had not been validly instituted, the pltf. here resp., filed I.A. No. 11 of 1949 through her advocate asking for leave to sue 'in forma pauperis', treating the plaint in O.S. No. 70 of 1948, already on the file of the Ct., as the pet. for leave to sue 'in forma pauperis'. The question is, whether this was a sufficient compliance with the law. The amended plaint which was represented to the Sub Court, & registered as a suit, O.S. No. 70 of 1948, could not thereafter be taken back by the pltf. so long as the suit was pending. Even assuming that it can be formally handed over to the pltf. & taken back along with I.A. No. 11 of 1949, I consider it was a needless formality, having regard to the decisions of this Ct. in **'Subbarao v. Venkataratnam', 53 Mad 43 : (AIR (16) 1929 Mad 828); 'Bava Sahib v. Abdul Jhani', 64 MLJ 728 : (AIR (20) 1933 Mad 498) & 'Neeli Khandi v. Kunhayisa', AIR (23) 1936 Mad 158 : (161 IC 359)**. If the pltf. had presented in person I.A. No. 11 of 1949 for leave to sue 'in forma pauperis', & the plaint in respect of which leave was sought, was already on the file of the Ct. she could be considered as having presented the plaint in person on the date when I.A. No. 11 of 1949 was filed by her in person in Ct. Unfortunately, she did not present I.A. No. 11 of 1949 in person though he verified petn. was signed

> by her she declared the truth of its contents. In these circumstances, it is not possible to uphold the order of the Ct. below.

13. *In **Debi Sahai v. Ganga Sahai**, **AIR 1954 All 749**,* the plaintiff made the amendment after the plaint was returned to him and re-presented it before the Court, which had ordered its return. The High Court held that there was nothing bad in it. There was nothing to prevent the plaintiff from carrying out the amendment after it was returned to him. It was observed:-

> **3.** It is urged that once the plaint was returned for presentation to the proper Court, it was not open to the plaintiffs to represent the plaint after correcting the valuation themselves outside the Court. It is argued that if this were allowed to be done, it would be an abuse of the process of the Court. It has been suggested that the proper remedy for the plaintiffs was to appeal against the order directing the return of the plaint.
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> **4.** In my opinion the contention has no force. The Court's previous order that the plaint be returned for presentation to the proper Court was on the basis of the plaint as it stood before the Court. The suit was valued at ₹ 100/-. Under the U.P. Panchayat Raj Act, the suit was cognizable by the Panchayati Adalat. The Munsif had, therefore, no jurisdiction to entertain the plaint as it was at that time. No appeal lay against the order on the application for amendment of the plaint. An appeal could only lie against the order directing that the plaint be returned for presentation to the proper Court.
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> **5.** This appeal would have failed because admittedly the plaint, as it stood at that time, was not cognizable by the Munsif. It may be open to question whether the Munsif had jurisdiction, on the plaint as it stood, to amend it. However that may be, assuming that the Munsif had jurisdiction to amend it, the fact remains that he dismissed the application for

> amendment. This was entirely a matter for his discretion, and in the appeal that might have been presented against the order directing the return of the plaint to the proper Court, the appellate Court was not bound to interfere with the order rejecting the application for amendment.
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> **6.** After the plaint had been returned to the plaintiffs there is no rule of law preventing them from altering the valuation mentioned in the plaint so as to bring it within the jurisdiction of the Munsif. In — '**Deoki Nandan v. Ram Chandra', AIR 1938 All 17** (A)—it was observed:
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> "Assuming that the plaint, as originally filed, disclosed a suit not cognizable by the civil Court, and assuming also that the amendment would have made it cognizable by such a Court, it was open to the plaintiff to amend it as soon as it was returned to him for presentation to the proper Court and to represent it in the same Court which was bound to entertain it, as ex hypothesi the suit would, have become one which the civil Court was competent to decide."
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> **7.** The plaint, as amended by them outside the Court, could be presented to the Court which would have taken cognizance of the plaint as so amended. As amended, the valuation was ₹ 110/-, and the plaint was not cognizable by the Panchayati Adalat. It was cognizable by the Munsif. The Munsif alone had jurisdiction to entertain it and he entertained it correctly.
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> **8.** There is no question of an abuse of the process of the Court involved in the case, seeing that under the law the plaintiffs are not prevented from amending the plaint which had been returned to them and to represent it to the Court which would have jurisdiction to entertain the amended plaint.

14. Therefore, the consistent view of the High Court is that the plaintiff can amend the plaint after its return to him, and present it before the Court having the jurisdiction as per the amendment carried out by him. Therefore, the

plea that the plaint could not have been amended by the plaintiff on his own before presentation is not correct and the very basis of filing of the application that the production of the original plaint is necessary to find if any amendment was carried by the plaintiff or not is not correct.

15. The question regarding the stage from which the proceedings are to commence has been authoritatively settled by three Judges Bench of the Hon'ble Supreme Court in ***EXL Careers v. Frankfinn Aviation Services (P) Ltd.*, *(2020) 12 SCC 667*,** which answered the reference made to the Larger Bench. The Hon'ble Supreme Court held that the proceedings have to commence *denovo* and not from the stage where they were pending before the Court ordering the return of the plaint. It was observed: -

> **14.** That brings us to the order of the reference to be answered by us. In ***Joginder Tuli [Joginder Tuli v. S.L. Bhatia, (1997) 1 SCC 502***] the original court lost jurisdiction by reason of the amendment of the plaint. The trial court directed it to be returned for presentation before the District Court. This Court observed as follows: (SCC pp. 503-04, para 5)
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> > "*5.* ... Normally, when the plaint is directed to be returned for presentation to the proper court perhaps it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the matter was tried accordingly. The High Court had directed to proceed from that stage at which the suit stood transferred. We find no illegality in the order passed by the High Court warranting interference."
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> To our mind, the observations are very clear that the

suit has to proceed afresh before the proper court. The directions came to be made more in the peculiar facts of the case in the exercise of the discretionary jurisdiction under Article 136 of the Constitution. We may also notice that it does not take into consideration any earlier judgments including ***Amar Chand Inani v. Union of India [Amar Chand Inani v. Union of India, (1973) 1 SCC 115]*** by a Bench of three Hon'ble Judges. There is no discussion of the law either and therefore it has no precedential value as laying down any law.

15.*Modern Construction [ONGC v. Modern Construction & Co., (2014) 1 SCC 648 : (2014) 1 SCC (Civ) 617]*, referred to the consistent position in law by reference to ***Ramdutt Ramkissen Dass v. E.D. Sassoon & Co. [Ramdutt Ramkissen Dass v. E.D. Sassoon & Co., 1929 SCC OnLine PC 3 : (1928-29) 56 IA 128: AIR 1929 PC 103], Amar Chand Inani v. Union of India [Amar Chand Inani v. Union of India, (1973) 1 SCC 115], Hanamanthappa v. Chandrashekharappa [Hanam anthappa v. Chandrashekharappa, (1997) 9 SCC 688], Harshad Chimanlal Modi (2) [Harshad Chimanlal Modi (2) v. DLF Universal Ltd., (2006) 1 SCC 364]*** and after also noticing ***Joginder Tuli [Joginder Tuli v. S.L. Bhatia, (1997) 1 SCC 502***], arrived at the conclusion as follows: (***Modern Construction case [ONGC v. Modern Construction & Co., (2014) 1 SCC 648 : (2014) 1 SCC (Civ) 617***], SCC p. 654, para 17)

> "*17.* Thus, in view of the above, the law on the issue can be summarised to the effect that if the court where the suit is instituted, is of the view that it has no jurisdiction, the plaint is to be returned in view of the provisions of Order 7 Rule 10 CPC and the plaintiff can present it before the court having competent jurisdiction. In such a factual matrix, the plaintiff is entitled to exclude the period during which he prosecuted the case before the court having no jurisdiction in view of the provisions of Section 14 of the Limitation Act, and may also seek adjustment of court fee paid in that court. However, after presentation before the court of competent jurisdiction, the plaint is to be considered as a fresh plaint and the trial is to be conducted de novo even if it

> stood concluded before the court having no competence to try the same."

Joginder Tuli [Joginder Tuli v. S.L. Bhatia, (1997) 1 SCC 502] was also noticed in ***Harshad Chimanlal Modi (2) [Harshad Chimanlal Modi (2) v. DLF Universal Ltd., (2006) 1 SCC 364]*** but distinguished on its own facts.

16. We find no contradiction in the law as laid down in ***Modern Construction [ONGC v. Modern Construction & Co., (2014) 1 SCC 648 : (2014) 1 SCC (Civ) 617]*** pronounced after consideration of the law and precedents requiring reconsideration in view of any conflict with ***Joginder Tuli [Joginder Tuli v. S.L. Bhatia, (1997) 1 SCC 502]. Modern Construction [ONGC v. Modern Construction & Co., (2014) 1 SCC 648 : (2014) 1 SCC (Civ) 617]*** lays down the correct law. We answer the reference accordingly.

17. We regret our inability to concur with ***Oriental Insurance Co. Ltd. [Oriental Insurance Co. Ltd. v. Tejparas Associates & Exports (P) Ltd., (2019) 9 SCC 435 : (2019) 4 SCC (Civ) 534],*** relied upon by Mr Patwalia, that in pursuance of the amendment dated 1-2-1977 by reason of insertion of Rule 10-A to Order 7, it cannot be said that under all circumstances the return of a plaint for presentation before the appropriate court shall be considered as a fresh filing, distinguishing it from ***Amar Chand Inani [Amar Chand Inani v. Union of India, (1973) 1 SCC 115]*** . The attention of the Court does not appear to have been invited to ***Modern Construction [ONGC v. Modern Construction & Co., (2014) 1 SCC 648 : (2014) 1 SCC (Civ) 617***] and the plethora of precedents post the amendment.

18. Order 7 Rule 10-A, as the notes on clauses indicate, was inserted by the Code of Civil Procedure (Amendment) Act, 1976 (with effect from 1-2-1977) for the reason:

> "New Rule 10-A is being inserted to obviate the necessity of serving summonses on the defendants where the return of plaint is made after the appearance of the defendant in the suit."

Also, under sub-rule (3) all that the Court returning

the plaint can do, notwithstanding that it has no jurisdiction to try the suit is:

> "**10-A.** ***Power of court to fix a date of appearance in the court where the plaint is to be filed after its return.***—(1)-(2) * * *
>
> (3) Where an application is made by the plaintiff under sub-rule (2), the court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit,—
>
> (*a*) fix a date for the appearance of the parties in the court in which the plaint is proposed to be presented, and
>
> (*b*) give to the plaintiff and the defendant notice of such date for appearance."

19. The language of Order 7 Rule 10-A is in marked contrast to the language of Section 24(2) and Section 25(3) of the Code of Civil Procedure which read as under:

> "**24.** ***General power of transfer and withdrawal.***—(1) * * *
>
> (2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn. ...
>
> **25.** ***Power of Supreme Court to transfer suits, etc.***—(1)-(2) * * *
>
> (3) The court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either retry it or proceed from the stage at which it was transferred to it."

20. The statutory scheme now becomes clear. In cases dealing with transfer of proceedings from a court having jurisdiction to another court, the discretion vested in the court by Sections 24(2) and

> 25(3) either to retry the proceedings or proceed from the point at which such proceeding was transferred or withdrawn, is in marked contrast to the scheme under Order 7 Rule 10 read with Rule 10-A where no such discretion is given and the proceeding has to commence de novo.
>
> **21.** For all these reasons, we hold that ***Oriental Insurance Co. Ltd. [Oriental Insurance Co. Ltd. v. Tejparas Associates & Exports (P) Ltd., (2019) 9 SCC 435: (2019) 4 SCC (Civ) 534]*** does not lay down the correct law and overrule the same. ***R.K. Roja [R.K. Roja v. U.S. Rayudu, (2016) 14 SCC 275: (2017) 3 SCC (Civ) 270]*** has no direct relevance to the controversy at hand.

16. Hence, the submission that the presentation of the original plaint is required because the proceedings have to be carried further from the stage where they were pending before the Court ordering the return of the plaint is not acceptable.

17. In view of the above, the direction cannot be issued to the plaintiffs to present the original plaint before the Court for comparison. Hence, the present application fails and the same is dismissed.

18. The observations made hereinbefore shall remain confined to the disposal of the application and will have no bearing, whatsoever, on the merits of the regular second appeal.

CMP No. 14734 of 2023 in RSA No. 290 of 2012

The applicants/defendants have filed the present application for framing the additional issues for

determination of the disputes between the parties. It has been asserted that the learned Civil Judge, Senior Division Court No.1 Shimla framed 12 issues. However, all the material issues arising out of the pleadings of the parties have not been framed and the complete point of controversy has not been correctly adjudicated upon. The plaintiffs claimed that the late Rana Bir Pal Singh was deposed by the then British Government in the year 1939 and the plaintiff was recognized as Rulerof the Erstwhile State of Bhajji including properties vested in the plaintiff. However, it was not pleaded or proved that Rana Birbal Singh ceased to be Ruler of the Bhajji State and he was deprived of the suit property of which he was owner in possession. No issue has been framed on this point especially, regarding the consequences of the deposition of the late Rana Bir Pal Singh, who had died on 16.11.1961. The plaintiff claimed that he had acquired the suit land being Ruler of the State Bhajji in place of Rana Bir Pal Singh. However, no issue was framed nor any material was brought on record based on which, it can be held that late Rana Bir Pal Singh was deprived of his property. Rana Bir Pal Singh died on 16.11.1961 and he continued to be the owner of the property during his lifetime. The plaintiff did not acquire any right, title or interest in the suit property during the lifetime of late Rana Bir Pal Singh. No issue was framed regarding the death

of Raja Bir Pal Singh. An objection was raised in the written statement that the plaintiff had earlier filed a suit before the learned Sub Judge, Court No.3, Shimla, which was returned; however, the original plaint has not been filed. No issue regarding the same was framed. The applicants claimed that the suit for mandatory injunction was not maintainable because the plaintiff wasin possession. The claim set up by the plaintiff is time-barred. Issue No.3 has been incorrectly framed. The same is required to be reframed and a burden has to be placed upon the plaintiff. Issue No.4 has also wrongly been framed. Issue No.10 (b) is required to be re-framed and the burden of proof was required to be put on the plaintiff. The plaintiff had set up his claim on the plea of Rule of primogeniture, according to which the Ruler of a State, is succeeded by a male heir only. However, no issue was framed regarding this fact. Since the plaintiff claimed that he had become the owner in possession of the property of the Ruler of Bhajji, a specific issue was required to be framed about this fact. The framing of the issue is necessary for the determination of the real point of controversy effectively and properly. The findings recorded by the Courts are silent on the points and the issues raised above. No prejudice would be caused by the framing of the issue. No evidence may be required to be produced by the parties; therefore, it was

prayed that the application be allowed and the issue be framed.

2. The application is opposed by filing a reply taking preliminary objection regarding the application having been filed with ulterior purpose and the application being barred by time. It was asserted that the suit was originally instituted in the year 1984. Both the learned Courts below decreed the suit. The applicants/appellants have delayed proceedings on one pretext or another by making prayers for adjournments repeatedly and by filing false and frivolous applications. The non-applicants/ respondent filed applications for an early hearing which were allowed on 10.03.2021, 25.08.2022, and 27.04.2023. When the appeal came up for final hearing, the application was filed with the ulterior motive to delay and obstruct the proceedings on merits. The applicant had earlier filed an application for amendment of the issue, which was allowed. The present application is not maintainable. The Court has already framed 12 issues. Issue No.10 (a) was framed on 28.05.2008 based on the application made by the applicants/appellants. Issues No.10(b) and 10(c) were framed on 21.07.2008 when the application for framing additional issues was filed. The plea that the learned Trial Court failed to frame the proper issues is not correct. All the material issues have been framed and

the complete point of controversy has been adjudicated. The stand taken by the applicant is argumentative. The aim is to project a new stand contrary to what was in issue in the case right from the beginning of the lis. The applicants are trying to change the nature and foundation of the case by pleading the contrary stand. There is no necessity for framing any additional issues. It was specifically denied that the plaint which was ordered to be returned was not filed before the Court. The amended plaint was returned and was presented before the Court. The learned Trial Court and learned First Appellate Court had rightly decreed the suit. The appeal has been pending adjudication for more than one decade and pure findings of fact are involved in the appeal. There is no necessity to modify issue No.10(b). The applicants have been held to be trespassers and are holding the possession to the detriment of the plaintiffs. Therefore, it was prayed that the present application be dismissed.

3. I have heard Mr G.D.Verma, learned Senior Advocate assisted by Mr Sumit Sharma, learned counsel for the applicants/appellants/defendants and Mr Neeraj Gupta, learned Senior Advocate assisted by Mr Pranjal Munjal, learned counsel or the non-applicants/respondents/ plaintiffs.

4. Mr. G.D. Verma, learned Senior Advocate

submitted that the Court had not correctly framed the issues. It is the duty of the Court to frame the issue. The issues are required to be framed for the proper adjudication of the dispute between the parties. He relied upon the judgments of this Court in ***Dr Om Prakash Rawal vs. Mr Justice Amrit Lal Bahri,AIR 1994 HP 26*** and ***Gurpal Singh Vs. Ramswaroop, AIR 197 HP99 in*** support of his submission. He prayed that the application be allowed and issues as framed be amended.

5. Mr. Neeraj Gupta, learned Senior Advocate for the respondents/plaintiffs submitted that there is no necessity to frame the issues. The parties were aware of the controversy and had led the evidence accordingly. The applicants had lost before two Courts and are trying to prolong the proceedings by filing this application. Hence, he prayed that the application be dismissed.

6. I have given considerable thought to the submission at the bar and have gone through the records carefully.

7. The learned Trial Court had framed the following issues:

1. Whether the suit has not been properly valued for the purposes of Court fee and jurisdiction?OPD

2. Whether the plaintiff is the sole owner of the property in dispute, as alleged?OPP

3 Whether late Shri Bir Pal Singh continued to be the owner in possession of the property in question despite his deposition as a ruler of Bhajji State because of his alleged insanity?OPD.

4. In case Issue No. 3 is decided in the affirmative, whether property was inherited by his widow, the plaintiff and defendant No. 1 in equal shares?OPD

5 Whether the share inherited by the widow of late Shri Bir Pal Singh was willed away to defendant No. 1 as alleged? OPD

6. Whether the registered Will allegedly set up is legal and valid? OPD

7. Whether the suit is not maintainable for want of material particulars, as alleged? OPD

8. Whether the plaintiff is estopped from filing the present suit on account of his acts, deeds, conduct and acquiescence, as alleged? OPD

9 Whether the defendants have become the owners of the property in question by way of adverse possession, as alleged? .... OPD

10. Whether the plaintiff is entitled to damages at the rate of ₹2,000/- per month for use and occupation of the property in question or any other amount, as alleged? OPD

10.A Whether the suit of the plaintiff is barred by principle of resjudicata, as alleged?...OPD

10.B Whether the plaintiff is entitled for decree of mandatory injunction directing the defendants to remove themselves and their personal belongings from the suit land, as alleged? ....OPD

10.C Whether the plaintiff is entitled for decree of permanent prohibitory injunction, as prayed for?

OPP

11 Whether the claim of the plaintiff for mesne profits is within time? OPP

12. Relief.

8. Issue No. 2 is regarding the sole ownership of the property in dispute by the plaintiff. This issue covers the dispute mentioned in the application because in order to show his ownership, the plaintiff would have to show that the previous owner had lost his title in accordance with the law;therefore, the issues regarding the ownership of the property by Rana Bir Pal Singh, his deposition and the plaintiff acquiring his property by reorganisation are included in the issue framed.

9. The applicants are seeking to frame the issues on behalf of the plaintiffs. The plaintiffs had specifically stated in reply to the application that all the issues have been framed and no issue is required to be framed. It was laid down by ***Wali Singh v. Sohan Singh, (1953) 2 SCC 431: 1953 SCC OnLine SC 137,*** that a party can always give up an issue and when it gives up an issue, it cannot complain that proper issues were not framed. It was observed:

> "**9.** But we notice that the above aspect has not at all been raised in the courts below. There is no mention of it in the grounds of appeal to the High Court or in the case filed for the respondent in this Court. The abovementioned facts were relied on in the courts below only to make out pleas of acquiescence, estoppel or ratification which have been found against. Besides, it appears from the record that

> when the issues were framed by the trial court, it was expressly recorded as follows in a statement signed by the counsel for both parties.
>
> > "There is no other point in the dispute or any issue to be framed. We give it up if a mention of it is made in the pleadings."
>
> In these circumstances, it is too late to allow this point to be raised at this stage. Besides, the plaintiff has a subsisting title and his legal right as a three-fourth sharer has been denied at least in these proceedings. There is, therefore, no purpose served by dismissing this suit and by driving the parties to another litigation."

10. In the present case, issues are sought to be framed on behalf of the plaintiff who is not interested in getting the issues framed. Therefore, no issues can be framed on behalf of the plaintiff at the instance of the defendants.

11. A perusal of other record shows that an application under Order 14 Rule 5 of CPC was filed on behalf of the defendant on 16.01.1997 and the Court framed issue No. 11 on 17.01.1997. Again, an application for amendment was filed on behalf of the defendant and an additional issue was framed on 28.05.2008. The learned Trial Court specifically recorded that issue has been read over and explained to the parties. No other issue arose or pressed. Again issues No.10(b) and 10(c) were framed on 21.07.2008. Again, the Court noticed that no other issue was claimed. It means that issues framed before the learned Trial Court were accepted to be correct and any other issue arising out of the pleading was deemed to be given up and cannot be framed as per the judgment of the Hon'ble

Supreme Court in ***Wali Singh's case (supra).***

12. It was asserted that the onus of issue No.10(b) has wrongly been placed upon the defendant and that onus should have been placed upon the plaintiff. This is not correct because as per the order dated 21.07.2008, the onus to prove the issue was placed upon the plaintiff and was wrongly typed as OPD in the judgment. Since the onus was placed upon the plaintiff in the presence of their learned counsel, therefore, the plea taken by the applicants that onus was wrongly placed upon them is not acceptable and they cannot take any advantage of the clerical error committed by the learned Trial Court while deciding the lis.

13 It was further submitted that an issue regarding the non-presentation of the plaint has not been framed. It has already been held that there is no legal requirement to present the plaint which was returned, therefore, this issue is not material and cannot be framed merely because defendants have taken any such plea.

14. It has not been stated in the application that any prejudice was caused to any party or they were not aware of the real dispute between the parties.

15. It was laid down in ***Bimla Kumari &Ors versus Ved Parkash &Ors 2005 (2) Current Law Journal (HP) 61*** that where

the parties had gone to trial knowing the case of each other, non-framing of issues is not fatal. It was observed:

> 11. In the case ***Sanjoy Mitra v. Bhupendra Nath Bhattacharjee AIR 1994 Gauhati 31***, the Gauhati High Court held that the law is well settled that non-framing of issues may not be fatal if both the parties go to trial knowing the case of each other.
>
> 12. In the case ***Sudhaangshu Bikash Dutta v. Ramesh Kumar Chakraborty and others, AIR 1997 Gauhati 15***, it was held as follows:-
>
> > "It is well-settled law that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. The findings which are not based on pleading or evidence is not justified. In the instant case, there was no specific issue regarding the agreement of sale which was the disputed matter between the parties. But there was a pleading on it as made by the defendant in his written statement. Both the trial Court and the first appellate Court made concurrent and exhaustive findings and turned down the pleadings of the defendant with regard to the existence of the agreement for the sale of the suit property. There was a specific pleading and evidence on record and, there is concurrent findings of both the Courts below. The parties did not give up their respective pleadings and the foundation of their cases. On the basis of the pleadings of the parties, the Original Court, as well as the First Appellate Court, gave their reasoned findings. Therefore, it cannot be said that any injustice has been caused to the defendant in not framing a particular and specific issue regarding the agreement of sale which was the disputed matter between the parties inasmuch as a reasoned finding have been arrived with proper pleadings made by the parties concerned in the matter."
>
> 13. In case ***R.B. Bharatha Charyulu v. R.B. Alivelu Manga Thayaru, AIR 1996 Andhra Pradesh 238***, it was held as follows:-

> "Now the question is whether the matter cannot be disposed of by this Court in the appeal on the ground that proper issues were not framing by the trial Court. The law appears to be that always the improper framing of issues will not result in illegality so as to reconsider the whole thing afresh by framing appropriate issues. If the parties know that particular issues arose in a particular case depending upon such pleadings and the Court gives findings on all such issues and when no injustice is caused to either of the parties, there is no need to try the matter afresh by framing such issues. Moreover, although by virtue of Order XIV of CPC, issues concerning facts and law are to be raised distinctly and separately and while the Court disposes of such issues, it has to frame the points for consideration which are to be considered and not the issues as such. This is clear from sub-clause 4(2) of Order XX of CPC which reads as follows:-
>
> > "Judgments of other Courts-(2) Judgments of other Court shall contain a concise statement of the case, the points for determination, the decision thereon, and the reason for such decision."

14. Nowhere in the provision, it is mentioned that the Court will either repeat the issues or dispose of the issues technically in that sense so as to render justice. On the other hand, if the Court considers all the controversies between the parties either in their specific form for determination or incidentally, perhaps, the real purpose of sub-clause 4(2) of Order XX of CPC can be taken as complete in spirit. After hearing both sides and going through the records, this Court is convinced that although no specific issues were raised as above, all the controversies stated above arising under the pleadings have been understood by the parties, and they have produced the evidence on such issues: and the Court while disposing of issues 1 and 2 has considered the points for determination which arose out of such controversy, Therefore, the matter does not require reconsideration or re-trial after raising such issues for determination. Moreover, this Court while disposing

of this appeal will consider all such issues for determination

15. In the case ***Ashwin Kumar K. Patel v. Upendra J. Patel and others, AIR 1999 Supreme Court 125***, the Apex Court held as under:-

> "In our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, CPC to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the Trial Court and considered whether the order of the Trial Court ought to be confirmed or reversed or modified."

16. The law, as is apparent from the decisions cited above, is well settled that where the parties go to trial with the knowledge that a particular question is in issue, and adduced evidence relating thereto, then the mere fact that no specific issue has been framed thereon is not a sufficient ground to set aside the judgment. In the present case, also, I find that the parties were well aware of each other's case. The evidence by both sides has been led on all issues including the most important controversies with regard to the genuineness of the tatima and also with regard to the identity of the land. Both parties were fully aware that these were the contentions disputes between, them. It is true that the issues framed are not happily worded. The Court has framed omnibus issues covering a lot of points. Issues as 'framed were very widely worded and definitely covered the disputes, which the defendant has raised and which are the subject matter of the issues re-cast/freshly framed by the learned lower appellate Court. The wholesale remand of the case has always been deprecated and even if the appellate court feels that some fresh issue is to be framed, and evidence should be recorded then also it should either frame the issue and call for the

> finding from the trial Court or record the evidence itself. This has not been done in the present case

16. Similarly, it was held in ***Roshan Lal Versus Sumati Parkash 2005(2) Latest HLJ 1380*** that where the parties had not raised any objection to the issues framed and they were aware of the issue involved in the case, the judgment cannot be said to be bad because proper issues were not framed. It was observed:

> 8. The Next question to be considered is whether a fresh issue was required to be framed in this case or not. The original issue was framed in the year 1994. The parties merrily proceeded with the case and led evidence till the year 2001 when the arguments were heard. During this entire period, no objection was raised with regard to the issues framed. Even when the application for framing additional issues was filed in the year 2001 by the plaintiffs. No fresh issue was sought to be framed with regard to the right of an easement or customary right to repair the wall. For eight long years, the suit proceeded without the parties complaining that appropriate issues had not been framed.
>
> 9. No doubt, issue No.1 which is an omnibus issue is not happily worded. Whoever, the parties were well aware of their respective case and were fully aware of what were the questions and issues involved in the case. They have not been taken surprised that they have not been prejudiced by the non-framing of the issue. They have led evidence on both the questions of the easement as well as the customary rights. There is no complaint that they were prevented from leading such evidence because no issue has been framed in this regard.
>
> 10. It is no doubt true that primarily, it is the duty of the Court to frame the issues. As observed above, issue No.1 is not happily framed. However, the parties should be vigilant and should raise objections at the earliest. They cannot permit the proceedings to go on for years and end without raising any objections and

then after the matter is decided against one party then raise the point that a particular issue should have been framed.

11. The Apex Court in ***NedunuriKameshwaramma v. Sampati Subba Rao, AIR 1968 SC 884***, considered the effect of non-framing of issues and held as follows:-

> "No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their 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 mistrial which vitiates proceedings. We are, therefore, of the 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."

12. This Court in ***Khem Chand v. Hari Saran and others, AIR 1988 HP 10***, held as follows:-

> "The mere omission, on the part of a trial court to frame an issue on a matter in controversy between the parties cannot be regarded as fatal unless, upon examination of the record, it is found that the failure to frame the issue had resulted in the parties having gone to the trial without knowing that the said question was in issue between them and having, therefore, failed to adduce evidence on that point.

13. Where the lower appellate Court ordered de novo trial on all the issues which were duly framed and on which the parties had adduced evidence and gone to trial and on which findings were also recorded by the trial Court merely because there was a failure on the part of the trial Court to frame one of the issues and also an omission on the part of the parties to lead evidence relatable to the said issue, the order of remand was illegal and hence set aside."

> 14. The law, as is apparent from the decisions cited above, is well settled that where the parties go to trial with the knowledge that a particular question is in issue and adduce evidence on the issue, then the mere fact that no specific issue has been framed is not a sufficient ground to set aside the judgment. In the present case, also, I also find that the parties were well aware of each other's case. The evidence by both sides has been led on all issues including the most important controversies with regard to the easementary and customary rights of the plaintiff to use the defendant's land to repair their shops. Both parties were fully aware that there were contentions disputes between them. It is true that the issues framed are not happily worded. The Court has framed omnibus issues covering a lot of points. Issues are framed were very widely worded and definitely covered the disputes, which the defendant has raised and which are the subject matter of the issues re-cast/freshly framed by the learned lower Appellate Court."

17. It was held by this Court in ***Madan Lal vs. Soma Devi, 2020 (1) Shimla Law Cases 20*** that no objection was raised to the non-framing of issues nor any application was filed before the learned Trial Court for framing the additional issues, the Appellate Court should not frame the fresh issues. It was observed:

> Once the matter stood decided by the learned Trial Court on the basis of the issues which stood framed by it and there was no objection by either of the parties at any stage that the issues which were framed by the learned Trial Court were inappropriate, nor any request was made before the learned Trial Court by any party for framing of additional issues, qua which power does vests with the learned Trial Court, learned Appellate Court ought to have decided the appeals on merit rather than following the course of framing 13 additional issues and then remanding the case back to the

learned Trial Court for adjudication of the case afresh.

18. In the present case since the applicants had not claimed any issue before the learned Trial Court and had filed the application for framing of additional issue, which was allowed. They remained silent thereafter; therefore, no issues can be framed at their instance in the present appeal.

19. In view of the above, issues cannot be framed in the present case, therefore, the present application fails and the same is dismissed

20. The observations made hereinbefore shall remain confined to the disposal of the application and will have no bearing, whatsoever, on the merits of the regular second appeal.

RSA Nos. 290 and 303 of 2012

List the appeals for final hearing in due course.

(Rakesh Kainthla)
Judge

June 19, 2024
(ravinder)