by amendment of the same though the mistake can be rectified by allowing the plaintiff to avail the remedy under Order XXIII Rule 1(3) CPC by filing a fresh suit on the same cause of action to cure the formal defect, there should not be any reason to disallow the same. It is a well established principle of law that a party should not be allowed to suffer for a lapse on the part of his counsel. Support in this regard may be sought from ***Om Prakash*** *versus* ***Sarupa and others***[6]***,*** ***Muthukaruppan @ Velayutham*** *versus* ***Suresh @ Muthukaruppan***[7]***,*** and ***Herbert Irwin Pereira*** *versus* ***Rudolph Pereira and others***[8].

(24) Keeping in view the totality of facts and circumstances as mentioned earlier, it is a clear case where the learned lower court has committed illegality in declining the request of the petitioner-plaintiff to withdraw the suit with liberty to file fresh one on the same cause of action.

(25) Sequelly, accepting the present revision petition and setting aside the impugned order, the application filed by the petitioner-plaintiff to withdraw the suit with liberty to file fresh one on the same cause of action under Order XXIII Rule 1 CPC is allowed.

(26) However, the petitioner-plaintiff is burdened with costs of ₹20,000/- to be paid to the opposite side which shall be a condition precedent.

M. Jain

Before Rameshwar Malik, J

M. S. AHLAWAT— *Petitioner*

versus

HARYANA URBAN DEVELOPMENT AUTHORITY AND OTHERS — *Respondents*

CWP No.19254 of 2004

December 17, 2014

Constitution of India, 1950 — Art. 226 — HUDA — Adverse Remark recorded in the ACR of Petitioner — Representation of the petitioner against adverse remarks was rejected by passing non-speaking order — Petitioner was compulsorily retired from service

[6] AIR 1981 Punjab 157
[7] 2000(1) RCR (Civil) 655 (Madras)
[8] 2010(2) BCR 824 (Bombay)

on the basis of his alleged doubtful integrity recorded in his ACR — In view of government instructions dated 2.3.1971, respondent No.2 was not competent to record adverse remarks, unless he had seen work of petitioner for a period of 3 months at least during financial year — Petition allowed with all consequential benefits.

Held, that since the impugned adverse remarks recorded by respondent no.2 in the ACR of the petitioner for the year 1998-99 conveyed vide Annexure P-5 dated 3.10.2001 and also the order dated 31.8.2004 (Annexure P-8) rejecting the representation of the petitioner against adverse remarks by passing a non-speaking and cryptic order, have been found to be patently illegal, the same are hereby set aside. Similarly, second writ petition i.e. CWP No.9975 of 2006 is also allowed, impugned order of compulsory retirement dated 9.6.2006 (Annexure P-1), has since been found contrary to the law laid down by the Hon'ble Supreme Court in R.K.Panjeta's case (supra), is hereby set aside. Natural consequences will follow. Petitioner shall be entitled for all the consequential service benefits.

(Para 18)

R.K. Malik, Sr. Advocate with Ramandeep Singh, Advocate *for the petitioner.*

J.P. Bhatt, Advocate for respondent no.1 in CWP No.19254 of 2004.

None for the respondents in CWP No.9975 of 2006.

RAMESHWAR SINGH MALIK, J.

(1) These two writ petitions bearing CWP No.19254 of 2004 and 9975of 2006 filed by the same petitioner are being disposed of vide this common order, as both were ordered to be heard together by the Division Bench vide order dated 7.7.2006.

(2) Feeling aggrieved against recording of adverse remarks in his ACR for the year 1998-99conveyed vide communication dated 3.10.2001 (Annexure P-5) and the order dated 31.8.2004 (Annexure P-8) whereby representation of the petitioner against adverse remarks was rejected by passing a non-speaking order, petitioner has approached this court by way of instant writ petitions, under Articles 226/227 of the Constitution of India, seeking a writ in the nature of Certiorari.

(3) Petitioner also seeks a writ in the nature of Mandamus directing the respondents to consider the petitioner for promotion as

Superintendent and Assistant Estate Officer from the date his juniors have been promoted. In the second writ petition, petitioner challenges the impugned order dated 9.6.2006 (Annexure P-1) whereby he was compulsory retired from service at the age of 55 years on the basis of his alleged doubtful integrity recorded in his Annual Confidential Report (`ACR' for short) for the year 1998-99.

(4) Notice of motion was issued and pursuant thereto, different written statements were filed by the respondents. Respondent no.2 filed his separate written statement. The writ petition was admitted for regular hearing by the Division Bench of this court vide order dated 5.9.2006. That is how this court is seized of the matter.

(5) Learned Senior counsel for the petitioner submits that in view of the government instructions dated 2.3.1971 (Annexure P-9), respondent no.2 was not competent to record adverse remarks against the petitioner, unless he would have seen work and conduct of the petitioner atleast for a period of three months during the said financial year. Placing reliance on the averments taken in para 7 of the writ petition, learned Senior counsel for the petitioner submits that respondent no.2, as a matter of fact, has seen the work and conduct of the petitioner only for a period of 50 days, because of which he was not competent to record adverse remarks in the ACR of the petitioner for the year 1998-99(Annexure P-5). Learned Senior counsel for the petitioner next contended that petitioner had 25 years service record to his credit and during this period of 25 years, no adverse remarks were ever conveyed to the petitioner. He also refers to the corresponding paragraph of written statements filed on behalf of respondent no.1 as well as on behalf of respondent no.2, to contend that specific and categoric averments taken by the petitioner in para 7 and 14 (ii) of the writ petition have not been properly replied by the respondents. He further submits that in fact, it was respondent no.2, who was supposed to specifically reply the averments taken by the petitioner, but he failed to do so, because of which the averments taken by the petitioner would amount to be admitted. In support of his contention, learned Senior counsel for the petitioner places reliance on the judgement of this court in ***Om Parkash*** *versus* ***State of Haryana and others***[1]. Learned Senior counsel for the petitioner, referring to the impugned order dated 9.6.2006 of compulsory retirement (Annexure P-1) in the second writ petition i.e. CWP No.9975 of 2006 submits that the impugned order of compulsory retirement was stigmatic and punitive in nature, which runs

[1] 1995 (4) SCT 275

counter to the law laid down by the Hon'ble Supreme Court in ***R. K. Panjeta*** *versus* ***Haryana Vidyut Prasaran Nigam Ltd. and others*** decided on 25.4.2000 vide Annexure P-9. He submits that respondent no.1 proceeded on a factually incorrect approach, while passing the impugned order of compulsory retirement referring to some punishments, which had already been set aside by this court, vide order dated 26.4.2005 (Annexure P-4) as well as Annexure P-6. Finally, he prays for setting aside the impugned adverse remarks conveyed to the petitioner vide communication Annexure P-5 and also the order dated 31.8.2004 (Annerxure P-8), whereby self contained representation of the petitioner was rejected by a non-speaking and cryptic order, by allowing both these writ petitions. He also prays for a writ in the nature of Mandamus directing the respondent authorities to consider the petitioner for promotion to the next higher post with effect from the date his juniors have been promoted, with all consequential service benefits.

(6) Per contra, learned counsel for respondent no.1 submits that since respondent no.2 has seen the work of the petitioner for more than five months i.e. 26.6.1998 to 3.12.1998, requirement of the instructions dated 2.3.1971 (Annexure P-9) stood complied with and respondent no.2 was competent to record adverse remarks against the petitioner in his ACR for the year 1998-99. Regarding the judgment relied upon by learned Senior counsel for the petitioner, he submits that the said judgment was distinguishable on facts. He prays for dismissal of the writ petition.

(7) Having heard learned counsel for the parties at considerable length, after careful perusal of the record of the case and giving thoughtful consideration to the rival contentions raised, this court is of the considered opinion that in view of the peculiar facts and circumstances of the present case noticed herein above, both these writ petitions deserve to be allowed. Impugned adverse remarks recorded by respondent no.2 in the ACR of the petitioner for the year 1998-99, vide Annexure P-5 are liable to be set aside, being an action without jurisdiction. Similarly, impugned order Annexure P-8 is also liable to be set aside being a totally non-speaking and cryptic order. Further, petitioner is also entitled for a writ in the nature of Mandamus directing the respondent authorities for considering him for promotion to the post of Superintendent and Assistant Estate Officer from the date his juniors have been promoted, with all consequential service benefits. Since the order of compulsory retirement impugned in 2nd writ petition is

stigmatic and punitive in nature, it cannot be sustained. To say so, reasons are more than one, which are being recorded hereinafter.

(8) Petitioner has pointed out minute details about 50 working days, during which his work and conduct was seen by respondent no.2. Very specific and categoric averments have been taken in para 7 of the writ petition and relevant part thereof, reads as under:-

"DATES	DAYS	TOUR PROGRAMME
8.7.98 to 9.7.98	(2days)	Hisar to Chandigarh
12.9.98 to 13.7.98	(2days)	Hisar to Chandigarh
15.8.98 to 16.8.98	(2days)	Hisar to Chandigarh
27.8.98 to 28.8.98	(2days)	Hisar to Delhi
13.9.98 to 15.8.98	(3days)	Hisar to Chandigarh
24.9.98	(1days)	Hisar to Chandigarh
28.11.98	(1days)	Hisar to Delhi
1.12.98 to 2.12.98	(2days)	Hisar to Chandigarh
Total	(15days)	

So, in the above period, the respondent no.2 was on tour for 15 days. So the respondent no.2 has only seen the work of the petitioner for 50 days. The detail is given below for ready reference:

Total period from 24.6.1998 to 3.12.1998 = 163 days Details of the earned leave/casual leave/gazetted holidays/tour programmes/ Saturdays and Sundays of the petitioner:

Earned leave		42 days
Casual leave		05 days
Gazetted Holidays		06 days
Tour Programme		11 days
Saturdays/Sundays		34 days
Total		98 days
15 days, the respondent no.2 was on tour		15 days
	(98+15)	113 days
	Total period	163 days
		---
		50 days

So, the respondent no.2 has actually seen the work of the petitioner for only 50 days."

(9) In this regard, written statement filed by respondent no.2 was very relevant, because it was a specific allegation against him that he has seen the working of the petitioner only for a period of 50 days. However, interestingly respondent no.2 virtually admitted the above specific averments taken by the petitioner, while taking following averments in para 7 of his written statement :-

"That the contents of para no.7 of writ petition are denied for want of knowledge. The replying respondent is not in any way related with the contents of para no.7 of the petition."

(10) Similar was the position regarding the averments taken by the petitioner in para 14 (ii) of the writ petition, wherein he has claimed to have rendered 25 years good service and during the said period, no adverse remarks were ever conveyed to him. Para 14 (ii) of the writ petition, reads as under :-

"14(ii) That the petitioner is in service for the last about 25 years and there is no adverse remarks regarding integrity against the petitioner except the impugned remarks (P-5).The petitioner was appointed as Assistant on 29.5.79 and uptill now he has rendered more than 25 years service and uptill now 25 confidential reports of the petitioner have been written by different confidential reporting authorities. All his reports are good or better than good and no adverse remark was ever conveyed to the petitioner. So there is no adverse remark regarding the integrity of the petitioner. Even in the year 1998-99 the other confidential reporting authority had written regarding the period from 1.4.1998 to 23.6.98 and from 4.12.1998 to 31.3.1999 and the other confidential reporting authority has given good remarks in the confidential report of the above period. So, in the year 1998-99 itself except these 50 days, the confidential report of the remaining period is good or better than good. This clearly demonstrate that the adverse remarks regarding integrity has been written by respondent no.2 on extraneous considerations."

(11) Corresponding para 14 (ii) of the written statement filed by respondent no.2, reads as under :-

"(ii) That the contents of sub para (ii) of para Nop.14 are denied for want of knowledge. The replying respondent is not in any way related with the contents of this sub para of the petition. However,

it is submitted that the entries made in the ACR of the petitioner by the replying respondent who was reporting officer of the petitioner during the above mentioned period from 24.6.98 till 3.12.98 truly reflect his style of work and official conduct."

(12) A combined reading of the above said pleadings of the parties would show that respondent no.2 has miserably failed to reply to the specific averments taken by the petitioner on both the material issues. Firstly, he denied the averments taken in para 7 of the writ petition only for want of knowledge and further said that contents of para 7 of the writ petition were not related to him. These averments taken by the respondent no.2 in para 7 of the written statement were, in fact, factually incorrect. Similarly, he did not deny the specific averments taken by the petitioner in para 14 (ii) of the writ petition, while denying the contents thereof for want of knowledge in para 14 (ii) of his written statement.

(13) In view of this undisputed fact situation on the record, judgment of this court in ***Om Parkash's case*** *(supra)* squarely covers the case of the petitioner. Relevant observations made in para 9 of the judgment, which can be gainfully followed in the present case, read as under :-

"From the above quoted extracts of the instructions issued by the Chief Secretary to Government of Haryana, it is clear that the Reporting Officer does not have the jurisdiction to make remarks in the Annual Confidential Report of an officer unless he has seen his work for a minimum period of three month This shown that the Government has in its wisdom thought it proper to prescribe a minimum period of service under Reporting Officer as the condition precedent to the making of remarks in the confidential report by the Reporting Officer. These instructions have been issued with twin objects. Firstly, this is to prevent the Reporting Officer from unnecessary enhancing the record of an official. Secondly, it is intended to prevent the degradation of the record of the official who may not have served even for three months under the Reporting Officer. In the background of this I do not find any substance in the contention of the learned Assistant Advocate General that even though the petitioner had served for less than three months under Respondent no.3, the latter had the authority to make adverse remarks in the Annual Confidential Report of the petitioner. This view of mine is fully supported by a decision of the Division Bench dated 15.3.1994 in CWP No.14801 of 1993

Satbir Singh** versus **State of Haryana and others, 1993 (2) SCT 494 (P&H).”

(14) So far as the order Annexure P-8 is concerned, the same has been found to be patently illegal, being a non-speaking and cryptic order. It reads as under :-

> “It is intimated that your representation dated 29.6.2002 made against the adverse remarks recorded in the ACR for the year 1998-99 and conveyed vide this office memo no.EA-3-2000/26131 dated 3.10.2000 has been considered by the competent authority and consigned to record.”

(15) Since respondent no.2 has recorded adverse remarks in the ACR of the petitioner for the year 1998-99, including recording his integrity to be doubtful, respondent no.1 was duty bound to pass a reasoned and speaking order. However, he miserably failed to do so, while passing the impugned order dated 31.8.2004 (Annexure P-8) and the same cannot be sustained, for this reason also.

(16) Coming to the second writ petition i.e. CWP No.9975 of 2006, it has been found after perusal of the record of the case that the learned Senior counsel for the petitioner was right in contending that the impugned order of compulsory retirement Annexure P-5, was stigmatic and punitive in nature, because of which the same was contrary to the law laid down by the Hon'ble Supreme Court in ***R.K. Panjeta's case** (supra)* as well as the order dated 29.1.2001 passed by a Division Bench of this court in CWP No.9981 of 1999 (S.B. Panihar Vs. Haryana Vidyut Prasaran Nigam Ltd) Annexure P-10. A bare perusal of the impugned order Annexure P-1 would show that it was undoubtedly a stigmatic and punitive order and the same was an order without jurisdiction, in view of the law laid down by the Hon'ble Supreme Court in ***R.K. Panjeta's case*** (*supra*) and also as per the law laid down by the Division Bench of this court in ***S.B. Panihar's case** (supra)*.

(17) No other arguments was raised.

(18) Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this court is of the considered opinion that since the impugned adverse remarks recorded by respondent no.2 in the ACR of the petitioner for the year 1998-99 conveyed vide Annexure P-5 dated 3.10.2001 and also the order dated 31.8.2004 (Annexure P-8) rejecting the representation of the petitioner against adverse remarks by passing a non-speaking and

cryptic order, have been found to be patently illegal, the same are hereby set aside. Similarly, second writ petition i.e. CWP No.9975 of 2006 is also allowed, impugned order of compulsory retirement dated 9.6.2006 (Annexure P-1), has since been found contrary to the law laid down by the Hon'ble Supreme Court in ***R.K. Panjeta's case*** *(supra),* is hereby set aside. Natural consequences will follow. Petitioner shall be entitled for all the consequential service benefits.

(19) Consequently, respondent no.1 is directed to consider the petitioner for promotion to the post of Superintendent and Assistant Estate Officer from the date his juniors have been promoted. It goes without saying that petitioner shall also be entitled for all the consequential service benefits.

(20) Since the legally justified claim of the petitioner had been denied to him for all these years, petitioner shall be entitled for arrears along with interest @ 9% p.a. from the date when the amount became due, till the date of actual payment thereof. Let respondent no.1 do the needful within a period of two months from today, failing which petitioner shall be entitled for interest @ 12% p.a. Since the petitioner has retired from service on 30.4.2008, during the pendency of these writ petitions, he shall be entitled only for notional benefits.

(21) With the above said observations made and directions issued, both these writ petitions stand allowed, however, with no order as to costs.

A. Aggr.

Before Ajay Kumar Mittal & Raj Rahul Garg, JJ

RAJNI BALA — *Appellant*

versus

RAJESH DHIMAN — *Respondent*

FAO–M–No.298 of 2014

September 25, 2014

Hindu Marriage Act, 1955 — Ss. 12, 11 & 29(2) — Marriage of the appellant with respondent was solemnized on 19.7.2009 — Before the marriage, the parents of appellant had shown agreement dated 27.12.2007 as evidence of divorce by Panchyatnama — Appeal Dismissed holding that Panchayatnama cannot be regarded as valid proof of Divorce.