

**IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA**

Regular Second Appeal No.548 of 2006.

Judgment Reserved on: 19.06.2017.

Date of decision: 30.06.2017

Vijay Kumar

....Appellant-Defendant

Versus

M/s.Ram Lal and Sons

....Respondent-Plaintiff

Coram

The Hon'ble Mr.Justice Sandeep Sharma,Judge.

Whether approved for reporting ?¹ Yes.

For the Appellant: Mr.Neeraj Gupta, Advocate.

For the Respondent: None.

Sandeep Sharma,J.

This appeal has been filed by the appellant-defendant against the judgment and decree dated 29.09.2006, passed by the learned District Judge, Shimla, District Shimla, H.P., affirming the judgment and decree dated 29.04.2002, passed by the learned Sub Judge, Court No.5, Shimla, whereby the suit filed by the respondent-plaintiff has been partly decreed.

2. Briefly stated facts, as emerged from the record, are that the respondent-plaintiff (*hereinafter referred to as the 'plaintiff'*), filed a suit for permanent prohibitory injunction as well

¹ *Whether the reporters of Local Papers may be allowed to see the judgement? Yes.*

as for mandatory injunction against the defendant-appellant (*hereinafter referred to as the 'defendant'*). It is averred in the plaint that the plaintiff-firm is tenant qua the top floor, 70, The Mall, Shimla since 1948-49 and the accommodation is in its possession. It is the case of the plaintiff that the defendant was running shop on the second floor of the said building in the name and style of M/s.Ganpati House. It is averred in the plaint that the defendant has illegally and un-authorisedly affixed some boards of his shop without the consent of the plaintiff on the outer wall and one board over the roof of the plaintiff, when the Managing Partner of the firm Anju Mehta was away from Shimla. It is also averred in the plaint that aforesaid Anju Mehta, objected the same through her attorney and asked the defendant to remove the board from the roof and outer wall, but the defendant flatly refused to do the same. It is further averred by the plaintiff that instead of removing those boards, the defendant threatened the plaintiff through its partner to affix more boards on the roof top of the tenanted premises, to which he has no right. In this background, the plaintiff filed a suit for permanent prohibitory injunction against the defendant from affixing any board as well as for mandatory injunction to remove all such boards.

3. Defendant, by way of filing written statement, raised preliminary objections on the grounds of maintainability,

estoppel, limitation and cause of action etc. On merits, the defendant has denied that the plaintiff was tenant on the top storey since 1948-49. It is averred that the plaintiff-firm is in possession of only two third area of the top floor and the rest of the area is in possession of Kashmir Emporium. It is also denied that the defendant was running any shop, rather it is pleaded that he was serving in Urban Co-operative Bank as a Branch Manager and cannot do any business. It is also denied that the defendant has affixed any sign boards on the outer wall or roof in occupation of the plaintiff. It is averred in the written statement that the sign boards of M/s.Ganpati House were affixed there for about 2 to 3 years and prior to this, there were boards in the name and style of Star Land, which were affixed there for about 20 to 25 years back, which were affixed by the brother of defendant, who was running business there. It is further averred that the defendant had purchased the attic with roof top of the premises in occupation of the plaintiff and as such he has every right title and interest to deal with the same in any manner.

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

- “1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as alleged? OPP.**
- 2. Whether the plaintiff is entitled for the relief of mandatory injunction, as alleged? OPP.**

3. ***Whether the suit is not maintainable? OPD.***
4. ***Whether the suit is not within limitation? OPD.***
5. ***Whether the plaintiff is estopped to file the present suit due to his acts, conducts, acquiescence etc.? OPD.***
6. ***Whether the plaintiff has no cause of action? OPD.***
7. ***Relief.”***

5. Learned trial Court vide judgment and decree dated 29.04.2002 partly decreed the suit of the plaintiff and restrained the defendant from affixing any board on the roof of the tenanted premises of the plaintiff i.e. the Top Floor of the building 70, The Mall, Shimla, H.P.

6. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiff was partly decreed, appellant-defendant filed an appeal under Section 96 of the Code of Civil Procedure (*for short `CPC`*) assailing therein judgment and decree dated 29.04.2002 passed by learned Sub Judge in the Court of learned District Judge, Shimla, who, vide impugned judgment and decree dated 29.09.2006, dismissed the appeal preferred by the defendant by affirming the judgment and decree passed by the learned trial Court. Learned first appellate Court, while dismissing the appeal, also granted relief of mandatory injunction in favour of the respondent-plaintiff. In the aforesaid

background, the present appellant-defendant 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 question of law:

“(1) Whether the tenant who has allegedly put up the board without having been impleaded as party, the decree of mandatory injunction passed by the first appellate court directing the removal of the board can be executed?”

8. Before advertng to the merits of the case, it may be noticed that on 21.10.2016, learned counsel representing the appellant stated that appellant intends to move an application under Order 41 Rule 27 CPC placing therewith copy of judgment passed by the learned District Judge (Forests), Shimla, which has direct bearing on this case. Learned counsel further contended that, during the pendency of instant appeal, property in dispute has been purchased by the appellant and as such his status qua the property in dispute has altogether changed. However, fact remains that application bearing **CMP No.2652 of 2017** under Order 41 Rule 27 CPC only came to be filed in the Registry of this Court on Ist April, 2017, but since, respondent-firm or its counsel failed to put in appearance on various dates i.e. 21.10.2016, 7.11.2016, 5.12.2016, 7.1.2017 and 1.4.2017, this Court, vide order dated 2.5.2017, directed the Registry of this Court to issue

actual date notice to the respondent, intimating therein the next date of hearing, returnable on 19.6.2017. However, despite service respondent failed to put in appearance on 19.6.2017 and as such this Court had no option but to proceed against it ex-parte. Accordingly vide order dated 19.6.2017, sole respondent was ordered to be proceeded against ex-parte.

9. At the first instance, application bearing **CMP No.2652 of 2017** filed under Order 41 Rule 27 CPC by the appellant for leading additional evidence by tendering certified copies of judgments and decrees dated 20.9.2010 passed by learned trial Court and dated 08.08.2014 passed by learned appellate Court, needs to be dealt with on merits.

10. Mr.Neeraj Gupta, learned counsel representing the appellant, while inviting the attention of this Court to the application under Order 41 Rule 27 CPC having been filed on behalf of appellant, prayed that appellant-applicant may be permitted to lead additional evidence by tendering certified copies of judgments and decrees dated 20.9.2010 passed by learned trial Court and dated 08.08.2014 passed by the appellate Court, which have direct bearing on the instant case. It emerged from the application, as referred hereinabove, that during the pendency of the present appeal, one Shri Krishan Gopal Walia sold the entire roof/attic of the building i.e. 70, The Mall, Shimla

to the appellant-applicant. Respondent-plaintiff herein, being aggrieved with the aforesaid sale made in favour of the applicant-appellant by aforesaid Shri Krishan Gopal Walia, instituted a Civil Suit bearing No.70-1 of 08/2000 against appellant-applicant as well as Shri Krishan Gopal Walia, seeking therein decree for declaration declaring the sale deed dated 18.2.1999 to be illegal, void ab-initio and inoperative with a consequential relief of permanent prohibitory injunction restraining the appellant-defendant from raising any construction over the roof/attic in any manner, whatsoever and further causing any unlawful interference into its peaceful possession and enjoyment of the 3rd storey of the building. However, fact remains that aforesaid suit instituted by the respondent-plaintiff-non-applicant in the Court of learned Civil Judge (Senior Division), Court No.1, Shimla, H.P. came to be dismissed vide judgment and decree dated 20.9.2010 (Annexure-A1 annexed with the application referred hereinabove). Respondent-plaintiff-non-applicant being aggrieved and dissatisfied with the aforesaid judgment and decree dated 20.9.2010 passed by learned Civil Judge(Senior Division), Court No.1, Shimla, preferred an appeal bearing Civil Appeal RBT No.56-S/13 of 2013/11 in the Court of learned District Judge. Appellant-applicant also filed cross appeal, which came to be registered as Cross Objections RBT No.6-S/13 of 2014/12. Learned District

Judge (Forests), Shimla, decided the aforesaid Appeal and Cross Objections vide judgment and decree dated 8.8.2014, (Annexure-A2 annexed with the application referred hereinabove), whereby appeal having been filed by the appellant-plaintiff-non-applicant was dismissed, whereas Cross-Objections preferred by the respondent-applicant were allowed, by dismissing the suit of respondent-plaintiff in its entirety,

11. Mr.Neeraj Gupta, while placing reliance upon the judgments Annexures A-1 and A-2 annexed with the application for leading additional evidence, vehemently contended that the aforesaid suit as well as appeal were not only instituted during the pendency of the appeal, rather judgments thereupon were rendered during the pendency of the present appeal and as such on account of subsequent developments, especially in view of the fact that the appellant-applicant has purchased the suit property on account of sale having been effected in his favour by one of the co-owner of the property on 18.2.1999, status of the appellant-applicant at present in the premises in question is that of an owner and as such judgment and decree impugned in the present appeal having been passed by learned first appellate Court deserves to be quashed and set aside. Mr.Gupta further contended that since the sale deed referred hereinabove has been upheld by the District Judge (Forests), appellant-applicant has

every right to use the premises as an absolute owner without any hindrance or obstruction from anybody, especially at the hands of respondent-non-applicant, who admittedly enjoys the status of tenant not more than that.

12. In the aforesaid background Mr.Gupta contended that it would be in the interest of justice that the appellant-applicant is permitted to lead additional evidence by producing/placing certified copies of the aforesaid decisions/judgments on record of the instant appeal. Shri Gupta further contended that to the best of knowledge of the appellant-applicant, no appeal, whatsoever, has been preferred against the judgment and decree dated 8.8.2014 passed by learned first appellate Court against the respondent-non-applicant and as such the same has attained finality.

13. Lastly, Mr.Gupta contended that the application under Order 41 Rule 27 CPC has been made in bonafide manner and in due diligence. He contended that since factum with regard to the property, having been purchased by the appellant-applicant, came to the knowledge of the counsel during the pendency of the appeal, appellant-applicant was advised to bring certified copies thereof so that same are placed on record as additional evidence.

14. At the cost of repetition, it may be stated that since nobody appeared on behalf of the respondent despite there being sufficient opportunities, the aforesaid application for leading additional evidence remained un-contested and as such, this Court has no option but to decide the same on the merits of the averments contained in the same as well as documents annexed therewith. By now, it is well settled that application filed under Order 41 Rule 27 is required to be decided alongwith the main appeal. Once an application under Order 41 Rule 27 is filed, it is incumbent upon the Court to consider/deal the same on merits.

15. It has been repeatedly held by the Hon'ble Apex Court that dismissal of appeal without deciding the application of additional evidence is improper and in all eventualities, application for additional evidence under Order 41 Rule 27 CPC should be dealt with on merits at the first instance. In this regard, Hon'ble Apex Court in ***Jatinder Singh & Anr. (Minor through Mother) v. Mehar Singh and Ors. with Balbir Singh & Anr. v. Jatinder Singh and Anr., AIR 2009 Supreme Court 354***, has held as under:-

3. *In our view, this appeal can be decided on a very short question. The trial court as well as the appellate court and finally the High Court in the second appeal dismissed the suit filed by the plaintiffs/appellants for declaration challenging the sale deed dated 29th of May, 1989, executed by the respondent Nos. 1 to 3 in favour of respondent Nos. 9 and 10 as well as the*

compromise (Exhibit No. C1) dated 7th of April, 1986 in a suit title Ujagar Singh vs. Puran Singh, But it is an admitted position that before the High Court, the appellants filed an application under Order 41 Rule 27 of the Code of Civil Procedure for acceptance of additional evidence, namely, documents such as certificate of Military service, voter list of concerned assembly segment for the year 1982, receipt of house tax 1988-89, payment of chaowkdra of khariiff 1986, rabi 1990, rabi 1991, khariiff 1992, identity card issued by Election Commission of India, Ration Card etc.

4. *While deciding the second appeal, however, the High Court had failed to take notice of the application under Order 41 Rule 27 of the Code of Civil Procedure and decide whether additional evidence could be permitted to be admitted into evidence. In our view, when an application for acceptance of additional evidence under Order 41 Rule 27 of the Code of Civil Procedure was filed by the appellants, it was the duty of the High Court to deal with the same on merits. That being the admitted position, we have no other alternative but to set aside the judgment of the High Court and remit the appeal back to it for a decision afresh in the second appeal along with the application for acceptance of additional evidence in accordance with law.*
5. *For the reasons aforesaid, the impugned Judgment is set aside. The appeal is thus allowed to the extent indicated above. There will be no order as to costs.*

(p.354)

16. There cannot be any dispute that it is the pure discretion of appellate Court to allow/dis-allow the additional evidence proposed to be led on record and such discretion is required to be used sparingly. Under Order 41 Rule 27 CPC, appellate Court has power to allow the document to be produced and witness to be examined but the requirement of Court must be

limited to those cases where it found necessary to obtain such evidence for enabling it to pronounce judgment. But, before exercising the discretion as referred above, Court is expected to assign reasons for accepting or rejecting the additional evidence sought to be adduced on record during the pendency of the appeal.

17. In this regard, reliance is placed on judgment passed by the Hon'ble Apex Court in ***Union of India v. Ibrahim Uddin and Anr. (2012)8 SCC 148***, wherein the Hon'ble Apex Court has held as under:-

“36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide: *K. Venkataramiah v. A. Seetharama Reddy & Ors.*, AIR 1963 SC 1526; *The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors.*, AIR 1965 SC 1008; *Soonda Ram & Anr. v. Rameshwaralal & Anr.*, AIR 1975 SC 479; and *Syed Abdul Khader v. Rami Reddy & Ors.*, AIR 1979 SC 553).

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a

party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).

38. *Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].*
39. *It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam , AIR 1969 SC 101).*
40. *The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the*

importance of a document does not constitute a "substantial cause" within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. *The words "for any other substantial cause" must be read with the word "requires" in the beginning of the sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this Rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.*

42. *Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this Rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the Rule.*

43. *The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough compliance with the requirement as to recording of reasons.*

44. *It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice – delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is the principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, (2008)11 SCC 205; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336; (2010)4 SCC (Civ) 904).*

(Emphasis supplied)

18. Careful perusal of judgments referred hereinabove suggests that though under Order 41 Rule 27 appellate Court has the power to allow the documents to produce or witness to examine but it does not entitle appellate Court to allow him fresh

evidence only for the purpose of pronouncing the judgment in a particular way. Similarly, it is not the business of the appellate Court to supplement the evidence adduced by one party or the other in the lower Court and in the absence of satisfactory reasons for the non-production of evidence in trial Court, additional evidence should not be admitted in appeal and the same can be disallowed by the Court. Similarly, if party fails to lead evidence, which is sought to be produced by way of additional evidence, despite ample opportunities, the appellate Court is well within its powers to reject the same, in view of the aforesaid proposition of law as laid down by the Hon'ble Apex Court.

19. Now, this Court would proceed whether application under Order 41 Rule 27 CPC having been filed by the appellant can be allowed at this stage and whether judgments having been passed by the learned Courts below, which are sought to be adduced as additional evidence, have direct bearing on the findings returned by the trial Court, which is subject matter of the present case.

20. Learned first appellate Court, vide impugned judgment and decree dated 29.09.2006, modified the judgment and decree passed by learned trial Court, whereby suit filed by the plaintiff was partly decreed to the effect that the defendant is

restrained from affixing any board on the roof of the tenanted premises of the plaintiff i.e. Top Floor of the building No. 70, The Mall, Shimla. It is also not in dispute that learned trial Court had declined the relief of mandatory injunction in favour of the respondent-plaintiff, which came to be subsequently granted by learned first appellate Court by modifying the judgment passed by learned trial Court.

21. Perusal of written statement having been filed by the defendant-appellant suggests that though plea was taken that defendant has purchased the attic with roof top of premises in occupation of the plaintiff and as such defendant has every right, title and interest to deal with the same in any manner, but learned trial Court partly decreed the suit of the respondent-plaintiff. However, perusal of judgment dated 29.4.2002, passed by learned trial Court, nowhere suggests that finding, if any, qua the aforesaid claim having been made by the defendant, was returned by the Court below.

22. Learned first appellate Court, taking note of the aforesaid claim having been made by the defendant in para-4 of written statement, concluded that plea of defendant shows the thinking of the defendant that since he has purchased the attic with roof top in occupation of the plaintiff, therefore, he has right to deal with the same in any manner. Learned first appellate

Court has further concluded that purchase of the same does not entitle the defendant to use roof top for fixing of boards or any other such purpose since they are in possession of the tenant, who is entitled to use them in any manner. Learned first appellate Court has further held that defendant has not become entitled to use the premises in possession of the tenant to the detriment of the tenant, especially, when the plaintiff has proved that these sign boards were affixed within three years and as such he has cause of action to file the suit for permanent prohibitory injunction as well as for mandatory injunction. Learned first appellate, while upholding the judgment and decree passed by the learned trial Court, further held that the plaintiff has every right to use the premises as tenant on the third floor as well as on the top floor and defendant has no right to fix the sign boards on the outer wall and top floor and plaintiff is also entitled to remove the boards affixed unauthorisedly in the premises of the plaintiff including top floor/attic and accordingly learned first appellate Court held respondent-plaintiff entitled for both the reliefs and affirmed the findings of the learned trial Court qua permanent prohibitory injunction and reversed the findings of the trial Court on issue No.2 and held the plaintiff entitled to the relief of mandatory injunction directing the defendants to remove

the boards affixed on the outer wall and roof top in possession of the plaintiff as tenant.

23. Now, perusal of Annexure-A1 annexed with the application for leading additional evidence under Order 41 Rule 27 CPC suggests that one Shri Krishan Gopal Walia executed a sale deed dated 18.2.1999 in favour of the appellant-defendant in respect of entire roof/attic of building No.70, The Mall, Shimla. Respondent-plaintiff being aggrieved and dis-satisfied with the aforesaid sale having been made by Shri Krishan Gopal Walia filed a suit for declaration, which came to be registered as Civil Suit No.70-1 of 10/2000. In the aforesaid suit, having been filed by the respondent-plaintiff, following issues were framed:-

- “1. Whether the plaintiff is entitled for the relief of declaration, as prayed? OPP.**
- 2. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for? OPP.**
- 3. Whether the present suit is not maintainable, as alleged? OPD.**
- 4. Whether the present suit is barred under Section 69(2) of the Indian Partnership Act, 1932, as alleged? OPD.**
- 5. Whether the plaintiff has no cause of action to file the present suit, as alleged? OPD.**
- 6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged? OPD.**
- 7. Relief.”**

24. Subsequently, on the basis of evidence adduced on record by the respective parties, learned trial Court dismissed the suit of the plaintiff. Learned District Judge (Forests), Shimla vide its common judgment and decree dated 8.8.2014 (Annexure-A2) disposed of Civil Appeal having been filed by the respondent-plaintiff against the aforesaid judgment and decree passed by the learned trial Court as well as Cross Objections filed by the appellant-defendant. Perusal of judgment and decree dated 8.8.2014 (Annexure A-2) suggests that appeal having been filed by the respondent-plaintiff came to be dismissed, whereas cross objections filed by the appellant-defendant having been filed by the appellant-defendant were allowed. Learned first appellate Court, while allowing the cross objections, reversed the findings returned by the learned trial Court on issue No.1 and held the same against the respondent-plaintiff.

25. At this stage, it may be noticed that learned trial Court, while deciding issue No.1, held that sale deed dated 18.2.1999 showing transfer of share of Madan Lal Walia in favour of defendant No.1 cannot be held to be legal, but on sole basis thereof, sale deed as a whole, especially with respect to the transfer of the share of remaining co-sharers, could not be held to be illegal or void. But, fact remains that the aforesaid finding returned by learned first appellate Court was reversed, as a result

of which, sale deed dated 18.2.1999 executed by Krishan Gopal Walia in favour of defendant No.1 was declared valid. At this stage, this Court deems it fit to reproduce para-13 of judgment of learned first appellate Court from where it can be safely concluded that respondent-plaintiff being tenant in the disputed building was not at all affected by this sale deed in any manner and as such the plaintiff firm had no locus standi to challenge this sale deed:-

“13. The main grievances of the plaintiff firm are against sale deed dated 18.02.1999 executed by the defendant No.1 in favour of the defendant No.1 as GPA of Sh.Madan Lal Walia, one of the co-sharer of the building in which the plaintiff firm is a tenant of the premises on the top floor. Case of the plaintiff is that on the date of the execution of the said deed Sh.Madan Lal Walia, on whose behalf this sale deed was executed by the defendant No.1 as his GPA, was dead. Therefore, this sale deed is void. In other words on the date of the execution of the sale deed the defendant No.1 was not authorized to execute the the sale deed on behalf of deceased Madan Lal Walia. But such sale deed could have been challenged by the LR's and successors of deceased Madan Lal Walia who were adversely affected by the said sale deed. The plaintiff firm being tenant in the disputed building was not affected by this sale deed in any manner and as such the plaintiff firm had no locus standi to challenge this sale deed. The learned trial court has committed an error to return findings regarding the validity of the disputed sale deed in favour of the plaintiff firm. In view of this the findings returned by the learned trial court on issue No.1 are liable to be reversed.”

26. It may be noticed that aforesaid findings, having been returned by the learned first appellate Court, have attained

finality as no appeal, whatsoever, qua the same was ever filed by the respondent-plaintiff. After having carefully perused Annexures A-1 and A-2 i.e. certified copies of impugned judgments, this Court sees substantial force in the arguments having been made by Shri Neeraj Gupta that subsequent developments, which have taken place during the pendency of the present appeal i.e. passing of impugned judgments, would have material effect on the decision of the present appeal and as such it would be in the interest of justice to allow the application under Order 41 Rule 27 CPC to lead additional evidence by taking certified copies of the judgments Annexures A-1 and A-2 on record.

27. This Court, after having carefully perused findings returned by the Courts below in the judgments sought to be placed on record, deems it just and necessary to take the same on record for adjudication of the right of the present parties. Since by way of aforesaid judgments, which are sought to be adduced in evidence, appellants-applicants have been held to be absolute owners, they have every right to use the premises without any hindrance/obstruction from anybody.

28. Accordingly, in view of the reasons stated hereinabove, application under Order 41 Rule 27 CPC is allowed and certified copies of judgment and decree dated 20.9.2010

passed by learned Civil Judge (Senior Division), Court No.1, Shimla in Civil Suit No.70-1 of 08/2000 and common judgment and decree dated 08.08.2014, passed by learned District Judge (Forests), Shimla in Civil appeal RBT No.56-S/13 of 2013/11 and Cross Objections RBT No.6-S/13 of 2014/12, annexed therewith as Annexures A-1 and A-2, are ordered to be taken on record as Ex.A-1 and Ex.A-2.

29. In view of aforesaid order having been passed by this Court in the application under Order 41 Rule 27 CPC, following additional substantial question of law arise for determination of this Court:-

“2. Whether relief of permanent prohibitory injunction as well as mandatory injunction, as prayed for by the respondent-plaintiff in Civil Suit, which is subject matter of the present case, can be granted to the respondent-plaintiff in view of subsequent judgments dated 20.9.2010, passed by learned trial Court (Annexure A-1) and which has been further upheld by learned District Judge in Civil Appeal on 08.08.2014 (Annexure A-2), in the suit for declaration having been filed by the respondent-plaintiff wherein admittedly appellant-defendant has been held to be absolute owner of roof/attic of building No.70, The Mall, Shimla?”

30. Keeping in view the text of additional substantial question of law framed at the time of hearing of this case, this Court intends to take the same for adjudication at first instance.

31. Perusal of judgment and decree dated 08.08.2014, Annexure A-2, having been passed by learned District Judge (Forests), Shimla in Civil Appeal No.56-S/13 of 2013/11, clearly

proves on record that Shri Krishan Gopal Walia executed sale deed dated 18.9.1999 in favour of defendant No.1 in respect of entire roof/attic of the building No.70, The Mall, Shimla. Respondent-plaintiff by way of Civil Suit No.70-1 of 2010/2000, which came to be decided by Civil Judge (Senior Division), Shimla vide judgment dated 20.9.2010 Annexure A-1, sought declaration that sale deed dated 18.2.1999 executed by defendant No.2 in favour of defendant No.1 in respect of entire roof/attic of building No.70, The Mall, Shimla is illegal, void ab-initio and inoperative, with a consequential relief of perpetual injunction restraining defendant No.1 from raising any construction over the roof/attic in any manner, whatsoever, and causing unlawful interference into its peaceful possession and enjoyment of the 3rd storey of the building.

32. Perusal of Ex.A-1 and Ex.A-2 clearly suggests that suit of the plaintiff was dismissed and sale deed dated 18.2.1999, executed by Krishan Gopal Walia in favour of appellant-defendant, was held valid. Learned first appellate Court, while allowing cross objections, having been filed by the appellant-defendant, reversed the findings of the trial Court on issue No.1, as a result of which sale deed aforesaid executed in favour of defendant-appellant came to be upheld in toto.

33. Since factum with regard to the appellant-defendant having purchased the suit property on account of sale having been effected in his favour by one of the co-owner of the property on 18.2.1999 has been duly proved in aforesaid judgments Ex.A-1 and Ex.A-2, this Court is in agreement with arguments having been made by Mr.Neeraj Gupta, learned counsel representing the appellant-defendant that the status of the appellant-defendant at present is that of owner on account of execution of sale deed and appellant has every right to use the premises as an absolute owner without any hindrance or obstruction from anybody. Since the appellant-defendant has been held to be absolute owner qua the entire roof/attic on building No.70, The Mall, Shimla, impugned judgments and decrees passed by the learned trial Court which was further upheld by learned first appellate Court deserve to be quashed and set aside. Once appellant-defendant has been held to be absolute owner of roof/attic of the building No.70, The Mall, Shimla, he neither can be restrained from affixing any board on the same and to remove the sign boards affixed on the outer wall of the top of the roof. Substantial question of law is answered accordingly.

34. Substantial question of law No.1 (originally framed by this Court):

Bare perusal of pleadings, especially written statement having been filed by appellant, suggests that defendant

claimed before Court below that he is not the owner of the shop M/s Ganpati House, as such, there is no question of refusing to remove sign boards, if any, allegedly affixed on the roof of the tenanted premises of plaintiff by the defendant. Defendant specifically averred in the written statement that sign boards of M/s Ganpati House are there for about two to three years and prior to this there were sign boards in the name and style of Star Land, which were there for about 20-25 years back and the same were affixed there by the brother of the defendant, who was running his business there. Defendant further claimed that he is only the owner of premises where shop in the name and style of M/s Ganpati House is being run and since he is employee of Semi-Government Institution, he could not run any private business.

35. Interestingly, Court below failed to frame specific issue on the basis of aforesaid specific stand taken by the defendant. Defendant, while appearing as DW-1, reiterated the aforesaid contents contained in the written statement. Apart from above, DW-2 Raj Kumar, who claimed himself to be proprietor of M/s Ganpati House, specifically stated that M/s Ganpati House is in his name and the documents are Ex.DW-2/A to Ex.DW-2/D.

36. Perusal of impugned judgment passed by learned trial Court, which was further upheld by first appellate Court, suggests that Court below, taking note of aforesaid stand adopted by defendant, held that defendant has no right to affix any board on the roof of the tenanted premises of the plaintiff. Both the Courts below have fallen in grave error while granting decree of prohibitory as well as mandatory injunction against defendant No.2, especially when it stood proved on record that defendant; namely; Vijay Kumar is only the owner of premises; namely; M/s Ganpati House and same is being run by Shri Raj Kumar. Once it stood proved on record that shop in the name and style of M/s Ganpati House is being run by Shri Raj Kumar, it is not understood how decree of prohibitory injunction as well as mandatory injunction could be granted against appellant-defendant Vijay Kumar, especially when sign boards, if any, on the tenanted premises of plaintiff were affixed by M/s Ganpati House and prior to them by Star Land.

37. It also emerged from pleadings that there is no specific denial, if any, on the part of the respondent-plaintiff to the specific stand taken by defendant that he is not owner of M/s Ganpati House, whereas bare perusal of plaint suggests that the respondent-plaintiff specifically stated in the plaint that defendant is running shop immediately in the down storey, 70,

The Mall, Shimla in the name and style of M/s Ganpati House and he has recently illegally and unauthorizedly affixed the boards of his shop, without the consent of plaintiff, on the outer wall towards Khadi Gram Udyog, The Mall, Shimla and one board over the roof of the tenanted premises of the plaintiff. Once defendant had specifically stated that he is not owner of M/s Ganpati House, no decree of injunction, be it prohibitory or mandatory, could be passed against appellant-defendant. Since M/s Ganpati House was being run by Raj Kumar, as stands proved on record, and not by defendant Vijay Kumar, decree of mandatory injunction passed against appellant-defendant by the first appellate Court directing him to remove the boards cannot be executed qua the defendant. Substantial question of law is answered accordingly.

38. In view of the detailed discussion made hereinabove, judgments and decrees passed by both the Courts below are set aside and present appeal is allowed. There shall be no order as to costs.

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

June 30, 2017
(aks)

(Sandeep Sharma)
Judge.