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Somesh Tiwari vs. Union of India and others, (2009) 2 SCC 592;
State of M.P. and another vs. S.S. Kourav and others, (1995) 3 SCC 270;
State (Govt. of NCT of Delhi) v. Nitin Gunwant Shah, (2016) 1 SCC 472,
State of Haryana and Others v. Mohinder Singh, (2000) 3 CC 394;
State of Haryana and others vs. Kashmir Singh and another,(2010) 13 SCC 306,
State of Karnataka v. J. Jayalalitha, (2017) 6 SCC 263, Supreme Court
State of Kerala etc. vs. Rajesh etc., Criminal Appeal No(s) 154-157 of 2020 (Arising out of SLP(Crl.) No(s). 7309-7312 of 2019), decided on Jan 24, 2020. [2020 SCC OnLine SC 81
State of M.P. v. Ram Kishan, 1995(3) SCC 221,
State of Maharashtra and Another v. Suresh Pandurang Darvakar (2006) 4 SCC 776;
State of Punjab Vs.Darshan Singh, 2004) 1 SCC 328,
State of U.P. and others vs. Gobardhan Lal, (2004) 11 SCC 402;
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'T'

T.M. Jacob vs. C. Poulose and others reported in (1999) 4 SCC 274,
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Union of India and others vs. Ganesh Dass Singh, 1995 Supp. (3) SCC 214;
Union of India and others vs. H.N. Kirtania, (1989) 3 SCC 445;
Union of India and others Vs. Janardhan Debanath and another, (2004) 4 SCC 245;
Union of India and others vs. Muralidhara Menon and another, (2009) 9 SCC 304;
Union of India and others vs. S.L. Abbas, (1993) 4 SCC 357;
Union of India v. Merajuddin, (1999) 6 SCC 43,
Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738,
Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624,
Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798,
Union of India Vs. Swaran Singh, (1996) 5 SCC 501,

'V'

Vaman Narain Ghiya vs. State of Rajasthan; (2009) 2 SCC 281,
Vijayan Versus State of Kerala, (1999) 3 SCC 54,
Vilas Pandurang Pawar v. State of Maharasthra, 2012 (8) SCC 795,
Vinod S. Panicker v. Sub Inspector of Police, 2013 CriLJ 833;

'Y'

Yash Pal Mittal v. State of Punjab (1977) 4 SCC 540,

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

State of Himachal Pradesh ...Appellant.

Versus

Ravi Kumar ...Respondent

Cr. Appeal No. 351 of 2009
Judgment reserved on : 29.11.2019.
Date of Decision : March 23, 2020.

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- **Motor Vehicles Act, 1988-** Sections 181, 192 & 192-A- Transport of IMFL and country liquor without licence/permit in a vehicle- Appeal against acquittal- State contending wrong appreciation on part of Trial Court- On facts, held evidence of police witnesses contradictory qua recitals made in rukka- Rukka mentioning as having been written at 6.30 AM whereas Investing Officer stating about counting and sampling of bottles were over by 9.30 AM- Independent witnesses 'AK' and 'KC' not supporting prosecution case during trial- Cuttings and over writings in FIR as to time of receipt of information in police station- Police witness, who was member of patrolling party not stating anything qua search of vehicle-Copy of registration certificate of vehicle already on record- No evidence that opportunity was afforded to accused by Investing Officer to produce route permit of vehicle and his driving licence- Appeal dismissed. (Para 9 & 13 to 15)

Whether approved for reporting?[1] *Yes.*

For the appellant : Mr. Ashwani K. Sharma, Additional Advocate General for the appellant-State.

For the respondent : Mr. Bhuvnesh Sharma, Advocate, for the respondent/accused.

Anoop Chitkara, Judge.

The misadventure of a boy aged just 19 years, to arbitrage the lesser cost price of liquor at Chandigarh, and its retail price in Himachal Pradesh, got scuttled, costing dearly on being nabbed while smuggling 864 bottles of licit Country and English liquor, leading to his prosecution, and on its failure the present appeal by the State of Himachal Pradesh seeking his conviction for the violation of the provisions of the Excise Act as well as Motor Vehicles Act.

2. The gist of the facts, apposite to decide the present case, traces its origin to daily diary report number 6, dated Oct 7, 2007, reported at 11.00 pm (Ext. PW-7/A) whereby the police party headed by SI Hans Raj (PW-6), Police Station SV & ACB, Hamirpur, and comprising of SI Amar Singh (PW-3) and other police officials proceeded in their official vehicle to erect a check post, and also to patrol. When the police officials were present at place Gashota Road at 3.30 am (night), they spotted one mini truck coming towards them on which they signaled it to stop. There was none except the driver in the said truck, who, on being asked, revealed his name as Ravi Kumar, respondent herein. Police Officials inquired about the goods loaded in the vehicle on which he replied that these are only empty plastic crates. Still, to ascertain the veracity of the statement of the accused, the police officials looked in the body of the truck with torchlight and noticed cartons beneath the empty plastic crates. Police officials asked the driver to show the permit to transport liquor, but he could not produce any permit. Since it was midnight and it was impossible to search, as such, the police officials made the driver take his vehicle towards the Mini Secretariat, Hamirpur, and they got it parked there.

3. In the morning i.e., Oct 8, 2007, the police officials associated two independent witnesses, namely Ajay Kumar (PW-1) and Kalyan Chand (PW-9), out of whom they had hired Ajay Kumar (PW-1) to unload the vehicle.

4. On search of the body of the truck, the police recovered 60 cartons of the country made liquor of mark "Hulchul Sofia" and twelve cartons of IMFL bearing the mark "Officer's Choice." Each box contained 12 bottles in it; thus, the police recovered a total of 864 bottles of liquor. On all the cartons, mark "for sale only in Chandigarh," was printed. After conducting the search and seizure, the police prepared the search and seizure memo (Ext. PW-3/A). After that, the Investigating Officer SI Hans Raj (PW-6) made ruka (Ext. PW-6/B) and sent the same for the registration of FIR in Police

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

Station SV & ACB, Hamirpur. Constable Deep Kumar (not examined) carried the ruka to the police station which led to the registration of FIR No. 9 of 2007, dated 8.10.2007 (Ext.PW-4/A), for the commission of an offense punishable under Section 61 of the Punjab Excise Act as applicable to the State of HP, in the file of Police Station SV & ACB, Hamirpur, District Hamirpur, Himachal Pradesh. After that, the police officials returned to the police station, and entry to that effect is Ext. PW-7/B. The police handed over the case property to ASI Daljeet Singh (PW-2), who was holding the charge of MHC of the police station.

5. MHC Daleep Kumar (PW-8) sent the case property for chemical analysis to CTL Kandaghat. Vide report (Ext. PW-6/G) all the sample bottles contained alcohol and thus fell in the category of liquor, sale of which was controlled under the Excise Act.

6. After the completion of the investigation, police filed a report under Section 173 (2) CrPC in the Court of Chief Judicial Magistrate, Hamirpur, H.P., in which the present respondent was arraigned as accused.

7. Vide order dated June 6, 2008, the Trial Court framed charges against the accused of commission of an offense punishable under Section 61(1)(a) of the Punjab Excise Act, 1914, as applicable to the State of Himachal Pradesh and Sections 181, 192 and 192-A of the Motor Vehicles Act, 1988. The accused did not admit his guilt and claimed trial.

8. After the recording of the prosecution evidence, the trial Court put the incriminating circumstances to the accused in compliance with the provisions of Section 313 of CrPC. The accused did not offer any explanation and has denied all circumstances and claimed innocence. However, the accused did not lead any evidence in defense.

9. Vide judgment dated May 11, 2009, Chief Judicial Magistrate Hamirpur, District Hamirpur, HP, in Criminal Case No. 35-1-2008 /45-III-08, dismissed the prosecution case and acquitted the accused, giving him the benefit of the doubt. The learned Trial Court acquitted the accused because one of the members of the police party HC Daljeet Singh who was examined as PW-2, but he did not support the case of the prosecution by remaining silent about the search. The further ground of acquittal was contradiction regarding the departure of ruka from the spot and its receipt in the police station, and thirdly on the ground that the learned Trial Court did not find the statement of SI Amar Singh (PW-3) as credible enough as he is present on the spot must have remembered about the vehicles that had crossed at that time and details surrounding the recovery. The learned Trial Court further held that SI Hans Raj (PW-6) was the complainant, and he investigated the case himself. Another valid reason given by the Trial Court was that prosecution could not prove any violation under the provisions of the Motor Vehicles Act because of Section 130 of the same. Learned Trial Court held that the prosecution had failed to prove its case beyond reasonable doubt and thus acquitted him of all charges.

10. It is against this judgment of acquittal; the state has come up before this Court by filing the present appeal under section 378 of the Code of Criminal Procedure, 1973.

11. I have heard Mr. Ashwani K. Sharma, learned Additional Advocate General for the appellant-State and Mr. Bhuvnesh Sharma, learned Counsel, for the respondent-accused and have waded through the entire record.

ANALYSIS AND REASONING:

12. Analysis of the judgment of acquittal does not lead to any infirmity or perversity and is well reasoned. Apart from it, there are two more significant aspects which need discussion.

13. As per the case set up by the prosecution SI Hans Raj (PW-6), after completing the formalities of search and seizure, prepared search memo Ext. PW-3/A. After that, he made ruka (Ext. PW-6/B) and sent the same to the police station for the registration of the FIR through Constable Deep Kumar. The prosecution did not examine Const. Deep Kumar as a witness. After receipt of ruka, the concerned police station registered the FIR (Ext. PW-4/A) and in column No. 3 (b) it explicitly mentions the time of information received at the police station as “6.40 am”. There is cutting overtime, and it appears that 3.00 pm was over-written at 6.40 am.

14. None has initialed the said cuttings. This cutting assumes importance because in the testimony the Investigating Officer SI Hans Raj, who testified as PW-6 specifically mentioned that the formalities of sampling and counting of bottles were over at 9.30 am the other spot witness SI Amar Singh (PW-3) had contradicted SI Hans Raj (PW-6) when in his cross-examination he explicitly mentioned that SI Hans Raj had sent ruka at 6.30 am from the campus of Mini Secretariat. A perusal of ruka (Ext. PW-6/B) also indicates the time 6.30 am. Because the distance between the compound of the Mini Secretariat and the Police Station is just 7 k.m. by a motorable road, as such, to cover the time from 6.30 am to 3.00 pm it appears that one of the police officials tampered with the FIR and interpolated the time from 3 pm. To 6.40 am. However, while doing so, they forgot another aspect which came to light from the cross-examination of the Investigating Officer SI Hans Raj (PW-6), wherein he stated that counting and sampling of bottles were over by 9.30 am. Once the police had not even counted the bottles and sealed the same by 9.30 am, then there was no question of writing the ruka at 6.30 am. These contradictions lead to the irrefutable inference that what happened in reality and where it happened was different from what the police projected. It assumes importance when none of the

independent witnesses, namely Ajay Kumar (PW-1) and Kalyan Chand (PW-9), have supported the case of the prosecution. Given above, the prosecution miserably failed to prove its case.

15. Another aspect of the matter is that prosecution clubbed the offense of Section 181 M.V. Act (driving on a public highway without a valid driving license); Section 192 M.V. Act (driving on a public highway without having a valid R.C.); and Section 192-A of the M.V. Act (driving on a public highway without a valid permit) with the primary offense under the Excise Act. These violations had nothing to do with the transport of the licit liquor in violation of the Punjab Excise Act. All these offenses were **"strict liability offenses",** and it was highly prejudicial to the accused to face regular trial on warrant case for **"strict liability offenses"**. There is no doubt that some offenses under the Motor Vehicles Act do not fall under the category of strict liability, but petty offenses like for what the accused had to face trial as warrant case was certainly falling under the category of strict liability which generally ends up in paying fine. Be that as it may, the prosecution itself tendered the Registration Certificate of the vehicle in evidence as Ext. PW-6/D. Regarding the absence of Route Permit and Driving Licence, there is no evidence that the Investigating Officer afforded any opportunity to the accused to place the same on record. Section 130 of the Motor Vehicles Act mandates that the driver had to produce the Driving Licence and the Registration Certificate on demand. Still, there is neither an averment nor any evidence that the Investigating Officer demanded the same from the driver.

16. It shall be appropriate to quote excerpts from the treatise "Text Book of Criminal Law", Second Edition by Glanville Williams, Cambridge (pg. 142) which reads as follows:

> "The *mens rea* doctrine is equally excluded in cases of strict liability, even though a question of pure fact is involved. Here it is sufficient for the prosecution to prove the doing of the prohibited act, the existence of the circumstance or the happening of the consequence as the case may be. In other words, any defence of ignorance, mistake or reasonable case is excluded unless the law allows it to some limited extent. The reason offered by some judges for construing an offence as one of strict liability is that the statute is silent on the question of *mens rea;* yet if there is in law an implied requirement of *mens rea* (as has from time to time been said), the fact that the Act does not express the requirement should not affect the matter.
>
> Strict liability is sometimes called "absolute liability," but this, although accepted usage, is a misnomer, because all the usual defences are available except the defences of lack of intention, recklessness or negligence. For example, the defendant can set up a defence of duress, automatism, and perhaps impossibility in some circumstances.
>
> > An offence may be of strict liability in one respect but require a fault element in another. Driving while disqualified is an offence of strict liability in respect of the disqualification (the driver is guilty although he firmly, but mistakenly, believed that he was not then disqualified), but it requires an intentional act of driving. We call it an offence of strict liability because that is its predominant feature.
>
> When it is held that an element of a serious crime is a matter of strict liability, this is probably because the courts fear that the prosecution would find it too difficult to establish *mens rea* in respect of that element. Serious problems arise when the element in question is highly speculative."

17. I have also gone through the impugned judgment, which is well reasoned and is based on complete, correct, and proper appreciation of evidence so placed on record. I do not find any infirmity or illegality in the same.

Given the above discussions, I find that there is no merit in the present appeal, and hence the same is dismissed. The judgment rendered by the learned trial Court in Criminal Case No. 35-1-2008 /45-III-08, dated May 11, 2009, is affirmed. Bail bonds stand discharged.

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

Sudama Ram Sharma ...Petitioner.

State of Himachal Pradesh & others ...Respondents.

CWP No. 287 of 2001

Judgment Reserved on : December 21, 2019
Date of Decision : April 27, 2020

Constitution of India, 1950- Article 226- Allegations of wrong sanctioning of building plans, encroachment of land etc.- Writ jurisdiction- Availability of- Held, building plans of private respondents duly sanctioned with respect to their land- Allegations of encroachment by private respondents by removal of boundary fencing and preparation of wrong revenue record involve disputed questions of facts which require examination of witnesses for adjudication – Writ Court may not be inclined to decide disputed questions of facts- Petition disposed of. (Para 6 to 13, 19 & 20)

Whether approved for reporting?[2] *Yes.*

For the petitioner : Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Mohan Singh & Ms. Abhilasha Kaundal, Advocates, for the petitioner.

For the respondent : Mr. Ashwani K. Sharma, & Mr. Nand Lal Thakur, Additional Advocate Generals for the respondents No. 1, 2 and 4/State.

Mr. Naresh K Gupta, Advocate, for respondent No. 3.

Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, for respondents No. 5 and 6.

Anoop Chitkara, Judge.

All these cases bearing Nos. CWP No. 54 of 2019, CWP No. 654 of 2000, CWP No. 287 of 2001, RSA No. 452 of 2007, RSA No. 459 of 2007 and FAO No. 315 of 2002, were heard together and are being decided simultaneously. However, this Court is passing separate detailed judgments in each of these cases.

2. Seeking various reliefs, all revolving around the sanction of the additional building plan by Municipal Corporation Shimla in favor of 5th respondent, the Petitioner, whose land is adjacent to the property of 5th respondent, has come up before this Court asking for issuance of Mandamus by quashing not only the building plan (Annexure P-9) but also restoration of status quo ante for his demolished railing, and preparation of new field map.

3. The petitioner claims to be an owner in possession of land measuring 5 Biswas described in khasra no. 357 (Old 190), situated in Revenue village Bagog, (Near Summerhill), Tehsil and District Shimla, HP. As per the counsel for the petitioner, this land was purchased vide sale deed dated 21 Nov 1986, and the mutation was attested on 24 Nov 1986. The 5th Respondent Sh. Ravinder Parkash and his wife, Smt. Surekha, the 6th Respondent, are the owners in possession of the adjoining land, measuring 1-12 bighas (32 Biswas), described in khasra nos. 353 and 354 (Old 189), in the same revenue village. As per the counsel for the 5th and 6th respondents, they had purchased the land vide sale deed dated 1 July 1987.

4. I have heard the counsel for the parties and have gone through the entire record, including the written arguments filed by the Petitioner.

5. The reliefs claimed by the petitioner falls in the following three categories:

A. DISPUTE PERTAINING TO FENCE:

6. The Petitioner claims that the 5th Respondent had erected an iron fence between their boundaries, after proper demarcation done on 28-08-1990 and 9-11-1990, vide Annexures P-5 & P-6. However, the 5th Respondent claimed that the land beyond this fence also belongs to him. The Petitioner further contended that the 5th Respondent demolished the said iron fence through his Contractor, paving the way for the extension of his existing building.

7. Placing reliance upon the admission made by the 5th respondent vide Annexure P-5 and P-6, whereby he had admitted his satisfaction over the boundaries fixed and boundary posts erected by the Revenue officials, the Petitioner contends that he cannot blow hot and cold over the admissions once made.

8. The 5th respondent contended that he had raised an iron fence, but taking advantage of his absence, due to his posting, the petitioner demolished the said fence on 16.2.2000, which led to the registration of an FIR against him.

9. The case set up by the 5th and 6th respondents is specific to the extent that a civil suit no. 199/1of 1995/1991, filed by them against the petitioner, about the encroachment was pending

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

between the parties at the time of filing of the present writ petition. Thus, the present writ petition, for a similar relief is not maintainable.

10. To decide the dispute about the removal of iron fence, needs evidence, by examining witnesses, for which the writ Court is not an efficacious remedy. Consequently, this Court refrains itself from issuing such writ, because the controversy involves disputed questions of facts.

B. ERRONEOUS SETTLEMENT PLANS:

11. The petitioner pleaded that the 5th respondent lays his claim over the land adjoining his land, based upon erroneous field maps of Settlement Authorities, the 4th respondent herein. The response of the 5th respondent is that the petitioner is an encroacher over his land. While admitting the ownership of the petitioner over the land described in khasra no. 357, the 5th respondent alleged that the petitioner had built a portion of his house over the land belonging to him.

12. The stand of the Settlement Collector, the 4th respondent, on the Affidavit is that the Tehsildar Settlement had correctly prepared the Tatima Tafawat, according to the demarcation dated 15.9.1997. In the Paras 5&6 of the Sur-rejoinder, the Settlement Officer, on Affidavit stated that Tehsildar Settlement had found encroachment by the Petitioner over the land of the 5th respondent over khasra no. 189/1, to the extent of 09 biswansi.

13. Given the Affidavit filed by the Settlement Officer, the issue involves disputed questions of fact. Resultantly, this Court is not inclined to decide the disputed questions of facts in its writ jurisdiction.

C. DISPUTE PERTAINING TO BUILDING SANCTION PLAN:

14. The Petitioner claims that the 5th Respondent applied for additional building plan over the land, which was beyond the iron fence, claiming the same to be in his ownership. The Petitioner further pleaded that the land over which the 5th Respondent sought additional building plan belonged to the Petitioner. On coming to know about such a plan, the Petitioner sent his objections (Annexure P-7) to the Municipal Corporation, Shimla, the 3rd Respondent, herein. However, without hearing him, the Municipal Corporation, Shimla gave permission (Annexure P-9), to the 5th Respondent to go ahead with the construction as per the amended and altered building plan.

15. The grievance of the Petitioner is that the sanction plan Annexure P-9, allows the 5th Respondent to construct up to 4.5 meters from his existing building towards the Petitioner's house. His further case is that there is not that kind of space available between these buildings, and there is only one meter of setback between the existing boundary and the current structure of the 5th Respondent.

16. The 5th respondent submitted that if the petitioner had any grudges against the sanction, then the remedy lay in filing the appeal/revision, and not by invoking the writ jurisdiction. The 5th respondent further contended in Para 8 that under the new sanctioned plan, the building that he proposes to construct would not intrude the land under the existing structure or the staircase of the petitioner.

17. In Para 10 of the reply, the 5th respondent claimed that it is for him to leave or not to leave any setbacks in his land, and it is none of the concerns of the petitioner.

18. The Municipal Corporation, the 3rd respondent, filed its reply supported by an affidavit of its Commissioner. The Reply affidavits state that its concerned Junior Engineer had inspected the spot and noticed that the construction was going in as per sanctioned plan. The affidavit further reads that the proposal of the 5th respondent for sanction of the additional building was as per the Municipal Corporation Act, its Byelaws, and based upon the revenue records submitted along with the application. The petitioner had also shown the setbacks.

19. Given the affidavit filed by the Commissioner, Municipal Corporation, Shimla, it is clear that the sanctioned plan is on the land, which as per revenue records and physical inspection of the site, is owned and possessed by the 5th and 6th respondents, and does not belong to the Petitioner.

20. It is a fundamental law that the Municipal Corporation Shimla, and for that matter, any sanctioning authority of building plans, can sanction plans only if the building proposed to be constructed, falls squarely on the land over which the applicant has undisputed rights to raise such structure. Those rights may be by way of no-objection certificates of other co-owners, or persons whose names reflect in the revenue records in the column of possession. The only exception to this rule of law is the areas wherein the revenue records mention the land as Abadi Deh, etc. The sanction of any building plan neither confers ownership nor any other rights over the land beneath the structure, or the structure itself. Even after the permission, or approval, or completion plan of any such structure or building, if it's any portion, in any subsequent demarcation comes under the land, which is beyond the area mentioned and described in such sanction/approval/ completion plan, then all such portions of the structure beyond the approved plan shall deemed to be unauthorized, notwithstanding such sanction or final approval, by any authority whom so ever. The remedy to this would lie in acquisition of ownership or similar rights over such land in accordance with law, and provided the rules permit the sanction of plan.

21. Consequently, because of the affidavits of the Settlement Officer and the Commissioner, Municipal Corporation, Shimla, wherein the said building plan was over the land owned and

possessed by the 5th and 6th respondents, the Petitioner has no cause of action to challenge the plan Annexure P-9.

Given the above analysis and reasoning, the writ petition fails and is dismissed. All pending applications, if any, are closed.

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

Surekha ...Petitioner.

Versus

The Municipal Corporation, Shimla through its Commissioner and others.

...Respondents

CWP No. 654 of 2000
Judgment Reserved on : December 21, 2019
Date of Decision : April 27, 2020

Constitution of India, 1950- Article 226- **Himachal Pradesh Municipal Corporation Act, 1994**- Section 268- Writ petition seeking directions against State to complete the proceedings against private respondent for making unauthorized construction and to withdraw water and electricity connections granted to him qua said unauthorized construction- And for restraining private respondent from digging Government land- Held, private respondent had obtained building sanction by wrongly showing existence of passage to his plot through forest land and making interpolation in field book and khatoni with connivance of revenue staff- In earlier writ petition, High Court had directed official respondents to consider withdrawal of building sanction accorded to private respondent but after affording opportunity of being heard to him- Multiple litigation between petitioner and private respondent and writ is not in public interest- Petitioner and her husband also found having made some encroachment over government land- Petition disposed of with certain directions i.e. initiate inquiry against private respondents but while conducting inquiry for revocation of sanction, benefit of regularization policy be extended to him, permit change of user of land being used as passage by private respondent on payment of market value of said land and its declaration as public path etc. by Municipal Corporation- Judgment passed keeping in view the 'spirit' and not the 'letter' of law. (Para 16 to 21)

Whether approved for reporting?[3] *Yes.*

For the petitioner : Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, for the petitioner.

For the respondent : Mr. Naresh K. Gupta, Advocate, for respondent No. 1.

Mr. Ashwani K. Sharma, & Mr. Nand Lal Thakur, Additional Advocate Generals for the respondents No. 2 & 3/State.

Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Mohan Singh & Ms. Abhilasha Kaundal, Advocates, for respondent No. 4.

Anoop Chitkara, Judge.

The cases bearing Nos. CWP No. 54 of 2019, CWP No. 654 of 2000, CWP No. 287 of 2001, RSA No. 452 of 2007, RSA No. 459 of 2007 and FAO No. 315 of 2002, were heard together and are being decided simultaneously. However, this Court is passing separate detailed judgments in each of these cases.

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[3] **Whether reporters of Local Papers may be allowed to see the judgment?**

2. Petitioner who is co-owner of the land comprising khasra Nos. 353, 354, NEW (Old Number 189), measuring 1231.37 Sq.Mts. which equals to 33 biswas in village Bhagog, Summerhill, Tehsil & District Shimla, has come up before this Court asking for the following substantial reliefs:

> "(I). By issue of writ of Mandamus or other suitable writ, direction or order the Respondent No. 1, that is Municipal Corporation Shimla may be ordered to complete the proceedings stated under section 268 HP M C Act against Respondent 4 vide Annexure P-B dated 18-9-1991 typed copy Annexure P-C within a short and definite time frame and also to ensure that respondent No. 4 restores the iron railings of the main road which he had removed to gain access to land bearing Khasra No. 355 New and to further ensure that he does not carry out any digging or excavation on his land. Respondent No. 4 may be further ordered to withdraw the electricity and water connection granted to him for his unauthorized structure.
>
> (II) By issue of appropriate writ, direction or order, the respondent No. 3 may be ordered to ensure that respondent No. 4 does not carry out any digging, excavation, or encroachment upon land bearing Khasra No. 355 Old 192 New Village Bagog, Summerhill, Tehsil and District Shimla."

3. The 2nd respondent, Director Town and Country Planning, State of Himachal Pradesh, Shimla, filed a reply-affidavit to the writ petition on Nov 1, 2000, in which it was explicitly mentioned in paragraph-6 that they had granted sanction to the 4th respondent Sh. Sudama Ram vide letter dated Jul 3, 1990 on the basis of the documents submitted by him. In paragraph-7 the 2nd respondent further stated that they had cancelled such sanction vide order dated Jul 08, 1991 in view of order dated Jun 01, 1991 passed by the Assistant Settlement Officer.

4. The 3rd respondent, Secretary Revenue, Government of Himachal Pradesh, also filed reply-affidavit to the writ petition on Dec 07, 2000, in which they explicitly mentioned that the 4th respondent Sh. Sudama Ram had conspired with the Patwari and had fabricated revenue document, by showing the path leading to the plot, on which he had sought sanction to construct his house. The response further states that vide order dated Jun 01, 1991 passed by the Assistant Settlement Officer, Shimla in Case No. 6/91 the said entries depicting the path have been ordered to be deleted.

5. The 1st respondent, Municipal Corporation, Shimla, filed its reply on Dec 04, 2000, in which in paragraph -7 they explicitly stated that they had revoked the sanction granted to respondent No. 4 on Sep 13, 1991. In paragraph – 9 of the response-affidavit, the Commissioner of M.C. Shimla stated that they could not initiate proceedings against the 4th respondent Sh. Sudama Ram under Section 268 of the M.C. Act because of the pendency of the Civil Writ Petition in this Court which is CWP No. 126 of 1995, titled *Sudama Ram vs. State of Himachal Pradesh & others*.

6. Before adverting to the response of the 4th respondent, it would be appropriate to state that the said CWP No. 126 of 1995, stood decided vide judgment dated May 29, 2003 (Annexure R4/O). It appears that the said judgment has attained finality. This Court had quashed the Annexures P-6 and P-7, which relate to the withdrawal of the sanctions granted to the 4th respondent. This Court while quashing the orders of revocation of sanction held as follows:

> "In the present case as well, in view of the admitted fact that no reasonable opportunity was afforded by the respondents 3 and 4 to show cause against the withdrawal/cancellation of the permission earlier granted in his favour, the orders withdrawing/cancelling the permissions as contained in Annexures P6 and P7 passed by respondents No. 3 and 4 are bad and cannot be sustained.
>
> As a result, the present writ petition is allowed and the orders as contained in Annexures P6 and P7 are quashed and set aside. The parties are left to bear their own costs.
>
> Before parting, it may be stated that the quashing of the orders as contained in Annexures P6 and P7 by this order will not in any manner preclude the respondents from re-considering the question of withdrawing/cancelling the requisite permission granted in favour of the petitioner vide Annexures P3 and P4 in accordance with law and in the light of the observations made above."

7. The 4th respondent Sh. Sudama Ram in response to the writ petition raised preliminary objections and stated that all the points raised in the present writ petition are also grounds in Civil Suit filed against him in the year 1991, vide Civil Suit No. 199/1 of 1995/91. The 4th respondent further submitted that the learned Sub Judge (I), Shimla, vide judgment and decree dated Dec 22, 1999 in Civil Suit No. 199/1 of 1995/91 had rejected the plaint seeking demolition of his building allegedly constructed in an unauthorized manner. In paragraph – 3 of the preliminary objections the 4th respondent further submitted that because of the above judgment (Annexure R-4/A) the *lis* between the parties already stands decided and the present prayers are barred by the principle of *res*

judicata, and as such, this petition is legally not maintainable The 4th respondent further claimed that he has no other approach road towards his house except the path in question and as such he has acquired easementary rights over it. Paragraph – 4 of the preliminary objections, is extracted as follows:

> "4. That the petitioner has no legal or fundamental right to restrain the replying respondent from using the path over the Govt. land to reach up to his plot/building. In fact there exists an age old path over the adjoining Govt. land which is used by the general public and which is also recorded as the Bartan-Bartandaran in revenue record, a copy of which is annexed herewith as Annexue R-4/B. Besides, there is no other approach path save and except the one over Govt. land pertaining to Khasra No. 192 (old) corresponding to 355 (new) and therefore, the replying respondent has also acquired easement of necessity for using the said path over Govt. land to reach his plot/building."

8. In reply on merits, the stand taken by the 4th respondent is that the path which leads to the plot was an approved road. In paragraph – 9 of the reply the 4th respondent has explicitly stated that this Court was seized of the matter in CWP No. 126 of 1995 (Sudama Ram, supra), as such, the present petition was not maintainable because similar matter was *sub judice*.

9. I have heard Sh. G.D. Verma, learned Senior Counsel, assisted by Mr. B.C. Verma, Advocate, for the petitioner, Mr. Naresh K. Gupta, learned Counsel for respondent No. 1, Mr. Ashwani K. Sharma & Mr. Nand Lal Thakur, learned Additional Advocate Generals for respondents No. 2 & 3 and Mr. Sanjeev Bhushan, learned Senior Counsel, assisted by Mr. Mohan Singh & Ms. Abhilasha Kaundal, Advocates, for respondent No. 4, and have also waded through the record.

10. In this matter, which has a chequered history, a Co-ordinate Bench of this Court vide order dated Nov 16, 2010, passed the following order:

> "CWP No. 654 of 2000
>
> Arguments were heard for about two hours and I find that there is a long standing litigation between the two parties with respect to a path. To appreciate the rival contentions of the parties and with a view to put an end to all the disputes, I feel that it would be appropriate if I visit the spot personally. I shall visit the spot at 4.30 p.m. on 22.11.2010.
>
> Sh. Vivek Singh Thakur, learned Additional Advocate General is directed to ensure that the Naib Tehsildar, Kanungo andj Patwari of the area as well as the forest officials who are well conversant with the area are present on the spot at the given time. The parties and their counsel are also directed to be present at the spot on 22.11.2010 at 4.30 p.m."

11. Pursuant to the said order the Hon'ble Single Judge of this Court inspected the spot and recorded the spot visit in his order dated Nov 23, 2010.

12. To close the matter at this stage would although, do the Justice in 'Letter' but not in its 'Spirit.' However, to do the substantial Justice, it is pertinent to mention the great efforts put by a single co-ordinate Bench of this Court a decade ago. On 22-11-2010, the Hon'ble Judge of this Court visited the spot. Vide order dated 23-11-2010, in CWP No. 654 of 2000 along with CWP No. 287 of 2001, FAO No. 315 of 2002, RSA No. 452 of 2007 and RSA No. 459 of 2007, Hon'ble Court recorded all the proceedings of spot visit. This order reads as follows:

> "1. Pursuant to the order dated 16.11.2010, I had visited the spot on 22.11.2010 at 4.30 p.m. when the following were present:
>
> Shri G.D. Verma, Senior Advocate alongwith Sh.Ravinder Parkash Verma husband of Smt.Surekha.
>
> S/Sh.Sanjeev Bhushan and Mohan Singh, Advocates alongwith Sh.Sudama Ram.
>
> S/Sh.K.L. Bali & Shrawan Dogra, Advocates alongwith officers of the Municipal Corporation S/Sh.Joginder Chauhan, Legal Advisor, R.C. Thakur, Architect Planner, N.S. Guleria, Assistant Engineer and Hem Raj, Junior Engineer.
>
> Sh.Rajesh Mandhotra, Dy.A.G. alongwith forest officials S/Sh.Sushil Kapta, DFO, Gobind Singh Bali, Kanungo, Manohar Singh, Deputy Ranger, Mani Ram, Forest Guard, Shambu Dayal, Junior Assistant, Ms.Neelam Kumar, Patwari AND Revenue officials S/Sh. M.R. Bhardwaj,

Tehsildar (Urban), Sh.Bishan Singh Thakur, Kanungo and Sh.Krishan Sharma, Kanungo.

2. After visiting the spot I found that the dispute falls within a very narrow compass. In my opinion, this entire dispute can be resolved easily. There are four stake holders involved. Firstly, the State Forest Department which admittedly owns some land which falls below the mettled pucca road commonly known as "M.I. Road" and above the house of Sh.Ravinder Parkash Verma. There exists a path from the M.I. Road through forest land leading to the house of Shri Sudama Ram. The question whether this path existed at the time when sanction was granted in favour of Sh.Sudama Ram and whether he has any right over it shall be decided later on. However, as observed by me, as on date there is a path on the spot about 4 to 5 ft. wide which goes to the house of Sh.Sudama Ram above the house of Sh.Ravinder Parkash Verma. This path is a kacha path and there are Deodar trees on both sides of the path. As one walks on this path from the M.I. Road towards the house of Sh.Sudama Ram the land of Sh.Ravinder Parkash Verma and Smt.Surekha Verma touches the forest land on the left hand side. One Deodar tree was found fallen on the spot. It had in fact been cut and mostly removed. I was informed by the Revenue Officials that they had conducted demarcation and this tree fell in the land owned by the Forest Department. This fact was not seriously disputed by Sh.Ravinder Parkash Verma. On the edge of the boundary of the land of Shri Ravinder Parkash Verma, as pointed out to me on the spot, about 4 water tanks had been installed and when I inquired whether the land on which these water tanks were installed is forest land or land belonging to Sh.Ravinder Parkash Verma, the revenue authorities stated that it is a forest land and Sh.Ravinder Parkash Verma stated that if after demarcation it is found to be forest land he will remove the water tanks.

3. I also found that Sh.Ravinder Parkash and his wife had raised steps with railings on the back side of his house. Though I was informed by Sh.Ravinder Parkash that this is a retaining wall and not a staircase but to the naked eyes it is apparent that these were steps and not a retaining wall.

4. In between the house of Sh.Ravinder Parkash Verma and Sh. Sudama Ram there are steps leading to the lower storey of the house of Sh.Sudama Ram. The house of Sh.Ravinder Parkash Verma can be divided into two portions one the old portion which is obviously constructed many years back and second portion in which construction is still going on. A portion of the new construction virtually touches these steps or are very close to the steps. On the valley side the house of Sh.Ravinder Parkash Verma is being constructed in a triangular fashion and the corner of the triangle is barely at a distance of 2/3 ft. from the edge of the house of Sh.Sudama Ram.

5. The boundary of the property of Sh.Sudama Ram on the other side of his house is slightly unclear because one 'Burji" is alleged to have been fixed by one Col.Behal close to the house of Sh.Sudama Ram.

6. I was also informed that in settlement proceedings there has been some shifting of the map and 'karukans' have changed. There is a mettled road on one side of the land of Sh.Ravinder Parkash Verma. There is forest land on one side and there is a road leading to the Government School on the third side. Though new buildings of the school have been constructed but I am told that this Government School has been in existence for a very long time much before Sh.Sudama Ram and Sh.Ravinder Parkash Verma purchased their properties. No doubt the old building of the School does not exist but the boundaries of the School are the same .

7. Keeping in view the aforesaid facts, I direct the Tehsildar (Urban) Shimla to conduct fresh demarcation of the property. This demarcation will be conducted on or before 31.12.2010 in the presence of the parties and in the presence of the officials of Municipal Corporation as well as the forest officials. Therefore, notice of said demarcation will be given by the Tehsildar (Urban), Shimla to the learned counsel for the parties and not the parties themselves and it was the responsibility of the counsel to inform the parties of the date. The counsel are Sh.Romesh Verma, counsel for Sh.Ravinder Parkash Verma and Smt.Surekha Verma, S/Sh.K.L. Bali and Shrawan Dogra, counsel for Municipal Corporation, S/Sh.Sanjeev Bhushan and Mohan Singh, counsel for Sh.Sudama Ram, and Sh.Rajesh Mandhotra, Dy.A.G. for State. While demarcating the land the Revenue officials shall ensure that pucca points are fixed and demarcation is carried out in accordance with the instructions issued by the Financial

Commission as approved by the High Court in Chapter-1 Part-M of the High Court Rules and Orders.

8. The Revenue officials shall first demarcate the forest land and clearly indicate the boundary of the forest land with the land of Sh.Ravinder Parkash Verma and Sh.Sudama Ram. The Revenue officials shall clearly indicate whether the water tanks and the retaining wall in the form of steps falls in forest land or in the land of Sh.Ravinder Parkash Verma and Smt.Surekha Verma. It shall also be clearly indicated as to whether the steps leading from the rear of the house of Sh.Ravinder Parkash and in front of the house of Sh.Sudama Ram to the lower storey of the house of Sh.Sudama Ram fall in the land of Shri Sudama Ram or Sh.Ravinder Parkash Verma.

9. The Revenue officials shall also calculate the area of land in the possession of Sh.Ravinder Parkash Verma and Smt.Surekha Verma, both built up and vacant. They shall also calculate the area in the possession of Shri Sudama Ram both built up and vacant. The boundary of the school shall be identified with the help of permanent pucca points and the help of school officials so that there is no dispute later.

10. In the demarcation the distance between the trees which have fallen and which are standing from the houses of Sh.Ravinder Parkash Verma and Sh.Sudama Ram will be indicated in clear-cut terms.

11. The Commissioner, Municipal Corporation shall also on or before the next date file an affidavit on the following issues:

I) What were the norms relating to set-backs when the plan(s) of Sh.Sudama Ram and Sh.Ravinder Parkash Verma & Smt.Surekha Verma were sanctioned and what are the norms in this regard as on date.

ii) What were the norms relating to the distance from trees to construction when the plan(s) of Sh.Sudama Ram and Sh.Ravinder Parkash Verma & Mrs.Surekha Verma were sanction and what are the norms in this regard as on date.

12. The Revenue authorities shall also clearly indicate what was the area owned by Sh.Ravinder Parkash Verma and Sh.Sudama Ram prior to settlement and after settlement and how this area has changed. The Revenue officials shall clearly indicate how the change has been bought about in the revenue record.

13. It is obvious that the dispute is more in the nature of the boundary dispute and therefore the revenue officials i.e. the Tehsildar (Urban), Shimla is appointed to carry out demarcation in the aforesaid terms.

List on January 5, 2011. A copy of this order shall be sent by the Registrar General of this Court to the Tehsildar (Urban) Shimla, by hand, so as to reach him within 48 hours. Dasti copy."

13. Vide order dated May 2, 2011, the co-ordinate Bench of this Court observed that the Tehsildar, Shimla had submitted its report.

14. A perusal of the report reveals that the Tehsildar visited the spot on 9.2.2011. At the time of spot inspection Smt. Surekha, Shri Ravinder Prakash and Mr. Sudama Ram were present. Apart from them, Mr. Tara Singh Kanwar, Range Forest Officer, Mr. N.S. Guleria, Assistant Engineer, Municipal Corporation, Shimla, Mr. Hem Raj, Junior Engineer, Municipal Corporation, Mr. Jai Singh Garg, Superintendent, Government Senior Secondary School, Summerhill and other Revenue Officials were present. After conducting the demarcation, the Tehsildar, reported as follows:

a) That on the spot Mr. Ravinder Prakash and Ms. Surekha had kept four water tanks, which were on the boundaries of Khasra No. 354 and 355. Khasra No.354 is owned by Mr. Ravinder Prakash whereas Khasra No.355 is in the ownership of the State Government.

b) The stairs space behind the house of Mr. Ravinder Prakash were on Khasra No.353, which is in the ownership Mr. Ravinder Prakash and Smt. Surekha.

c) The constructed portion of the building of Mr. Ravinder Prakash and Ms. Surekha was 176-48 square meters.

d) The constructed portion of Mr. Sudama Ram's building was 66-41 square meters.

e) Mr. Ravinder Prakash and Ms. Surekha have encroached upon the land of Education Department on Khasra No.358/2 measuring 23-45 square meters, which is illegal encroachment.

f) Mr. Sudama Ram has also encroached upon the land of the State Government at Khasra No.358/1, measuring 29-69 square meters, which is illegal encroachment.

g) Mr. Sudama Ram has encroached upon the land measuring 4-90 square meters on Khasra No.353/1, which is in the ownership of Mr. Ravinder Prakash and Ms. Surekha, which is also illegal encroachment.

h) In comparison to the previous settlement, the total land of Mr. Ravinder Prakash and Mrs. Surekha increased to the extent of 26-21 square meters.

I) In comparison to the previous settlement, the total land area of Mr. Sudama Ram decreased by 4-04 square meters.

j) Mr. Ravinder Prakash and Ms. Surekha have expressed their full satisfaction and Mr. Sudama Ram has expressed his dissatisfaction to the demarcation.

15. Despite devoting so much time and opportunity to resolve the controversy between the parties, the Court failed in its endeavour and that is how this matter has come up before this Court for final hearing.

16. The only controversy involved in this matter is that the 4th respondent had taken permission to construct a building on his plot by showing that there was an approach road to the said plot. However, as explicit from the response filed by the 3rd respondent, the Secretary Revenue, to the Government of Himachal Pradesh, they had conducted inquiry and the Settlement Officer had found that the Patwari concerned had tampered with the Revenue Records and concocted the village map to show government land as road. The 4th respondent had challenged the said order of Assistant Settlement Officer before the Divisional Commissioner who had upheld the same. Finally the 4th respondent again took the matter before the Financial Commissioner (Appeals) who vide order dated Jun 6, 1995 upheld the order and also directed to bring the culprits to book for tampering with the settlement records. The relevant portion of the order reads as follows:

> "From the perusal of the record, it is noticed that interpolation, tempering with record and forgery was committed by the revenue field staff in the Mussavi of village Bagog, more especially in khasra No. 355 (New) by carving out khasra No. 355/1 and showing it as GAIR MUMKIN RASTA in the field book, Khatoni etc. This being criminal offence, therefore, it would be appropriate to bring these elements/culprits to book for which the Settlement Officer or the Assistant Settlement Officer of the area may report the matter to the Appellate Authority."

17. Given the findings of this Court in CWP No. 126 of 1995, wherein a co-ordinate Bench of this Court had observed that it shall be open for the respondents to reconsider the question of withdrawing or cancelling the requisite permission in accordance with law and in the light of the observations made in the said order, the prayers of the petitioner to the said extent becomes infructuous.

18. What the petitioner seeks from this Court is to restrain the 4th respondent from digging the government land. The petitioner pretends to take this case as a public interest, whereas, the facts reveal that he is immediate neighbour having number of litigations, *inter se,* and as such it is certainly not in public interest.

19. Be that as it may, it had come up in the report of the Tehsildar who had given the report pursuant to the spot inspection made by the co-ordinate Bench of this Court that some portions of the government land were also encroached upon by the petitioner and her husband, as such, this petition is disposed of by giving the following directions:

> (a) As observed by the co-ordinate Bench of this Court in CWP No. 126 of 1995, titled as *Sudama Ram vs. State of H.P. & others,* respondents No. 1 and 2 shall re-initiate the inquiry regarding grant of sanction based upon the concocted road map which was set aside by the Financial Commissioner and the said order has attained finality.
>
> (b) While conducting the inquiry for revocation of sanction, the 1st and the 2nd respondents shall extend all the benefits to the 4th respondent which were extended by various authorization policies/schemes issued by the Government from the date of the original sanction till date.
>
> (c) Given the ground reality that Mr. Sudama Ram had purchased his land before the purchase of property by Mr. Ravinder Parkash and his wife Mrs. Surekha; and Mr. Sudama Ram had constructed his building before 1990, and Mr. Sudama Ram and the other occupants of the building are using this path for almost three decades. Consequently, to bring an end to all the disputes between the parties, and to do the substantial Justice, this Court clarifies that it shall be open for the State Government/Central Government to change the nature and usage of the land being used as aforesaid path and

to authorize Municipal Corporation Shimla to declare this land as public path/road, provided the beneficiary Mr. Sudama Ram Sharma, or any other person who subsequently acquires interest in the land/building, compensate the State of HP as well as the Central Government who are the owners of the land in the revenue records, to the extent of their respective shares, which is allegedly used as the approach road to his house, by paying the market value of the land utilized for dedicated to the road or used in the road, along with interest at the rate of 1% per month from the date of assessment until its payment by Mr. Sudama Ram Sharma or his successors. At the time of assessment of market value, the State shall associate Mr. Ravinder Parkash and consider his views as well as consider any valuation report placed by him, to determine the prevailing market price of the land in issue. This Court hopes that the authorities of the Central and the State Governments shall take a lenient view in permitting Mr. Sudama Ram to use this land as path/road towards his house keeping in view the fact that there is no other approach road to his house. It is further clarified that Mr. Ravinder Parkash, Mrs. Surekha and their successors, shall be entitled to connect their property from this approach road, and the General Public shall also be entitled to use this path, without any obstacle, hindrance or obstruction by any person, whom so ever.

(d) It is clarified that the 1st and the 2nd respondents shall pass a reasoned and self explanatory order by affording due opportunity to the 4th respondent. Since this matter is very old as such the 1st and the 2nd respondents shall conclude the proceedings on or before Dec 31, 2020.

20. Mr.Ravinder Prakash and Mrs. Surekha are directed to remove their encroachments from the land of Government Senior Secondary School, Summerhill, if not already vacated, on or before 31st December, 2020 and shall ensure that no portion of their water tanks falls over the Government land.

21. Mr. Sudama Ram is also directed to remove his encroachment from the Government land on or before 31st December, 2020. However, there is no record in any of the file to prove that at subsequent stage Mr. Sudama Ram had challenged the demarcation report dated 9.2.2011. In case he had challenged the same then Mr. Sudama Ram shall abide by the final verdict of the said challenge, if any. However, if Mr. Sudama Ram did not challenge the same, then because of lapse of time and on the grounds of limitation, despite Mr. Sudama Ram did not accept the demarcation report, it has attained finality, even qua him. Subsequently, in either of the situation Mr. Sudama Ram shall remove all his encroachments from the Government land as mentioned in the demarcation report or its final outcome, if any, on or before 31st December, 2020.

22. It is clarified that the above judgment has been passed keeping in view the 'spirit' of law and not the 'letter' of law.

Petition stands disposed of in the aforesaid terms. All pending applications, if any, are closed.

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

Surekha & Another ...Appellants.

Versus

Sudama Ram & Others ....Respondents.

Sudama Ram .....Appellant

Versus

Surekha & Others .....Respondents.

RSA Nos. 452 & 459 of 2007.
Reserved on 21st December, 2019
Decided on : 27th April, 2020.

Specific Relief Act, 1963- Section 34, 38 & 39- Declaration and permanent prohibitory and mandatory injunction- Grant of – Plaintiffs seeking declaratory decree qua non-existence of any passage over government land for private defendant's property and seeking prohibitory injunction for restraining him from digging said land for passage- And also seeking possession of their own land allegedly encroached by private defendant by way of construction- Lower Courts partly decreeing suit qua non-existence of path and granting permanent injunction- Regular second appeals by both

parties- Held, private defendant had got building sanction by submitting false and tampered record showing passage to his house through Government land- False revenue record was prepared in connivance with field revenue staff- Such revenue entries were ordered to be corrected subsequently- No evidence on record showing existence of old path over government land- Findings of fact recorded by Lower Courts are correct- However, plaintiffs also found having made some encroachment over government land- Appeals disposed of with certain directions that State Government/ Central Government may permit change of user of government land being used as passage by private respondent on payment of market value of said land and its declaration as public path etc. by Municipal Corporation- Judgment passed keeping in view the 'spirit' and not the 'letter' of law. (Para 16, 19, 20 & 23 to 26)

1. **RSA No. 452 of 2007.**

For the Appellant : Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

For the respondents : Mr. Sanjeev Bhushan, Senior Advocate with Mr. Mohan Singh & Ms. Abhilasha Kaundal, Advocates for respondent No.1.

Mr. Ashwani K. Sharma & Mr. Nand Lal Thakur, Addl. A.Gs. for respondents No.2 and 4.

Mr. Naresh K. Gupta, Advocate for respondent No.3.

RSA No. 459 of 2007.

For the Appellant : Mr. Sanjeev Bhushan, Senior Advocate with Mr. Mohan Singh & Ms. Abhilasha Kaundal, Advocates.

For the respondents : Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate for respondents No.1 and 2.

Mr. Ashwani K. Sharma & Mr. Nand Lal Thakur, Addl. A.Gs. for respondents No.3 and 5.

Mr. Naresh K. Gupta, Advocate for respondent No.4.

Anoop Chitkara, J.

Both these Regular Second Appeals were heard along with the connected cases bearing CWP Nos. 654 of 2000, 287 of 2001, 54 of 2019, and FAO No.315 of 2002, which are being decided simultaneously.

Both these appeals being arisen out of common judgment dated 25.6.2007, passed by learned Additional District Judge, Shimla are being taken up and decided together by a common judgment.

2) The facts apposite to decide the present appeals trace back to a plaint dated 3.11.1991, filed by plaintiff Surekha and her husband Ravinder Prakash against Sudama Ram, who was arraigned as defendant No.1; Director, Town and Country Planning-Defendant No.2; Commissioner, Municipal Corporation, Shimla-Defendant No.3; and State of H.P. through its Secretary (Revenue)-defendant No.4, for declaration to the effect that there exist no path through Khasra No.192(355), and for possession of part of Khasra No.189, measuring 20' encroached by defendant No.1 by demolition of the structure raised by him, and for mandatory injunction directing defendants No.2 and 3 to remove the unauthorized construction of defendant No.1, the sanction of which has been obtained illegally, and further for permanent

prohibitory injunction restraining defendant No.1 to dig/construct path through Khasra No.192 upon Khasra No189, and directions to defendant No.2 and 3 not to allow/permit any path through Khasra No.192 old (355 new) in front of the house of the plaintiffs..

3) Defendant No.1 Sudama Ram filed written statement dated 23.2.1992, wherein his claim is that Khasra No.192 is a path, which leads to his land and building. His further claim was that this path is in use since time immemorial, much prior to the time, he purchased the land in question from its previous owner. Defendant No.1 further stated that since the land comprised Khasra No.192 is owned by Government as such the plaintiff has no right, title or interest to file the Civil Suit and it is for the Government to protect its own land.

4) Defendant No.2, Director, Town and Country Planning has also filed written statement dated 20.7.1992. The stand of the Director, Town and Country Planning is that the department had sanctioned the building plan of defendant No.1 Sudama Ram relying upon the revenue document, which showed the approach road and subsequently Assistant Settlement Officer, Shimla vide its office letter No. Raj.A.M.L./91-1225, dated 20.6.91 has informed that the tatima supplied by defendant No.1 Sudama Rama was forged and the department consequently revoked the sanction vide letter No. HIM/TP-Case No. 3105/90-2323-27, dated 8.7.1991

5) The Municipal Corporation, Shimla, the third defendant has also filed its written statement and took the stand similar to the stand taken by the second defendant and mentioned that the Corporation had withdrawn the sanction.

6) The fourth defendant, State of Himachal Pradesh also took the similar stand.

7) The plaintiff did not file any replication.

8) On the pleadings of the parties, learned Sub Judge 1st Class framed the following issues on 15.10.1993:

1. Whether there exists no path through khasra No.192 as alleged? OPP
2. Whether the plaintiff is entitled for the relief possession of portion of khasra No.189 after demolish of the structure, as alleged? OPP
3. Whether the plaintiffs are entitled for mandatory injunction, as alleged? OPP
4. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction? OPP
5. Whether the plaintiffs have no locus-standi to file the suit? OPD
6. Whether the suit is bad for non-compliance of Section 80C.P.C. as alleged? OPD
7. Whether the suit is not maintainable, as alleged? OPD
8. Relief.

9) The plaintiff examined various witnesses including concerned Junior Engineer apart from himself stepping into the witness-box. The first defendant also examined the Junior Engineer of the Municipal Corporation, Shimla and also himself stepped into the witness-box as DW-7.

10) Vide judgment dated 22.12.1999, passed in Case No.199/1 of 95/91, learned Sub Judge 1st Class, Court No.1, Shimla partly decreed the suit by granting decree to the plaintiff to the effect that there is no path in Khasra No.192, as such Sudama Ram, defendant No.1 had no right to dig the same and thereby caused danger to the house of the plaintiff. Learned Sub Judge did not grant any relief on the other issues.

11) Feeling aggrieved, both the plaintiffs and defendant No.1 challenged the said judgment by filing Civil Appeals before learned District Judge, Shimla. Vide common Judgment dated 25.6.2007, passed in Civil Appeal No. 2-S/13 of 2007/2K

and Civil Appeal No. 3-S/13 of 2007/2K, learned Additional District Judge, Shimla dismissed both the appeals.

12) Challenging the said dismissal, both the plaintiffs and defendant No.1 have come up before this Court by filing the present Regular Second Appeals.

13) I have heard Mr. G.D.Verma, learned Senior Advocate, assisted by Mr. B.C. Verma, Advocate for the appellants in RSA No. 452 of 2007 and for respondents No.1 and 2 in RSA No.459 of 2007, Mr. Sanjeev Bhushan, learned Senior Advocate assisted by Mr. Mohan Singh & Ms. Abhilasha Kaundal, Advocates, for respondent No.1 in RSA No.452 of 2007 and for appellant in RSA No. 459 of 2007, Mr. Ashwani Sharma, and Mr. Nand Lal Thakur, Additional Advocates General for the respondents-State, Mr. Hamender Chandel, Advocate for the Municipal Corporation, Shimla and have also waded through the entire record.

14) The brief questions involved in this suit is the use of path by defendant No.1 Sudama Ram to his house. The case of the plaintiff is that in fact no such path ever existed over Khasra No.192, and when the first defendant Sudama Ram applied for sanction of building plan, then initially the Municipal Corporation, Shimla rejected the same on the ground that no approach road exists to his land. The claim of the plaintiff is that subsequently the first defendant, in connivance with local Patwari, fabricated the revenue records and after tampering with the Musabbi, showed the path to his house and again applied for the sanction of building plan and on the basis of such fabricated documents got sanction thereof.

15) On 22.11.2010, a learned Single Bench of this Hon'ble Court visited the spot and recorded all the proceedings of spot visit. This order reads as follows:

> "1. Pursuant to the order dated 16.11.2010, I had visited the spot on 22.11.2010 at 4.30 p.m. when the following were present:
>
> Shri G.D. Verma, Senior Advocate alongwith Sh.Ravinder Parkash Verma husband of Smt.Surekha.
>
> S/Sh.Sanjeev Bhushan and Mohan Singh, Advocates alongwith Sh.Sudama Ram.
>
> S/Sh.K.L. Bali & Shrawan Dogra, Advocates alongwith officers of the Municipal Corporation S/Sh.Joginder Chauhan, Legal Advisor, R.C. Thakur, Architect Planner, N.S. Guleria, Assistant Engineer and Hem Raj, Junior Engineer.
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> Sh.Rajesh Mandhotra, Dy.A.G. alongwith forest officials S/Sh.Sushil Kapta, DFO, Gobind Singh Bali, Kanungo, Manohar Singh, Deputy Ranger, Mani Ram, Forest Guard, Shambu Dayal, Junior Assistant, Ms.Neelam Kumar, Patwari AND Revenue officials S/Sh. M.R. Bhardwaj, Tehsildar (Urban), Sh.Bishan Singh Thakur, Kanungo and Sh.Krishan Sharma, Kanungo.
>
> 2. After visiting the spot I found that the dispute falls within a very narrow compass. In my opinion, this entire dispute can be resolved easily. There are four stake holders involved. Firstly, the State Forest Department which admittedly owns some land which falls below the mettled pucca road commonly known as "M.I. Road" and above the house of Sh.Ravinder Parkash Verma. There exists a path from the M.I. Road through forest land leading to the house of Shri Sudama Ram. The question whether this path existed at the time when sanction was granted in favour of Sh.Sudama Ram and whether he has any right over it shall be decided later on. However, as observed by me, as on date there is a path on the spot about 4 to 5 ft. wide which goes to the house of Sh.Sudama Ram above the house of Sh.Ravinder Parkash Verma. This path is a kacha path and there are Deodar trees on

both sides of the path. As one walks on this path from the M.I. Road towards the house of Sh.Sudama Ram the land of Sh.Ravinder Parkash Verma and Smt.Surekha Verma touches the forest land on the left hand side. One Deodar tree was found fallen on the spot. It had in fact been cut and mostly removed. I was informed by the Revenue Officials that they had conducted demarcation and this tree fell in the land owned by the Forest Department. This fact was not seriously disputed by Sh.Ravinder Parkash Verma. On the edge of the boundary of the land of Shri Ravinder Parkash Verma, as pointed out to me on the spot, about 4 water tanks had been installed and when I inquired whether the land on which these water tanks were installed is forest land or land belonging to Sh.Ravinder Parkash Verma, the revenue authorities stated that it is a forest land and Sh.Ravinder Parkash Verma stated that if after demarcation it is found to be forest land he will remove the water tanks.

3. I also found that Sh.Ravinder Parkash and his wife had raised steps with railings on the back side of his house. Though I was informed by Sh.Ravinder Parkash that this is a retaining wall and not a staircase but to the naked eyes it is apparent that these were steps and not a retaining wall.

4. In between the house of Sh.Ravinder Parkash Verma and Sh. Sudama Ram there are steps leading to the lower storey of the house of Sh.Sudama Ram. The house of Sh.Ravinder Parkash Verma can be divided into two portions one the old portion which is obviously constructed many years back and second portion in which construction is still going on. A portion of the new construction virtually touches these steps or are very close to the steps. On the valley side the house of Sh.Ravinder Parkash Verma is being constructed in a triangular fashion and the corner of the triangle is barely at a distance of 2/3 ft. from the edge of the house of Sh.Sudama Ram.

5. The boundary of the property of Sh.Sudama Ram on the other side of his house is slightly unclear because one 'Burji" is alleged to have been fixed by one Col.Behal close to the house of Sh.Sudama Ram.

6. I was also informed that in settlement proceedings there has been some shifting of the map and 'karukans' have changed. There is a mettled road on one side of the land of Sh.Ravinder Parkash Verma. There is forest land on one side and there is a road leading to the Government School on the third side. Though new buildings of the school have been constructed but I am told that this Government School has been in existence for a very long time much before Sh.Sudama Ram and Sh.Ravinder Parkash Verma purchased their properties. No doubt the old building of the School does not exist but the boundaries of the School are the same.

7. Keeping in view the aforesaid facts, I direct the Tehsildar (Urban) Shimla to conduct fresh demarcation of the property. This demarcation will be conducted on or before 31.12.2010 in the presence of the parties and in the presence of the officials of Municipal Corporation as well as the forest officials. Therefore, notice of said demarcation will be given by the Tehsildar (Urban), Shimla to the learned counsel for the parties and not the parties themselves and it was the responsibility of the counsel to inform the parties of the date. The counsel are Sh.Romesh Verma, counsel for Sh.Ravinder Parkash Verma and Smt.Surekha Verma, S/Sh.K.L. Bali and Shrawan Dogra, counsel for Municipal Corporation, S/Sh.Sanjeev Bhushan and Mohan Singh, counsel for Sh.Sudama Ram, and Sh.Rajesh Mandhotra, Dy.A.G. for State. While demarcating the land the Revenue officials shall ensure that pucca points are fixed and demarcation is carried out in

accordance with the instructions issued by the Financial Commission as approved by the High Court in Chapter-1 Part-M of the High Court Rules and Orders.

8. The Revenue officials shall first demarcate the forest land and clearly indicate the boundary of the forest land with the land of Sh.Ravinder Parkash Verma and Sh.Sudama Ram. The Revenue officials shall clearly indicate whether the water tanks and the retaining wall in the form of steps falls in forest land or in the land of Sh.Ravinder Parkash Verma and Smt.Surekha Verma. It shall also be clearly indicated as to whether the steps leading from the rear of the house of Sh.Ravinder Parkash and in front of the house of Sh.Sudama Ram to the lower storey of the house of Sh.Sudama Ram fall in the land of Shri Sudama Ram or Sh.Ravinder Parkash Verma.

9. The Revenue officials shall also calculate the area of land in the possession of Sh.Ravinder Parkash Verma and Smt.Surekha Verma, both built up and vacant. They shall also calculate the area in the possession of Shri Sudama Ram both built up and vacant. The boundary of the school shall be identified with the help of permanent pucca points and the help of school officials so that there is no dispute later.

10. In the demarcation the distance between the trees which have fallen and which are standing from the houses of Sh.Ravinder Parkash Verma and Sh.Sudama Ram will be indicated in clear-cut terms.

11. The Commissioner, Municipal Corporation shall also on or before the next date file an affidavit on the following issues:

i) What were the norms relating to set-backs when the plan(s) of Sh.Sudama Ram and Sh.Ravinder Parkash Verma & Smt.Surekha Verma were sanctioned and what are the norms in this regard as on date.

ii) What were the norms relating to the distance from trees to construction when the plan(s) of Sh.Sudama Ram and Sh.Ravinder Parkash Verma & Mrs.Surekha Verma were sanction and what are the norms in this regard as on date.

12. The Revenue authorities shall also clearly indicate what was the area owned by Sh.Ravinder Parkash Verma and Sh.Sudama Ram prior to settlement and after settlement and how this area has changed. The Revenue officials shall clearly indicate how the change has been bought about in the revenue record.

13. It is obvious that the dispute is more in the nature of the boundary dispute and therefore the revenue officials i.e. the Tehsildar (Urban), Shimla is appointed to carry out demarcation in the aforesaid terms.

List on January 5, 2011. A copy of this order shall be sent by the Registrar General of this Court to the Tehsildar (Urban) Shimla, by hand, so as to reach him within 48 hours. Dasti copy."

16) Subsequently, the Tehsildar submitted the report. A perusal of the report reveals that the Tehsildar visited the spot on 9.2.2011. At the time of spot inspection Ms. Surekha, Mr. Ravinder Prakash and Mr. Sudama Ram were present.

Apart from them, Mr. Tara Singh Kanwar, Range Forest Officer, Mr. N.S. Guleria, Assistant Engineer, Municipal Corporation, Shimla Mr. Hem Raj, Junior Engineer, Municipal Corporation, Mr. Jai Singh Garg, Superintendent, Government Senior Secondary School, Summerhill and other Revenue Officials were present. After conducting the demarcation, the Tehsildar, reported as follows:

a) That on the spot Mr. Ravinder Prakash and Ms. Surekha had kept four water tanks, which were on the boundaries of Khasra Nos.354 and 355. Khasra No.354 is owned by Mr. Ravinder Prakash whereas Khasra No.355 is in the ownership of the State Government.

b) The stairs space behind the house of Mr. Ravinder Prakash were on Khasra No.353, which is in the ownership Mr. Ravinder Prakash and Smt. Surekha.

c) The constructed portion of the building of Mr. Ravinder Prakash and Ms. Surekha was 176-48 square meters.

d) The constructed portion of Mr. Sudama Ram's building was 66-41 square meters.

e) Mr. Ravinder Prakash and Ms. Surekha have encroached upon the land of Education Department on Khasra No.358/2 measuring 23-45 square meters, which is illegal encroachment.

f) Mr. Sudama Ram has also encroached upon the land of the State Government at Khasra No.358/1, measuring 29-69 square meters, which is illegal encroachment.

g) Mr. Sudama Ram has encroached upon the land measuring 4-90 square meters on Khasra No.353/1, which is in the ownership of Mr. Ravinder Prakash and Ms. Surekha, which is also illegal encroachment.

h) In comparison to the previous settlement, the total land of Mr. Ravinder Prakash and Mrs. Surekha increased to the extent of 26-21 square meters.

i) In comparison to the previous settlement, the total land area of Mr. Sudama Ram decreased by 4-04 square meters.

j) Mr. Ravinder Prakash and Ms. Surekha have expressed their full satisfaction and Mr. Sudama Ram has expressed his dissatisfaction to the demarcation.

17) Two facts stand fully proved in this case. Firstly that the concerned Patwari had tampered with the revenue record and had wrongly shown a path over Khasra No.192 in Partal Sajra Kistwar. This aspect traces its origin to a complaint filed by the plaintiff before Settlement Officer, District Shimla, HP, on 18.3.1991. The Plaintiff informed the Settlement Officer that Sudama Ram, the 1st Defendant, had constructed his house by misstating the facts about the path that would connect his proposed house to the Government road. Mr. Ravinder Parkash explicitly stated that the road shown was, in fact, property of the Government.

18) Vide order dated 1.6.1991, Ld. Assistant Settlement Officer found substance in the complaint and observed that the boundaries had been inspected and noticed the old cemented burjis. During this inquiry, the petitioner, Mr. Ravinder Parkash Verma, gave another application to the inquiry officer and leveled allegations that the approach road to the house of Mr. Sudama Ram, the 1st defendant herein, passes through the Government land. On this, the statements of the concerned Junior Engineer of the Municipal Corporation, as well as the Revenue officers, were also recorded. It surfaced in the inquiry that Hari Chand, who was posted as Patwari at that area, issued a tatima dated 13.6.1989 to Mr. Sudama Ram. In this, Tatima showed the path and gave a separate khasra number to this path by assigning a new number 192/2. The inquiry found that this Tatima was prepared in the absence of the corresponding reference in fard Inspection.

19) Ld. Assistant Settlement Officer ordered the correction of revenue records by removing new entries against khasra no. 192/2 old (355/1 new) and only khasra no. 355 be shown. It also issued a further direction, which is not the subject matter of this writ petition.

20) Mr. Sudama Ram challenged this order before Ld. Divisional Commissioner, who upheld the same in Revenue Appeal No. 117/91.

21) Feeling aggrieved, Mr. Sudama Ram filed an appeal under Section 14 of the H.P.Land Revenue Act before Financial Commissioner. Vide order dated 6.6.1995, Ld. Financial Commissioner dismissed the appeal and also issued guidelines to the Revenue officials.

22) This matter has attained finality. Even otherwise, the evidence adduced by the defendant to confront the claim of the plaintiff about non-existence of path is not sufficient. The first defendant could not prove through oral as well as documentary evidence that the path in question over Khasra No.192 was an old path in use prior to his purchase of land. Therefore, the findings of learned Courts below recorded on issues that no path existed over Khasra No.192 are legally correct and are accordingly upheld.

23) Now coming to the second aspect of the matter, it is also not in dispute that right from the construction of the house of first defendant Sudama Ram, he and all the occupants of the building are continuously using the path passing through Khasra No.192. Simply because Sudama Ram defendant No.1 is using this path over the Government land would not entitled him to widen the same or to further excavate so as to endanger the properties of the others.

24) To close the matter at this stage would although, do the Justice in 'Letter' but not in its 'Spirit.' However, to do the substantial Justice, it is pertinent to mention the great efforts put by a single co-ordinate bench of this Court a decade ago. On 22-11-2010, the Hon'ble Judge of this Court visited the spot. Vide order dated 23-11-2010 (supra), in CWP No. 654 of 2000 along with CWP No. 287 of 2001, FAO No.35 of 2002, RSA No. 452 of 2007, and RSA No. 459 of 2007, Hon'ble Court recorded all the proceedings of spot visit.

25) Given the ground reality that Mr. Sudama Ram had purchased his land before the purchase of property by Mr. Ravinder Parkash and his wife Mrs. Surekha; and Mr. Sudama Ram had constructed his building before 1990, and Mr. Sudama Ram and the other occupants of the building are using this path for almost three decades. Consequently, to bring an end to all the disputes between the parties, and to do the substantial Justice, this Court clarifies that it shall be open for the State Government/Central Government to change the nature and usage of the land being used as aforesaid path and to authorize Municipal Corporation Shimla to declare this land as public path/road, provided the beneficiary Mr. Sudama Ram Sharma, or any other person who subsequently acquires interest in the land/building, and also compensate the State of HP as well as the Central Government, who are the owners of the land in the revenue records, to the extent of their respective shares, which is allegedly used as the approach road to his house, by paying the market value of the land utilized for dedicated to the road or used in the road, along with interest at the rate of 1% per month from the date of assessment until its payment by Mr. Sudama Ram Sharma or his successors. At the time of assessment of market value, the State shall associate Mr. Ravinder Parkash and consider his views as well as consider any valuation report placed by him, to determine the prevailing market price of the land in issue. This Court hopes that the authorities of the Central and the State Government shall take a lenient view in permitting Mr. Sudama Ram to use this land as path/road towards his house keeping in view the fact that there is no other approach road to his house. It is further clarified that Mr. Ravinder Parkash, Mrs. Surekha and their successors, shall be entitled to connect their property from this approach road, and the General Public shall also be entitled to use this path, without any obstacle, hindrance or obstruction by any person, whom so ever.

26) Mr. Ravinder Prakash and Mrs. Surekha are directed to remove their encroachments from the land of Government Senior Secondary School, Summerhill, if not already vacated, on or before 31st December, 2020 and shall ensure that no portion of their water tanks falls over the Government land.

27) Mr. Sudama Ram is also directed to remove his encroachment from the Government land on or before 31st December, 2020. However, there is no record in any of the file to prove that at subsequent stage Mr. Sudama Ram had challenged the demarcation report dated 9.2.2011. In case he had challenged the same then Mr. Sudama Ram shall abide by the final verdict of the said challenge, if any. However, if Mr. Sudama Ram did not challenge the same, then because of lapse of time and on the grounds of limitation, despite Mr. Sudama Ram did not accept the demarcation report, it has attained finality, even qua him. Consequently, in either of the situation Mr. Sudama Ram shall remove all his encroachments from the Government land as mentioned in the demarcation report or its final outcome, if any, on or before 31st December, 2020.

28) Given observations, hereinabove both the regular second appeals are disposed of in the aforesaid terms.

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

Jagdish Lal ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 399 of 2020
Date of Decision : April 30, 2020

Code of Criminal Procedure, 1973- Sections 437 (1)(ii) & 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Sections 20 & 37- Interim/ Regular bail in a case involving commercial quantity (4 Kgs.) of contraband- Grant of on ground of serious medical condition of accused- On facts held, though rigors of Section 37 of Act would not entitle accused for grant of bail, yet under Section 437 (1) (ii) of Code, the Court may release on bail a person who is sick or infirm- Petitioner suffering from lung cancer- Letter of Jail Superintendent revealing that petitioner having become extremely frail, unable to stand on his legs and is on liquid diet- Prison unable to take care of petitioner or to shift him to bigger hospital and provide treatment on account of lockdown due to spread of COVID-19 pandemic and want of logistics involved- Not possible for him to repeat commission of offence or run away during bail on account of his extremely bad health- Life of human being cannot be put to peril simply because his case is pending for trial- Petition allowed- Petitioner ordered to be released on conditional bail. (Para 12 to 15)

Cases referred;

State of Kerala etc. vs. Rajesh etc., Criminal Appeal No(s) 154-157 of 2020 (Arising out of SLP(Crl.) No(s). 7309-7312 of 2019), decided on Jan 24, 2020. [2020 SCC OnLine SC 81

Tulsi Ram Yadav vs. State of Uttar Pradesh, I.A. No. 28851/2020 in Petitions(s) for Special Leave to Appeal (Crl.) No. 10732/2019, dated Mar 27, 2020;

Whether approved for reporting?[4] *Yes.*

For the petitioner : Mr. G.R. Palsra, Advocate, for the petitioner appeared through video conference.

For the respondent : Mr. Nand Lal Thakur, Addl. Advocate General and Mr. Bhupinder Thakur, Mr. Kunal Thakur and Mr. Amit Dhuman, Deputy Advocate Generals, for the respondent/State, appeared through video conference.

[4] **Whether reporters of Local Papers may be allowed to see the judgment?**

Ms. Shalini Thakur, Advocate, as Amicus Curiae.

Anoop Chitkara, Judge

Proceedings convened through Video Conferencing.

2. For possessing four kilograms of charas, the petitioner, who is under arrest, on being arraigned as a co-accused in FIR Number 111 of 2016, dated Oct 14, 2016, registered under Sections 20 and 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called "NDPS Act"), in Police Station Aut, Distt. Mandi, HP, disclosing non-bailable offences, has come up before this Court under Section 439 CrPC, seeking regular bail.

3. Application being Cr.MP No. 668 of 2020 filed in the main petition No. C.MP(M) No. 399 of 2020, dated Apr 28, 2020, is received through the Superintendent of Jail, District Jail Bangarh, Distt. Una, HP, and it is addressed to the Registrar (Judicial), High Court of Himachal Pradesh. Issue notice. Mr. Nand Lal Thakur, learned Addl. Advocate General appears and accepts service of notice through video conferencing. He submits that the main bail petition No. Cr.MP(M) No. 399 of 2020 is pending in this Court in which they have already filed the status report and the same may be treated as the status report even in this Cr.MP No. 668 of 2020.

4. In Cr.MP No. 668 of 2020, the Superintendent of District Jail, Bangarh, Una has submitted that the petitioner is suffering from Generalized-cum-Peripheral Vascular Disease i.e. Buerger's Disease/Atherosclerosis-cum-Takayasu Arteritis. He further submits that during his treatment in PGI Chandigarh the Doctors detected caner in his lungs and is also under treatment in PGI qua that. The Superintendent of Jail further submits that the petitioner has become extremely frail due to his ill health and his condition is getting deteriorated by every passing day. It is further stated that the prison has neither any permanent Medical Officer nor any facility to take care of the prisoners suffering from serious ailments. It is further stated that the prison ha no independent vehicle and they are facing great difficulty in getting the petitioner treated. On Apr 16, 2020 the petitioner was sent to the hospital and then he was returned to the prison on Apr 21, 2020. However, on Apr 23, 2020 his condition became extremely unwell and he was again sent to PGI Chandigarh but they again returned him. The Superintendent of Jail further submitted in the application that the petitioner has became so much frail that he cannot stand on his own legs and that he is not even eating food and is being given juice etc. Consequently, the Superintendent of Jail has prayed to this Court to decide the main bail application being CrMP(M) No. 399 of 2020.

5. This Court vide order dated Mar 3, 2020, had appointed Ms. Shalini Thakur, Advocate, as Amicus Curiae to assist the Court. After that on Mar 6, 2020 this Court had heard Ms. Shalini Thakur, learned Amicus Curiae who had also handed over the synopsis of case law to support her contentions. On such date, on the request of the State that they had filed an application under Section 311 Cr.PC for additional evidence, the matter was adjourned for Mar 27, 2020. After that because of the lock-down due to Covid-19 pandemic, the Court work got suspended partially and, thus,the Registry could not list the matter because of the situation beyond its control.

6. Ms. Shalini Thakur, learned Amicus Curiae ha placed reliance on the judgment of the Hon'ble Supreme Court reported in *State of Kerala etc. vs. Rajesh etc.,* Criminal Appeal No(s) 154-157 of 2020 (Arising out of SLP(Crl.) No(s). 7309-7312 of 2019), decided on Jan 24, 2020. [2020 SCC OnLine SC 81]. In this judicial precedent the Hon'ble Supreme Court held as under:

> "20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.
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> 21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

22. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act.

23. The submission made by learned counsel for the respondents that in Crime No. 14/2018, the bail has been granted to the other accused persons(A-1 to A-4), and no steps have been taken by the prosecution to challenge the grant of post-arrest bail to the other accused persons, is of no consequence for the reason that the consideration prevailed upon the Court to grant bail to the other accused persons will not absolve the act of the accused respondent(A-5) from the rigour of Section 37 of the NDPS Act.

24. The further submission of the learned counsel for the respondents that they have been falsely implicated in Crime No. 19/2018 for the reason that the batchmates of the excise official, Babu Varghese was convicted in the corruption case on the trap being laid down by the respondent-Shajimon(A-1) is only a conjecture of self-defence, and no inference could be drawn of false implication, more so when in Crime No. 19/2018 and 14/2018, charge-sheets have been filed after investigation and the matter is listed before the learned trial Judge for framing of the charge where the accused respondents certainly have an opportunity to make their submissions.

25. That apart, in the application which was filed before the learned Single Judge of the High Court by the appellant under Section 482 CrPC, the learned Single Judge has also prima facie accepted that error has been committed in granting bail to the accused respondents as observed in para 16 of the impugned judgment as under:—

> "On going through the orders granted on 10.5.2019 allowing bail applications of A1 and A3 on the one hand and 5 th accused on the other hand in NDPS crime Nos. 19/2018 and 14/2018 respectively, I find that the bail was granted by the Court after being cognizant of the principles laid down in Section 37 of the Act whether it ultimately turned out to be right or wrong. May be as regards 3 rd accused was concerned, order was passed under misconception of facts. Likewise, the criminal antecedents concerning the first accused did not fall to the notice of this Court. What could at the most be said of the order passed by this Court is that it was erroneous or it did not involve application of mind. But then the question arises is whether the same court could under law reconsider the facts invoking Section 482 of the Code. I am of the opinion that the remedy of the State lay in challenging the orders of this Court, if it was really aggrieved, before a superior forum and not before the same court. Therefore, accepting the argument of the learned counsel for the accused, I hold that none of the applications seeking to recall the order of this Court is maintainable under law.(emphasis supplied)"

7. I have read the status report(s) and heard Mr. G.R. Palsra, learned counsel for the bail petitioner, Mr. Nand Lal Thakur, learned Additional Advocate General for the State of Himachal Pradesh and Ms. Shalini Thakur, learned Amicus Curiae, all through video conference.

8.

9. Prior to the present bail petition, the petitioner had filed a petition under Section 439 CrPC, before the Additional Sessions Judge, Sundernagar, Distt. Mandi, HP. However, vide order dated Apr 2, 2020, the Court had dismissed the petition.

FACTS

10. The gist of the investigation is that on Oct 13, 2016, police party was present at a place near Thalaut, within the jurisdiction of Police Station Aut, Distt. Mandi, HP and they were conducting traffic checking. At around 9.40 p.m. one Maruti van came from the side of Aut Tunnel and reached in front of the Police Station Thalaut. The Police Officials gave indication to the driver of the said Maruti van to stop the vehicle. After some distance the driver of the van made the vehicle come to a halt, and the police officials conducted the search of the vehicle by using torch light. The driver of the vehicle disclosed his name as Pradeep Kumar resident of Kullu. On the back seat, one male and a female, both adults, were sitting. The male adult disclosed his name as Jagdish Lal, the petitioner herein, and the female adult disclosed her name as Raj Kaur. The police found the driver of the van becoming perplexed and he offered the Police to settle the matter. After this the police officials conducted the search of the vehicle. Behind the back seat there was a carton of cardboard and on opening the same, the police recovered eight packets. On checking the same it contained charas. On weighing the same, it was found to be 4 kilograms. It led to the registration of the present FIR under Sections 20, 25 of the NDPS Act. Subsequently, the Police party also complied with the procedural requirements under the NDPS Act and the CrPC and arrested all the occupants of the vehicle including the petitioner herein. During investigation, the bail petitioner told the police that out of the

total charas, 1.5 kg belongs to him. Similarly co-accused Prdeep Kumar told the police that charas measuring 2.5 kg belonged to him. Be that as it may, this is not relevant because it is not statement under Section 67 of the NDPS Act.

ANALYSIS AND REASONING:

11. Pre-trial incarceration needs justification depending upon the heinous nature of the offense, terms of the sentence prescribed in the Statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with victim(s) and/or witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

12. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule of NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offense, also mention that minimum and maximum sentence, depending upon the quantity of the substance. Commercial quantity mandates minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

13. The following aspects are relevant to decide the present bail petition:

(a) As per the FIR, the substance involved is charas, mentioned at Sr. No. 23 of the Notification, issued under Section 2(viia) and (xxiiia) of NDPS Act, specifying small and commercial quantities of drugs and psychotropic substances. The quantity in this case is a commercial quantity.

(b) Needless to say that the rigors of Section 37 of the NDPS Act would not entitle the petitioner for grant of bail, however, at this stage it shall be appropriate to make reference to Section 437 (I) (ii) Cr.PC which provides that the Court may release on bail a person who is sick or infirm. It is beyond any shadow of doubt that the petitioner is extremely sick and infirm. He is suffering from lung-cancer and Covid-19 disease also effects the lungs of a person. A request to grant him interim bail is received through the Superintendent of Jail.

(c) The learned Additional Advocate General also does not dispute the contents of the letter received from the Superintendent of Jail. What this letter implies is that the jail is practically unable to take care of the bail petitioner.

(d) Mr. Nand Lal Thakur, learned Addl. Advocate General also submits that due to the prevailing lock-down due to the spread of Covid-19 pandemic, it shall be extremely difficult for the State to shift this prisoner to a bigger hospital and provide treatment because of the logistics involved.

(e) On seeing the police party, the driver of the Maruti van had became perplexed and the recovery of the contraband was also effected from the boot of the vehicle.

(f) The petitioner is in judicial custody since Oct 14, 2016.

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

(h) Before releasing the petitioner from custody, her/his AADHAR and other proofs of identity would secure presence during trial.

13. The Hon'ble Supreme Court in *Tulsi Ram Yadav vs. State of Uttar Pradesh,* I.A. No. 28851/2020 in Petitions(s) for Special Leave to Appeal (Crl.) No. 10732/2019, dated Mar 27, 2020, held as under:

> "The applicant has been convicted of an offence under Section 302 of the Indian Penal Code. The Special Leave Petition arises from the judgment of the High Court of Allahabad dated 13 May 2019, affirming the conviction and the sentence of life imprisonment. The interlocutory application is for interim bail on medical grounds.
>
> The applicant has been detected to suffer from pancreatic carcinoma. It has been disclosed in the application that the applicant was referred by the Swarup Rani Hospital at Allahabad to the Sanjay Gandhi Postgraduate Institute of Medical Sciences, Lucknow. Mr. Tuhin, learned counsel appearing on behalf of the applicant states that the applicant is presently undergoing indoor treatment at SGPIMS, Lucknow. However, in the current

situation, the surgery has not been specifically scheduled on a particular date. Relevant medical papers have been annexed to the application for interim bail.

Having heard learned counsel appearing on behalf of the applicant and upon perusing the record, we find it appropriate and just to direct that the applicant be released on interim bail for a period of six weeks so as to enable him to pursue the medical treatment which he is undergoing for pancreatic cancer. The applicant shall surrender immediately upon the expiry of the period of six weeks from today. In the meantime, the whereabouts of the applicant shall be communicated by him to the nearest police station on a weekly basis. We are passing this order in the peculiar facts which have been noted above and having regard to the current situation.

The interlocutory application is disposed of in the above terms."

14. Given above, the life of the human being cannot be put to peril simply because his case is pending trial for the last most than three years. Therefore, without going into the merits of the case, keeping in view the extremely bad medical condition of the bail petitioner, this Court deems it appropriate to release him on bail. This Court can safely believe that the health of the petitioner would be a deterrent in his repeating the offence during bail and also because of very bad health it may not be possible for the petitioner to abscond or run away.

15. Given the above reasoning, in my considered opinion, the judicial custody of the petitioner is not going to achieve any significant purpose. Thus, the Court is granting bail and releasing the petitioner on personal bond in the sum of Rs. 50,000/-, subject to the following conditions, irrespective of the contents of the bail bonds:

(a) The petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing personal bond in the sum of Rs.50,000/- (rupees fifty thousand only) to the satisfaction of the Trial Court/Sessions Judge/Addl. Sessions Judge. The trial Court shall intimate the next date of the trial to the petitioner. The Court is dispensing with the requirement of furnishing surety bonds at this stage to avoid travelling of persons to furnish the sureties, to abide by the lockdown ordered by the Government for the safety of the people, by maintaining social distancing to contain the spread of the Covid-19 disease. In case the petitioner continues to appear before the Trial Court then it shall not insist upon surety bonds. However, if the petitioner fails to appear, even for one time before the Trial Court, the only exception being admitted in a hospital, then in such a situation the petitioner shall furnish one surety bond in the sum of Rs. 50,000/- to the satisfaction of the trial Court. In case the petitioner does not attend the Court for the second time, then this bail shall automatically stand cancelled without calling for any further orders from this Court.

(b) The bail bonds shall continue to remain in force throughout the trial and even after that in terms of section 437-A of the CrPC.

(c) The petitioner shall join investigation as and when called by the Investigating officer or any superior officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree treatment, indecent language etc.

(d) The petitioner shall fully co-operate in the investigation and shall not hamper it, in any manner what so ever.

(e) The petitioner shall not influence, threaten, browbeat or pressurize the complainant, witnesses, and the Police official(s).

(f) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade her from disclosing such facts to the Police, or the Court, or tamper with the evidence.

(g) The petitioner shall appear before the trial Court, on issuance of summons/warrant by such Court.

(h) There shall be a presumption of proper service to the petitioner about the date of hearing in the trial Court, even if such service takes place through phone/mobile/SMS/WhatsApp/E-Mail/Facebook or any other similar medium, by the trial Court, or by the Prosecution.

(i) The petitioner shall attend the trial on each date, unless exempted.

(j) In case of Non-appearance on the intimated date, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, subject to the provisions of Sections 446 & 446-A of CrPC. The failure of the petitioner to reimburse the State shall entitle the trial Court to order transfer of money from the bank account(s) of the petitioner, if any. However, this recovery is subject to the condition that the expenditure incurred must be only to trace the petitioner and relates to the exercise undertaken solely to nab the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

(k) The petitioner shall abstain from all criminal activities, if he does so, then in the fresh FIR, the Court shall take into account that even earlier the Court had cautioned the accused not to repeat the offence.

(l) In case the petitioner commits any fresh offence during the bail, then he shall intimate the SHO of the present police station, with all the details of the present and the new FIR, within thirty days of the knowledge of such fresh FIR. In such a situation, it shall be open for the State, if it deems fit and proper, to apply to the trial Court, and in case the trial is yet to commence then to this Court, for cancellation of this bail. The trial Court on receipt of such application shall be competent to cancel the bail if it so decides.

(m) The petitioner shall surrender all firearms along with ammunition, if any, and the arms license to the concerned authority within three months from today.

(n) The petitioner shall inform the SHO about the place of residence during trial. The petitioner shall intimate about the change of residential address, within two weeks from such change, to the police station, and after filing of the Police report also to the trial Court.

(o) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may file an application for cancellation of bail of the petitioner, and even the trial Court shall be competent to cancel the bail.

16. After the release of the petitioner from the Jail the State shall ensure that the relatives of the petitioner get permits to comfortably commute him to the place of his residence.

17. In case the petitioner finds the bail condition(s) as violating fundamental or other rights, including any human right, or faces any other difficulty due to any condition, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, before the Court taking cognizance or the trial Court, as the case may be.

18. The Counsel representing the accused and the Judicial officer accepting the bail bonds, shall explain all conditions of this bail order to the petitioner, in vernacular.

19. The petitioner undertakes to comply with all directions given in this order, and the furnishing of bail bonds by the petitioner is acceptance of all such conditions.

20. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing personal bond in the aforesaid terms.

21. The Court executing the personal bonds shall ascertain the identity of the bail-petitioner, his family members, through AADHAR Card. The petitioner shall give details of AADHAR Card, phone number(s), WhatsApp number, e-mail, Facebook account, etc., Pan Card and Passport if available, on the reverse page of the personal bonds. The petitioner shall also furnish details of personal bank account.

22. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in all other cases, if any, registered against the petitioner.

23. The SHO/Additional SHO of the concerned Police Station or the Investigating Officer shall send a copy of this order, preferably a soft copy, to the complainant.

24. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

25. The petition stands allowed in the terms mentioned above.

26. The Secretary shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the personal bonds shall not insist upon the certified copy of this order, and shall download the same from the website of this Court, which shall be sufficient for the purposes of the record.

27. The Secretary shall handover an authenticated copy of this order to the Counsel for the Petitioner, and to the Ld. Advocate General, if they ask for the same.

This Court expresses its gratitude to Ms. Shalini Thakur, learned Amicus Curiae for rendering valuable assistance in this case.

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

Bhom Bahadur .....Petitioner

Versus

State of Himachal Pradesh

.....Respondent

Cr.MP(M) No. 619 of 2020
Decided on: 21.5.2020

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Section 21- Recovery of 6.27 gms. of heroin and other incriminatory articles from house of accused**-** Regular bail- Grant of – Held, recovered contraband falls in category of small quantity- Rigors of Section 37 of Act are not attracted- No material on record that petitioner is actually a drug peddler- He is in custody for the last about one year- Investigation is complete- In previous cases, accused stands acquitted- His freedom cannot be curtailed for indefinite period during trial- Petition allowed- Petitioner admitted on conditional bail. (Para 4 & 10)

Cases referred;

Dataram Singh vs. State of Uttar Pradesh & Anr, Criminal Appeal No. 227/2018,
Manoranjana Sinh Alias Gupta versus CBI 2017 (5) SCC 218,
Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496,
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49,

Whether approved for reporting? [5] Yes.

For the Petitioner	**:**	Mr. Manoj Pathak, Advocate, through Video Conferencing.
For the Respondent	**:**	Mr. Sudhir Bhatnagar, Additional Advocate General and Mr. Kunal Thakur, Deputy Advocate General, for the State, through Video Conferencing.

Sandeep Sharma, Judge (oral):

By way of present petition filed under Section 439 of Cr.PC, prayer has been made on behalf of the bail petitioner for grant of regular bail in connection with FIR No. 123/2019 dated 1.6.2019 under Section 21 of ND&PS Act (in short "the Act") registered at P.S. Sadar, District Solan, H.P.

2. In terms of order dated 13.5.2020, respondent-State has filed/uploaded status report prepared on the basis of investigation carried out by the Investigating Agency, perusal whereof reveals that on 1.6.2019, police after having received secrete information raided the residential house of the bail petitioner in the presence of two independent witnesses and allegedly recovered 6.27 grams of Heroin/Chitta. Police apart from aforesaid quantity of contraband also recovered three used foil papers, one insulin syringe and folded currency notes. Since no plausible explanation ever came to be rendered on record on behalf of the petitioner for possessing aforesaid contraband, police after completion of necessary codal formalities, registered FIR, as detailed herein above, against the bail petitioner under Section 21 of the Act on 1.6.2019 and since then, he is behind bars.

[5] *Whether the reporters of the local papers may be allowed to see the judgment?*

3. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while putting in appearance on behalf of the State through Video Conferencing contends that though investigation in the case is complete and nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of offence, he does not deserve any leniency and as such, his prayer for grant for bail may be rejected outrightly. Mr. Bhatnagar further contends that though in the case at hand, quantity of contraband allegedly recovered from the bail petitioner is small, but his conduct, which is evident from call details report, clearly reveals that he is in the illegal trade of Narcotics and as such, it would be not in the interest of society at large to enlarge him on bail at this stage. While referring to the record, Mr. Bhatnagar contends that it stands duly admitted by the bail petitioner that he had gone to Delhi for buying Heroin/Chitta from some foreign national and as such, it would not be safe to enlarge the bail petitioner on bail because in the event of his enlargement on bail, he may not only abscond from trial, but may also indulge in such like activities again.

4. Having heard learned counsel for the parties and material available on record, this Court finds that on the date of alleged incident, police recovered 6.27 grams of Chitta/Heroin from the room of the bail petitioner in the presence of two independent witnesses and as such, there is no force in the argument of Mr. Pathak, learned counsel for the petitioner that petitioner has been falsely implicated. However, having taken note of the fact that small quantity of Heroin/Chitta came to be effected from the room of the bail petitioner coupled with the fact that he is behind bars for almost one year, this Court is in agreement with Mr. Manoj Pathak, Advocate, that provisions of Section 37 of the Act are not attracted in the present case. No doubt offence alleged to have been committed by the bail petitioner is of serious nature and has direct impact on society, but this Court cannot loose sight of the fact that guilt, if any, of the bail petitioner is yet to be ascertained by the Investigating Agency by way of cogent and convincing evidence and he is behind bars for almost one year. Status report itself reveals that no case apart from case at hand stands registered against the petitioner under the NDPS Act. Similarly, this court though finds from the record that bail petitioner has admitted before police that he had gone to Delhi to fetch Heroin from some foreign national, but there is no evidence worth the credence available on record suggestive of the fact that the plaintiff is dealing in drugs in connivance with the foreign nationals. No doubt case under various provisions of Indian Penal Code stands registered against the bail petitioner, but that cannot be a ground to deny the bail to him in the instant case, especially when in one or two cases as mentioned in the status report petitioner stands acquitted. Leaving everything aside, guilt, if any, of the bail petitioner is yet to be established on record by the Investigating Agency by leading cogent and convincing evidence and as such, his freedom cannot be curtailed for an indefinite period during trial. Apprehension expressed by the learned Additional Advocate General that in the event of his being enlarged on bail, he may flee from justice, can be best met by putting the bail petitioner to stringent conditions as has been fairly stated by the learned counsel for the petitioner. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly observed/held that one is deemed to be innocent till the time his/her guilt is not proved in accordance with law.

5. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court has further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
>
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the***

country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

6. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

7. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if

left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

8. In **Manoranjana Sinh Alias Gupta** versus **CBI** 2017 (5) SCC 218, The Hon'ble Apex Court has held as under:-

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

9. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
(ii) nature and gravity of the accusation;
(iii) severity of the punishment in the event of conviction;
(iv) danger of the accused absconding or fleeing, if released on bail;
(v) character, behaviour, means, position and standing of the accused;
(vi) likelihood of the offence being repeated;
(vii) reasonable apprehension of the witnesses being influenced; and
(viii) danger, of course, of justice being thwarted by grant of bail.

10. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, bail petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 2,00,000/- each with one local surety in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of

hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall handover passport, if any, to the Investigating Agency.

11. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

12. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone. The petition stands accordingly disposed of.

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BEFORE HON;BLE MR. JUSTICE ANOOP CHITKJARA, J.

Karnail Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 530 of 2020.
Date of Decision : May 04, 2020.

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Sections 18 & 37- Recovery of intermediate quantity (1.5943 Kg) of 'opium' from car of accused- Regular bail- Grant of- Quantity of opium alleged to be recovered from accused falls in intermediate category- Rigors of Section 37 of Act are not applicable- Investigation is complete and petitioner is permanent resident of address mentioned in petition- His judicial custody is not going to achieve any significant purpose- Previous case under the Act though pending against petitioner, but last chance afforded to him to mend his ways- Petitioner admitted on bail with stringent conditions. (Para 7 to 16)

Whether approved for reporting?[6] ***YES***.

For the petitioner : Mr. Nareshwar Singh Chandel, Sr. Advocate with Mr. Rajesh Verma, Advocate.

For the respondent : Mr. Nand Lal Thakur, Addl. A.G. with Mr.Kunal Thakur, Dy. A.G.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge.

For possessing 1.5943 kilograms of Opium, the petitioner, who is under arrest, on being arraigned as accused in FIR Number 11 of 2020, dated 28.01.2020, registered under Section 18-61-85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called "NDPS Act"), in Police Station Damtal, District Kangra, HP, disclosing non-bailable offences, has come up before this Court under Section 439 CrPC, seeking regular bail.

2. While issuing notices to the State, the Court had requested Mr. Nand Lal Thakur, Additional Advocate General to have telephonic instructions in the matter from the concerned Police Station, and to procure status report on or before the next date, either through e-mail or through other options of internet with an advance copy to the learned Counsel for the petitioner.

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6 **Whether reporters of Local Papers may be allowed to see the judgment?**

3. Mr. Nand Lal Thakur, learned Additional Advocate General has filed the status report through e-mail, printout whereof has been placed on record. He further submits that he has sent a copy of the status report to Mr. N.S. Chandel, Senior Advocate, learned Counsel for the petitioner on his WhatsApp number.

4. I have read the status report(s) and heard counsel for the parties through video conference.

5. The petitioner did not file any power of attorney. To contain the spread of Novel Corona Virus, the Epidemiologists have advised to maintain social distancing in the entire world. Consequently, to avoid unnecessary congregation, this Court exempts the petitioner from filing the power of attorney.

6. Prior to the present bail petition, the petitioner had filed a similar petition under Section 439 CrPC, before Special Judge-II, Kangra at Dharamshala. However, vide order dated 7.3.2020, passed in Bail Application No.46-D/XXII/2020, the Court had dismissed the petition.

FACTS

7. The gist of the First Information Report and the status report is that on 28.1.2020, the police party was on patrolling duty for detection of crime within the area of Police Post Dhangu Peer. At around 2.50 p.m., the I.O. received a secret information that Karnail Singh, the petitioner herein indulges in sale of Opium and Poppy husk and if the police conducted search of his house, then huge quantity of narcotic drugs and psychotropic substances can be recovered. The I.O. considered the information to be authentic and after complying with Section 42(2) of the NDPS Act, associated the independent witnesses and reached the house of Karnail Singh. The Police party conducted the search of his car 'Nissan' make bearing No.PB10DN-3176. After opening the same from the keys provided by Karnail Singh, the Police party recovered the plastic box from the Car, which, based upon the experience of the I.O., contained Opium. On weighing the same, it measured 1.5943 kilograms. Subsequently, the Police party also complied with the procedural requirements under the NDPS Act and the CrPC and arrested the petitioner.

PREVIOUS CRIMINAL HISTORY

8. As per the counsel for the petitioner as well as the status report the following cases are registered against the petitioner: -

i) FIR No.247/16, dated 9.10.2016, under Section 15- 61-85 NDPS Act, Police Station, Indora, District Kangra, H.P.

SUBMISSIONS:

9. The learned counsel for the bail petitioner submits that the allegations against the petitioner are false and he has nothing to do with the said allegations. He further states that petitioner has to shoulder responsibility of his family and also submitted that his bail petition be considered on humanitarian grounds in view of the spread of the Covid-19 pandemic.

ANALYSIS AND REASONING:

10. Pre-trial incarceration needs justification depending upon the heinous nature of the offence, terms of the sentence prescribed in the Statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with victim(s) and/or witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

11. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule of NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offense, also mention that minimum and maximum sentence, depending upon the quantity of the substance. Commercial quantity mandates minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

12. The following aspects are relevant to decide the present bail petition:

(a) As per the FIR, the substance involved is Opium, mentioned at Sr. No. 92 of the Notification, issued under Section 2(viia) and (xxiiia) of NDPS Act, specifying small and commercial quantities of drugs and psychotropic substances, wherein the small quantity is lesser than 25 grams, whereas commercial quantity if greater than 2.5 kilograms.

b) The quantity of drug involved is less than Commercial Quantity. As such the rigors of Section 37 of NDPS Act shall not apply in the present case. Resultantly, the present case has to be treated like any other case of grant of bail in a penal offence.

c) Although there is criminal history of the bail petitioner and on this ground learned Court below had rejected the bail application of the petitioner. But keeping in view the current Covid-19 pandemic, the petitioner has come up again before this Court on the grounds that his family is facing extreme financial difficulty and the family is extremely concerned about each other. **This Court is inclined to afford last opportunity to the Petitioner to mend his ways, making it very clear that in case, the petitioner repeats the offence, then this bail shall automatically stand cancelled and it shall also be a factor for future bail applications by the petitioner**.

(d) The material aspect of the investigation is complete.

(e) The petitioner is in judicial custody since 28.1.2020.

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

(g) Before releasing the petitioner from custody, her/his AADHAR and other proofs of identity to secure presence during trial.

8. Given the above reasoning, in my considered opinion, the judicial custody of the petitioner is not going to achieve any significant purpose. Thus, the Court is granting bail, subject to the following conditions, irrespective of the contents of the bail bonds, and the furnishing of personal bond shall be deemed acceptance of all stipulations, terms and conditions of this bail order:

(a) The petitioner shall furnish personal bond in the sum of Rs.50,000/- and one surety in the like amount, to the satisfaction of the Sessions Court/Special Court/ Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court exercising jurisdiction over the concerned Police Station where FIR is registered. The petitioner be released on his personal bonds and further he shall furnish the surety bond of the similar amount, on or before Jun 30, 2020, failing which this bail shall automatically stand cancelled and the petitioner shall surrender on Jul 1, 2020, before the Court accepting the bond, from where he is being released. The Court is dispensing with the requirement of furnishing surety bond at this stage to avoid travelling of persons to furnish the sureties, to abide by the lockdown ordered by the Government for the safety of the people, by maintaining social distancing to contain the spread of the Covid-19 disease.

(b) The bail bonds shall continue to remain in force throughout the trial and even after that in terms of Section 437-A of the CrPC.

(c) The petitioner shall join investigation as and when called by the Investigating officer or any superior officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree treatment, indecent language etc.

(d) The petitioner shall fully co-operate in the investigation and shall not hamper it, in any manner what so ever.

(e) The petitioner shall not influence, threaten, browbeat or pressurize the complainant, witnesses, and the Police official(s).

(f) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade her from disclosing such facts to the Police, or the Court, or tamper with the evidence.

(g) The petitioner shall appear before the trial Court, on issuance of summons/warrants by such Court.

(h) There shall be a presumption of proper service to the petitioner about the date of hearing in the trial Court, even if such service takes place through phone/mobile/SMS/WhatsApp/E-Mail/Facebook or any other similar medium, by the trial Court, or by the Prosecution. In case the petitioner does not appear before the trial Court on such date of hearing, then the trial Court may issue bailable warrants, and if the petitioner still fails to put in appearance, then the trial Court may issue Non-Bailable

warrants to procure the presence of the petitioner, and send the petitioner to the Judicial custody for the period for which the trial Court may deem fit and proper, without being unduly harsh towards him.

(i) The petitioner shall attend the trial on each date, unless exempted.

(j) In case of Non-appearance on the intimated date, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, subject to the provisions of Sections 446 & 446-A of CrPC. The failure of the petitioner to reimburse the State shall entitle the trial Court to order transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be only to trace the petitioner and relates to the exercise undertaken solely to nab the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

(k) The petitioner shall abstain from all criminal activities, if he does so, then in the fresh FIR, the Court shall take into account that even earlier the Court had cautioned the accused not to repeat the offence.

(l) During the pendency of the trial, if the petitioner commits any offence under NDPS Act, even if it involves small quantity or if he commits any offence where the sentence prescribed is seven years or more, then this bail order shall stand cancelled automatically. In such a situation, the bail already granted to the petitioner in previous case registered against him, (as mentioned supra), vide FIR No.247/16, shall be liable to be cancelled and the State shall move appropriate application for its cancellation.

(m) The petitioner shall surrender all firearms along with ammunitions, if any, and the arms license to the concerned authority within 30 days from today.

(n) The petitioner shall inform the SHO about the place of residence during trial. The petitioner shall intimate about the change of residential address, within two weeks from such change, to the police station, and after filing of the Police report also to the trial Court.

(o) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may file an application for cancellation of bail of the petitioner, and even the trial Court shall be competent to cancel the bail.

16. In case the petitioner finds the bail condition(s) as violating fundamental or other rights, including any human rights, or faces any other difficulty due to any condition, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, before the Court taking cognizance or the trial Court, as the case may be.

17. The Counsel representing the accused and the Judicial officer accepting the bail bonds, shall explain all conditions of this bail order to the petitioner, in vernacular.

18. The petitioner undertakes to comply with all directions given in this order, and the furnishing of bail bonds by the petitioner is acceptance of all such conditions.

19. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing personal bond in the aforesaid terms.

20. The Court attesting the personal bonds shall ascertain the identity of the bail-petitioner, his family members, through AADHAR Card. The petitioner shall give details of AADHAR Card, phone number(s), WhatsApp number, e-mail, Facebook account, etc., Pan Card and Passport if available, on the reverse page of the personal bonds. The petitioner shall also furnish details of personal bank account(s).

21. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation.

22. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in all other cases, if any, registered against the petitioner.

23. The SHO/Additional SHO of the concerned Police Station or the Investigating Officer shall send a copy of this order, preferably a soft copy, to the complainant.

24. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

25. The petition stands allowed in the terms mentioned above.

26. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the District and Sessions

Judge, concerned, by e-mail. The Court attesting the personal bonds shall not insist upon the certified copy of this order, and shall download the same from the website of this Court, which shall be sufficient for the purposes of the record.

27. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner, and to the Learned Advocate General, if they ask for the same.

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

Ram Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 600 of 2020.
Date of Decision : 05th May, 2020.

Code of Criminal Procedure, 1973- Section 438- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Section 18 – Illegal cultivation of 'opium plants'- Pre-arrest bail- Grant of- Held, offence of cultivation of 'opium plants' falls in intermediate category- Rigors of Section 37 of Act are not attracted in the case- Petitioner is permanent resident of address mentioned in petition and his presence can always be ensured- Petitioner admitted on anticipatory bail on account of prevailing COVID-19 pandemic with warning to mend his ways and subject to his joining investigation, not to influence or threaten witnesses etc. (Para 12 & 13)

The Hon'ble Mr. Justice Anoop Chitkara, Judge.

Whether approved for reporting?[7] ***Yes***.

For the petitioner : Mr. Y.P.S. Dhaulta, Advocate.

For the respondent : Mr. Nand Lal Thakur, Addl. A.G. with Mr. Kunal Thakur, Dy. A.G.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge.

Apprehending his imminent arrest on being arraigned as an accused in FIR number 0062/2020, registered under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called "NDPS Act"), in Police Station, Anni, District Kullu, HP, disclosing non-bailable offences, for allegedly cultivating 645 number of opium plants allegedly in his agricultural fields situated in Village Kanshan, Post Office Kamand, Tehsil Anni, District Kullu, Himachal Pradesh, the petitioner has come up under section 438 CrPC, seeking anticipatory bail.

2. While issuing notices to the State, the Court had requested Mr. Nand Lal Thakur, Additional Advocate General to have telephonic instructions in the matter from the concerned Police Station, and to procure status report immediately, either through WhatsApp/ e-mail and forward the same to this Court on e-mail id highcourt-hp@nic.in and also send the scanned copy or PDF copy of the status report to the learned Counsel for the petitioner on his WhatsApp number.

3. Mr. Nand Lal Thakur, learned Additional Advocate General has filed the status report through e-mail, printout whereof has been placed on record. He further submits that he has sent a copy of the status report to Mr. Y.P.S Dhaulta, Advocate, learned Counsel for the petitioner on his WhatsApp number.

4. I have read the status report(s) and heard counsel for the parties through video conference.

5. The petitioner did not file any affidavit and power of attorney. To contain the spread of Novel Corona Virus, the Epidemiologists have advised to maintain social distancing in the entire world. Consequently, to avoid unnecessary congregation, this Court exempts the petitioner from filing the affidavit as well as the power of attorney.

6. The Petitioner has straightaway come to this Court and did not choose to approach the Special Court/Sessions Court.

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[7] **Whether reporters of Local Papers may be allowed to see the judgment?**

FACTS

7. The gist of the First Information Report and the status report is that the on 25.4.2020, when the police party was conducting investigation, they noticed opium having been planted in two fields. The further investigation revealed that these fields belong to Ram Singh, the petitioner herein. On reaching the fields, the police party took photographs, conducted measurement and recovered 645 plants of opium. The police took into possession ten plants of opium as sample and destroyed the remaining plants as per the orders of Sub Divisional Police Officer, who was also present on the spot. Subsequently, the Police party also complied with the procedural requirements under the NDPS Act and the CrPC and arrested the petitioner.

PREVIOUS CRIMINAL HISTORY

8. As per the learned counsel for the petitioner as well as the status report, the petitioner has no criminal history.

SUBMISSIONS:

9. The learned counsel for the bail petitioner submits that the allegations against the petitioner are false and he has nothing to do with the said allegations. He further contends that probably a citizen of Nepal has cultivated these plants and he had no knowledge or information about it.

10. Mr. Nand Lal Thakur, Learned Additional Advocate General for the State contends that offence is serious and in case this Court grants protection then such relief must be with stringent conditions.

ANALYSIS AND REASONING:

11. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule of NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offense, also mention that minimum and maximum sentence, depending upon the quantity of the substance. Commercial quantity mandates minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

12. The following aspects are relevant to decide the present bail petition:

(a) As per the FIR, the contraband involved is opium plants, which prima facie falls in the intermediate quantity. As such the rigors of Section 37 of NDPS Act shall not apply in the present case. Resultantly, the present case has to be treated like any other case of grant of bail in a penal offence.

b) **Keeping in view the current Covid-19 pandemic,this Court is inclined to afford last opportunity to the Petitioner to mend his ways, making it very clear that in case, the petitioner repeats the offence, then this bail shall automatically stand cancelled and it shall also be a factor for future bail applications by the petitioner**.

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

13. Given the reasons above, in the event of arrest of the petitioner, he shall be released on bail, in connection with the FIR mentioned above, on his furnishing personal bond in the sum of Rs. 10,000/- with one surety in the like amount to the satisfaction of the arresting officer.

(a) The petitioner shall join investigation as and when called by the Investigating officer or any superior officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree treatment, indecent language etc.

(b) The petitioner shall fully co-operate in the investigation and shall not hamper it, in any manner what so ever.

(c) The petitioner shall not influence, threaten, browbeat or pressurize the complainant, witnesses, and the Police official(s).

(d) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade her from disclosing such facts to the Police, or the Court, or tamper with the evidence.

(e) The petitioner shall appear before the trial Court, on issuance of summons/warrants by such Court, and shall furnish fresh bail bonds, if asked to do so.

(f) There shall be a presumption of proper service to the petitioner about the date of hearing in the trial Court, even if such service takes place through phone/mobile/SMS/ WhatsApp/E-Mail/Facebook or any other similar medium, by the trial Court, or by the Prosecution. In case the petitioner does not appear before the trial Court on such date of hearing, then the trial Court may issue bailable warrants, and if the petitioner still fails to put in appearance, then the trial Court may issue Non-Bailable warrants to procure the presence of the petitioner, and send the petitioner to the Judicial custody for the period for which the trial Court may deem fit and proper, without being unduly harsh towards him.

(g) The petitioner shall attend the trial on each date, unless exempted.

(h) In case of Non-appearance on the intimated date, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, subject to the provisions of Sections 446 & 446-A of CrPC. The failure of the petitioner to reimburse the State shall entitle the trial Court to order transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be only to trace the petitioner and relates to the exercise undertaken solely to nab the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

(i) The petitioner shall abstain from all criminal activities, if he does so, then in the fresh FIR, the Court shall take into account that even earlier the Court had cautioned the accused not to repeat the offence.

(j) During the pendency of the trial, if the petitioner commits any offence under NDPS Act, even if it involves small quantity or if he commits any offence where the sentence prescribed is seven years or more, then the State may move appropriate application for its cancellation.

(k) The petitioner shall surrender all firearms along with ammunitions, if any, and the arms license to the concerned authority within 60 days from today.

(l) The petitioner shall inform the SHO about the place of residence during trial. The petitioner shall intimate about the change of residential address, within two weeks from such change, to the police station, and after filing of the Police report also to the trial Court.

(m) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may file an application for cancellation of bail of the petitioner, and even the trial Court shall be competent to cancel the bail.

14. In case the petitioner finds the bail condition(s) as violating fundamental or other rights, including any human rights, or faces any other difficulty due to any condition, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, before the Court taking cognizance or the trial Court, as the case may be.

15. The Investigating Officer accepting the bail bonds, shall explain all conditions of this bail order to the petitioner, in vernacular.

16. The petitioner undertakes to comply with all directions given in this order, and the furnishing of bail bonds by the petitioner is acceptance of all such conditions.

17. The Arresting Officer shall ascertain the identity of the bail-petitioner, his family members, through AADHAR Card. The petitioner shall give details of AADHAR Card, phone number(s),

WhatsApp number, e-mail, Facebook account, etc., Pan Card and Passport if available, on the reverse page of the personal bonds. The petitioner shall also furnish details of personal bank account(s).

18. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation.

19. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in all other cases, if any, registered against the petitioner.

20. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments. The petition stands allowed in the terms mentioned above.The Police Officer attesting the personal bonds shall not insist upon the certified copy of this order, and shall download the same from the website of this Court, which shall be sufficient for the purposes of the bonds.The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner, and to the Learned Advocate General, if they ask for the same.

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

Saroj Kumari ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 668 of 2020.

Date of Decision: May 20, 2020.

Code of Criminal Procedure, 1973- Section 439- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**- Sections 3(i)(s) and 3(ii)(va)- Regular bail- Whether accused is required to be in custody or his surrender before Court is necessary for seeking bail under Section 439 of Code? – Held, in a petition filed under Section 439 of Code, it is obligatory for the bail petitioner to be in custody or surrender before the Court- Petitioner filing petition under Section 439 of Code directly before High Court without actually surrendering before it- Transport services stopped by State to contain spread of COVID-19 disease- Petitioner directed to surrender in a nearby Court and compliance therewith to be taken as surrender before the High Court for bail- Petitioner admitted on bail subject to conditions including condition as to surrendering before Court of nearly Judicial Magistrate and furnishing personal bond there on that date itself. (Para 10, 11 & 26)

Code of Criminal Procedure, 1973- Section 439- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act)**- Sections 3(i)(s) and 3(ii)(va)- Practice of surrendering before Court of Sessions/ High Court and obtaining bail for offences under the Act – Legality of- Held, practice of accused surrendering before Sessions Court or High Court and thereafter obtaining bail for offences under the Act, cannot be said to be within a view to override the legislative intention of restraining anticipatory bail to violators of the Act. (Para 25)

Cases referred;

Dr. N.T. Desai vs. State of Gujarat, (1997) 2 GLR 942,

India Assurance v. Krishna Kumar Pandey, 2019 SCC Online SC 1786;

Jones versus State, 2004 Cr.LJ 2755,

Karam Dass and others v. State of H.P., 1995 (1) Shim.L.C 363,

Niranjan Singh v. Prabhakar Rajaram Kharote, 1980 Cri.LJ 426,

State of M.P. v. Ram Kishan, 1995(3) SCC 221,

Vilas Pandurang Pawar v. State of Maharasthra, 2012 (8) SCC 795,

Whether approved for reporting?[1] ***YES***.

For the petitioner : Mr. Sanjeev Kumar Suri, Advocate.

For the respondent : Mr. Nand Lal Thakur, Addl. A.G.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge.

The petitioner, after being arraigned as an accused in FIR No. 70 of 2020, under Sections 323 & 506 of IPC and Ss. 3(i)(s) and 3 (ii)(va) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989, after now called 'SCST Act', dated 18-05-2020, registered in the file of Police Station Gohar, District Mandi, HP, came up under section 439 CrPC, without surrendering before this Court, and simultaneously obtained ad-interim bail.

2. While issuing notices to the State, the Court had requested Mr. Nand Lal Thakur, Additional Advocate General to have telephonic instructions in the matter from the concerned Police Station, and to procure status report immediately, either through WhatsApp/ e-mail and forward the same to this Court on e-mail id highcourt-hp@nic.in and also send the scanned copy or PDF copy of the status report to the learned Counsel for the petitioner on his WhatsApp number.
3. Mr. Nand Lal Thakur, learned Additional Advocate General has filed the status report through e-mail, printout whereof has been placed on record. He further submits that he has sent a copy of the status report to Mr. Sanjeev Kumar Suri, Advocate, learned Counsel for the petitioner on his WhatsApp number.
4. I have read the status report(s) and heard counsel for the parties through video conference.
5. The petitioner did not file any power of attorney. To contain the spread of Novel Corona Virus, the Epidemiologists have advised to maintain social distancing in the entire world. Consequently, to avoid unnecessary congregation, this Court exempts the petitioner from filing the power of attorney.
6. The Petitioner did not file any petition before Special Judge/Sessions Court and has straightaway come up before this Court. However, that is inconsequential.

PREVIOUS CRIMINAL HISTORY

7. As per the counsel for the petitioner, the petitioner has no criminal history.

SUBMISSIONS:

7. The learned counsel for the bail petitioner submits that the case was lodged by the complainant to coverup their own act, conduct and a false, baseless and concocted case has been registered against her. The Ld. Counsel further contends that she is a permanent resident of the address mentioned in the memo of parties and there is no likelihood of her fleeing away and that she is ready to abide by all the conditions which may be imposed upon her.
8. Mr. Nand Lal Thakur, Ld. Additional Advocate General, states that in case this Court is inclined to grant bail, then it must be subject to stringent conditions.

9. In a petition filed under Section 439 CrPC, it is obligatory for the bail petitioner to be in custody or to surrender before the Court. However, due to the spread of Covid-19 disease, the State has stopped transport services and thus, it is not practically possible for the petitioner to travel up to Shimla. However, the Petitioner can surrender in a nearby Court and her surrender in such Court shall be her deemed surrender before this Court for the purpose of this bail.
10. **Consequently, let the bail petitioner surrender herself before the Court of Ld. Judicial Magistrate, Gohar, District Mandi, during the course of the day, either in the Court complex or at the residence of the concerned Magistrate, as the concerned Judicial Magistrate may desire. Once she surrenders, the concerned Judicial Magistrate shall accept her personal bonds and release her on bail. It is clear that on her failure to surrender on or before 5 p.m. on 20-05-2020, this bail order shall expire, amount to automatic recalling of this order without any further action on the part of this Court, in view of S. 362 CrPC and the Judicial pronouncement of a larger bench of Hon'ble Supreme Court in New India Assurance v. Krishna Kumar Pandey, 2019 SCC Online SC 1786,**

ANALYSIS AND REASONING:

7. Pre-trial incarceration needs justification depending upon the heinous nature of the offence, terms of the sentence prescribed in the Statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with victim(s) and/or witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.
8. Section 3 (1) (s) of the Act reads as follows: -

"*abuses any member of a Scheduled Caste or a Scheduled Tribe by caste name in any place within public view:"*

7. Section 18 and 18A of the Act bars the filing of application under Section 438 of the Code of Criminal Procedure and no anticipatory bail can be given to a person against whom allegations under the Act are leveled. For this reason, the petition is filed under Section 439 of the Code of Criminal Procedure.
8. I believe that the custodial interrogation of the petitioner is not going to serve any purpose.
9. Sections 18 & 18-A of SCST Act, 1989, bar the rights of anticipatory bail under Section 438 of the Code of Criminal Procedure. The provisions read as under:-

> "18. Section 438 of the Code not to apply to persons committing an offence under the Act.—Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.
>
> "18A. (1) For the purposes of this Act,— (a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or (b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply. (2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."

7. It is no more *res-integra* that provisions of Section 438 of the Code of Criminal Procedure are not applicable in cases registered under the provisions of SCST Act.
8. In *State of M.P. v. Ram Kishan*, 1995(3) SCC 221, Supreme Court upheld the Constitutional validity of Section 18 of SCST Act, holding: -

> "9. Of course, the offences enumerated under the present case are very different from those under the Terrorists and Disruptive Activities (Prevention) Act, 1987. However, looking to the historical background relating to the practice of "Untouchability" and the social attitudes which lead to the commission of such offences against Scheduled Castes and Scheduled Tribes, there is justification for an apprehension that if the benefit of anticipatory bail is made available to the persons who are alleged to have committed such offences, there is every likelihood

of their misusing their liberty while on anticipatory bail to terrorise their victims and to prevent a proper investigation. It is in this context that Section 18 has been incorporated in the said Act. It cannot be considered as in any manner violative of Article 21.

10. It was submitted before us that while Section 438 is available for graver offences under the Penal Code, it is not available for even "minor offences" under the said Act. This grievance also cannot be justified. The offences which are enumerated under Section 3 are offences which, to say the least, denigrate members of Scheduled Castes and Scheduled Tribes in the eyes of society, and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude. These offences constitute a separate class and cannot be compared with offences under the Penal Code.

11. A similar view of Section 18 of the said Act has been taken by the Full Bench of the Rajasthan High Court in the case of Jai Singh v. Union of India, AIR 1993 Rajasthan 177 and we respectfully agree with its findings.

12. In the premises, Section 18 of the said Act cannot be considered as violative of Articles 14 and 21 of the Constitution."

7. In *Vilas Pandurang Pawar v. State of Maharasthra*, 2012 (8) SCC 795, Supreme Court holds as under:-

"9. The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence."

7. Supreme Court relied upon this precedent in, *Bachu Das v. State of Bihar*, 2014(1) R.C.R. (Criminal) 975.

8. In *Niranjan Singh v. Prabhakar Rajaram Kharote*, 1980 Cri.LJ 426, Justice V.R. Krishna Iyer, J., speaking for the bench of Supreme Court, holds as follows: -

"8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or an least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can, be stated to be in judicial custody when he surrenders before the court and submits to its directions. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and may be, enabled the accused persons to circumvent the principle of Section 439 Criminal Procedure Code We might have taken a serious view of such a course, indifferent to mandatory provisions by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court. Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail

and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We, therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but sitting under Article 136 do not feel that we should interfere with a discretion exercised by the two courts below."

7. A Bench of this Court in *Karam Dass and others v. State of H.P.*, 1995 (1) Shim.L.C 363, accepted the surrender of the persons who had been arraigned as accused in an FIR under SCST Act, and released them on bail, by exercising its powers under section 439 CrPC.
8. In Jones versus State, 2004 Cr.LJ 2755, Madras High Court, observed:-

"16. This Court recently has brought to light the misuse of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 against people of other community. This is another example of misuse of the Act. The purpose of bringing SC & ST Act is to put down the atrocities committed on the members of the scheduled castes and scheduled tribes. The law enforcing authorities must bear in mind that it cannot be misused to settle other disputes between the parties, which is alien to the provisions contemplated under the Act. An Act enacted for laudable purpose can also become unreasonable, when it is exercised overzealously by the enforcing authorities for extraneous reasons. It is for the authorities to guard against such misuse of power conferred on them."

7. In Dr. N.T. Desai vs. State of Gujarat, (1997) 2 GLR 942, High Court of Gujrat, observed:

"... 8.... But then having closely examined the complaint more particularly in the context and light of the backdrop of the peculiar facts situation highlighted by the petitioner leading ultimately to filing of the complaint, this Court prime facie at the very outset is at some doubt about the complainant's story and yet if it readily, mechanically like a gullible child accepts the allegations made in the complaint at its face value, it would be surely blundering and wandering away from the path of bail-justice, making itself readily available in the hands of the scheming complainant who on mere asking will get arrested accused on some false allegations of having committed non-bailable offence, under the Atrocity Act, meaning thereby the Court rendering itself quite deaf, dumb and blind mortgaging its commonsense, ordinary prudence with no perception for justice, denying the rightful protection to the accused becoming ready pawn pliable in the hands of sometime scheming, unscrupulous complainants !!! This sort of a surrender to prima facie doubtful allegation in the complaint is not at all a judicial approach, if not unjudicial !! At the cost of repetition, I make it clear that these observations are only preliminary, at this stage only in peculiar background of the case highlighted by petitioner-accused and for that purpose may be even in future be so highlighted by the accused in some other cases to the satisfaction of the Court ! The reason is having regard to the basic cardinal tenets of the criminal jurisprudence more particularly in view of the peculiar circumstances highlighted by the accused which allegedly actuated complainant to victimise him, in case if ultimately at the end of trial what the accused has submitted in defence is accepted as probable or true and as a result, the accused is given a clean bill, holding that the complaint was nothing else but false, concoction by way of spite to wreck the personal vengeance then in that case what indeed would be the remedy and redresses in the hands of the petitioner, who in the instant case is Doctor by profession and for that purpose in other cases an innocent citizen? He stands not only stigmatised by filing of a false complaint against him but he shall stand further subjected to trial !! Not only that but before that even subjected to arrest before the public eye and taken to Special Court where only he could pray for bail ! Thus, subjected to all sort of agonies, pains and sufferings lowering his image and esteem in the eye of public because the Court when approached adopted the helpless attitude? Under such bewildering circumstances, what indeed would be the face of the Court and the fate of the Administration of Justice

denying bail to some victimised innocent accused at crucial stage when he surrenders to the Court custody for the purpose?!! Should the Court proclaiming doing justice stand befooled at the hands of some mischievous complainant with head-down in shame !! Supposing for giving false evidence before the Court, the complainant is ordered to be prosecuted, but then will such prosecutions of complainant bring back the damage already done to an innocent !! Bearing in mind this most embarrassing and excruciating situation created by the complainant when, this Court as a Constitutional functionary is duty bound to zealously protect the liberty of citizen, should it be helplessly watching and passively surrendering itself to sometimes prima facie ex-facie malicious complaint denying simple bail to the accused? In this regard, perhaps, it may be idly said that accused can be given compensation for the malicious prosecution 22 and ultimate refusal of bail or anticipatory bail !! True, but then in that case what compensation can any Court would be in a position to give when the complainant is a person who is poor enough unable to pay a single pie?!! Not only that but in case complainant is rich and able to pay compensation then even can any monetary compensation ever adequately compensate the wrong accused suffered at the hands of the malicious complainant? It is here that the conscience of this Court stands pricked and terribly perturbed and indeed will have a sleepless night if what ought we do not know where the petitioner, in the facts and circumstances of the case be quite innocent and accordingly a needy consumer of bail justice and yet is unnecessarily subjected to arrest taken to the police custody and then before Court because of denial of bail to him at this stage !!"

7. The practice of accused surrendering before Sessions Court or High Court and thereby obtaining bail, cannot be said to be with a view to override the legislative intention of restraining the anticipatory bail to the violators of the SCST Act. If the allegations are serious, keeping in view the object of the SCST Act and the purpose for which this stringent provision in SCST Act was enacted, then certainly, such kind of accused would not be permitted to take advantage bails after surrender. However, when prima facie, the Court notices that the provisions have been used as a tool to send people in custody, then in such cases, it shall be prudent, proper and legal to grant *ad-interim* bail or regular bails. The Courts cannot be mute spectators, even when from the face of the allegations, it is seen that the provisions of the SCST Act have been invoked simply with a view to deny the benefit of Section 438 of the Code of Criminal Procedure.

26. Given the above reasoning, in my considered opinion, the judicial custody of the petitioner is not going to achieve any significant purpose. Thus, the Court is granting bail, subject to the following conditions, irrespective of the contents of the bail bonds, and the furnishing of personal bond shall be deemed acceptance of all stipulations, terms and conditions of this bail order:

(a) The petitioner shall furnish personal bond in the sum of Rs. 10,000/- and one surety in the like amount, to the satisfaction of the concerned Ilaqua Magistrate/Duty Magistrate. The petitioner be released without sending her to lockup, upon her furnishing personal bonds. The Petitioner shall also furnish one surety bond of the similar amount, on or before June 30, 2020, failing which this bail shall automatically stand cancelled and the petitioner shall surrender on Jul 1, 2020, before the Court accepting the bond, from where she is being released. The Court is dispensing with the requirement of furnishing surety bond at this stage to avoid travelling of persons to furnish the sureties, to abide by the lockdown ordered by the Government for the safety of the people, by maintaining social distancing to contain the spread of the Covid-19 disease.

(b) The bail bonds shall continue to remain in force throughout the trial and even after that in terms of Section 437-A of the CrPC. Before releasing the petitioner from custody, her AADHAR and other proofs of identity to secure presence during trial.

(c) The petitioner shall join investigation as and when called by the Investigating officer or any superior officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and

shall be let off before 5 PM. The petitioner shall not be subjected to third-degree treatment, indecent language etc.

(d) The petitioner shall fully co-operate in the investigation and shall not hamper it, in any manner what so ever.

(e) The petitioner shall not influence, threaten, browbeat or pressurize the complainant, witnesses, and the Police official(s).

(f) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade her from disclosing such facts to the Police, or the Court, or tamper with the evidence.

(g) The petitioner shall appear before the trial Court, on issuance of summons/warrants by such Court.

(h) There shall be a presumption of proper service to the petitioner about the date of hearing in the trial Court, even if such service takes place through phone/mobile/SMS/WhatsApp/E-Mail/Facebook or any other similar medium, by the trial Court, or by the Prosecution. In case the petitioner does not appear before the trial Court on such date of hearing, then the trial Court may issue bailable warrants, and if the petitioner still fails to put in appearance, then the trial Court may issue Non-Bailable warrants to procure the presence of the petitioner, and send the petitioner to the Judicial custody for the period for which the trial Court may deem fit and proper, without being unduly harsh towards him.

(i) The petitioner shall attend the trial on each date, unless exempted.

(j) In case of Non-appearance on the intimated date, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, subject to the provisions of Sections 446 & 446-A of CrPC. The failure of the petitioner to reimburse the State shall entitle the trial Court to order transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be only to trace the petitioner and relates to the exercise undertaken solely to nab the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

(k) The petitioner shall abstain from all criminal activities, if he does so, then in the fresh FIR, the Court shall take into account that even earlier the Court had cautioned the accused not to repeat the offence.

(l) During the pendency of the trial, if the petitioner commits any offence under SCST Act, then this bail shall be liable to be cancelled and the State shall move appropriate application for its cancellation.

(m) The petitioner shall surrender all firearms along with ammunitions, if any, and the arms license to the concerned authority within 60 days from today.

(n) The petitioner shall inform the SHO about the place of residence during trial. The petitioner shall intimate about the change of residential address, and phone numbers, within two weeks from such change, to the police station, and after filing of the Police report also to the trial Court.

(o) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may file an application for cancellation of bail of the petitioner, and even the trial Court shall be competent to cancel the bail.

27. In case the petitioner finds the bail condition(s) as violating fundamental or other rights, including any human rights, or faces any other difficulty due to any condition, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, before the Court taking cognizance or the trial Court, as the case may be.
28. The Counsel representing the accused and the Judicial officer accepting the bail bonds, shall explain all conditions of this bail order to the petitioner, in vernacular.
29. The petitioner undertakes to comply with all directions given in this order, and the furnishing of bail bonds by the petitioner is acceptance of all such conditions.
30. Consequently, the petitioner shall be released on bail during the course of the day, in the present case, in connection with the FIR mentioned above, on her furnishing personal bond in the aforesaid terms.
31. The Court attesting the personal bonds shall ascertain the identity of the bail-petitioner, her family members, through AADHAR Card. The petitioner shall give details of AADHAR Card, phone number(s), WhatsApp number, e-mail, Facebook account, etc., Pan Card and Passport if available, on the reverse page of the personal bonds. The petitioner shall also furnish details of personal bank account(s).
32. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation.
33. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in all other cases, if any, registered against the petitioner.
34. The SHO/Additional SHO of the concerned Police Station or the Investigating Officer shall send a copy of this order, preferably a soft copy, to the complainant.
35. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.
36. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the Judicial Magistrate, Gohar, District Mandi, Himachal Pradesh, by e-mail. The Court attesting the personal bonds shall not insist upon the certified copy of this order, and shall download the same from the website of this Court, which shall be sufficient for the purposes of the record.
37. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner, and to the Learned Advocate General, if they ask for the same.
38. The petition stands allowed in the terms mentioned above.

1 **Whether reporters of Local Papers may be allowed to see the judgment?**

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

1. CMPMO No.: 550 of 2017
Rupa Suri ....Petitioner.
Vs.
Neelam Rana .....Respondent.

2. CMPMO No. 551 of 2017
Sanjiv Dewan ....Petitioner.
Vs.
Neelam Rana ....Respondent.

3. CMPMO No. 171 of 2018
Smt. Neelam Rana .....Petitioner.
Vs.
Smt. Roopa Suri ....Respondent.

4. CMPMO No. 173 of 2018
Smt. Neelam Rana .....Petitioner.
Vs.
Sh. Sanjeev Diwan .....Respondent.

5. CMPMO No.: 175 of 2018
Smt. Neelam Rana ....Petitioner.

Vs.

Sh. Mukesh Thareja ....Respondent.

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6. CMPMO No. 394 of 2018

Mukesh Thareja ....Petitioner.

Vs.

Neelam Rana ....Respondent

CMPMO No.: 550 of 2017 a/w
CMPMO No. 551 of 2017 and CMPMO Nos. 171, 173, 175 and 394 of 2018
Reserved on: 27.05.2020
Date of Decision: 02.06.2020

.**Constitution of India, 1950**- Article 227- Supervisory jurisdiction of High Court- Scope- Held, while exercising power of superintendence, the High Court has to act within bounds- It can neither be called upon nor it should enter in to adjudication of main lis pending between parties as if it was the original Court hearing the dispute- High Court will only go into the legality of orders of Lower Court which are being assailed by invoking jurisdiction under Article 227 of the Constitution. (Para 37 & 38)

Limitation Act, 1963- Section 21(1)- Joining of additional parties to suit after its institution- Commencement of date of suit by or against such parties - Held, as regards newly added plaintiff or defendant, suit shall be deemed to have been instituted when he was so made a party provided where Court is satisfied that omission to include a new plaintiff or defendant was due to mistake in good faith, it may direct that suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. (Para 44)

Code of Civil Procedure, 1908- Order 1 Rule 9, proviso- Non-joinder of a necessary party- Consequences- Held, suit shall be defeated for non-joinder of a necessary party. (Para 45)

Code of Civil Procedure, 1908- Order 1 Rule 10- Purpose and object- Held, object of Order 1 Rule 10 of Code is to discourage contest on technical pleas and to save honest and bonafide claimants from being non-suited. (Para 53)

Code of Civil Procedure, 1908- Order 1 Rule 10- Application for impleadment of additional defendant- Trial Court allowing application of plaintiff and directing impleadment of 'RS' as additional defendant- Challenge thereto- Held, no material on record showing that on account of some bonafide error 'RS' was not impleaded as party to suit- Application was just an attempt to fill up lacunae in suit in view of objections taken by defendants in their respective written statements- Application was filed at a belated stage- Even many opportunities were taken by plaintiff for adducing evidence and only thereafter application for impleadment of 'RS' was filed- Plaintiff did not approach the Court honestly and with bonafide intents- Order of Trial Court allowing application and directing impleadment of 'RS' set aside- Petition allowed. (Para 20 & 54 to 59)

Cases referred;
Anil Kumar Singh Vs. Shiv Nath Mishra, 39 (1995) 3 SCC 147;
Amit Kumar Shaw and anotherVs. Farida Khatoon and another, 2005(11) SCC 403).

For the petitioner:	Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lal, Advocate, for the petitioner(s)in CMPMO Nos. 550 and 551 of 2017. Mr. Vipin Pandit, Advocate, for the petitioner(s) in CMPMO Nos. 171, 173 and 175 of 2018. Mr. P.S. Goverdhan, Advocate, for the petitioner in CMPMO No. 394 of 2018.
For the respondents:	Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lal, Advocate, for the respondentsin CMPMO Nos. 171 and 173 of 2018 Mr. Vipin Panndit, Advocate, for the respondent(s) in CMPMO No. 550 of 2017.

Mr. P.S. Goverdhan, Advocate, for the respondent in CMPMO No. 175 of 2018. Mr. Neeraj Gupta, Senior Advocate, withMr. Ajeet Jaswal, Advocate, for the respondent in CMPMO No. 551 of 2017.

Whether approved for reporting?1 *Yes.*

Ajay Mohan Goel, Judge *:*

As similar factual matrix and common issues of law are involved in all these petitions, therefore, these petitions are being disposed of vide a common judgment.

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1 ***Whether the reporters of the local papers may be allowed to see the Judgment?***

2. Facts resulting in filing of each of the above petitions are mentioned hereinbelow in brief.

(a) ***CMPMO No. 550 of 2017 (Rupa Suri Vs. Neelam Rana)***

3. Respondent/plaintiff Neelam Rana has filed Civil Suit 147/1 of 2015/12 for declaration to the effect that sale deed dated 17th June, 2000 with respect to land comprised in Khasra No. 137/12/2/4, measuring 0-15 biswas, out of Khasra No. 137/12/2, measuring 6-10 bighas alongwith the built up area, situated at Mauza Mashobra, Pargna Dharti, Tehsil Kasauli, District Solan being result of fraud, mis- representation and based upon forged documents, be cancelled and declared as illegal, void and inoperative against the rights of the plaintiff and a decree for possession alongwith structure on the same be passed in favour of the plaintiff and against the defendant. This suit is pending adjudication before the Court of learned Senior Civil Judge, Kasauli, District Solan, H.P. Petitioner herein, namely, Rupa Suri is the defendantin the said suit.

4. Present petition has been filed by petitioner/defendant against order dated 05.10.2017, passed by the Court of learned Senior Civil Judge, Kasauli, District Solan, H.P. in Applications No. 109/6 of 2017 & 110/6 of 2017, whereby, an application filed by the respondent/plaintiff before the said Court under Order 1, Rule 10 of the Code of Civil Procedure for impleading one Shri Rajinder Singh as defendant, has been allowed by the learned Court below and application filed under Order 1 Rule 9 and Order 2, Rule 2(3) read with Section 151 of the Code of Civil Procedure filed before the said Court by the present petitioner/defendant, has been dismissed.

(b) ***CMPMO No. 551 of 2017 (Sanjiv Dewan Vs. Neelam Rana***

5. Respondent/plaintiff Neelam Rana has filed Civil Suit No. 146/1 of 2012/15 for declaration to the effect that sale deed dated 31.05.2000 with respect to land comprised in Khasra No. 137/12/2/1, measuring 2-18 bighas, out of Khasra No. 137/12/2, measuring 6-10 bighas, out of which, there exists an uncompleted house on 8 biswas of land, situated at Mauza Mashobra, Pargna Dharti, Tehsil Kasauli, District Solan, H.P. being result of fraud, mis-representation and based upon forged documents, be cancelled and declared as illegal, void and inoperative against the rights of the plaintiff and a decree for possession alongwith structure on the same be passed in favour of the plaintiff and against the defendant. This suit is pending adjudication before the Court of learned Senior Civil Judge, Kasauli, District Solan, H.P. Petitioner

herein, namely, Sanjiv Dewan is the defendant in the said suit.

6. Present petition has been filed by petitioner/defendant against order dated 05.10.2017, passed by the Court of learned Senior Civil Judge, Kasauli, District Solan, H.P. in Applications No. 111/6 of 2017 and 112/6 of 2017, whereby, an application filed by the respondent/plaintiff before the said Court under Order 1, Rule 10 of the Code of Civil Procedure for impleading one Shri Rajinder Singh as defendant has been allowed by the learned Court below and application filed under Order 1 Rule 9 and Order 2, Rule 2(3) read with Section 151 of the Code of Civil Procedure filed before the said Court by the present petitioner/defendant has been dismissed.

(c) ***CMPMO No. 171 of 2017 (Smt. Neelam Rana Vs.Smt. Roopa Suri)***

7. This petition has been filed by the petitioner Neelam Rana against order dated 05.10.2017 passed by the Court of learned Senior Civil Judge, Kasauli, District Solan, feeling aggrieved by the fact that learned Court below while allowing the application filed by the petitioner/plaintiff before the said Court under Order 1, Rule 10 of the Code of Civil Procedure to implead one Shri Rajinder Singh as defendant, has not permitted the petitioner/plaintiff to amend the relief clause of her plaint, seeking declaration with regard to a General Power of Attorney.

(d) ***CMPMO No. 173 of 2017 (Smt. Neelam Rana Vs. Sh.Sanjeev Diwan)***

8. This petition has been filed by the petitioner Neelam Rana against order dated 05.10.2017 passed by the Court of learned Senior Civil Judge, Kasauli, District Solan, feeling aggrieved by the fact that learned Court below while allowing the application filed by the petitioner/plaintiff before the said Court under Order 1, Rule 10 of the Code of Civil Procedure to implead one Shri Rajinder Singh as defendant, has not permitted the petitioner/plaintiff to amend the relief clause of her plaint, seeking declaration with regard to a General Power of Attorney.

(e) ***CMPMO No. 394 of 2018 (Mukesh Thareja Vs. Neelam Rana)***

9. This petition has been filed by the petitioner/defendant against order dated 09.08.2017, passed by the Court of learned Senior Civil Judge, Kasauli, District Solan, H.P. in Application No. 149/6 of 2016 in Civil Suit No. 98/1 of 2015/12, vide which, an application filed under Order 1, Rule 10 of the Code of Civil Procedure before the said Court by the respondent/plaintiff herein to implead Rajinder Singh as a defendant has been allowed by the leaned Court below.

(f) ***CMPMO No. 175 of 2018 (Smt. Neelam Rana Vs. Sh.Mukesh Thareja)***

10. This petition has been filed by the petitioner herein, i.e., plaintiff in Civil Suit No. 98/1 of 2015/12 against order dated 09.08.2017, passed by the Court of learned Senior Civil Judge, Kasauli, District Solan, feeling aggrieved by the fact that learned Court below while allowing the application filed by the plaintiff before the said Court under Order 1, Rule 10 of the Code of Civil Procedure to implead one Shri Rajinder Singh as defendant, has not permitted the petitioner to seek a declaration with regard to General Power of Attorney, as pleaded by her in her application.

11. Civil Suit No. 147/1 of 2015/12, titled as Neelam Rana Vs.

Roopa Suri was initially filed in this High Court. Plaint was supported by the affidavit of Shri B.C. Rana, General Power of Attorney holder of the plaintiff and was signed and verified at New Delhi on 15th May, 2012. The plaint was filed with the Registry of this Court on 30th June, 2012. In the written statement which was filed on behalf of the defendant on 17th November, 2012, preliminary objections were taken with regard to the maintainability of the suit, inter alia, on the ground that the suit was bad for non-joinder of essential and necessary parties and the same was also barred by limitation.

12. Civil Suit No. 146/1 of 2012/15, titled as Neelam Rana Vs. Sanjeev Diwan was initially filed in this High Court. Plaint was supported by the affidavit of Shri B.C. Rana, General Power of Attorney holder of the plaintiff and was signed and verified at New Delhi on 15th May, 2012. The plaint was filed with the Registry of this Court on 30th June, 2012. In the written statement which was filed on behalf of the defendant on 17th November, 2012, preliminary objections were taken with regard to the maintainability of the suit, inter alia, on the ground that the suit was bad for non-joinder of essential and necessary parties and the same was also barred by limitation.

13. Civil Suit No. 98/1 of 2015/12, titled as Smt. Neelam Rana Vs. Shri Mukesh Thareja was initially filed in this High Court. Plaint was supported by the affidavit of Shri B.C. Rana, General Power of Attorney holder of the plaintiff and was signed and verified at New Delhi on 15th May, 2012. The plaint was filed with the Registry of this Court on 30th June, 2012. In the written statement which was filed on behalf of the defendant on 8th October, 2012, a preliminary objection was taken with regard to the maintainability of the suit on the ground that the suit was barred by limitation. In addition, as is evident from the amended written statement filed to the suit on 22nd March, 2013 (which amendment to the written statement was allowed by this Court vide its order dated 26.04.2013), a specific objection was taken by the defendant to the effect that the plaintiff had filed the suit in connivance with her General Power of Attorney Shri Rajinder Singh, who was not arrayed as party to the suit deliberately and intentionally and, therefore, the suit was bad for non- joinder of necessary parties.

14. In the replications which were filed to the written statements in the above mentioned Civil Suits, it was denied by the plaintiff that the respective suits were bad for non-joinder of necessary parties or were barred by limitation.

15. For completion of records, it is pertinent to mention here that the issues in Civil Suit No. 54 of 2012 stood framed on 08.08.2013 at the stage when the said suit was pending adjudication before this Court itself. The issues so framed are quoted hereinbelow:

> "(1) Whether the plaintiff is entitled for grant of a decree for declaration against the defendant to the effect that the sale deed dated 10.11.2000 is as a result of fraud, misrepresentation and as such, is illegal, void and not binding upon the plaintiff alongwith consequential relief of possession, as prayed for vide prayer Clause (A)? OPP.
>
> (2) Whether the plaintiff is entitled for grant of a decree of perpetual prohibitory injunction against the defendant, as prayed for vide prayer clause(b)? OPP
>
> (3) Whether the plaint is liable to be rejected under Order 7 Rule 11 CPC being without any cause of action? OPD
>
> (4) Whether the plaintiff is estopped from filing the suit by her act, conduct and acquiescence? OPD

(5) Whether the suit is not within time?

....OPD

(6) Whether the suit filed by the plaintiff is false and vexatious and as such, liable to be dismissed with compensatory costs under Section 35-A CPC? OPD

(7) Whether the suit is bad for non- joinder of necessary party and if so, who is such party?...OPD

(8) Relief."

16. Record demonstrates that as far as Civil Suit No. 147/1 of 2015/12, titled as Neelam Rana Vs. Roopa Suri and Civil Suit No. 146/1 of 2012/15, titled as Neelam Rana Vs. Sanjeev Dewan are concerned, issues have not been framed therein as yet.

17. Alongwith said civil suits, which were filed by plaintiff Neelam Rana, she had also filed applications under Order 39, Rules 1 and 2 of the Code of Civil Procedure praying for interim relief during the pendency of the Civil Suits. Said applications filed in Civil Suit No. 147/1 of 2012/2015 and Civil Suit No. 146/1 of 2012/2015 stood dismissed by the Court of learned Civil Judge (Senior Division), Kasauli, District Solan vide order dated 24.12.2015. As common findings were returned in the orders which were passed by the learned Court below in the applications in both the suits, therefore, for the purpose of adjudication of these petitions, para-9 thereof is being quoted hereinbelow:

"9. As discussed by me above, the applicant has not approached this Court with clean hands and has suppressed material facts. The documentary evidence brought on record by the respondent reveal that the applicant knew Sh. Rajender Singh and had executed a power of attorney in his favour which she later on revoked in the year 2007. The applicant claims that the power of attorney is forged but has not sought a declaration to that effect in the main suit. She claims that no power of attorney was executed in favour of Rajender Singh but has not made Rajender Singh as a party to the litigation. In the back drop of the above, I find that the applicant has not been able to satisfy this Court that all the three ingredients which entitle her to the discretionary relief of interim injunction exist in her favour. It is settled principle of law that even where prima facie case is in favour of the applicant/plaintiff, the Court will refuse temporary injunction if the other ingredients are not satisfied. On this, I also rely upon findings given by our own Hon'ble High Court in Sagar Chand Nayyar and others Vs. Manuj Nayyar and others reported in 2014(2) Shim. L.C. 609, wherein the Hon'ble High Court held that persons seeking injunction has to show that all the three principles i.e. prima facie, balance of convenience and that he will suffer irreparable loss, not only exist but co-exist. Hence, the application is dismissed. It is clarified that the findings in the present application shall bear no impact on the merits of the main suit. Application stands accordingly disposed of.

It, after due completion, be tagged with the main case file for record."

18. It is evident from the above quoted para of the order passed by the learned Court below that what weighed with the learned Court alongwith other factors while disallowing the applications for interim relief, was the fact that the applicant/plaintiff had claimed that Power of Attorney, purportedly executed in the name of Sh. Rajinder Singh, was forged, yet no declaration to that effect was sought in the main suit, neither Rajender Singh was made a party to the litigation.

19. As already mentioned above, these orders were passed on 24.12.2015. Similar application filed in Civil Suit No. 98/1 of 2015/12 is pending, as per record.

20. Record further demonstrates that after the transfer of Civil Suit No. 98/1 of 2015 to the Court of learned Civil Judge (Senior Division), Kasauli, District Solan, the case was listed for recording of the evidence of the plaintiff initially for 17.11.2015. As no PWs. were present nor steps were taken in this regard, the case was ordered to be listed for recording of statements of PWs. on 12.01.2016. PWs. were not present on the said date, as steps were not taken to summon any witness by the plaintiff. On the request of the plaintiff, the case was ordered to be listed for 29.03.2016, as a matter of last opportunity for recording the statements of plaintiff's witnesses. On the said date also, plaintiff did not examine any witness and on her prayer, another opportunity was granted to examine the plaintiff's witnesses and for the said purpose, the case was ordered to be listed on 02.04.2016. On the said date, an application was filed under Order 1, Rule 10 of the Code of Civil Procedure accompanied with an unattested affidavit, which was withdrawn.

21. Record demonstrates that thereafter fresh applications were filed under Order 1, Rule 10 of the Code of Civil Procedure by the plaintiff in above three Civil Suits for impleading Rajinder Singh, the alleged General Power of Attorney holder, as a defendant in the suits.

22. Application in Civil Suit No. 147/1 of 2015/12, titled as Neelam Rana Vs. Roopa Suri was filed on 28.05.2016, application in Civil Suit No. 146/1 of 2012/15, titled as Neelam Rana Vs. Sanjeev Dewan was filed on 28.05.2016 and application in Civil Suit No. 98/1 of 2015/12, titled as Neelam Rana Vs. Mukesh Thareja was filed on 31.05.2016. Similar averments were made in the applications which were filed in the above mentioned three civil suits to implead Rajinder Singh as a party defendant. Same were to the effect that the suits which were filed by the applicant/plaintiff, were being contested by the defendants on various legal grounds, including preliminary objection that the suits were bad for non-joinder of essential and necessary parties. It was mentioned in the applications that to avoid such technical defect in the plaints, the applicant intended to implead Rajinder Singh as a defendant in the respective suits and also intended to take the plea that General Power of Attorney in favour of said person was wrong, illegal and void and also intended to seek relief against the alleged General Power of Attorney by way of seeking an amendment in the plaint.

23. The applications were resisted by the non-applicant/defendant, inter alia, on the ground that filing of applications was nothing but an abuse of the process of law and the applications were in fact filed not to meet the preliminary objections so taken in the written statements, which were filed quite far back but to set at naught the findings recorded by the Court on 24.12.2015 in the order passed in application(s) under Order 39 Rules 1 and 2 of the Code of Civil Procedure that Rajinder Singh had not been impleaded as a party in the suit nor any declaration stood sought by the plaintiff to the effect that the Power of Attorney executed purportedly in favour of Rajinder Singh was illegal and void. It was also stated in the replies that the alleged amendment being

sought was otherwise time barred and the applicant/plaintiff could not be permitted to withdraw or take away the admissions made by her in her affidavit dated 15th March, 2007 as also letter dated 20th March, 2007 so submitted to Sub-Registrar, Kasauli. It was also mentioned in the replies that the relief being claimed against Rajinder Singh was hopelessly time barred and valuable rights which had accrued in favour of the defendants would be taken away in case the applications were allowed, as prayed for.

24. In addition, the defendants in Civil Suit No. 147/1 of 2015/12 and Civil Suit No. 146/1 of 2012/15 also moved an application under Order 1 Rule 9, read with Order 2, Rule 2(3) and Section 151 of the Code of Civil Procedure for dismissal of the suit for non-joinder of essential and necessary party, i.e., Rajinder Singh and for omitting toclaim a relief which the plaintiff was entitled to claim at the time of filing the suit. Said application was filed in the Court on 17.06.2017.

25. By way of orders which stand impugned in these six petitions, the applications which were filed under Order 1, Rule 10 of the Code of Civil Procedure for impleadment of Rajinder Singh as a defendant in the suit(s), stand allowed by the learned Court below, whereas the applications filed under Order 1 Rule 9, read with Order 2, Rule 2(3) and Section 151 of the Code of Civil Procedure stand dismissed by the learned Court below. In addition, while allowing the applications filed under Order 1, Rule 10 of the Code of Civil Procedure, learned Court below has permitted the plaintiff only to implead Rajender Singh as a defendant, however, she has not been permitted to amend the relief clause of her plaint, seeking a declaration with regard to the General Power of Attorney. This is the background in which all these petitions have been filed.

26. Learned Court below while disposing of the applications filed before it under Order 1, Rule 10 of the Code of Civil Procedure by the plaintiff and under Order 1, Rule 9 read with Order 2, Rule 2(3) and Section 151 of the Code of Civil Procedure by the defendants in Civil Suit Nos. 147/1 of 2015/12 and 146/1 of 2012/15has held that though applications to implead Rajender Singh as a party defendant in the suits were not filed at the earliest by the plaintiff, yet as evidence of the parties had not yet been recorded, therefore, allowing the applications would not cause grave prejudice to the other side.

27. Learned Court also held that it was settled law that all parties who are necessary to a lis, should be joined for proper adjudication of the lis and further it was the case of the defendants themselves that Rajinder Singh was a necessary party. After referring to the judgment of the Supreme Court in ***Anil Kumar Singh*** *Vs.* ***Shiv Nath Mishra*** (1995) 3 SCC 147, learned Court held that as Rajinder Singh was a necessary party and as his impleadment in the case would enable the Court to effectively and completely adjudicate and settle all the issues involved in the suit, to avoid multiplicity of litigation, the prayer of the plaintiff to the extent that Rajinder Singh was a necessary party and should be impleaded as a party, had to be allowed. It further held that as far as the prayer of the defendants in Civil Suit Nos. 147/1 of 2015/12 and 146/1 of 2012/15 in the applications filed under Order 1, Rule 9 read with Order 2, Rule 2(3) and Section 151 of the Code of Civil Procedure that the suit should be dismissed, was not acceptable, because the trial of the suit was yet to open and before that Rajinder Singh was being impleaded as a party. Regarding prayer of the plaintiff to amend the plaint seeking a declaration for relief clause to the effect that General Power of Attorney in favour of Rajinder Singh was wrong, null and void, learned Court held that the plaintiff had filed the suit on 30.06.2012 and in her prayer clause, she had not prayed for a declaration that the alleged Power of Attorney was illegal, null and void or a result of fraud, although, it was the substance of her plaint that the General Power of Attorney was forged and fabricated. Learned Trial Court held that as from the date of filing of the plaint, almost five years had passed when the applications were filed by the

plaintiff, thus, it was apparent that declaration which was being sought qua General Power of Attorney, was definitely hit by limitation and by virtue of Rajinder Singh being brought on record as a defendant, plaintiff cannot get her plaint amended seeking declaration, which was time barred. Learned Trial Court also held that the plea taken by the plaintiff regarding the General Power of Attorney, in the plaint, would be considered at the time of trial, but the plaintiff could not be allowed to add a relief part qua declaration regarding General Power of Attorney, since it was not initially sought by her at the time of filing of the suit nor any application for amendment was filed during this period, and since then five years had elapsed. Learned Court also held that the question of limitation will also remain open during the trial and it was settled law that suit against the newly added party is deemed to have been instituted from the date when permission to implead the party is granted. On these bases, learned Trial Court held that suit against Rajinder Singh, who was being impleaded as a party, shall be deemed to have been instituted from the date of order and all questions with regard to limitation shall remain open and will be adjudicated at the time of final disposal of the suits.

28. By returning said findings, learned Trial Court allowed the applications which were filed by the plaintiff under Order 1, Rule 10 of the Code of Civil Procedure partially, but dismissed the applications which were filed under Order 1, Rule 9 read with Order 2, Rule 2(3) and Section 151 of the Code of Civil Procedure by the defendants in Civil Suit Nos. 147/1 of 2015/12 and 146/1 of 2012/15.

29. For the matter of record, it is clarified that no application under Order 1, Rule 9 read with Order 2, Rule 2(3) and Section 151 of the Code of Civil Procedure was filed in Civil Suit No. 98/1 of 2015/12, titled as Neelam Rana Vs. Mukesh Thareja.

30. When CMPMO Nos. 550 of 2017 and 551 of 2017 were initially filed in this court, the prayers made therein were to the following effect:

CMPMO No. 550 of 2017

> "It is, therefore, respectfully prayed that this petition may kindly be allowed and this Hon'ble Court may kindly be pleased to:-
>
> (a) Quash and set aside the impugned order Annexure A-6, dated 05.10.2017, passed by the learned Civil Judge (Senior Division), Kasauli in Civil Suit No. 147/1 of 2015/12, whereby he was pleased to dismiss the application under Order 1, Rule 9 read with Order 2 Rule 2(3) CPC of the petitioner (original defendant) with all consequences flowing therefrom in favour of the present petitioner (original defendant) and against the plaintiff/respondent.
>
> (b) Call for the records of the Court(s) below i.e. the record of the Ld. Civil Judge (Sr. Division), Kasauli, as also the record of the Ld. District Judge, Solan, pertaining to the appeal filed by the present petitioner (originaldefendant) against the present respondent/original plaintiff, challenging the impugned order whereby the application under Order 1, Rule 10 CPC moved by the present respondent (original plaintiff) was allowed by

the Ld. Court below and thereafter decide the present matter alongwith the said appeal.

(c) Allow the application under Order 1 Rule 9 read with Order 2 Rule 2(3) CPC, and thus dismiss the suit of the present respondent (original plaintiff).

(d) Allow any other relief deemed fit bythis Ld. Court in favour of the petitioner and against the respondent (original plaintiff), in the peculiar facts and circumstances attending to the case.

(e) Allow costs of this petition in favour of the petitioner and against the respondent."

CMPMO No. 551 of 2017

"It is, therefore, respectfully prayed that this petition may kindly be allowed and this Hon'ble Court may kindly be pleased to:-

(a) Quash and set aside the impugned order Annexure A-6, dated 05.10.2017, passed by the learned Civil Judge (Senior Division), Kasauli in Civil Suit No. 146/1 of 2012/15, whereby he was pleased to dismiss the application under Order 1, Rule 9 read with Order 2 Rule 2(3) CPC of the petitioner (original defendant) with all consequences flowing therefrom in favour of the present petitioner (original defendant) and against the plaintiff/respondent.

(b) Call for the records of the Court(s) below i.e. the record of the Ld. Civil Judge (Sr. Division), Kasauli, as also the record of the Ld. District Judge, Solan, pertaining to the appeal filed by the present petitioner (original defendant) against the present respondent/original plaintiff, challenging the impugned order whereby the application under Order 1, Rule 10 CPC moved by the present respondent (original plaintiff) was allowed by the Ld. Court below and thereafter decide the present matter alongwith the said appeal.

(c) Allow the application under Order 1 Rule 9 read with Order 2 Rule 2(3) CPC, and thus dismiss the suit of the present respondent (original plaintiff).

(d) Allow any other relief deemed fit bythis Ld. Court in favour of the petitioner and against the respondent (original plaintiff), in the peculiar facts and circumstances attending to the case.

(e) Allow costs of this petition in favour of the petitioner and against the respondent."

31. During the pendency of these petitions, applications were

filed under Order 6, Rule 17 of the Code of Civil Procedure by the petitioners for amendment of the petitions, which were allowed by this Court vide order dated 31st October, 2019 and now the prayers which have been made in these two petitions post amendment read as under:

CMPMO No. 550 of 2017

"(a) Quash and set aside the impugned order Annexure A-6, dated 05.10.2017, passed by the learned Civil Judge (Senior Division), Kasauli in Civil Suit No. 147/1 of 2015/12, whereby he was pleased to allow the application moved by the plaintiff under Order

1 Rule 10 CPC and was further pleased to dismiss the application under Order 1 Rule 9 read with Order 2 Rule 2(3) CPC of the petitioner (original defendant) with all consequences flowing therefrom in favour of the present petitioner (original defendant) and against the plaintiff/respondent, including that of the dismissal of the suit filed by the plaintiff and dismiss the suit of the plaintiff as beingbarred by limitation.

(b) Call for the records of the Court(s) below i.e. the record of the Ld. Civil Judge (Sr. Division), Kasauli, as also the record of the Ld. District Judge, Solan, pertaining to the appeal filed by the present petitioner (originaldefendant) against the present respondent/original plaintiff, challenging the impugned order whereby the application under Order 1, Rule 10 CPC moved by the present respondent (original plaintiff) was allowed by the Ld. Court below and thereafter decide the present matter alongwith the said appeal.

(c) Allow the application under Order 1 Rule 9 read with Order 2 Rule 2(3) CPC, and thus dismiss the suit of the present respondent (original plaintiff).

(d) Allow any other relief deemed fit bythis Ld. Court in favour of the petitioner and against the respondent (original plaintiff), in the peculiar facts and circumstances attending to the case.

(e) Allow costs of this petition in favour of the petitioner and against the respondent."

CMPMO No. 551 of 2017

"(a) Quash and set aside the impugned order Annexure A-6, dated 05.10.2017, passed by the learned Civil Judge (Senior Division), Kasauli in Civil Suit No. 147/1 of 2015/12, whereby he was pleased to allow the application moved by the plaintiff under Order

1 Rule 10 CPC and was further pleased to dismiss the application under Order 1 Rule 9 read with Order 2 Rule 2(3) CPC of the petitioner (original defendant) with all consequences flowing therefrom in favour of the present petitioner (original defendant) and against the plaintiff/respondent including that of the dismissal of the suit filed by the plaintiff and dismiss the suit of the plaintiff as being barred by limitation.

(b) Call for the records of the Court(s) below i.e. the record of the Ld. Civil Judge (Sr. Division), Kasauli, as also the record of the Ld. District Judge, Solan, pertaining to the appeal filed by the present petitioner (original defendant) against the present respondent/original plaintiff, challenging the impugned order whereby the application under Order 1, Rule 10 CPC moved by the present respondent (original plaintiff) was allowed by the Ld. Court below and thereafter decide the present matter alongwith the said appeal.

(c) Allow the application under Order 1 Rule 9 read with Order 2 Rule 2(3) CPC, and thus dismiss the suit of the present respondent (original plaintiff).

(d) Allow any other relief deemed fit by this Ld. Court in favour of the petitioner and against the respondent (original plaintiff), in the peculiar facts and circumstances attending to the case.

(e) Allow costs of this petition in favour of the petitioner and against the respondent."

32. Before proceeding further, I will, in brief, refer to the respective arguments which were raised in support of their contentions by learned counsel for the parties.

33. Mr. R.L. Sood, learned Senior Counsel appearing for the petitioners in CMPMO Nos. 550 and 551 of 2017 primarily argued that the orders passed by the learned Court below, impleading Rajinder Singh as a party defendant in the suits and dismissing the applications filed under Order 1, Rule 9 read with Order 2, Rule 2(3) and Section 151 of the Code of Civil Procedure filed by the defendants in the two respective suits are not sustainable in the eyes of law, as learned Court has erred in not appreciating that filing of the applications under Order 1, Rule 10 of the Code of Civil Procedure was an abuse of the process of law and the same stood filed by the plaintiff to fill up the lacunae in the suits. He argued that learned Court erred in not appreciating that as the suits were bad for non-joinder of necessary party, the plaintiff in all likelihood was to be non-suited and the provisions of Order 1, Rule 10 of the Code of Civil Procedure are not meant to come to the rescue of a party, who does not approaches the Court *bonafidely*. He further contended that at the time when the suits were filed by the plaintiff, she elected not to implead Shri Rajinder Singh as a defendant nor claimed any relief against him. This decision of the plaintiff was fait accompli and an extremely important right which had accrued upon the defendant by the said act of the plaintiff could not have been wiped away by the learned Trial Court by allowing a belated applications filed by the plaintiff for impleading Rajinder Singh as party defendant. He further argued that as the applications filed under Order 1, Rule 10 of the Code of Civil Procedure were filed beyond limitation, the same could

not have been allowed and further, as the suit itself was barred by limitation, therefore, learned Court below was bound to have had dismissed the suit itself as time barred as well as for non-impleadment of necessary party. He argued that the impugned orders are otherwise also not sustainable in law as the applications which stood filed under Order 1, Rule 9 read with Order 2, Rule 2(3) and Section 151 of the Code of Civil Procedure bythe petitioners/defendants in Civil Suit Nos. 147/1 of 2012/2015 and 146/1 of 2012/2015 have been dismissed by the learned Court below vide impugned orders without assigning any reason whatsoever. Mr. Sood argued that preliminary objection stood taken by the defendants in each of the three Civil Suits filed by plaintiff Neelam Rana that besides the suits being barred by limitation, the same were also bad for non-joinder of necessary party. In Civil Suit No. 98/1 of 2015/12, it was specifically mentioned that suit was bad for non-joinder of Shri Rajinder Singh as a necessary party. Even in the other two Civil Suits, it was evident that whowas the necessary party, which was not impleaded as a defendant in thesaid suits. He reiterated that the filing of the application under Order 1 Rule 10 of the Code of Civil Procedure for impleading Rajinder Singh as a party defendant in the suit and also seeking relief qua permission to amend the plaint was an afterthought and an attempt to fill up the lacunae in the suits, as was evident from the fact that the applications were not filed immediately after filing of the written statements to the suits or within some reasonable time thereafter, but were filed after the application filed under Order 39 Rules 1 and 2 of the Code of Civil Procedure by the plaintiff stood dismissed by the learned Trial Court by specifically holding that Rajinder Singh, who was a necessary party to the suit, was not impleaded as a defendant therein. He argued that the applications filed under Order 1, Rule 9 read with Order 2, Rule 2(3) and Section 151 of the Code of Civil Procedure by the petitioners/defendants in Civil Suit Nos. 147/1 of 2012/2015 and 146/1 of 2012/2015 stood dismissed without any due application of mind by the learned Trial Court, which has resulted in grave injustice to the defendants. According to Mr. Sood, the suits filed by the plaintiff deserved dismissal for non-impleadment of Rajinder Singh, who was a necessary party, as the allegation was that the General Power of Attorney, on the strength of which sale deeds were executed by the plaintiff with the defendants, was a forged and fabricated General Power of Attorney in the name of and by Rajinder Singh and, but obvious, this allegation, which otherwise is false, could not have been taken to its logical conclusion inthe Civil Suit without the impleadment of Shri Rajinder Singh. Mr. Sood also argued that Rajinder Singh was not initially impleaded as a defendant in the suit by the plaintiff, as she was aware of the fact that a legal and valid General Power of Attorney was in fact executed by her in favour of Rajinder Singh and the transactions which were conducted on the strength of said General Power of Attorney were genuine and legal sale transactions. Mr. Sood further argued that learned Trial Court has also erred in not appreciating that in the application which was filed by the plaintiff under Order 1 Rule 10 of the Code of Civil Procedure, very cleverly, a prayer stood made for amendment of the plaint, which was outside the scope of Order 1 Rule 10 of the Code of Civil Procedure and this extremely important aspect of the matter has been ignored by the learned Trial Court while allowing the application filed by the plaintiff for impleading Rajinder Singh as a defendant. He further argued that when the learned Trial Court itself kept the issue of limitation open because, *prima facie,* learned Trial Court is also convinced that the suit against Rajinder Singh is palpably time barred, no fruitful purpose will be solved by going through the rigors of a trial and this extremely important aspect of the matter has been ignored by the learned Trial Court while not dismissing the suit itself being barred by limitation. Accordingly, he prayed that the order(s) impugned, be set aside and the suits be dismissed as time barred by this Court. Another point raised by ShriSood during the course of his arguments on the point of limitation was that the sale deeds in issue were executed on 31.05.2000 and 17.06.2000, respectively and the suits were filed in this Court on 30th June, 2012, therefore, suits were

admittedly filed beyond limitation within which a suit for declaration could have been filed and, thus also, the suits deserved dismissal, as the petitioners/defendants should not be forced to undergo a purposeless trial of a Civil Suit. Mr. Sood argued that the Civil Suits which have been filed by the plaintiff are liable to be dismissed under the provisions of Order 7, Rule 11 of the Code of Civil Procedure, as the suits do not disclose any cause of action relating to the relief sought and this can be done by this Court in exercise of its powers under Article 227 of the Constitution of India, as it is settled law that when the Court is satisfied that there is no chance of the suit succeeding,the High Court can set aside the plaint to prevent abuse of process of lawand to meet the ends of justice. Mr. Sood argued that while allowing the applications filed under Order 1, Rule 10 of the Code of Civil Procedure, learned Trial Court has erred in not appreciating that the applications which were filed by the plaintiff before the learned Trial Court were time barred and therefore also, the same could not have been allowed.

34. Mr. P.S. Goverdhan, learned counsel appearing for the petitioner in CMPMO No. 394 of 2018 and for the respondent in CMPMO No. 175 of 2018 has adopted the submissions made by Mr. R.L. Sood, learned Senior Counsel.

5. On the other hand, learned counsel appearing for Ms. Neelam Rana, who is respondent in CMPMO Nos. 550 and 551 of 2017 and CMPMO No. 394 of 2018 and petitioner in CMPMO Nos. 171, 173 and 175 of 2018 argued that the applications filed under Order 1 Rule 9 and Order 2, Rule 2(3) read with Section 151 of the Code of Civil Procedure by the defendants in Civil Suit Nos. 147/1 of 2012/2015 and 146/1 of 2012/2015 were rightly dismissed by the learned Court below, as these applications were filed as an afterthought by the defendants therein after the applications under Order 1 Rule 10 of the Code of Civil Procedure stood filed by Ms. Neelam Rana for impleading Rajinder Singh as a party defendant in the suits. He argued that the plea of the plaintiff qua the relief which stood sought in the Civil Suits was not time barred and even otherwise this point shall be decided during the course of trial by the learned Court below. Learned counsel argued that there was no infirmity with the order passed by the learned Trial Court vide which it impleaded Rajinder Singh as a party defendant in the suits, as it was the own case of the defendants that Rajinder Singh was a necessary party for the purpose of adjudication of the Civil Suits. He also argued that as per the provisions of Order 1, Rule 10 of the Code of Civil Procedure, the Court may at any stage of the proceedings, either upon or without the application of either party, join such person as defendant whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved inthe suit. He submitted that the order passed by the learned Trial Court to implead Rajinder Singh as a party defendant was well within its domain and the same called for no interference. He submitted that whatever observations have been made by the learned Court in the applications filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure were only for the purpose of deciding the said applications and the same could not be relied upon before this Court by either of the party, as the Suits filed by the plaintiff have to be decided independently on the basis of respective pleadings of the parties as well as the evidence which the party adduce before the learned Court below. He further contended that the observations of the learned Court in the impugned orders with regard to the issue of limitation qua Rajinder Singh was a fact which would be decided by the Court after Rajinder Singh puts in appearance before the learned Court below and chooses to file his written statement. Learned counsel submitted that though there was no infirmity with the order passed by the learned Court below to the extent it had allowed the application filed by the plaintiff to implead Rajinder Singh as a party defendant and had dismissed the applications filed under Order 1 Rule 9and Order 2, Rule 2(3) read with Section 151 of the Code of Civil Procedure at the behest of two of the defendants, however, learned Court below has gravely erred in disallowing the request of the plaintiff to seek amendment of the

plaint qua declaration with regard to the General Power of Attorney. He argued that it was a necessary amendment which went to the root of the case and in the absence of said relief being permitted to be added in the suit, the impleadment of Rajinder Singh as a defendant was of no consequence or relevance and just a mere formality. Learned Counsel also argued that the prayer of the plaintiff seeking amendment in the plaint was within the parameters of Order 6 Rule 17 ofthe Code of Civil Procedure and a formal application would have had been filed by the plaintiff subsequently under Order 6, Rule 17 of the Code of Civil Procedure seeking a formal amendment in the plaint, had prayer to amend the plaint been granted by the learned Trial Court. As per him, asa result of denial of said relief, as prayed for by the plaintiff to her before the learned Court below grave injustice was done to her. He argued thatas far as the petitions filed by the defendants are concerned, the same be dismissed and the petitions filed by the plaintiff be allowed and the orders passed by the learned Court below be modified to the extent that the plaintiff be permitted to amend the plaint, as prayed for in the applications.

36. The purpose of giving in detail the arguments put forth by learned counsel for the respective parties is that besides assailing the impugned orders passed by the learned Court below on merit, learned counsel for the parties have also in extentio argued that as this Court is seized with these petitions in exercise of jurisdiction under Article 227 of the Constitution of India, therefore, this Court in exercise of its powers of superintendence, can pass any order in the interest of justice, as it deems fit and it need not confine itself only to the legality of the orders impugned.

37. However, in my considered view, in exercise of its jurisdiction under Article 227 of the Constitution of India, this Court while exercising powers of superintendence has to act within bounds and this Court can neither be called upon nor it should enter into the adjudication of the main lis pending between the parties as if it was the original Court hearing the dispute.

38. Therefore, in the adjudication of these petitions, this Court is only going into the legality of the orders which have been passed by the learned Court below, i.e., the orders passed on the applications filed under Order 1, Rule 10 of the Code of Civil Procedure before the learned Court below by the plaintiff in the three suits as also the orders passed in the applications filed in two suits by the defendant thereinunder Order 1 Rule 9 and Order 2, Rule 2(3) read with Section 151 of the Code of Civil Procedure.

39. The dates on which the civil suits were filed as also the written statements thereto were filed have already been referred to by me hereinabove, which are not being repeated for the sake of brevity. The replications which were filed in each suit by the plaintiff in response to the written statements, deny the factum of the respective suits being barred by limitation or the same being bad for non-joinder of necessary party.

40. I have mentioned hereinabove that the applications filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure by the plaintiff in two out of three Civil Suits were dismissed by the learned Court below by passing similar orders, in which, observation was made with regard to non-joinder of Sh. Rajinder Singh as a defendant in the suit, is a fact which weighed upon the learned Court below while dismissing the said applications.

41. It is a matter of record that it was only thereafter that the applications were filed in each of the civil suits under Order 1 Rule 10of the Code of Civil Procedure by the plaintiff for impleadment of Rajinder Singh as a party defendant. Filing of the applications under Order 1 Rule
9 and Order 2, Rule 2(3) read with Section 151 of the Code of Civil Procedure by the defendant in two out of the three civil suits was an act subsequent to the filing of the applications under Order 1, Rule 10 of the Code of Civil Procedure.

42. Order 1, Rule 10(2) of the Code of Civil Procedure, inter alia,

envisages that the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any person, who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added

43. Order 1, Rule 10(4) of the Code provides that where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary. Sub-rule (5) therefo further envisages that subject to the provisions of the Indian Limitation Act, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

44. Section 21 of the Indian Limitation Act, 1963 envisages that where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party, provided that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. Sub-section (2) thereof provides that the provisions of Sub-section (1) shall not apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

45. Order 1, Rule 9 of the Code of Civil Procedure envisages that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it, provided that nothing in the said Rule shall apply to non-joinder of a necessary party. In other words, in my considered view, a plain reading of Order 1, Rule 9 of the Code of Civil Procedure is that a suit shall be defeated for non-joinder of a necessary party.

46. When three civil suits, subject matter of these petitions, were filed by the plaintiff seeking the relief sought therein on the basis of the pleadings, as are mentioned in the respective plaints, the plaintiff in her wisdom, chose not to implead Sh. Rajinder Singh as a party defendant nor any relief has been sought against him. Dominus litis, of course, is with the plaintiff and, as already mentioned hereinabove, she chose not to seek any relief against Sh. Rajinder Singh nor to implead him as a defendant in the suits. It goes without saying that this was done by the plaintiff at her own risk and peril. When the written statements were filed to the civil suits by the respective defendants therein, as observed earlier also, preliminary objection was taken with regard to non-joinder of necessary parties as also limitation amongst other preliminary objections, which were denied in the replications by the plaintiff. Though in two out of the three civil suits, it was not specifically pointed out as to the suits were bad for non-joinder of which particular party, however, in Civil Suit No. 98/1 of 2015/12, titled as Smt. Neelam Rana Vs. Shri Mukesh Thareja, in the preliminary objections which were taken in the amended written statement, it was specifically mentioned that suit was bad for non-joinder of Sh. Rajinder Singh. The objections so raised by the respective defendants in the written statements filed in three civil suits were not admitted to be correct by the plaintiff in the replications filed, as observed hereinabove.

47. Striking out or addition of the parties under Order 1, Rule 10 (2) of the Code of Civil Procedure can be done by the Court either upon or without the application of either party or its own, if it appears to the Court that presence of a party is necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

48. In these cases, learned Trial Court *suo moto* did not felt the

necessity of impleading Rajinder Singh as a party defendant to effectually and completely adjudicate and settle all the questions involved in the suit. The impugned orders to implead Rajinder Singh as a party have been passed by the learned Trial Court on applications which have been so filed by the plaintiff before it.

49. Perusal of the applications which were filed before the learned Trial Court under Order 1, Rule 10 of the Code of Civil Procedure in the three civil suits filed by the plaintiff demonstrates that the reasons mentioned for impleadment of Rajinder Singh as a defendant are that the defendants were contesting the suits on various legal grounds including preliminary objection with regard to non-joinder of essential and necessary parties. Therefore, in order to avoid the technical defect in the plaints, the plaintiff intended to implead Rajinder Singh as a party defendant and also to take the plea that General Power of Attorney issued in favour of the said person was wrong, illegal and void. It was also mentioned in the applications that the applicant intended to seek a declaration against the alleged General Power of Attorney by amending the plaints. Interestingly, para-5 of the applications so filed by the plaintiff in the three civil suits (contents of which applications are verbatim) reads as under:

> *"5. That in the facts and circumstances of the case Sh. Rajinder Singh is a necessary party to the present suit so as to adjudicate the matter on merits and grant justice to the parties on merits of their claim. Moreover, in view of objection taken by the respondent with regard to non-joinder of necessary party, the prayer of the applicant to implead alleged G.P.A. deserves to be granted in the interest of justice."*

50. The averments made in para-5 thus are to the effect that in the facts and circumstances of the case, Rajinder Singh is a necessary party to the suits so as to adjudicate the matter on merit and grant justice to the parties.

51. Thus, the applicant in the same application, on one hand, stated that Rajinder Singh was being sought to be impleaded as a party to meet the technical objections of the defendants that the suit was bad for necessary parties and in the same breath, on the other hand, mentioned therein that Rajinder Singh was not indeed a necessary party in the facts and circumstances of the case so as to adjudicate the meriton merit.

52. The reasoning assigned by the learned Court below for allowing the application filed under Order 1, Rule 10 of the Code of Civil Procedure has been referred by me in detail hereinabove, which I am not repeating for the sake of bravity. Suffice it to say that learned Trial Court came to the conclusion that as Rajinder Singh was a necessary party, his impleadment in the case would enable the Court to effectually and completely adjudicate the case and settle all the questions involved in the suits to avoid multiplicity of litigation. This reasoning has been assigned by the learned Trial Court by relying upon the judgment of the

Hon'ble Supreme Court in ***Anil Kumar Singh*** Vs. ***Shiv Nath Mishra*** (1995) 3 SCC 147. A perusal of the judgment of the Hon'ble Supreme Court in ***Anil Kumar Singh's*** case (*supra*) demonstrates that Hon'ble Court held in the said judgment that under the provisions of Order 1, Rule 10, the Court had the power to strike out or add the name of a party in a lis with or without application, but condition precedent is that the

Court must be satisfied that the presence of the party to be added, is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. Hon'ble Court has also held that to add a person as a party defendant was not a substantive right and thus was a discretion to be exercised by the Court, as the object of the provisions of Order 1

Rule 10 of the CPC, was to be bring on record all the persons who are parties to the dispute relating to the subject matter so that the dispute may be determined in their presence at the same time without any protraction in convenience and to avoid multiplicity of proceedings.

53. In the suits filed before the learned Trial Court, there is no relief prayed for in the suits against Rajinder Singh. The relief prayed for therein is for declaration that sale deeds, subject matter of the said civil suits, allegedly executed by Rajinder Singh as a General Power of Attorney of the plaintiff in favour of the defendant and registered in the office of Sub-Registrar, Kasauli, was the result of fraud, misrepresentation, as such, illegal, void and inoperative against the plaintiff and for cancellation of the same and further for a decree of possession of the suit land. There is no declaration sought with regard to the purported General Power of Attorney referred to in the plaint. Why not, this Court cannot answer, because this is something which only the plaintiff can explain and what is the result thereof, but obvious, learned Trial Court has to decide on the basis of pleadings as well as the respective evidence which shall be led by the parties after the issues are framed. Similarly, if the plaintiff at the time of filing the applications under Order 1, Rule 10 of the Code of Civil Procedure felt that Rajnder Singh was a necessary party for the adjudication of the suits, then question arises as to why he was not initially impleaded as a party defendant nor any relief was claimed against him. Not only this, why was no application under Order 1, Rule 10 of the Code of Civil Procedure preferred by the defendant(s) at the earliest and within some reasonable time when the preliminary objection was taken by the defendant in the Civil Suits qua non-impleadment of necessary parties as defendants therein. This I say so for the reason that as has been held by the Hon'ble Supreme Court, it is settled law that the object of Order 1, Rule 10 is to discourage contests on technical pleas and to save "honest and bona fide claimants from being non-suited" (See ***Amit Kumar Shaw and another*** *Vs.* ***Farida Khatoon and another***, 2005(11) SCC 403).

54. In the peculiar facts and circumstances of these cases, in my considered view, the provisions of Order 1, Rule 10 of the Code of Civil Procedure will not come to the rescue of the plaintiff for the simple reason that it is no where borne out from the applications which were filed under the said provisions of the Code for impleadment of Rajinder Singh as a party that it was on account of some bonafide error that Rajinder Singh was not impleaded as a party in the suits. In other words, the applications stood filed for impleadment of Rajinder Singh as a party defendant to fill up the lacunae in the suit in view of the objections which stood taken by the defendants in the respective written statements which were filed to the civil suits.

55. Not only the applications were filed at a belated stage, there is no cogent explanation in the applications as to why the same were filed at a belated stage or what prevented the applicants to file the applications at that stage, save and except the justifications which stand given therein, which have already been quoted hereinabove by me.

56. In the facts of these cases, it cannot be said that the plaintiff approached the Court by way of applications filed under Order 1, Rule 10 of the Code of Civil Procedure honestly and with *bonafide* intents. Of course, the provisions of Order 1, Rule 10 of the Code of Civil Procedure are meant to save honest and *bonafide* claimants from being non-suited, however, said provisions cannot come to the aid of a party which with open eyes has failed to implead a necessary party as a defendant. Not only this, the provision further will not come to the rescue of a party, which in the application filed under Order 1, Rule 10 of the Code of Civil Procedure fails to mention therein cogent and sufficient reasons as to why the party which was now being sought to be impleaded as a defendant, was not impleaded initially as such. Of course, the procedure is the handmaiden

of justice, but the Court of law has to applya pragmatic and reasonable yardstick so that while considering the effect of a fatal lapse on the part of one party to a lis, the rights which stand accrued upon the other party are not trampled, especially when the party immediately does not takes any steps to cure the lapse after objections in this regard are taken by the opponents in the written statement. That being so, the applications so filed by the plaintiff in the three suits under Order 1, Rule 10 of the Code of Civil Procedure could not have been allowed by the learned Court below and the findings to the contraryreturned by it are thus liable to be set aside. Learned Trial Court has erred in allowing the applications for impleadment of Sh. Rajinder Singh without appreciating that in the applications, which were filed by the plaintiff under Order 1, Rule 10 of the Code of Civil Procedure, no sufficient explanation was given as to why Sh. Rajinder Singh was not impleaded as a party defendant at the time of filing of the suits. Learned Trial Court has also erred in not appreciating that filing of the applications was nothing but an attempt at the behest of plaintiff to fill up the lacunae in the suits. Learned Trial Court has also erred in not appreciating that though the provisions of impleadment of party to a *lis* are to be construed liberally, however, the provisions are meant to come to the rescue of a *bonafide* litigant and the same cannot be abused by a litigant by indulging in sharp practice to over come the lacunae in the suit.

57. Accordingly, in view of the findings returned hereinabove, the orders passed by the learned Court below, whereby it has allowed the impleadment of Shri Rajinder Singh as a party defendant in the above mentioned three civil suits, are set aside. As this Court has set aside the orders passed by the learned Trial Court, vide which it had ordered the impleadment of Shri Rajinder Singh in the Civil Suits, the petitions which have been filed before this Court against that part of the order passed by the learned Trial Court, vide which, learned Trial Court refused the plea of the plaintiff for amendment of the plaint, are accordingly dismissed.

58. As far as the dismissal of applications filed by some of the petitioners herein, who had preferred applications under Order 1, Rule 9 of the Code of Civil Procedure are concerned, this Court observes that the dismissal of the said applications shall not come in the way of said petitioners raising the issue of all the suits being bad for non-joinder of necessary party at the appropriate stage.

59. Accordingly, CMPMO Nos. 550 & 551 of 2017 and CMPMO No. 394 of 2018 stand allowed by setting aside the orders passed by the learned Court below of impleading Shri Rajinder Singh as a defendant in the three Civil Suits, whereas CMPMO Nos. 171, 173 and 175 of 2018 are dismissed.

Parties shall appear before the learned Trial Court through counsel on ***1st July, 2020*** and thereafter learned Court below shall proceed with the matter in accordance with law. Pending miscellaneous applications, if any, also stand disposed of.

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

Prem Lal and Ors.

.....Petitioners

Versus

Amar Chand

.....Respondent

CMPMO No. 11 of 2020
Decided on 5.6.2020

Code of Civil Procedure, 1908- Order XXXIX Rules 1 & 2- Temporary injunction qua joint land- Entitlement of a co-sharer vis-à-vis other co-sharer for restraining him from raising construction- Held, suit land though joint but in exclusive possession of co-sharer on the spot under family arrangement- Plaintiffs also having raised construction over joint land in their possession- Allegations of defendant that he is raising construction over land after dismantling old structures not denied by plaintiffs- Plaintiffs not approaching Court with clean hands, not entitled for temporary injunction- Petition dismissed- Order of Additional District Judge allowing appeal and setting aside stay order granted by Trial Court in plaintiffs favour, upheld. (Para 6 to 9)

Cases referred;

Kalawati V. Netar Singh and Ors, AIR 2016 HP 85,

Whether approved for reporting? [8] Yes.

For the petitioners	**:**	Mr. G.R. Palsra, Advocate, through Video Conferencing.
For the respondent	**:**	Mr. Navlesh Verma, Advocate, through Video Conferencing.

Sandeep Sharma, Judge (oral):

Being aggrieved and dis-satisfied with judgment dated 26.12.2019, passed by the learned Additional District Judge, Sundernagar, District Mandi in CMA No. 36/2019, whereby order dated 25.11.2019, passed by the learned Civil Judge, Court No.2, Sundernagar, District Mandi, H.P. in CMA No. 474 of 2019 in CS No. 207 of 2019 came to be set aside, petitioners-plaintiffs (in short the "plaintiffs") have approached this Court in the instant proceedings filed under Article 227 of the Constitution of India, praying therein to set-aside aforesaid impugned order.

2. Precisely, the facts of the case as emerge from the record are that the plaintiffs filed civil suit for permanent prohibitory injunction against the respondent-defendant *(herein after referred to as "the defendant")* stating therein that land comprising khewat No. 6, Khatauni No.6, Khasra Nos. 83, 607, 1322, 1324, 1325, 2092/860, 2092, 294, kitas 7, total land measuring 19-08-15 bigha and khweat No.6, Khatuni No. 7, Khasrsa Nos. 1320 and 1321 kitas 2, land measuring 00-04-10 bighas situate in Muhal Jarol/94 Tehsil Sundernagar, District Mandi, H.P. (in short "the suit land") is jointly recorded in the ownership and possession of the plaintiffs and other co-owners. Plaintiffs further submitted before the court below that since the suit land is joint and not partitioned between the parties coupled with the fact that some portion of the suit land is adjoining to the National Highway, defendant without getting the suit land partitioned could not have raised construction without the consent and permission of the plaintiffs. Being aggrieved and threatened with the alleged forcible construction being raised by the defendant on the suit land, plaintiffs besides filing aforesaid suit also filed an application under Order 39 Rule 1 & 2 CPC, praying therein for interim relief.

3. Defendant resisted the aforesaid claim by way of filing written statement as well as reply to the application, stating therein that plaintiffs have not approached the court with clean hands and have suppressed the material facts. Defendant also claimed that suit land has been privately partitioned inter-se all the co-sharers by way of family arrangement and at present, every co-sharer has been allotted separate share and they all are in exclusive possession of the separate portion of the land. Defendant further stated in the written statement as well as reply to the application that he is not trying to cover any area, rather due to enlargement of family and out of necessity, he has been raising construction on the dismantled old structure of toilet and flour mill, which is about 50 feet away from the road frontage over khasra No. 1322. Defendant also claimed before the court below that all the co-sharers have constructed their houses over khasra No. 1322, but such fact has not been disclosed by the plaintiffs. Defendant further claimed that plaintiffs have not disclosed the factum of their having possession over the vacant land on the road front to the extent of more than 500 feet. Defendant with a view to substantiate his aforesaid plea also placed reliance upon the report of Patwari and Kanungo, who in their report categorically stated that the suit land comprising khasra No.1322 is owned and possessed by all the co-sharers including plaintiffs.

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[8] *Whether the reporters of the local papers may be allowed to see the judgment?*

4. Learned trial Court vide order dated 25.11.2019, allowed the application filed by the plaintiff under Order 39 Rule 1 & 2 CPC and restrained the defendant from raising any construction on the suit land till the final disposal of the main suit.

5. Being aggrieved and dissatisfied with the aforesaid order passed by the learned trial Court, defendant preferred an appeal under Order 43 Rule (1) R CPC before the learned Additional District Judge, Sundernagar, District Mandi, H.P., who vide order dated 26.12.2019, accepted the appeal, as a consequence of which, order of restraint issued by the Trial Court came to be set-aside. In this background, plaintiffs have approached this Court in the instant proceedings, praying therein for restoration of order dated 25.11.2019, passed by the learned trial Court after setting aside judgment dated 26.12.2019, passed by the learned Additional District Judge, Sundernagar, Mandi.

6. Having heard learned counsel for the parties and perused material available on record, this Court finds that factum with regard to joint ownership and possession of the parties over the suit land weighed heavily with the trial Court while allowing application under Order 39 Rule 1&2 CPC filed by the plaintiffs. Learned court below while passing order of interim injunction failed to take note of the specific assertion made by the respondent (defendant) that suit land stands partitioned inter-se parties by way of family arrangement. While making aforesaid assertion, defendant has further stated in the written statement that pursuant to aforesaid family arrangement, parties have not only been put to the physical possession of their shares, rather they all have raised some kind of construction over the land. Similarly, trial court also failed to take note of the fact that land comprised of khasra No. 1322 is in joint possession of the parties to the lis.

7. Plaintiffs while stating in their plaint that the suit land is jointly owned and possessed by the plaintiffs, defendant and other co-sharers, have nowhere stated that over khasra No. 1322, all the co-sharers have built their houses. Factum with regard to construction over some portion of the land by the plaintiffs and other co-sharers has not been denied specifically by the plaintiffs. Similarly, there is no specific denial to the assertion made by the defendant that pursuant to family arrangement inter-se parties, all the co-sharers including plaintiffs have been put to the possession of the specific portion of the land. Similarly, this court finds that assertion of the respondent in the written statement that there was one Atta Chakki and toilet belonging to him and the structure was old and around 50 meter away from the road front has also not been specifically denied. Since new facts with regard to construction by all the co-sharers over khasra No. 1322 and existence of Atta Chakki and toilet belonging to the defendant were made in the written statement, plaintiffs were duty bound to explain their position because mere denial simpliciter is not sufficient to rebut the claim, if any, of the opposite party. Denial simpliciter, if any, of the averments made by the contesting party virtually amounts to admission on the part of the other party.

8. This Court finds from the record that defendant has specifically stated in the written statement that plaintiffs were already in possession of the vacant land on the road front to the extent of 500 feet, but even such assertion never came to be refuted on behalf of the plaintiffs in their replication. In the aforesaid background, impugned judgment passed by the learned Additional District Judge cannot be said to be against the facts and law, rather court below has rightly concluded that since plaintiffs have failed to approach the court with clean hands, they are not entitled to the discretionary relief. Otherwise also, pleadings adduced on record by the respective parties as well as documents annexed therewith clearly reveal that construction allegedly raised by the defendant over khasra No. 1322 was already on the suit land and same was in the knowledge of the plaintiffs. Similarly, it clearly emerges from the pleadings that all the co-sharers including plaintiffs and defendant have already raised the construction over khasra No. 1322 after having got specific portion of the land in terms of some family arrangement arrived inter-se all the co-sharers and as such, learned Additional District Judge has rightly held that one co-sharer cannot be allowed to stop the construction, if any, made by other co-sharers on the ground that suit land being jointly owned and possessed is yet to be partitioned by meets and bounds, especially when he himself has raised construction over the joint land without there being any partition *inter-se* parties. It clearly emerges from the pleadings that defendant after having pulled down his old toilet and Atta Chakki was raising construction by covering that very portion. Apart from above, plaintiffs have been not able to dispute that they are already in possession of more than 500 feet area comprising of khasra No. 1322 abutting to road. Since plaintiffs failed to approach the court with clean hands as is evident from the pleadings available on record, learned trial Court ought not have granted discretionary relief in favour of the plaintiffs, especially when it stood established on record that plaintiffs themselves have raised construction over Khasra No. 1322 abutting to the road without there being any legal partition.

9. Factum with regard to construction over khasra No. 1322 by all the co-sharers including the plaintiffs and defendant clearly suggests that all the co-sharers of the suit land without

there being any legal partition agreed *inter-se* them to raise construction over specific portions of the land allotted to them in some family arrangement and as such, plaintiffs who have already raised construction over one portion of the suit land cannot be permitted to stop construction by other co-sharers on the ground that land being joint is still to be partitioned in accordance with law. It is none of the case of the plaintiffs that defendant has raised or is raising construction over and above his share allotted to him in family partition arrived inter-se parties. Plaintiffs have nowhere stated that they are being dispossessed by the defendant from his possession and he is encroaching upon the area in possession of the applicants/plaintiffs. Interestingly, in the case at hand, factum with regard to construction, if any, made on some portion of the suit land by the respondent has not been specifically denied by the plaintiffs and it has been nowhere pleaded in the plaint that how much area of the khasra No. 1322 is in his possession and how much area, they are likely to get in the partition. Leaving everything aside, since all the parties have allowed themselves to raise construction over khasra No. 1322 without there being legal partition, plaintiffs being one of the co-sharers, cannot be permitted to object construction, if any, by other co-sharers on the portion of khasra No. 1322 on the ground that land is still joint *inter-se* parties.

10. A co-ordinate Bench of this Court in case titled ***Kalawati V. Netar Singh and Ors, AIR 2016 HP 85*** has categorically held that in case party does not specifically and expressly deny the averments made by the opposite party in the written statement and reply, the averments so made in the written statement are presumed to be admitted and court must give due weightage to the same. In the case at hand, as has been discussed herein above, averments made by the respondent with regard to construction by all the co-sharers over khasra No. 1322 in terms of family arrangement as well as existence of old structure i.e. toiled and Atta Chakki have not been specifically denied by the plaintiffs and as such, such assertions are presumed to be correct.

11. Needless to say, grant or refusal of relief of temporary injunction is purely equitable relief and while refusing/granting the same, court is required to weigh several factors before coming to any conclusion. There are three basic ingredients, which are to be taken into consideration by the court while considering prayer, if any, for interim injunction i.e. prima-facie case, balance of convenience and sufferance of irreparable loss and injury and these all factors are required to be comparatively examined by the court. Over and above all the aforesaid factors, court while considering grant of discretionary relief is also expected to see conduct of the parties, which is most important factor. In the case at hand, material adduced on record by the respective parties clearly suggests that plaintiffs failed to approach the court with clean hands and as such, an inference can be drawn that plaintiffs with a view to have interim order in their favour suppressed material facts purposely and intentionally. In the case at hand, no irreparable loss and injury, which cannot be compensation in terms of money, would be caused to the applicants/plaintiffs in case injunction is not granted to them and as such, no illegality and infirmity can be found in the impugned order passed by the learned Additional District Judge.

12. Consequently, in view of the detailed discussion as well as law relied upon, this Court sees no illegality and infirmity in the impugned order passed by the learned Additional District Judge, Sundernagar, which otherwise appears to be based upon proper appreciation of facts and law and accordingly, same is upheld. As such, present petition is dismissed being devoid of any merits. Interim order, if any, stands vacated. Records be sent back forthwith. Needless to say, any observation/finding returned in the case at hand by this Court shall not be construed to be reflection on the merits of the main case, which shall be decided by the court below strictly on the basis of pleadings as well as evidence ought to be led on record by the respective parties before it.

BEFORE HON'BLE MS. JUSTICE JYOSTNA REWAL DUA, J.

Rekha

.....petitioner.

Versus

State of H.P.& another ..... respondents.

CMPMO No 603 of 2019
Reserved on: 06.12.2019
Decided on: 20.12.2019

Code of Civil Procedure, 1908- Section 152- Rectification of errors in judgment, decree or order- Extent of power of Court- Held, application under Section 152 of Code is maintainable for correction of errors in judgment, decree or order which are clerical or arithmetical in nature- Powers cannot be invoked for claiming a substantive relief which was not granted under the decree which has attained finality. (Para 3)

Code of Civil Procedure, 1908- Section 152- Correction of errors in judgment, decree or order- Extent of powers- Held, where intention reflected in the judgment has not resulted in the relief clause, application under Section 152 of Code would be maintainable to correct the accidental slip. (Para 4)

Cases reffered;
Bai Shakriben (Dead) by Natwar Melsingh Vs. Special Land Acquisition Officer (1996) 4 SCC 533
Bijay Kumar Saraogi Vs.State of Jharkhand, (2005) 7 SCC 748,
Jayalakshmi Coelho V/S Oswald Joseph Coelho, (2001) 4 SCC 181,
Narotam Ram Vs. Land Acquisition Collector, AIR 2003 HP 55
State of Punjab Vs.Darshan Singh, 2004) 1 SCC 328,
Union of India Vs. Swaran Singh, (1996) 5 SCC 501,

Whether approved for reporting?1 Yes.

For the petitioner: Mr. B.S. Chauhan, Sr. Advocate with Mr.Munish Datwalia, Advocate.
For the respondent: Mr. Anil Jaswal, Additional Advocate General with Mr. Manoj Bagga, Assistant Advocate General, for the respondents.

Jyotsna Rewal Dua, J

An application moved by the petitioner under Section 152 of Code of Civil Procedure, seeking rectification of an alleged omission in the award passed by the learned Additional District Judge- (I), Shimla, in a land reference case, has been dismissed vide order dated 22.08.2019. Hence, instant petition has been preferred underArticle 227 of the Constitution of India.

[1] *Whether reporters of the local papers may be allowed to see the judgment?*

2. Facts

2(i) An award was passed on 10.11.2017, in LAC PetitionNo. 2-S/4 of 2017/16, under Section 18 of Land Acquisition Act, whereunder, petitioner was held entitled for enhancement of compensation of land @ Rs.10,196/- per square meter and Rs.4,69,124/- on account of 23 apple trees. The petitioner was also held entitled for following statutory benefits in para 37 of the award:-

> "*a) she shall be entitled to solatium at the rate of 30% per annum on the enhanced market value of the land assessed herein above;*
>
> *b) she shall also be entitled to additional compensation @ 12% per annum under section 23(1A) of the Act from the date of notification under Section 4 of the Act, till the date of award made by the Collector i.e. 20.08.2011 and*
>
> *c) she shall be entitled to interest on market value assessed under section 23(1) of the Act, solatium the additional acquisition charges worked out under Section 23 (1A) of the Act @ 9% per annum from 20.08.2011 to 19.8.2012 i.e. for the period of one year and @ 15% per annum from 19.8.2012 till the amount of payment/deposit of the amount of compensation as assessed above in the court."*

The aforesaid award has been challenged by the State in this Court in RFA No.380/2018, wherein execution of award has been stayed, subject to deposit of entire awarded amount.

2(ii) An application under Section 152 of Code of Civil Procedure was moved by the petitioner before the learned Additional District Judge (1) Shimla to the effect that in para-37(c) of the award, interest @ 9% per annum has been granted from 20.08.2011 to 19.8.2012, whereas, it should have been granted from the date of issuance of notification under Section 4 of Land Acquisition Act i.e. from 25.07.2008 to 24.7.2009. And thereafter 15% interest per annum has been granted w.e.f. 19.8.2012, whereas, it should have been grantedfrom 24.7.2009.

The case of the petitioner is that:- there is an error in the award in respect of period from which the statutory interest has been allowed. As the provisions of Section 28 of the Land Acquisition Act 1894, 9% interest per annum has to be awarded w.e.f. date of taking over of the possession of the land; as per the settled law, possession for the purpose of acquisition has to be determined from the date of issuance of notification under Section 4 of the Land Acquisition Act; the 15% interest per annum is payable from the date of expiry of the said period of one year on the amount of such excess or part thereof which has not been paid into Court before the date of such expiry.

2(iii) This application moved by the petitioner under Section 152 CPC has been dismissed by the learned Additional District Judge on 22.8.2019. Aggrieved, instant petition has been preferred.

3(i) Any party to a judgment, decree or order, as the case may be, has a right to apply at any time under Section 152 of the Code of Civil Procedure to the concerned Court for rectification of any arithmetical or clerical error in the judgment, decree or the order, as thecase may be. An application can be maintained under Section 152 CPC,provided the judgment/order/decree contains clerical or arithmetical error.

3(ii) Hon'ble Apex Court in (1996) 4 SCC 533 titled **Bai Shakriben (Dead) by Natwar Melsingh Vs. Special Land Acquisition Officer,** has clearly indicated that omission to award additional amount under Section 23(1-A), enhanced interest under Section 28 and solatium under Section 23(2) are not clerical or arithmetical mistakes and the Court has no power or jurisdiction to award the amounts under Section 152 CPC. The relevant part is reproduced hereinafter:-

> *"The omission to award additional amounts under Section 23 (1- A), enhanced interest under Section 28 and solatium under Section 23(2) are not clerical or arithmetical mistake crept in the award passed by the Reference Court but amounts to non-award. Under those circumstances, the Reference Court was clearly in error in entertaining the application for amendment of the decree and is devoid of power and jurisdiction to award the amounts under Sections 23(2) 23(1-A) and 28 of the Act."*

3(iii) In (1996) 5 SCC 501 titled **Union of India Vs. Swaran Singh**, Hon'ble Apex Court reiterating its earlier decisions held that that the Reference Court or the High Court has no power or jurisdiction to entertain any applications under Sections 151 and 152 tocorrect any decree which has become final or to independently pass an award enhancing the solatium and interest as amended by Act 68 of 1984.

3(iv) In (2005) 7 SCC 748 titled **Bijay Kumar Saraogi Vs. State of Jharkhand**, it was held that Section 152 CPC cannot be invoked for claiming a substantial relief, which was not granted under the decree, which has attained finality.

4. Learned Senior counsel for the petitioner contended that present is a

case where there is an omission, an error in the relief clause of the award, which becomes evident when one goes through the entire award as a whole, in particular paragraph-35 thereof. In para-35 of the award, learned Additional District Judge has held that the petitioner was entitled to interest from the date of issuance of notification under Section 4(1) of the Land Acquisition Act. The interest from the date of issuance of Section 4 notification has been allowed in relief Clause No.37 (b), however, the same has not found its way in relief clause No. 37(c) pertaining to grant of statutory benefit under Sections 28 and 34 of the Act, which is an accidental slip & needs to be corrected under Section 152 CPC.

4(ii) Section 28 of the Land Acquisition Act, pertaining to grant of interest on excess compensation, having bearing on relief clause No.37(c) is extracted hereinafter:-

> "28. Collector may be directed to pay interest on excesscompensation. If the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of (nine per centum) per annum from the date on which he took possession of the land to the date of payment of such excess into Court.
>
> Provided that the award of the Court may also direct that where such excess or any part thereof is paid into Court after the date of expiry of a period of one year from the date on which possession is taken, interest at the rate of fifteen per centum per annum shall be payable from the date of expiry of the said period of one year on the amount of such excess or part thereof which has not been paid into Court before the date of such expiry."

As per the above section, on excess compensation, interest @ 9% per annum is payable from the date of taking possession of land to the date of payment of such excess into Court. Court may also direct in cases where excess is paid after expiry of one year from the date on which the possession is taken then interest @ 15% per annum shall be payable from the expiry of the period of one year till the date of deposit.

A Full Bench decision of this Court in AIR 2003 HP 55 titled **Narotam Ram Vs. Land Acquisition Collector**, held that interest under Section 28 of the Land Acquisition Act is to be paid from the date the possession is taken over under the Act, which in no case can be before the issuance of notification under Section 4 of the Act.

4(iii) In the award in question, learned Reference Court in paragraph 35, held the petitioner entitled to interest from the date of issuance of notification under Section 4(1) of Land Acquisition Act i.e.

w.e.f. 25.7.2008. The date of taking over the possession of land was thus taken as 25.7.2008, which was the date of issuance of Section 4(1) notification. Apart from enhancing the compensation, learned Reference Court also granted statutory benefits including interest @ 9% per annum and 15% per annum. Intention of the Reference Courtto award interest under Section 28 of the Act @ 9% per annum for a period of one year from the date of taking over the possession and thereafter @15% till the deposit of the amount is clear. Paragraph 35 ofthe award is manifestation of the intention of the learned Reference Court in treating the date of issuance of Section 4 notification as the date of taking over the possession. However, this intention has not been completely translated in the relief clause. As a result of some mistake 9% interest has been awarded w.e.f. 20.08.2011 to 19.8.2012 instead of 25.7.2008 (date of issuance of section 4 notification) to 24.7.2009. Accordingly interest @ 15% was to be awarded w.e.f. 24.7.2009 till the date of deposit.

Hon'ble Apex Court in (2001) 4 SCC 181 titled **Jayalakshmi Coelho V/S Oswald Joseph Coelho,** held that application under Section 152 CPC will be maintainable where intention reflected in the judgment has not resulted in the relief clause.Following para being relevant is reproduced hereinafter:-

> "**14.** As a matter of fact such inherent powers would generally be available to all Courts and authorities irrespective of the fact whether the provisions contained under Section 152, CPC may or may not strictly apply to any particular proceeding. In a matter where it is clear that something which the Court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake it would only advance the ends of justice to enable the Court to rectify such mistake. But before exercise of such power the Court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits something which was intended to be otherwise that is to say while passing the decree the Court must have in its mind that the order or the decree should be passed in a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The facts and circumstances may provide clue to the fact as to what was intended by the Court but unintentionally the same does mentionin the order or the judgment or something which was intended to be there stands added to it. The power of rectification of clerical, arithmetical errors or accidental slip does not empower the Court to have a second thought over the matter and to find that a better order or decree could or should be passed. There should not be re-consideration of merits of the matter to come to a conclusion thatit would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. On a second thought Court may find that it may have committed a mistake in passing an order in certain terms but every such mistake does not permit its rectification in exercise of Court's inherent powers as contained under Section 152, CPC. It is to be confined to something initially intended but left out or addedagainst such intention.

In (2004) 1 SCC 328, titled **State of Punjab Vs. Darshan Singh**, relevant segment held as under:-

> "**13.** The basis of the provision under S. 152 of the Code is founded on the maxim "actus curiae neminem gravabit" i.e. an act of Court shall prejudice no man. The maxim "is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law," said Cresswell, J. in Freeman v. Tranah(12 CB 406). An unintentional mistake of the Court which may prejudice the cause of any party must and alone could be rectified. In Master Construction Co. (P) Ltd. v. State of Orissa (AIR 1966 SC 1047) it was observed that the arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of theCourt liable to be corrected. To illustrate this point it was said that in a case where the order contains something which is not mentioned in the decree, it would be a case of unintentional omission or mistake as the mistake or omission is attributable to the Court which may say something or omit to say something which it did not intend to say or omit. No new arguments or re- arguments on merits can be entertained to facilitate such rectification of mistakes. The provision cannot be invoked to modify, alter or add to the terms of the original order or decree so as

to, in effect, pass an effective judicial order after the judgmentin the case."

5. In the instant case, there is an accidental slip in the relief clause, which is writ large on the face of the award. The intention of the learned Reference Court is to grant statutory benefits under Section 28 of Land Acquisition Act. These statutory benefits have also actuallybeen granted in the award. However, the date from which these statutory benefits have been granted is not in consonance with the intention clearly reflected in paragraph-35 of the award. The date of taking over the possession of the land was taken as 25.7.2008, which isthe date of issuance of Section 4 notification and interest was allowed from this date whereas in the relief clause No.37(c), a variation has occurred.

In view of the aforesaid reasons, there is merit in the petition. Accordingly, the same is allowed. Impugned order passed on 22.8.2019 by the learned Additional District Judge (1), Shimla, is quashed and set aside. Application moved by the petitioner under Section 152 of Code of Civil Procedure is allowed. Learned Reference Court is directed to rectify paragraph 37(c) of the award by allowing 9% interest per annum w.e.f. 25.7.2008 to 24.7.2009 and 15% interest per annum from 24.7.2009 to the date of deposit. All pending application(s) shall also stand(s) disposed of.

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

1. Cr.MMO No.373 of 2018

Parminder Singh ...Petitioner.

Versus

Om Prakash ..Respondent.

2. Cr.MMO No.432 of 2018

Parminder Singh ...Petitioner.

Versus

Om Prakash ..Respondent.

Cr.MMO No. 373 of 2018 alongwith
Cr.MMO No. 432 of 2018
Reserved on: 22.06.2020
Date of Decision: June 23, 2020

Code of Criminal Procedure, 1973- Section 254- Closure of defence evidence- Legality of- Trial Court closing evidence of accused facing trial before it for offence under Section 138 of Negotiable Instruments Act, 1881 – Additional Sessions Judge upholding order in revision- Petition against- Held, accused remained absent on seven consecutive hearings fixed for recording his defence evidence- He never filed any list of witnesses or documents prior to date of closure of his evidence by Trial Court- No irregularity or perversity in order of Additional Sessions Judge dismissing revision petition of accused against order of Trial Court- Petition dismissed. (Para 11 & 12)

Code of Criminal Procedure, 1973- Section 311- Adduction of additional evidence- Conduct of party- Relevancy- Held, when provisions of Section 311 of Code are sought to be invoked by a party, its conduct is relevant for taking decision whether to exercise or not to exercise such power in its favour- Where party has not led any evidence despite availing large number of opportunities and right to lead evidence has been closed by order of Court, in such an eventuality, Section 311 of Code would not be available to help out such party. (Para 18 & 19)

Whether approved for reporting?[9] *Yes*

For the Petitioner: Mr. Rajiv Jiwan, Senior Advocate with Mr.Ajeet Sharma and Prashant Sharma, Advocates, through Video Conferencing.

For the Respondent: Mr.L.S. Mehta, Advocate, through Video Conferencing.

Vivek Singh Thakur, J (oral)

Petitioner herein is accused in a complaint case filed, under Section 138 of Negotiable Instruments Act (hereinafter referred to as 'N.I. Act'), by respondent-complainant.

2. Petitioner-accused has preferred two petitions under Section 482 of the Code Criminal Procedure (hereinafter referred to as 'Cr.P.C.').

3. First petition bearing Cr.MMO No. 373 of 2018, titled as *Parminder Singh vs. Om Prakash*, has been preferred against impugned order dated 16.05.2018, passed by learned Additional Sessions Judge-II, Solan, District Solan, H.P., in Revision Petition No.2ASJ-II/10 of 2018, titled as *Parminder vs. State of Himachal Pradesh & another,* whereby revision petition preferred by petitioner-accused against closure of his evidence in the complaint, vide order dated 02.12.2017, passed by learned Judicial Magistrate, 1st Class, Arki, District Solan, H.P., in case No.6/3 of 2013, titled as *Om Prakash vs. Parminder*, has been dismissed.

4. Second petition bearing Cr.MMO No. 432 of 2018, titled as *Parminder Singh vs. Om Prakash,* has also been filed by the petitioner-accused against the impugned order dated 24.07.2018, passed by the trial Court whereby application preferred by petitioner-accused under Section 311 Cr.P.C. for filing certain documents and examining/summoning of witness has been dismissed.

5. Complaint, by respondent-complainant, for dishonour of cheque amounting to `3,50,000/- allegedly issued by the petitioner-accused, was filed in the trial Court on 08.11.2012, wherein after service of petitioner-accused, subsequent to putting of Notice of Accusation to him, evidence of respondent-complainant was closed on 28.05.2016 and the case was listed on 30.06.2016 for recording statement of accused under Section 313 Cr.P.C., which was recorded on 24.09.2016 and on that date, on request made on behalf of petitioner-accused, opportunity to lead evidence in defence was granted to him and the case was fixed for 20.02.2017. On 20.02.2017, Presiding Officer was on medical leave and, thus, case was adjourned for proper order on 17.03.2017, on which date, case was fixed for 24.04.2017 to record defence evidence. On 24.04.2017 petitioner-accused was not present and his application for exemption from personal appearance was allowed. On that day, no defence evidence was produced, rather time was sought for, which was granted and case was adjourned for 08.06.2017. Thereafter, on 08.06.2017 and 17.07.2017 neither petitioner-accused attended the Court nor any defence evidence was produced. However, on 17.07.2017, case was listed for consideration before Lok Adalat on 19.08.2017. It is pertinent to record that petitioner-accused did not attend the Lok Adalat and, thus, no amicable settlement could be arrived at between the parties and, therefore, case was ordered to be listed before regular Court for examining the defence witnesses by giving last opportunity and case was fixed for 06.09.2017. On 06.09.2017 again, one more opportunity, as last opportunity, was sought for recording defence witnesses. Accepting prayer of the petitioner-accused, case was adjourned for 06.11.2017 for recording statement of defence witnesses (DWs) to be brought on self responsibility. On 06.11.2017, petitioner-accused did not attend the Court. On that day also, no DWs were present and on request of learned counsel for the petitioner-accused, one more last opportunity was granted to examine defence witnesses on self responsibility on next date of hearing fixed as 02.12.2017.

6. On 02.12.2017, petitioner-accused attended the Court, but no defence witnesses were produced and, therefore, on the ground that despite availing various opportunities no witness was produced by petitioner-accused, his defence evidence was closed by order of the Court and case was adjourned for hearing final arguments on 20.12.2017.

7. On perusal of record, as noted hereinabove, it reveals that after recording of statement of petitioner-accused under Section 313 Cr.P.C., despite having availed opportunity to lead evidence in defence, he did not appear before the Court on 24.04.2017, 08.06.2017, 17.07.2017, 19.08.2017, 06.09.2017, 06.11.2017 and lastly he appeared on 02.12.2017, but without his learned counsel and any witness to be examined in defence.

8. It is also noticeable that till 02.12.2017, no list of witnesses was ever filed by the petitioner-accused, which he intended to examine as defence witnesses.

9. Against the aforesaid order of closure of leading defence evidence, petitioner-accused had approached the Appellate Revisional Court and the said Court after considering entire facts and

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9 Whether reporters of the local papers may be allowed to see the judgment?

circumstances, has dismissed his revision petition. In the revision petition or during its pendency, petitioner-accused has not brought on record any plausible reason for not appearing before the trial Court on seven dates fixed for recording of his evidence in defence. In revision petition, petitioner-accused has claimed that on 02.12.2017 he could not produce evidence before the trial Court, as his learned counsel was not present and he had already handed over the documents i.e. Daily Diary Rapat No.22(A) dated 16.03.2012 and GD entry No.13(A) dated 13.12.2011, but his learned counsel could not produce the same and file the list of witnesses in the Court. It is further averred in the revision petition that on 02.12.2017 his learned counsel was not present in the Court and petitioner-accused could not contact his learned counsel as his Mobile Phone was switched off and, therefore, it was canvassed that the trial Court has wrongly closed his evidence.

10. Plea taken in the revision petition was never taken before the trial Court nor any list of witnesses was ever filed giving details of the witnesses to be examined in defence alongwith documents sought to be produced and proved through them.

11. Petitioner-accused has tried to justify non-production of evidence in defence on 02.12.2017, but he is conspicuously silent about the reason for his absence on previous 6-7 dates fixed for recording his defence evidence and he has also failed to assign any reason for not filing list of witnesses or documents prior to 02.12.2017.

12. Considering entire facts and circumstances, learned Additional Sessions Judge-II, Solan, has rightly dismissed the revision petition preferred by the petitioner-accused against impugned order dated 16.05.2018. No material has been brought on record so as to indicate, much less to establish, that learned Additional Sessions Judge has committed material irregularity, illegality or perversity in passing the impugned order. Complaint was filed on 08.11.2012 and right to lead evidence in defence was closed on 02.12.2017 after consecutive seven absents of petitioner-accused on the dates fixed for leading his evidence in defence. Therefore, I find no ground for interference in the impugned order and accordingly Cr.MMO No.373 of 2018 must fail.

13. After dismissal of revision petition, learned Additional Sessions Judge-II, Solan, had directed the parties to appear before the trial Court on 21.05.2018, on which date neither respondent-complainant nor petitioner-accused were present, however, their respective learned counsel had attended the Court and case was adjourned for arguments on 30.05.2018. The case was again adjourned for 12.06.2018, on which date, an application under Section 311 Cr.P.C. was moved on behalf of the accused-petitioner for adducing additional evidence. The said application was rejected by the trial Court vide order dated 24.07.2018, which is impugned in Cr.MMO No.432 of 2018.

14. In the application filed for filing documents and examining/summoning of witness under Section 311 Cr.P.C., petitioner-accused has stated that he intended to produce the lost reports registered in the Police Station referred supra, which according to him, were very important documents and, thus, examination of MHC Police Station, Arki, for proving these documents is necessary. It is also averred that application for production of aforesaid documents and summoning the aforesaid material witnesses could not be filed earlier due to bonafide mistake. It has been explained that there was another complaint under Section 138 N.I. Act pending between the same parties, but present complaint was fixed for examination of defence witnesses prior to the said complaint and the petitioner-accused remained under the impression that he would be filing an application for production of documents and summoning of witnesses together in both cases. But before arriving that stage in another complaint/criminal case, defence evidence was closed by the Court in present case and, thus, applicant could not file application earlier.

15. Section 311 Cr.P.C. provides that any Court, at any stage of inquiry, trial or other proceeding under Cr.P.C., may summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined with further rider that the Court shall summon and examine or recall and re-examine any such person if his evidence appears to the Court to be essential to the just decision of the case.

16. Section 311 Cr.P.C. empowers the Court to summon and examine material witness(es) or examine a person present in Court even not summoned, whereas, in present case, petitioner-accused also intends to file documents. Even if, it is construed that documents can also be brought on record by invoking power of the Court under Section 311 Cr.P.C., and summoning, examining/re-examining a witness, then also prime test for bringing such evidence on record would be that such evidence must appear to the Court to be essential for just decision of the case.

17. The power, under Section 311 Cr.P.C., can be invoked by any Court, at any stage of an inquiry, trial or other proceedings, but with rider that Court shall do so if it appears to it to be essential to the just decision of the case. In the first limb of Section, wherein Court has been empowered to summon any person as a witness or examine any person in attendance or recall or re-examine any person already examined, the Legislature has used word 'may' by saying that 'any Court may'. Whereas, in the second limb which provides rider on the power of the Court given in first limb the word 'shall' has been used by Legislature providing that Court 'shall' summon and examine or recall or re-examine any such person if his evidence appears to be essential for just decision of the case. Therefore, power to summon is discretionary, but in case Court intends to exercise its powers then, it is mandatory that such evidence must appear to the Court to be essential to the just decision of the case.

18. Power under Section 311 Cr.P.C. can be exercised by the Court *suo motu* or on an application preferred by either party to the *lis.* In both eventualities the evidence, so proposed to be led, must appear to the Court to be essential to the just decision of the case. Exercising of power under Section 311 Cr.P.C. by the Court *suo motu,* is altogether different from invoking provisions of Section 311 Cr.P.C. by a party. In case provisions of Section 311 Cr.P.C., are sought to be invoked by a party, then definitely conduct of the said party shall also be relevant for the purpose of taking decision to exercise or not to exercise the power.

19. There may be a case where party would have led evidence, but for bonafide reasons, would not have been able to lead some evidence which may be essential to the just decision of the case for any reason beyond control of the said party like non-availability or ignorance of existence of such evidence at the time of leading the evidence and in such eventuality the party may invoke power of the Court under Section 311 Cr.P.C. However, in a case where party has not led any evidence despite availing large number of opportunities and right to lead evidence has been closed by order of the Court and there is no plausible reason for not leading evidence earlier in regular manner, I doubt, in such eventuality, power under Section 311 Cr.P.C. would be available to help such party. It is an exceptional power which would be in addition to the evidence already led, but where there is no evidence led by a party, for no satisfactory explanation there is no question of leading evidence invoking Section 311 Cr.P.C., more particularly when, it is not a case of the party that piece of evidence sought to be produced was not in possession or knowledge of the applicant party, rather in the present case from the evidence on record, for questions put to the complainant during cross-examination, documents proposed to be led in evidence were very much in the knowledge of the party, but neither those documents were put to the complainant at the time of his cross-examination nor were brought on record during six opportunities availed by the party to lead evidence.

20. Plea of the petitioner-accused that steps could not be taken to examine the witnesses on account of bonafide mistake also does not appear to be plausible for the reason that for about six dates fixed for recording evidence, he did not attend the Court, and it is also the fact that his learned counsel had been attending the dates and filing applications for exemption without taking any steps for leading evidence. It is not a case where the petitioner-accused was contesting in person, rather he was represented by a professional i.e. an Advocate, who is supposed to know duty of party to take effective steps to lead evidence by filing list of witnesses to be examined and documents to be relied and proved well within time at appropriate stage i.e. on fixing a date by the Court to lead evidence. It is another question that when two criminal cases are not clubbed, how common evidence be led therein. But as no such request was ever made by the party either in trial Court or in Revisional Court, without entering into merit, I do not find this plea to be bonafide, as such plea has been taken for the first time in the application filed under Section 311 Cr.P.C.

21. In present case, documents sought to be brought on record are GD entry No.13(A) dated 13.12.2011 and GD entry No.22(A) dated 16.03.2012 Daily Station Diary of Police Station, Arki, photocopies whereof have been filed with the application. GD entry No.13(A) recording caption 'Missing entry' was made on 13.12.2011 on the basis of application filed by petitioner-accused, wherein it was stated that his Cheque Book has been lost containing some cheques signed therein alongwith two affidavits and, therefore, it was requested to register FIR about missing of Cheque Book and affidavits so as to avoid any misuse thereof. In GD entry No.22(A) also caption as 'Missing entry' was recorded on 16.03.2012 on the basis of affidavit submitted by the petitioner-accused stating therein that Pan Card Number alongwith Cheque Book of PNB Branch, Arki, bearing Sl.No.795880 to 795889, which were signed, had lost somewhere in the month of December 2011 regarding which report dated 13.12.2011 was entered in Police Station, Arki, but cheque numbers were not indicated therein and that petitioner-accused had tried best at his level to trace the Pan Card and Cheque Book, but could not find the same.

22. Even if, documents proposed to be led in evidence, are permitted to be brought on record, it may not be suffice to absolve the petitioner-accused from his liability, if otherwise proved on record by the complainant, as these documents have contradiction with respect to the items lost by the petitioner-accused. Without discussing merits and demerits of these documents, I do not find that these documents are necessary for just decision of the case as these documents in isolation without any further corroboration of story put forth by the petitioner-accused are not sufficient to convince that these are essential for just decision of the case, as photocopies of the GD entries sought to be proved by examining police official, if taken to be true as it is, would only establish that these two reports were lodged in Police Station, Arki, at the instance of petitioner-accused, wherein he has reported missing of the Cheque Book, but this evidence would not be sufficient in itself to arrive at just and fair conclusion. In the first report, Serial Numbers of cheques of lost Cheque Book were not disclosed and it was stated that Cheque Book alongwith two affidavits was lost. Whereas, in second report, there is no reference of affidavits, but of Pan Card Number and further, Cheque Book containing cheques from Sl.No.795880 to 795889 is stated to have been lost. Normally Cheque Book starts from Odd numbers i.e. 1, 11.....71, 81, 91 as the case may be. The Cheque Book would be either of ten leaves or 20 leaves and so on and last number would be even number multiple of 10. Whereas, according to missing report, lost Cheque Book was containing cheques from Sl.No.795880 to 795889. So, neither starting nor closing number is normal. Otherwise also, in absence of any

document establishing reporting to the Bank that Cheque Book had been lost, would not be sufficient to believe the story of missing of Cheque Book in absence of further evidence with respect to action taken by the petitioner-accused for reporting the matter to the Bank, which was the main Institution wherefrom the money would have been withdrawn by misusing the cheques. There is no complaint by the complainant with respect to misusing of cheques. The petitioner-accused has not proposed to lead any evidence to the effect that he had ever informed his Bank about missing of his signed Cheque Book. Therefore, evidence proposed to be led in the application under Section 311 Cr.P.C., would not be sufficient to substantiate the plea taken by the petitioner-accused and the case has to be decided only on the basis of evidence led by the complainant, sufficiency and deficiency whereof, is not a question in the present case. However, from the above discussion, it can be construed that evidence proposed to be led with the application does not appear to be essential to the just decision of the case. Therefore, no case is made out for invoking powers of the Court under Section 311 Cr.P.C. Hence, second petition being Cr.MMO No.432 of 2018 also must fail.

23. For the aforesaid discussions and observations, both petitions are dismissed. However, it is made clear that any observation expressed for deciding these petitions, shall not have any bearing on the adjudication of the complaint pending before the Magistrate and any such observation made with respect to the pleadings or any other evidence of the case shall be construed to be limited for the purpose of adjudicating the present petitions. Pending application(s), if any, also stand disposed of.

Records of the Courts below be sent back immediately. Parties are directed to appear before the trial Court on 29.07.2020, through mode permissible either in person or alongwith/through counsel.

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

Shiv Ram .....Petitioner

Versus

State of Himachal Pradesh

.....Respondent

Cr.MP(M) No.426 of 2020
Decided on: 18.6.2020

Code of Criminal Procedure, 1973- Section 439- Regular bail- Grant of in a case registered for rape, penetrative sexual assault and wrongful confinement- Prosecution resisting bail on ground of chances of accused fleeing away from justice or dissuading witnesses from deposing in Court- Held, trial in the case has already commenced and material prosecution witnesses including prosecutrix stand examined- Two FIRs of sexual abuse were registered at instance of victim on same day and each contradicting and falsifying the other- So also the recitals made in her MLC which make the involvement of petitioner in rape case doubtful- Petitioner cannot be kept in jail for an indefinite period- He is already in jail for the last about two years- Petition allowed- Accused admitted on bail subject to conditions. (Para 5 to 8)

Cases referred;

Manoranjana Sinh Alias Gupta versus CBI 2017 (5) SCC 218,
Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496,
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49,

Whether approved for reporting? [10] Yes

For the Petitioner : Mr. N.S. Chandel, Senior Advocate with Mr. Vinod Gupta, Advocate.

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[10] *Whether the reporters of the local papers may be allowed to see the judgment?*

For the Respondent : Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, for the State.

Sandeep Sharma, Judge (oral):

By way of present petition filed under Section 439 of Cr.PC, prayer has been made on behalf of the bail petitioner namely Shiv Ram for grant of regular bail in case FIR No. 170/18 dated 17.7.2018, under Sections 342, 376 and 506 of IPC and Section 4 of POCSO Act, registered at P.S. Barmana, District Bilaspr, H.P.

13. In terms of order dated 4.6.2020, ASI Raj Kumar, has come present alongwith records. Mr. Arvind Sharma, learned Additional Advocate General, has also placed on record status report prepared on the basis of investigation carried out by the Investigating Agency. Record perused and returned.

14. Record/status report made available to this Court reveals that on 17.7.2018, complainant namely Sant Ram lodged a complaint at PS Barmana, District Bilaspur, H.P. alleging therein that his minor daughter victim-prosecutrix (name withheld) has been repeatedly sexually assaulted by the bail petitioner and as such, appropriate action in accordance with law be taken against him. Complainant alleged that on 6.7.2018, his minor daughter had got the case under Section 376 IPC registered against a person namely Vikas Kumar at Women Police Station Bilaspur. He alleged that on 6.7.2018, his minor daughter revealed him that when she was studying in class-9, bail petitioner, who is uncle in her relations, repeatedly called her to his tea shop and thereafter, sexually assaulted her. He alleged that on 4.7.2018, bail petitioner called his minor daughter and thereafter, sexually assaulted her. He further alleged that on 5.7.2020, she was sent to her native place from village Malokhar, District Bilaspur, in a three wheeler, but the driver of three wheeler dropped her at Khalsi, from where person namely Vikas took her to Bilaspur and allegedly sexually assaulted her. On the basis of aforesaid complaint, police lodged FIR as detailed herein above against the petitioner on 17.7.2018 and since 18.7.2018, he is behind bars. Record further reveals that separate FIR bearing No. 12/2018 dated 6.7.2018, under Sections 363, 376 and 506 and Section 4 of POCSO Act, came to be registered against person namely Vikas at Women Police Station Bilaspur, but he stands enlarged on bail vide order dated 1.8.2019, passed by the learned Sessions Judge, Bilaspur.

15. Mr. Arvind Sharma, learned Additional Advocate General, while fairly admitting factum with regard to completion of investigation and filing of challan, contends that though nothing remains to be recovered from the bail petitioner but keeping in view the gravity of offence alleged to have been committed by the bail petitioner, his application for grant of bail deserves to be rejected outrightly. He further contends that since trial has commenced and 12 witnesses have been examined, it may not be in the interest of justice to enlarge the petitioner on bail, who in the event of his being enlarged on bail may not only flee from justice, but also, may make an attempt to dissuade the remaining prosecution witnesses from deposing against him. While fairly admitting factum with regard to enlargement of person namely Vikas on bail, Mr. Sharma, contends that same cannot be a ground to enlarge the petitioner on bail, especially when it stands duly established on record that bail petitioner, who otherwise happened to be uncle of victim-prosecutrix, had been repeatedly sexually assaulting the victim-prosecutrix since 2018 taking undue advantage of her minority and innocence.

16. Having heard learned counsel for the parties and perused material available on record, this Court finds that trial in the case at hand has commenced, wherein statements of material prosecution witnesses including the victim-prosecutrix stand recorded. It is also not in dispute that two separate FIRs have been lodged against the persons namely Vikas as well as the present bail petitioner for the offences alleged to have been committed on the same date i.e. 4.7.2018 that too at different places; one at Bilaspur; and other at village Malokhar. Having carefully perused charge sheet filed by the Investigating Agency in FIR No. 12/2018 dated 7.6.2018, this Court finds that on 6.7.2018, victim-prosecutrix lodged a complaint at Women Police Station Bilaspur, alleging therein that on 4.7.2018, she was forcibly taken to Bilaspur at 11:00 AM by the person namely Vikas on his motorcycle, where he allegedly sexually assaulted her in a hotel named Balaji. As per the complaint made in the aforesaid FIR, victim-prosecutrix was kept in an illegal confinement in the hotel in question for a whole night i.e. 4.7.2018 and she was only permitted to go back to her native place on 5.7.2020. Subsequent to filing of aforesaid FIR, another FIR bearing No. 170 of 2018 dated 17.7.2018, which is subject matter of the present case, came to be lodged at the behest of the father of the victim-prosecutrix, wherein complainant alleged that on 4.7.2018, victim-prosecutrix was called by the present bail petitioner to his tea shop in a village called Mulokhar, District Bilaspur, H.P., and at 2:30 pm, she was sexually assaulted by the bail petitioner.

17. If the version putforth by the victim-prosecutrix in the FIR at hand is perused, it clearly suggests that on 4.7.2018, victim-prosecutrix after having received telephonic call at 6:00 am, went to village Malokhar to meet the bail petitioner, where allegedly at 2:30 pm, she was sexually assaulted by the present bail petitioner. Version put forth by the victim-prosecutrix in the case at

hand further reveals that victim-prosecutrix remained in the company of the present bail petitioner in the night of 4.7.2018 at village Malokhar, from where she was sent to her native place on 5.7.2018 by the bail petitioner in a three wheeler, but driver allegedly dropped her at Bilaspur. If aforesaid version putforth by the victim-prosecutrix is presumed to be correct, it completely falsifies her earlier version given in FIR No. 12/2018. If the versions putforth by victim-prosecutrix in both the FIRs are read in conjunction, it certainly creates doubt with regard to correctness and genuineness of the allegations leveled by the victim-prosecutrix against the present bail petitioner. If the MLC adduced on record by the Investigating Agency in FIR No. 12 of 2018 is perused, it also casts serious doubt with regard to allegation leveled by the victim-prosecutrix against the present bail petitioner in the case at hand because in a statement given to the doctors, victim-prosecutrix has categorically stated that on 4.7.2018, she was taken to Bilaspur by person namely Vikas and she was in his company till the morning of 5.7.2018.

18. Though aforesaid aspects of the matter are to be considered and decided by the court below on the basis of totality of evidence collected on record by the Investigating Agency, but having noticed aforesaid glaring aspects of the matter, this Court, sees no reason to let the bail petitioner incarcerate in jail for an indefinite period, especially when he has already suffered for approximately two years. Moreover, statements of material prosecution witnesses including victim-prosecutrix stand recorded coupled with the fact that person namely Vikas, against whom same allegation has been leveled by the victim-prosecutrix stands enlarged on bail.

19. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that one is deemed to be innocent till the time, guilt of his/her is not proved in accordance with law. In the case at hand, guilt if any of the bail petitioner is yet to be established on record by the Investigating Agency by leading cogent and convincing evidence and as such, his freedom cannot be curtailed for an indefinite period during trial. Apprehension expressed by the learned Additional Advocate General that in the event of his being enlarged on bail, he may flee from justice or dissuade the remaining prosecution witnesses, can be best met by putting the bail petitioner to stringent conditions as has been fairly stated by the learned counsel for the petitioner.

20. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court has further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
>
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***
>
> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody***

after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

21. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

22. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

23. In **Manoranjana Sinh Alias Gupta** versus **CBI** 2017 (5) SCC 218, The Hon'ble Apex Court has held as under:-

> ***" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."***

24. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

> ***(ix) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
> ***(x) nature and gravity of the accusation;***
> ***(xi) severity of the punishment in the event of conviction;***
> ***(xii) danger of the accused absconding or fleeing, if released on bail;***
> ***(xiii) character, behaviour, means, position and standing of the accused;***
> ***(xiv) likelihood of the offence being repeated;***
> ***(xv) reasonable apprehension of the witnesses being influenced; and***
> ***(xvi) danger, of course, of justice being thwarted by grant of bail.***

25. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 2,00,000/- each with one local surety in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

> ***(f) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;***
> ***(g) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***
> ***(h) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and***
> ***(i) He shall not leave the territory of India without the prior permission of the Court.***

26. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

27. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone. The petition stands accordingly disposed of.

Dasti on usual terms.

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

Anil Kumar ...Petitioner.

Versus

State of H.P. ...Respondent.

Cr. MP (M) No. 892 of 2020
Reserved on : 25.06.2020
Date of Decision: 29th June, 2020

Code of Criminal Procedure, 1973- Section 439- Regular bail in a gang rape case- Grant of- On facts held, victim was an adult capable of giving consent and at relevant time was with her boyfriend- Place of her abduction is in thickly populated area and close to police post- Highly unbelievable that accused would feed their mobile numbers in cell phones of victim and would make a call from her phone numbers after committing rape- Other injuries on person of victim not explained by her- Conduct of her boyfriend after alleged abduction shady- Victim removed photographs from cell phone taken by accused on her cell phone- Accused in jail for last about one year and permanent resident of address given in petition- Case for grant of bail is made out- Petition allowed- Bail granted subject to conditions. (Para 14, 15 & 21)

For the petitioner : Mr. Karan Singh Kanwar, Advocate.

For the respondent : Mr. Nand Lal Thakur, Addl. A.G. with Mr. Ram Lal Thakur, Asstt. A.G. & Mr. Rajat Chauhan, Law Officer.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge

The petitioner who is under incarceration from June 9, 2019, i.e., for more than a year, for having been arrested along with co-accused, for kidnapping and committing rape with a girl aged 21 years, has come up before this Court, seeking regular bail.

2. Based on a First Information Report (FIR), the police arrested the petitioner, on 9.6.2019 in FIR No.23 of 2019, dated 9.6.2019, registered under Sections 365, 376D, 506, 34 of the Indian Penal Code, 1860, (IPC), in Women Police Station, Nahan, District Sirmour, Himachal Pradesh, disclosing cognizable and non-bailable offences.

3. Mr. Nand Lal Thakur learned Additional Advocate General had filed the status report through e-mail, printout of which is available on file. He further submits that he had sent a copy of the status report to learned counsel for the petitioner on WhatsApp number.

4. I have read the status report(s) and heard Mr. Karan Singh Kanwar, Advocate for the petitioner, Mr. Nand Lal Thakur, Ld. Additional Advocate General for the State of H.P.

FACTS:

5. The allegations in the First Information Report and the gist of the evidence collected by the Investigator are:

a) On 9th June 2019, at around 5.30 a.m., the victim, along with her boyfriend Ankush, visited Police Post, Kacha Tank, Nahan, and told them that yesterday night she was kidnapped and raped by two persons. After that, the officials of the concerned police post immediately took her to Women Police Station, Nahan.

b) On reaching Women Police Station, the victim made her statement under Section 154 CrPC, alleging that on the previous night, she had left her home along with her boyfriend, Ankush Sharma. While Ankush had gone nearby to buy cigarettes from a shop in the bus stand, the victim waited near Hari Om Stationery Shop alone. While she was waiting, two boys in a white Alto car drove up and stopped right in front of her. One of the boys stepped out of the car, grabbed her by her arm, and forced her inside the car, after which they drove the vehicle to Vikram Bagh. One of the boys showed her knife and threatened to kill her. He called the driver of the Alto car by Avinash and asked him to drive at some distance. When the victim tried to scream and fight back, they threatened her with a knife and told her that they would cut her up. They also warned her that if she continues fighting, they will call ten other boys to come and rape her.

c) After that, the accused took her to Bikram Bag and, in an isolated place, stopped the car and asked her to agree to have sex with them; otherwise, they would cut her into pieces and would also call ten boys to the river. Due to fear, the victim remained quiet. After that, they took her towards a creed near Markanda bridge in the car; both of them raped her. They undressed her entirely and raped her. Both the accused were under heavy intoxication. While in the vehicle Avinash burnt her arm with the cigarette

d) After that, the accused took the vehicle towards Subzi Mandi's side and took it in a path, where they again committed coitus with her.

e) The accused kept the victim nude in the car with them all night, and in the morning around 4-5 a.m., returned her clothes and dropped her near Sanskrit College.

f) The victim stated that she had not known the accused before this instance.

g) After being dropped, she called her friend Ankush, who came there. She revealed the entire incident to Ankush, and then they visited the Police Post Kacha Tank, which has led in the registration of the FIR mentioned above.

h) The investigator took the victim to Dr. Y.S. Parmar Government Medical College and Hospital, Nahan, where the doctors examined her. During such examination, the doctors preserved her vaginal swabs and, after sealing, handed the same to the police. The police arrested the accused and seized the vehicle. During the investigation, the police also sent the seat covers of the car for Forensic Examination.

i) The Forensic Science Laboratory detected the human semen from underwear, vaginal slides, vaginal swabs, cervical swabs, seat covers, one piece of cloth, and underwear of Anil Kumar, the bail petitioner. The examiner also detected human blood on the pants of the victim.

j) The Forensic Science Laboratory also conducted a test to match the DNA Profile of samples taken from the accused with the semen recovered from victim and seat covers. The samples obtained from the underwear of the victim and piece of cloth recovered from the car completely matched with the DNA profile obtained from Avinash. Similarly, the samples collected from the seat cover wholly matched with the DNA profile of Anil Kumar, the bail petitioner.

k) During the investigation, the police also took the victim to judicial custody for recording her statement under Section 164 CrPC. In her statement recorded under Section 164 CrPC, the victim reiterated her allegations and further stated to the Magistrate that she was threatened that in case she does not cooperate in the coitus, they will do away with her life.

l) She further stated that in the morning before dropping her at Sanskrit College, they had stopped the Alto Car near Gas Agency, where the accused Anil @ Chand alighted from the vehicle and went home and got his wallet. He told the victim that they would leave her only when she agrees to become their friend. They further advised her to meet them again in the night. After that, both the accused entered their mobile numbers in her mobile and also made a phone call from the mobile of the victim on their phone number. She further stated that Anil Kumar had taken her phone number immediately after pushing her in the car. She further mentioned that Avinash had also taken photographs with her.

m) During investigation, the police recorded supplementary statement of victim, in which she stated that she is a friend of Ankush for last 3-4 years and want to marry him. She further stated that she had deleted the photographs taken by Avinash from her phone. She further stated that when she dropped at Sanskrit College, she had made an Internet call to her boyfriend Ankush. The Police associated Ankush and recorded his statement under Section 161 CrPC. He stated that after purchasing cigarette, when he returned back then he did not find the victim present there. He further stated that he made a phone call to victim but her phone was switched off. He thought that the victim has got annoyed with him and after that he

searched her at various places, but did not find her. He assumed that she had returned to her home and consequently, he also returned to his home.

PREVIOUS CRIMINAL HISTORY

6. As per the Police report, the accused involved himself in the following case:

1). Case FIR No.93/2019 dated 21.8.2018, under Sections 341, 323, 506, 325, 34 of the Indian Penal Code, registered in Police Station, Sadar Nahan, District Sirmour, H.P.

SUBMISSIONS:

7. The learned counsel for the bail petitioner submits that the allegations are false and concocted.

8. On the contrary, Mr. Nand Lal Thakur, Additional Advocate General, contended that the victim reiterated her allegations on oath in her statement under Section 164 CrPC, which is a sufficient *prima facie* evidence. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

ANALYSIS AND REASONING:

9. Pre-trial incarceration needs justification depending upon the heinous nature of the offence, terms of the sentence prescribed in the statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

10. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows:

> "It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail."

11. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**,(1978) 1 SCC 240, Supreme Court in Para 16, holds:

> "The delicate light of the law favours release unless countered by the negative criteria necessitating that course."

12. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, a three-member bench of Supreme Court holds:

> "18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie

> case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

13. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches would be detailed and paintings with a few strokes.

14. In the present case, a perusal of evidence collected so far, and as placed in the Police report filed under section 173(2) CrPC, leads to the following inference:

a) The age of the victim is 21 years, and at that particular time, she admittedly was with her boyfriend Ankush, who was also an adult male aged 28 years.

b) Doctors examined the victim within around 15 hours of her abduction and noticed the following injuries:

i) 19 linear scar marks;

ii) 4 healed circular scars of diameter 1 centimeter on her body;

iii) Circular burn marks;

iv) Some circular marks showing parched skin and some showing blisters;

v) While giving history to the medical officer, she told that the accused had subjected her to four times penetrative sexual assault without using condoms (two times by each accused). She further told the doctors that on 4.6.2019, she had a consensual coitus with her boyfriend.

c) A combined reading of medico-legal certificate and Forensic Science Report, including a DNA Report, establishes that the accused had sexual intercourse with the victim.

d) The victim disclosed her age to be 21 years, was thus capable of consenting. At the time of the bail petition, the accused neither pleaded consent nor are they supposed to reveal their defence at the stage of bail.

e) According to the victim, the accused kidnapped her at around 11.15 p.m. In her statements under Sections 154, 164 as well as 161 CrPC, the victim is silent about her phone, being taken away by the accused or was with her and only stated that in the morning before the accused dropped her, Avinash took photographs with her and accused had fed their phone numbers in her phone and had also made a call from her phone to their phone. She further stated that she had deleted the photographs from her phone. In the statement under Section 161 CrPC of her friend Ankush, he said that when he found the victim missing, he tried to call her, but her phone was switched off. In the report under Section 173 CrPC, the Investigator has taken on record the call details of the mobile of the victim. On 9.6.2019 at 00:24:02 hours i.e., 12.24 midnight, there is an incoming call from phone number 80917-38993. The duration of this call is 22 seconds. Mr. Nand Lal Thakur learned Additional Advocate General, on instructions received from the Investigator, states that this phone number 80917-38993 belongs to Ankush. The victim states in her statement under Section 164 CrPC that both the accused were under heavy intoxication being drunken. She is silent that who attended this incoming phone call of 22 seconds. The investigation is also silent about who attended this phone call; was it victim or the accused. Even the suspect is quiet in his statement under Section 161 CrPC.

f) Ankush finding her young female friend whom he wanted to marry, missing at midnight, what he would have at least done was to ensure that she had reached home. All this appears to be shady.

g) According to the victim, the accused Avinash had put cigarette burn on her arm; however, she did not speak even a single word about how did she receive so many other injuries like 19 linear scars, 4 healed circular scars, and some scars marked with parched skin and some blisters. She did not attribute to these accused.

h) It is also somewhat suspicious that why the accused, who, according to the victim, were not previously known to her, would feed their numbers in her mobile and also make a call to ensure that the victim identifies them.

i) In the site plan, the area is ultimately thickly habituated. It is common knowledge that from the spot where the accused allegedly kidnapped the victim, the police post is in the vicinity of the bus stand.

j) It seems highly improbably that any accused would feed his phone number into the victim's phone after committing rape upon her.

15. Thus, deciphering from the allegations of the victim and other evidence collected by the investigator, coupled with the victim's truthfulness and credibility, make out a case for bail. While deciding bail, this Court cannot discuss the evidence threadbare.

16. The petitioner is a permanent resident of House No.243/13, Balmiki Basti, Nahan, District Sirmour, H.P., therefore, his presence can always be secured.

17. Further incarceration of the accused during the period of trial is neither warranted, nor justified, or going to achieve any significant purpose.

18. Without commenting on the merits of the evidence collected so far, considering all the reasons mentioned above, the victim's credibility makes out a case of bail for the present petitioner.Given above, coupled with the fact that the accused is in judicial custody for more than one year, the petition is allowed.

19. The report under Section 173(2) CrPC does not restrict the police's powers to investigate further by following the law. Needless to say, that the Prosecution has all the rights of further investigation under S. 173(8) CrPC, following the law. It is still open for the Investigator to recover the deleted photographs from the mobile through Forensic expert and to investigate that who had answered the call at midnight by making an appropriate application before the concerned Court following the law, if she thinks appropriate.

20. To ensure that he does not get an opportunity to intimidate or stalk the victim, while on bail and the Court is putting the stringent conditions and this bail shall be subject to the strict terms.

21. Given the above reasoning, the Court is granting bail to the petitioner, subject to the imposition of following stringent conditions, which shall be over and above, and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC. Consequently, the present petition is allowed. The petitioner shall be released on bail in the present case, connected with the FIR mentioned above, on his furnishing a personal bond of INR 10,000/, (INR Ten thousand only), to the satisfaction of the Trial Court. The petitioner shall also furnish one surety for INR 5000 (INR Five thousand only), to the satisfaction of the Sessions Court/Special Court/ Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court, which is exercising jurisdiction over the concerned Police Station where FIR is registered. Trial Court. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

a) The petitioner to give security to the concerned Court(s)/ Investigating Officer, for attendance on every date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

b) The Attesting officer shall mention on the reverse page of personal bonds, the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), email (if any), and details of personal bank account(s) (if available).

c) The petitioner shall join investigation as and when called by the Investigating officer or any superior officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree treatment, indecent language etc.

d) The petitioner shall not influence, threaten, browbeat, or pressurize the witnesses and the Police officials.

e) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.

f) Once the trial begins, the appellant shall not in any manner try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

g) There shall be a presumption of proper service to the petitioner about the date of hearing in the concerned Court, even if it takes place through SMS/ WhatsApp message/ E-

Mail/ or any other similar medium, by the Court.

h) In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/ E-Mail.

i) In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issue bailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about such Bailable warrants through SMS/ WhatsApp message/ E-Mail.

j) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper.

k) In case of non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be spent to trace the petitioner and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

l) The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

m) The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within 10 days from such modification, to the police station of this FIR, and also to the concerned Court.

n) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner, and even the concerned trial Court shall be competent to cancel the bail. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

o) The learned counsel for the petitioner, as well as the attesting officer, shall explain the conditions of this bail to the petitioner.

p) The petitioner shall neither stare, stalk, make any gestures, remarks, call, contact, message the victim, either physically, or through phone call or any other social media, nor roam around the victim's home. The petitioner shall not contact the victim.

q) The petitioner shall surrender all firearms along with ammunitions, if any, along with the arms license to the concerned authority within 30 days from today. However, subject to the provisions of the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back, in case of acquittal in this case.

22. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

23. The officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in vernacular.

24. The petitioner undertakes to comply with all the directions given in this order. Furnishing of bail bonds by the petitioner is the acceptance of all such conditions.

25. On the reverse page of the personal bonds, the officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents.

26. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on her/his furnishing bail bonds in the terms described above.

27. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

28. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

29. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

30. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

31. The SHO of the concerned Police Station or the Investigating Officer shall send a copy of this order, preferably a soft copy, to the victim, at the earliest.

32. In return for the freedom curtailed for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

The petition stands allowed in the terms mentioned above.

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

Ranjit Singh @ Chhotu ...Appellant.

Versus

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

Criminal Appeal No: 396 of 2017
Reserved on : June 19, 2020
Date of Decision : June 22, 2020

Indian Penal Code, 1860- Section 307- Attempt to murder- Essential requirements- Held, to hold accused guilty of offence, it is necessary that accused should have done act with such intention or knowledge and under such circumstances that if he by that act caused death, he would be guilty of murder. (Para 29)

Indian Penal Code, 1860- Section 307- Attempt to murder- Appeal against conviction and sentence- Proof of- Held, accused and victim were friends and had consumed liquor together- They were dancing in courtyard of victim and left on objection of his mother- Intention or knowledge on part of accused to commit murder of victim not attributable- Causing of injuries with stone by accused to victim however stands proved from oral and documentary evidence on record- Stone when used as weapon can cause death also- Conviction and sentence altered to one for offence under Section 326 of Code- Appeal partly allowed. (Para 29 to 31)

Whether approved for reporting? Yes.

For the Appellant : Mr. Lakshay Thakur, Advocate.

For the respondent : Mr. R.P. Singh, Mr. R.R. Rahi and Mr. Gaurav Sharma, Deputy Advocates General.

Vivek Singh Thakur, Judge

The instant appeal has been preferred by the accused-appellant Ranjit Singh @ Chhotu, against the judgment dated 7.4.2017, passed by learned Additional Sessions Judge (II), Mandi, District Mandi, Hiamchal Pradesh (Camp at Jogindernagar), in Sessions Trial No.63/2015, titled as *State v. Ranjit Singh alias Chhotu & others*, in case FIR No.34/2015, registered at Police Station, Jogindernagar, under Sections 451, 323, 325, 307 read with Section 34 of the Indian Penal Code (herein after referred to as IPC), wherein appellant-accused has been convicted under Sections 451, 325 & 307 IPC, whereas co-accused Ramzan and Sanjeev Kumar alias Sanju have been acquitted.

2. The trial Court has awarded sentence to the appellant as under:

Section	Sentence	Fine
351 IPC	Simple Imprisonment for one year.	`2,000/- and in default of payment to undergo simple imprisonment for a period of one month.
325 IPC	Simple Imprisonment for three years.	`5,000/- and in default of payment to undergo simple imprisonment for a period of one month.
307 IPC	Simple Imprisonment for seven years.	`10,000/- and in default of payment to undergo simple imprisonment for a period of six months.

3. Investigating Agency was set in motion on the basis of telephonic call received in Police Station, Jogindernagar, from the Office of Medical Officer, Civil Hospital, Jogindernagar. The said telephonic call was recorded in the Daily Station Diary, vide GD Entry No.22(A) (Ex.PW-9/A), whereby it was informed that one injured person has been brought to the Civil Hospital, Jogindernagar, in Ambulance 108, whereupon Investigating Officer PW-13 SI Yog Raj, alongwith ASI Rajesh Kumar, PW-14 HHC Prakash Chand and HHC Praveen Kumar, rushed to the Hospital in Government vehicle. On reaching Hospital at about 11 a.m., he moved an application Ex. PW-13/A to the Medical Officer for issuance of MLC of Injured Bhawani Singh and for opinion about fitness of injured to make statement. On opinion of the Medical Officer that injured was unfit for making statement, statement Ex. PW-1/A of mother of victim, i.e. PW-1 Ram Piari was recorded under Section 154 of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) and the same was sent through HHC Prakash Chand to the Police Station for registration of FIR and on the basis of the said statement (Ruka) FIR Ex.PW-12/A was recorded by PW-12 ASI Sukesh Kumar and after making endorsement Ex.PW-12/B on Ruka, it was sent back to the Investigating Officer.

4. PW-1 Ram Piari, in her statement referred supra, had stated that she was an Agriculturist and her husband had expired 5-6 years ago and that injured Bhawani Singh, aged 25 years, was her son. She had further stated that on 6.3.2015 at about 9.30 p.m., her son Bhawani Singh alongwith his friends Ranjit Singh alias Chhotu (Servant of Malkiat Singh), Ramzan and Sanjeev Kumar alias Sanju, all accused, came to her house and started dancing and singing in Courtyard and after some time while doing so, Ranjit Singh @ Chhotu had caught hold of neck of her son Bhawani Singh on some issue and Ramzan and Sanjeev Kumar alias Sanju had also joined the scuffle and when she tried to rescue her son from them they pushed her and took her son Bhawani Singh alongwith them towards their house and thereafter she slept. She had further stated that on waking up next morning, at about 5 a.m., when she did not find her son at home, she went to the house of Ramzan and Sanjeev Kumar alias Sanju, but her son was not found there, and when she was coming back to her house, her neighbour Kamla met her near the house and disclosed that one boy was lying unconscious near the school, whereupon she went to see and found her son there in naked condition with injuries on his mouth, ear, head, etc. wherefrom blood was oozing. According to her, she called Ward Member PW-3 Harnam Singh and other villagers had also come and thereafter Ambulance 108 was called and her son was taken to the Hospital for treatment.

5. It is further prosecution case that on 7.3.2015 supplementary statement Ex.PW-13/D of PW-1 Ram Piari was also recorded, under Section 161 Cr.P.C., when she was associated in the investigation, spot inspection, preparation of spot maps and taking photographs, wherein it was also stated that her son Bhawani Singh had been beaten by Ramzan, Ranjit Singh alias Chhotu and Sanjeev Kumar @ Sanju, because on 7th Morning, she had also inquired Ranjit Singh alias Chhotu about her son and had noticed scratch marks on his neck and on back of his sweater which was also worn by him previous night she had noticed soil, blood, etc.

6. Initially, case was registered under Sections 323 and 506 IPC. After recording of supplementary statement Ex. PW-13/D of complainant, all accused were associated in the

investigation and accused Ranjit Singh @ Chhotu was also got medically examined and as per MLC Ex.PW-6/E, minor injuries were found on his person. According to prosecution case on 21.3.2015, accused Ranjit Singh @ Chhotu had produced Sweater Ex.P-2 to the Police in presence of injured Bhawani Singh and PW-5 Sarika, which was taken in possession vide Memo Ex.P-2/A and sealed in Parcel Ex.P-1 with seal "T", sample whereof Ex.PW-2/B was also taken on separate piece of cloth. Injured Bhawani Singh was discharged from the hospital on 14.3.2015 but his treatment was continue and he was not able to speak due to injuries sustained in his jaw. He had identified the sweater produced by accused Ranjit Singh @ Chhotu.

7. After obtaining final opinion of the Doctor, on 19.3.2015, wherein Injuries No.1 to 4 were found simple and Injuries No.5 to 8 grievous, Section 325 IPC was added and on 22.3.2015, accused were arrested and after interrogation were released on bail.

8. On the basis of statement of injured, offence under section 307 IPC was also found to have been committed and, therefore, Section 307 IPC was also added and accused Ranjit Singh @ Chhotu was arrested.

9. As per prosecution case, on 26.4.2015, during interrogation, accused Ranjit Singh @ Chhotu had made disclosure statements Ex.PW-2/C and Ex.PW-2/E, in presence of injured Bhawani Singh and PW-7 Malkiat Singh, disclosing therein that he could get stone recovered with which he had smashed the head of the victim and he could also cause recovery of purse of victim from a forest of pine trees where he had hidden the same. In pursuance to these disclosure statements, stone Ex.P-4 was identified, recovered, seized and sealed in Parcel Ex.P-3, vide Memo Ex.PW-2/D and purse Ex.P-6, identified, recovered, seized and sealed in Parcel Ex.P-5, were taken in possession vide Memo Ex.PW-2/G. On 26.4.2015, victim Bhawani Singh had also produced documents relating to his treatment which was also taken in possession vide Memo Ex.PW-2/J in presence of Constable Rakesh Kumar and PW-7 Malkiat Singh.

10. During investigation, MLC Ex.PW-6/C of injured Bhawani Singh was also obtained on 7.3.2015 and for two injuries, victim was referred for opinion of ENT Expert, who had opined that Injury No.4 was simple, Injury No.8 was grievous caused by blunt object and with regard to other injuries, final opinion was that Injuries No.1,2 and 3 were simple in nature and Injuries No.5,6 and 7 were grievous in nature caused with blunt object. On application Ex.PW-6/D, submitted by PW-13 Yog Raj to PW-6 Dr. Jayant, the said Doctor had opined that the injuries were on head and face, which were vital parts of body, and for that it could be stated that the injuries No.5 to 8 were endangering the life of patient.

11. Sweater Ex.P-2 and stone Ex.P-4, alongwith blood sample of Bhawani Singh, were sent for chemical examination by PW-14 MHC Kamlesh Kumar through PW-15 HHC Prakesh Chand, vide RC No.19/15, dated 7.5.2015. As per FSL Report Ex.PR, human blood of Group AB was detected on sweater of accused Ranjit Singh @ Chhotu and in blood sample of Bhawani Singh. Traces of blood were also detected on stone, but it was insufficient for further serological examination.

12. Prosecution has put reliance on production of sweater, disclosure statements under Section 27 of the Evidence Act, leading to recovery of stone and purse by accused, in presence of witnesses. It is expected from the Investigating Officer to associate independent witnesses to such production, disclosure statements as well as recovery of articles, if any, in pursuant to disclosure statements.

13. In present case, injured Bhawani Singh has been cited as one of two witnesses in the production Memo Ex.PW-2/A, disclosure statements Ex.PW-2/C and Ex.PW-2/F and also in recovery and seizure Memos Ex.PW-2/D and Ex.PW-2/G. Despite corroboration of the prosecution case on this point by him, his own evidence is not credible and second independent witness has not supported the version of prosecution. PW-5 Sarika, an independent witness to production of sweater vide Memo Ex.PW-2/A, has stated that on 21.3.2015, she remained associated with the police when accused Ranjit Singh had produced one blood stained sweater to the Police, which was sealed and taken in possession. She has identified her signature in Circle 'A', but in cross-examination she has admitted that police had come before her arrival and the sweater Ex. P-2 was shown by the police to her and she had signed Ex.PW-2/A and parcel Ex.P-1 in Police Station, Jogindernagar. She is not related to accused Ranjit Singh @ Chhotu, in any manner, and she had not been further cross-examined by the prosecution. Her explanation in the cross-examination creates doubt about the prosecution version with respect to production of sweater. Accused Ranjit Singh @ Chhotu is resident of Jammu and Kashmir, whereas co-accused Ramzan and Sanjeev Kumar are residents of village Dhelu under Police Station, Jogindernagar, i.e. village of injured and other private witnesses.

14. In disclosure statements Ex.PW-2/C and Ex.PW-2/F, PW-2 Bhawani Singh and PW-7 Malkiat Singh are witnesses. Unlike PW-2 Bhawani Singh, PW-7 Malkiat Singh has not supported the prosecution case, rather in examination-in-chief, he has stated that nothing had happened in his presence and he had just signed the papers. After being declared hostile, he was subjected to cross-examination by the Public Prosecutor, wherein again he has denied all the suggestions put to him, except admitting the signatures on the documents. He has denied that he remained associated in the proceedings of Memos Ex.PW-2/B to Ex.PW-2/J.

15. In recovery Memo Ex.PW-2/D, only one witness PW-7 Malkiat Singh has been cited whereas PW-2 Bhawani Singh has signed it as identifier of the stone and in place of second witness

signature of accused is there. The stone has been recovered from a public place and that too from the place where PW-2 Bhawani Singh was found unconscious. Therefore, the said place as well as stone was in notice of not only the complainant, injured and the Investigating Officer, who had visited the spot on the very next day of the incident and had prepared the spot map Ex.PW-13/C-1, but also to villagers, including Panchayat Member, who had gathered on the spot when injured was found there. It is the same place which has been shown place of recovery of stone in Ex.PW-13/F. Therefore, this piece of evidence is also of no help to the prosecution.

16. So far as recovery of purse is concerned, for want of corroboration from independent witnesses, it is also under cloud.

17. It is also case of prosecution that PW-2 Bhawani Singh was found in naked condition. Who unclothed him, has not been clarified and further as to whether clothes of PW-2 Bhawani Singh were recovered or not is also not stated by the Investigating Officer in his conclusion as well as statement. Whereas PW-1 Ram Piari has stated that clothes of PW-2 Bhawani Singh were found inside the boundary wall of the school. When clothes were found at a place adjacent to the place where PW-2 Bhawani Singh was found unconscious, no reason or purpose, apparently, appears to be there to hide the purse in the jungle, more particularly when injured was left lying on the side of the road. Not only on this point, but at certain other stages also, it appears that there is padding in the story by the Investigating Officer or the complainant but true facts have not been disclosed.

18. Undoubtedly, human blood of Group AB had been detected on sweater, stated to have been produced by accused Ranjit Singh @ Chhotu, which matches with the blood sample of Bhawani Singh, but the evidence to rule out any other possibility is incomplete. It is not clear what was the blood group of accused Ranjit Singh @ Chhotu, so as to clarify that the blood found on the sweater was only and only of injured Bhawani Singh. This report creates ground to suspect that accused Ranjit Singh @ Chhotu might have been involved in commission of the offence, but for want of investigation about blood group of accused, it is not a conclusive proof, more particularly when production of the sweater by accused Ranjit Singh @ Chhotu has not been proved on record in accordance with principles of criminal jurisprudence. Blood traces detected on the stone, definitely indicate that the injuries might have been caused with that stone, but again it is not conclusive proof.

19. It is true that medical evidence as well as chemical analysis report are corroborative pieces of evidence and conviction can be maintained even in absence of such evidences, if oral depositions of the complainant and other witnesses are found to be reliable, trustworthy, credible, to establish commission of offence beyond reasonable doubt. Even conviction can be on the basis of sole testimony of injured or eye witnesses depending upon quality thereof.

20. In examination-in-chief, PW-1 Ram Piari, mother of injured PW-2 Bhawani Singh, has not uttered any word accusing other two co-accused Ramzan and Sanjeev Kumar for causing injuries to the victim. However, in cross-examination by the learned Assistant Public Prosecutor, PW-1 Ram Piari has admitted it to be correct to suggest that Sanjeev Kumar @ Sanju and Ramzan had also given beatings to her son Bhawani Singh. Further, a circumstance of noticing scratch marks on the body of accused Ranjit Singh @ Chhotu by PW-1 Ram Piari has been brought on record by way of supplementary statement (Ex.PW-13/D) of PW-1 Ram Piari, wherein it is recorded that next morning when she asked Ranjit Singh about her son, she had noticed scratch marks on his neck and the sweater worn by him yesternight was also torn from the side and on the back of it she had noticed soil and blood. However, in Court, this witness did not state these facts in her examination-in-chief in the Court and even to the suggestion put to her by learned Assistant Public Prosecutor, she had replied negatively by denying said fact.

21. Further, PW-1 Ram Piari, in her cross-examination by the learned Defence Counsel, had expressed her ignorance as to whether her son and his friends had consumed liquor, whereas her son, injured PW-2 Bhawani Singh, in cross-examination by defence, has admitted that on 6.3.2015 they, i.e. he and all accused, had consumed liquor in the compound of liquor vend and further that he had disclosed to the police that accused Ranjit Singh @ Chhotu had caught his mother from her hand and had twisted her arm.

22. PW-3 Harnam Singh, a Member of Panchayat, who had informed the police telephonically, in his cross-examination stated that PW-1 Ram Piari had disclosed that her son had consumed liquor on last evening and he was causing noise after taking liquor and further that at that time Ram Piari had not disclosed name of any accused to him and he had also asked Ram Piari about the reason for not reporting the matter to him last evening. He has also admitted the suggestion that PW-1 Ram Piari and her son are habitual drunkard.

23. PW-7 Malkiat Singh, in cross-examination, has put forth a new story of quarrel taken place between mother and son, i.e. PW-1 Ram Piari and PW-2 Bhawani Singh, and receiving of injuries by PW-2 Bhawani Singh by slipping from the slope. His version does not inspire confidence for the reason that he is not only master of accused Ranjit Singh @ Chhotu but had also stood surety for him when he was arrested before addition of Section 307 IPC, during investigation.

24. Considering entire evidence on record, though there are certain improvements in the statements of PW-1 Ram Piari and PW-2 Bhawani Singh and also there are traces of padding by the prosecution, particularly at the time of production and recovery of sweater, stone and purse, however, there is sufficient evidence on record, particularly in the statement of PW-2 Bhawani Singh that

accused Ranjit Singh @ Chhotu had caused injuries to him. Statement of victim is also reliable on this count for the reason that he has no enmity with accused Ranjit Singh @ Chhotu, rather he was having friendly relations with accused which is proved on record, as it is also suggested to victim and admitted by him in the cross-examination by the defence that all accused were his friends.

25. Trial Court has acquitted other two co-accused Ramzan and Sanjeev Kumar @ Sanju and no appeal has been preferred by the State against them. Otherwise also, PW-1 Ram Piari and PW-2 Bhawani Singh, one of which is the victim, have not stated anything against them with respect to the injuries received by PW-2 Bhawani Singh.

26. So far as accused Ranjit Singh @ Chhotu is concerned, there is ample evidence on record, in the statement of PW-2 Bhawani Singh, for arriving at a conclusion that he had caused injuries to PW-2 Bhawani Singh, which are duly corroborated by medical evidence.

27. Accused Ranjit Singh @ Chhoto had been convicted under Sections 307, 325 and 351 IPC. For the evidence discussed herein before and referred by the trial Court, as available on record, I find no evidence to establish that accused Ranjit Singh @ Chhotu is guilty of commission of offence under Section 307 IPC. Relevant portion of Section 307 IPC reads as under:

> "307. Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty or murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [imprisonment for life], or to such punishment as is hereinbefore mentioned."

28. Firstly, the opinion of Expert expressed on Ex.PW-6/B is not conclusive so as to draw inference that Injuries No.5 to 8 were sufficient to endanger the life of the victim as he has given opinion by stating that the injuries received by the victim were on head and face, which are vital parts of the body, so it could be stated that Injuries No.5 to 8 were endangering life of patient.

29. Essential ingredient to convict an accused under Section 307 IPC is that he should have done the act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder. In present case, no motive and intention to cause death has been brought on record. Contrary to that, it has come on record that victim and accused persons were friends and they had consumed liquor together and thereafter enjoying it by dancing and raising noise in the courtyard of victim and on objection raised by the mother of the victim, i.e. PW-1 Ram Piari, they had left the place and on the next day victim was found lying on ground in the village in injured condition. No reason for intention to cause death has been brought on record. The evidence is also lacking about the knowledge of accused that act, committed by him would have caused death of victim. In any case, it has been proved on record, beyond reasonable doubt, that accused Ranjit Singh @ Chhotu had caused grievous injuries to the victim voluntarily by using stone as a weapon of offence, which can be used for causing death also and, therefore, essential ingredients for convicting the accused under Section 326 IPC are available on record. It is a settled law that person charged for higher offence can be punished for lower offence. Therefore, conviction under Section 307 IPC is converted into conviction under Section 326 IPC.

30. Record reveals that accused Ranjit Singh @ Chhotu was arrested on 24.4.2015. Vide order dated 7.10.2015, passed by Additional Sessions Judge (II), Mandi, he alongwith co-accused was enlarged on bail, subject to his furnishing personal and surety bonds in the sum of `20,000/- each, to the satisfaction of learned Judicial Magistrate 1st Class, Jogindernagar, within thirty days. On further perusal of record, it appears that bail bonds on behalf of co-accused were furnished on 13.10.2015, whereas no such bail bonds were furnished on behalf of accused Ranjit Singh @ Chhotu and as a result thereof he continued to be in custody till final decision of the trial, wherein he has been convicted and sentenced as referred supra and now serving the sentence in sequel thereto.

31. Accused Ranjit Singh @ Chhotu was convicted under Section 307 IPC and sentenced to undergo simple imprisonment for a period of 7 years and pay fine of `10,000/- and in default of payment thereof to further undergo simple imprisonment for a period of six month. As discussed supra, since conviction of accused Ranjit Singh @ Chhotu under Section 307 IPC has been converted into conviction under Section 326 IPC, he is now sentenced to imprisonment already undergone alongwith fine of `10,000/- and in default of payment thereof to further undergo simple imprisonment for a period of four months. Conviction and sentence under Sections 351 and 325 IPC shall remain as it is as awarded by the trial Court. In case of production of proof of payment of fine, accused Ranjit Singh @ Chhotu shall be released forthwith and in case the fine is or has not been deposited, he shall serve the sentence as awarded for default in payment of fine.

With the aforesaid modification in the judgment of the trial Court, the appeal is disposed of. Pending application, if any, also stands disposed of.

BEFORE HON'BLE MR. ANOOP CHITKARA, J.

Satish Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 299 of 2020

Reserved on: 16th June, 2020

Date of Decision: 29th June, 2020

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 18, 20 & 37- Regular bail in a case of recovery of commercial quantity of 'charas' and intermediate quantity of opium to an accused who was allegedly escorting vehicle from which contraband was actually recovered- Appreciation of material on record- Prosecution relying upon three circumstances, i.e. presence of petitioner on same night taking meals with main accused, confession of principal accused implicating petitioner and seizure of his vehicle soon after confession of main accused- Held, no evidence that petitioner had kept contraband in main accused's vehicle prior to their taking of meals- Confession of principal accused implicating petitioner is inadmissible- Call details record showing no exchange of calls between petitioner and main accused- Long distance between places where principal accused's vehicle was intercepted and place where petitioner's vehicle was stopped- These missing links take the case of petitioner out of rigors of Section 37 of Act and make out a case for bail- Petition allowed- Petitioner admitted on conditional bail. (Para 23, 24 & 26 to 28)

Cases referred;

Babua v. State of Orissa, (2001) 2 SCC 566,

Babua v. State of Orissa, (2001) 2 SCC 566].

Bijando Singh v. Md. Ibocha, 2004(10) SCC 151, Supreme Court holds,

Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549

Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240, Supreme Court in Para 16, holds,

Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565

Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42,

Municipal Corporation of Greater Mumbai and another v. Kamla Mills Ltd., 2003(4) RCR(Civil) 265 : (2003)6 SCC 315,

N.C.B.Trivandrarum v. Jalaluddin, 2004 Law Suit (SC) 1598,

N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721,

Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705,

Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705].

New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

Satpal Singh v. State of Punjab, (2018) 13 SCC 813,

Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84,

Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84].

Union of India v. Merajuddin, (1999) 6 SCC 43,

Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738,

Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624,

Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798,

Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798].

Whether approved for reporting?[1] ***YES***

For the petitioner: Mr. Naresh Kaul, Advocate.

For the respondent: Mr. Ram Lal Assistant A.G. & Mr. Rajat Chauhan, Law Officer.

Ms. Richa Thakur, Advocate as Amicus Curiae.

Anoop Chitkara, Judge

The petitioner, who is under incarceration for the last one year and one month, for purchasing 6 kilograms and 324 grams of charas, and 413 grams of opium, and after that transporting it through another accused, has come up before this Court seeking bail.

2. Based on a First Information Report (FIR), the police arrested the petitioner, on 27.5.2019, in FIR No.83 of 2019, dated 27.5.2019, registered under Sections 18, 20 & 29 of the NDPS Act, read with S. 181, 192, 196 of Motor Vehicles Act, 1860, (MV Act), in Police Station, Jogindernagar,, District Mandi, Himachal Pradesh, disclosing cognizable and non-bailable offenses.
3. Earlier, the petitioner filed a petition under Section 439 CrPC before Special Judge-III, Mandi, HP. However, vide order dated 5.11.2019, the Court dismissed the petition, because in the opinion of the Court, the Petitioner could not cross the rigors of S. 37 of NDPS Act.

4. Mr. Nand Lal Thakur learned Additional Advocate General had filed the status report through e-mail, printout of which is available on file. He further submits that he had sent a copy of the status report to learned counsel for the petitioner on WhatsApp number.
5. I have read the status report(s) and heard Mr. Naresh Kaul, Advocate for the petitioner, Mr. Nand Lal Thakur, Ld. Additional Advocate General for the State of H.P., and Ms. Richa Thakur, Advocate, Amicus Curiae.

FACTS:

2. The allegations in the First Information Report and the gist of the evidence collected by the Investigator are:

1. On 26th May 2019, the Police party headed by inspector/in charge of Police Station Jogindernagar, District Mandi, has erected/laid a barrier on National Highway No.154. At around 8.15 p.m., one car came from the side of Mandi towards Jogindernagar. The Inspector signaled the driver of the said car to stop, and on this, the driver of the car brought it to a halt and parked it on the side of the road. After this, the Inspector checked the said car, which was Maruti Alto, and told him to show the car's documents. On this, the driver of the vehicle became perplexed and could not produce the registration certificate and other records of the car. He also started stammering and was extremely baffled. On inquiry, he revealed his name as Tule Singh.
2. The body language and gesture of said Tule Singh raise suspicion in the mind of the Investigating Officer, (I.O.), that he is most likely possessing some contraband or drugs. After that, the I.O. sent one of the constables to bring an independent witness, who returned after 20 minutes and brought two persons Rakesh Kumar and Gaurav Kumar for being associated as independent witnesses for the ensuing search. In the presence of these witnesses, the I.O. searched the vehicle, and below the front left seat, they noticed one cloth bag. The Police took it out and opened it. It had three taped packets. On opening these three packets, the Police detected charas.
3. Similarly, the Police recovered a bag from the dickey of the said car. This bag also contained one polythene, and one envelop and further contained five taped packets. On opening, the Police recovered charas from four packages and opium from one pack.

4. After that, the I.O. procured the weighing scale, and after weighing, the total quantity of charas measured as 6 kilograms and 324 grams and opium as 413 grams. After that, the police put back the charas and the opium in the same packets and in a similar way and sealed the same. After that, the police completed the other procedural requirement of the NDPS Act and CrPC and proceeded to arrest the accused. The police also took into possession of said Alto Car.
5. After that, on the spot itself, the I.O. made inquiries from Tule Ram, and upon this, he confessed before the Police that persons, namely Ram Singh s/o Tek Singh, R/o Village Manhon, P.O. Palahach, Tehsil Banjar; Tanu R/o Village Manhon, P.O. Palahach, Tehsil Banjar; and Satish Singh (bail petitioner) S/o Kishore Singh, R/o Village Dhanpatan, P.O.

Matlahar, Tehsil Jawali, District Kangra are also involved. He further told the I.O. that they were escorting the Alto Car in Satish Singh's white color Scorpio bearing registration No. HP54B-3622. Immediately on receipt of such information, the I.O. informed Police Post Ghattu, District Mandi, to detain the said vehicle.

6. On this H.C. Swami Nand of Police Post, Ghattu informed that they had detained such vehicle, and in this Scorpio, only one person, namely Satish Singh (bail Petition), is present and none-else. H.C. Swami Nand further told the I.O. that Satish Singh had said to him that those two persons have alighted from the vehicle at Jogindernagar. After that, the I.O. arrested Tule Singh and sent the report to the police station to register the FIR mentioned above. Thus, the Police arraigned Tule Ram, Satish Singh, Tanu, and Ram Singh @ Om Chand as accused and subsequently arrested all of them.
7. During the investigation, the Police procured call details between accused persons. Tule Singh. The Police also procured the CCTV footage wherein, in the Scorpio vehicle, the Police could notice three persons.
8. On seizure of the Scorpio mentioned above, the police recovered its registration certificate, which showed Scorpio's registration in the name of Satish Singh, petitioner herein. Subsequently, the police sent the charas and opium mentioned above and opium to SFL Junga, which tested positive for charas and opium after conducting the scientific examination.
9. In the investigation, the police concluded that Satish Singh, the bail petitioner, went to accused Om Chand accused No.4 at the spot known as Palahach, and there he purchased charas and opium from him. It further came in the investigation that after that, both the accused hired taxi of Tule Singh accused No.1 and told him that he has to transport the charas and opium at a place ahead of Jogindernagar. They settled the fare as INR 12,000/- it further came in the investigation that accused No.3 Tiwan Singh, was also present there. They put the charas and opium in the Alto Car, and themselves started escorting the Alto in the Scorpio owned and driven by Satish Singh. While driving, these people kept on talking to Tule Singh. It further came in the investigation that on the evening of 26th May 2019, all these persons had taken food together in one place.

PREVIOUS CRIMINAL HISTORY

7. As per the police report the accused Satish Singh involved himself in the following cases:

1). FIR No. 178/97, dated 10/09/1997, under Section 324, 323, 506 IPC, Police Station Jawali, District Kangra, H.P

2). FIR No.26/98, dated 28.1.1998, under Section 452, 323, 34, IPC, Police Station Jawali, District Kangra, H.P

3). FIR No.242/98, dated 10.12.1998, under Section 325, 34 IPC, Police Station Jawali, District Kangra, H.P

4). FIR No.93/99, dated 24.5.1999, under Section 61-1-14 of the Excise Act, Police Station Jawali, District Kangra, H.P .

5). FIR No. 141/05, dated 12.09.2005, under Section 61-1-14 of the Excise Act, Police Station Jawali, District Kangra, H.P.

8. According to learned Counsel for the petitioner, in all such cases, the petitioner stands acquitted and as on date, no case is pending against him. Learned Counsel further submits that after acquittal he stands absolved from all accusation and no reliance can be placed on such cases, which resulted into his acquittal.

SUBMISSIONS:

8. The learned counsel for the bail petitioner submits that the allegations are false and concocted.
9. On the contrary, Mr. Nand Lal Thakur, Additional Advocate General, contends that the investigating officer has collected sufficient prima facie evidence. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.
10. Ms. Richa Thakur, Learned Amicus Curiae very vehemently argued and also drew attention to the orders of this Court in Budhi Singh v. State of H.P., CrMPM 595 of 2020; Manohar Lal v. State of H.P., CrMPM 126 of 2018; Thakur Dass v. State of H.P., CrMPM 167 of 2010; Stynder Singh v. State of Himachal Pradesh, 2010(1) SimLC 490; and Nisar Ahmed Thakkar v. State of H.P., CrMPM 672 of 2008.

ANALYSIS AND REASONING:

8. Pre-trial incarceration needs justification depending upon the heinous nature of the offence, terms of the sentence prescribed in the statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

13. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows,

> It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail

14. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**, (1978) 1 SCC 240, Supreme Court in Para 16, holds,

> The delicate light of the law favours release unless countered by the negative criteria necessitating that course.

14. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, a three-member bench of Supreme Court holds,

> "18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

16. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule of NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offence, also mention the minimum and maximum sentence, depending upon the quantity of the substance. When the substance falls under commercial quantity statute mandates minimum sentence of ten years of imprisonment and a minimum fine of INR One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

16. In the present case, the quantity of substance seized is commercial quantity. Given the legislative mandate of S. 37 of NDPS Act, the Court can release a person, accused of an

offence punishable under the NDPS Act for possessing a commercial quantity of contraband only after passing its rigors. Section 37 of the Act is extracted as under: -

> "37. Offences to be cognizable and non-bailable.
>
> (1)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

16. Reading of Section 37(1)(b)(ii) mandates that two conditions are to be satisfied before a person/accused of possessing a commercial quantity of drugs or psychotropic substance, is to be released on bail.
17. The first condition is to provide an opportunity to the Public Prosecutor and clear her stand on the bail application. The second stipulation is that the Court must be satisfied that reasonable grounds exist for believing that the accused is not guilty of such offence, and that he is not likely to commit any offence while on bail. If either of these two conditions is not met, the ban on granting bail operates. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. Be that it may, if such a finding is arrived at by the Court, then it is equivalent to giving a certificate of discharge to the accused. Even on fulfilling one of the conditions, the reasonable grounds for believing that during the period of bail, the accused is not guilty of such an offence, the Court still cannot give a finding or assurance that the accused is not likely to commit any such crime. Thus, the grant of bail or denial of bail for possessing commercial quantity would depend on facts of each case.

16. **JUDICIAL PRECEDENTS ON S. 37 OF NDPS ACT**:

1. In **Union of India v. Merajuddin**, (1999) 6 SCC 43, a three Judges Bench of Supreme Court while cancelling the bail, observed in Para 3, as follows,

> The High Court appears to have completely ignored the mandate of Sec. 37 of the Narcotic Drugs and Psychotropic Substances Act while granting him bail. The High Court overlooked the prescribed procedure."

2. In **Customs, New Delhi v. Ahmadalieva Nodira**, (2004) 3 SCC 549, a three Judges Bench of Supreme Court holds,

> 7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based for reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

3. In **Satpal Singh v. State of Punjab**, (2018) 13 SCC 813, a bench of three judges of Supreme Court directed that since the quantity involved was commercial, as such High Court could not have and should not have passed the order under sections 438 or 439 CrPC, without reference to Section 37 of the NDPS Act.

4. In **Narcotics Control Bureau v Kishan Lal**, 1991 (1) SCC 705, Supreme Court holds,

> 6. Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The Narcotic Drugs And Psychotropic Substances Act is a special enactment as already noted it was enacted with a view to make stringent provision for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of Section 37 of
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> Narcotic Drugs And Psychotropic Substances Act are in negative terms limiting the scope of the applicability of the provisions of Criminal Procedure Code regarding bail, in our view, it cannot be held that the High Court's powers to grant bail under Section 439 Criminal Procedure Code are not subject to the limitation mentioned under Section 37 of Narcotic Drugs And Psychotropic Substances Act. The non-obstante clause with which the Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between Section 439 Criminal Procedure Code and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 Section 37 prevails.

5. In **Babua v. State of Orissa**, (2001) 2 SCC 566, Supreme Court holds,

> [3] In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In

> the present case, the petitioner attempted to secure bail on various grounds but failed. But those reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view.

6. In **Bijando Singh v. Md. Ibocha**, 2004(10) SCC 151, Supreme Court holds,

> 3. Being aggrieved by the order of the Special Court (NDPS), releasing the accused on bail, the appellant moved the Guwahati High Court against the said order on the ground that the order granting bail is contrary to the provisions of law and the appropriate authority never
>
> noticed the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act. The High Court, however, being of the opinion that if the attendance of the accused is secured by means of bail bonds, then he is entitled to be released on bail. The High Court, thus, in our opinion, did not consider the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act.

7. In **N.C.B.Trivandrarum v. Jalaluddin**, 2004 Law Suit (SC) 1598, Supreme Court observed,

> 3. ...Be that as it may another mandatory requirement of Section 37 of the Act is that where Public Prosecutor opposes the bail application, the court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. In the impugned order we do not find any such satisfaction recorded by the High Court while granting bail nor there is any material available to show that the High Court applied its mind to these mandatory requirements of the Act.

8. In **Union of India v. Shiv Shanker Kesari**, (2007) 7 SCC 798, Supreme Court holds,

> 6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and. that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.
>
> 7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points

to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

8. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word 'reasonable'. Stroud's Judicial Dictionary, Fourth Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable'.

Reason varies it, its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. (See : Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another, (1987)4 SCC 497 and Gujarat Water Supplies and Sewerage Board v. Unique Erectors (Gujarat) Pvt Ltd and another [(1989)1 SCC 532].

9. It is often said "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space". The author of 'Words and Phrases' (Permanent Edition) has quoted from in re Nice &., Schreiber 123 F. 987, 988 to give a plausible meaning for the said word. He says, "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined". It is not meant to be expedient or convenient but certainly something more than that.

10. The word 'reasonable' signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See : Municipal Corporation of Greater Mumbai and another v. Kamla Mills Ltd., 2003(4) RCR(Civil) 265 : (2003)6 SCC 315)."

11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.

9. In **N.R. Mon v. Md. Nasimuddin**, (2008) 6 SCC 721, Supreme Court holds,

9. ...The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds

for believing, that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the

accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case hand the High Court seems to have completely overlooked underlying object of Section 37.

10. In **Union of India v. Rattan Mallik @ Habul**, (2009) 2 SCC 624, Supreme Court holds,

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the Narcotic Drugs And Psychotropic Substances Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

11. In **Union of India v. Niyazuddin & Anr**, (2018) 13 SCC 738, Supreme Court holds,

7. ...Section 37 of the NDPS Act contains special provisions with regard to grant of bail in respect of certain offences enumerated under the said Section. They are:- (1) In the case of a person accused of an offence punishable under Section 19, (2) Under Section 24, (3) Under Section 27A and (4) Of offences involving commercial quantity. The accusation in the present case is with regard to the fourth factor namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under Section 37 of the NDPS Act,

in case, the court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Cr.P.C. or any other enactment. (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; (2) that person is not likely to commit any offence while on bail.

8. There is no such consideration with regard to the mandatory requirements, while releasing the respondents on bail.

9. Hence, we are satisfied that the matter needs to be considered afresh by the High Court. The impugned order is set aside and the matter is remitted to the High Court for fresh consideration. It will be open to the parties to take all available contentions before the High Court.

12. In **Sujit Tiwari v. State of Gujarat**, 2020 SCC Online SC 84, in the given facts, Supreme Court granted bail, by observing,

10. The prosecution story is that the appellant was aware of what his brother was doing and was actively helping his brother. At this stage we would not like to comment on the merits of the allegations levelled against the present appellant. But other than the few *WhatsApp* messages and his own statement which he has resiled from, there is very little other evidence. At this stage it appears that the appellant may not have even been aware of the entire conspiracy because even the prosecution story is that the brother himself did not know what was loaded on the ship till he was informed by the owner of the vessel. Even when the heroin was loaded in the ship it was supposed to go towards Egypt and that would not have been a crime under the NDPS Act. It seems that Suprit Tiwari and other 7 crew members then decided to make much more money by bringing the ship to India with the intention of disposing of the drugs in India. During this period the Master Suprit Tiwari took the help of Vishal Kumar Yadav and Irfan Sheikh who had to deliver the consignment to Suleman who had to arrange the money after delivery. The main allegation made against the appellant is that he sent the list of the crew members after deleting the names of 4 Iranians and Esthekhar Alam to Vishal Kumar Yadav and Irfan Sheikh through *WhatsApp* with a view to make their disembarkation process easier. Even if we take the prosecution case at the highest, the appellant was aware that his brother was indulging in some illegal activity because obviously such huge amount of money could not be made otherwise. However, at this stage it cannot be said with certainty whether he was aware that drugs were being smuggled on the ship or not, though the allegation is that he made such a statement to the NCB under Section 67 of the NDPS Act.

11. At this stage, without going into the merits, we feel that the case of the appellant herein is totally different from the other accused. Reasonable possibility is there that he may be acquitted. He has been behind bars since his arrest on 04.08.2017 i.e. for more than 2 years and he is a young man aged about 25 years. He is a B.Tech Graduate. Therefore, under facts and circumstances of this case we feel that this is a fit case where the appellant is entitled to bail because there is a possibility that he was unaware of the illegal activities of his brother and the other crew members. The case of the appellant is different from that of all the other accused, whether it be the Master of the ship, the crew members or the persons who introduced the Master to the prospective buyers and the prospective buyers.

12. We, however, feel that some stringent conditions will have to be imposed upon the appellant.

SUM UP:

21. From the summary of the law relating to rigors of S.37 of NDPS Act, while granting bail involving commercial quantities in the NDPS Act, the following fundamental principles emerge:

1. **The limitations on granting of bail come in only when the question of granting bail arises on merits.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].
2. **In case the Court proposes to grant bail, two conditions are to be mandatorily satisfied in addition to the standard requirements under the provisions of the CrPC or any other enactment.** [Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738].
3. **Apart from the grant opportunity to the Public Prosecutor, the other twin conditions which really have relevance are the Court's satisfaction that there are reasonable grounds for believing that the accused is not guilty of the alleged offence.** [N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721].
4. **The satisfaction contemplated regarding the accused being not guilty has to be more than prima facie grounds, considering substantial probable causes for believing and justifying that the accused is not guilty of the alleged offence.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

5. **Twin conditions of S. 37 are cumulative and not alternative.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].
6. **If the statements of the prosecution witnesses are believed, then they would not result in a conviction.** [Babua v. State of Orissa, (2001) 2 SCC 566].
7. **At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed an offence under the NDPS Act and further that he is not likely to commit an offence under the said Act while on bail.** [Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624].
8. **While considering the application for bail concerning Section 37, the Court is not called upon to record a finding of not guilty.** [Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798].
9. **In case of inconsistency, S. 37 of the NDPS Act prevails over S. 439 CrPC.** [Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705].
10. **Bail must be subject to stringent conditions.** [Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84].

22. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches would be detailed and paintings with a few strokes. Satisfying the rigors of S. 37 of the NDPS Act is candling the infertile eggs.

23. In the present case, a perusal of evidence collected so far, and as placed in the Police report filed under section 173(2) CrPC, connects the petitioner with the principal accused with three circumstances. Firstly, by his presence with other accused in the same evening taking meals together, as recorded in CCTV footage. Secondly, through confession of main accused before Police, and lastly from the seizure of his Scorpio, soon after the confession of the main accused.

24. Even if all the accused took meals together in the evening, as recorded in CCTV, there is nothing to infer the time and place where he had kept the contraband in his Alto car. There is no legal evidence that he had placed contraband prior to the CCTV recording. The only evidence qua the placing of the contraband prior to taking meals is by way of the confession of the main accused before Police, which is legally inadmissible. Moreover, perusal of the phone records show no calls exchanged between Tule Ram and petitioner.

25. In **Surinder Kumar Khanna** v. **Intelligence Officer Directorate of Revenue Intelligence, (2018) 8 SCC 271**, Supreme Court holds,

> "13. In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend
>
> assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused."

26. Given the factual matrix, considerable time must have passed (Initial inquiry, twenty minutes in arranging independent witnesses, search, seizure, weighing by procuring a weighing machine, sampling, and preparation of search memo, seizure memo, information to Police, preparation of NCB forms) between the confession of Tule Ram of being escorted by the petitioner in his Scorpio, and the interception of Scorpio at Police Post Ghattu, the vehicle would have traveled a substantial. The investigation is silent about the time as well as the distance between the place of a search of Tule Ram's Alto and stoppage of Scorpio at Police Post Ghattu. The distance between these two places assumes importance. Coupled with the fact that the Police noticed and arrested only one person traveling in SUV, prima facie points out Scorpio's interception, driven by the petitioner, possibly a setup. However, the investigation is still not complete. It is for the Investigating Officer to look into this aspect and conduct further investigation per law.

27. The report under Section 173(2) CrPC does not restrict the police's powers to investigate further by following the law. Needless to say, that the Prosecution has all the rights of further investigation under S. 173(8) CrPC, following the law. However, the missing links mentioned above, take the case out of the rigors of S. 37 of the NDPS Act and makes out a case for bail.

28. Criminal conspiracies are hatched in secrecy. The recovery did not take place directly from the petitioner. Suffice to say that the quantity involved in this case is the commercial quantity, and the petitioner has crossed the riders of Section 37 of the NDPS Act.

29. The petitioner is a permanent resident of District Kangra, therefore, his presence can always be secured.

30. Without commenting on the merits of the evidence collected so far, the fact that initial interception of the petitioner appears to be not above board, coupled with the fact that the confession against co-accused is inadmissible, and the silence on the points extracted mentioned above would create reasons to make this Court believe that till now, the petitioner has made out a case for bail secondly. Thus, acquittal absolves him of all charges. To fulfill the second part

of Section 37 of the NDPS Act, this Court can impose stringent conditions to ensure and satisfy that the accused does not repeat the offence.

31. Any detailed discussions about the evidence may prejudice the case of the prosecution or the accused. Suffice it to say that due to the reasons mentioned above, and keeping in view the nature of allegations, this Court believes that further incarceration of the accused during the period of trial is neither warranted, nor justified, or going to achieve any significant purpose:

32. To ensure that the petitioner does not get an opportunity to commit an offence while on bail and the Court is putting the following stringent conditions and this bail shall be subject to the strict terms.

33. Given the above reasoning, the Court is granting bail to the petitioner, subject to the imposition of following stringent conditions, which shall be over and above, and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC. Consequently, the present petition is allowed. The petitioner shall be released on bail in the present case, connected with the FIR mentioned above, on his furnishing a personal bond of INR 10,000/, (INR Ten thousand only), to the satisfaction of the Trial Court. The petitioner shall also furnish one surety for INR 5000 (INR Five thousand only), to the satisfaction of the Sessions Court/Special Court/ Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court, which is exercising jurisdiction over the concerned Police Station where FIR is registered. Trial Court. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

1. The petitioner to give security to the concerned Court(s)/ Investigating Officer, for attendance on every date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.
2. The Attesting officer shall mention on the reverse page of personal bonds, the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), email (if any), and details of personal bank account(s) (if available).
3. The petitioner shall join the investigation as and when called by the Investigating Officer or any superior officer.
4. The petitioner shall not influence, threaten, browbeat, or pressurize the witnesses and the Police officials.
5. The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.
6. Once the trial begins, the appellant shall not in any manner try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.
7. There shall be a presumption of proper service to the petitioner about the date of hearing in the concerned Court, even if it takes place through SMS/ WhatsApp message/ E-Mail/ or any other similar medium, by the Court.
8. In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/ E-Mail.
9. In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issue bailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about such Bailable warrants through SMS/ WhatsApp message/ E-Mail.
10. Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper.
11. In case of Non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be spent to trace the petitioner and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.
12. The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.
13. The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within 10 days from such modification, to the police station of this FIR, and also to the concerned Court.
14. The petitioner shall, within ten days of his release from prison, procure a smartphone, and inform its IMEI number and other details to the SHO/I.O. of the Police station mentioned before. He shall keep the phone location always on the “ON” mode. Before replacing his mobile phone, he shall produce the existing phone to the SHO/I.O. of the police station and give details of the new phone. Whenever the SHO, I.O., or any officer of the concerned Police

Station, ask him to share his location, then he shall immediately do so. The petitioner shall neither clear the location history nor format his phone without permission of the concerned SHO/I.O. or any officer of the concerned Police Station.

15. During the pendency of the trial, if the petitioner commits any offence under NDPS Act, even if it involves small quantity, then it shall be open for the State to apply for cancellation of this bail order.
16. In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner, and even the concerned trial Court shall be competent to cancel the bail. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

17. The learned counsel for the petitioner, as well as the attesting officer, shall explain the conditions of this bail to the petitioner.
18. The petitioner shall surrender all firearms along with ammunitions, if any, along with the arms license to the concerned authority within 30 days from today. However, subject to the provisions of the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back, in case of acquittal in this case.

34. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

35. The officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in vernacular.

36. The petitioner undertakes to comply with all the directions given in this order. Furnishing of bail bonds by the petitioner is the acceptance of all such conditions.

37. On the reverse page of the personal bonds, the officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents.

38. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on her/his furnishing bail bonds in the terms described above.

39. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

40. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

41. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

42. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this

order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for

the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

43. In return for the freedom curtailed for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

44. The petition stands allowed in the terms mentioned above.

Whether reporters of Local Papers may be allowed to see the judgment?

BEFORE HON'BLE MR. ANOOP CHITKARA, J.

Theophilus Ndubulsi Nwosu ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 411 of 2020
Reserved on: 19.06.2020
Date of Decision: 24.06.2020

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 21, 29 & 37- Recovery of 20.5 gms. of heroin from 'NK' and 'JK' by police alleged to be supplied to them by petitioner, a foreign national and drug peddler based at Delhi- Regular bail- Grant of- Held, recovered contraband is less than commercial quantity but greater than small quantity- Rigors of Section 37 of Act are not applicable in the case- Investigation is complete and charge sheet stands filed in Court- Petitioner is in custody since long- Genuineness of his passport got verified by State from the Embassy concerned- Bail petition allowed subject to petitioner depositing amount of personal bond in the Court- Other conditions regarding leaving of India by petitioner also imposed. (Para 13, 17 & 18)

Cases referred;

Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240,
Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565,

Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42,
Lachhman Dass v. Resham Chand Kaler, (2018) 3 SCC 187,

Whether approved for reporting?[11] ***YES***.

For the petitioner: Mr. Lalit Kumar Sehgal, Advocate.

For the respondent: Mr. Ashok Sharma, Advocate General, assisted by Mr. Nand Lal Thakur, Additional Advocate General, for the State.

Anoop Chitkara, Judge

An under-trial prisoner, holder of Nigerian Passport, has come up before this Court under Section 439 of the Code of Criminal Procedure, 1973 (CrPC), seeking bail, under Section 21 of Narcotics Drugs

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[11] **Whether reporters of Local Papers may be allowed to see the judgment?**

and Psychotropic Substances Act, 1985 (NDPS Act), for selling 20.5 grams of heroin (Diacetylmorphine).

2. Based on a First Information Report (FIR), the police arrested the petitioner, on 12.12.2019, in FIR No.159 of 2019, dated 7.12.2019, registered under Sections 21 & 29 of the NDPS Act, read with S. 201 of Indian Penal Code, 1860, (IPC), in Police Station, Bhawarna, District Kangra, Himachal Pradesh, disclosing cognizable and non-bailable offenses.

3. Earlier, the petitioner filed a petition under Section 439 CrPC before learned Special Judge, Kangra at Dharamshala, HP. However, vide order dated 29.01.2020, the Court dismissed the petition, on the grounds that upon noticing the Police, the accused had run for a kilometer, before the Police caught him. Thus, the apprehension of the prosecution qua non-availability of the bail-petitioner can safely be said to be well-founded. There is a risk of fleeing from Justice, coupled with the fact that he was the main supplier of drugs. Before proceeding further, this Court would like to clarify that the story of Police qua chasing and nabbing prima facie appears to be a setup. It is quite unbelievable that they will be able to chase and catch a young African Male, that too on busy Delhi roads, especially when he was more accustomed to Delhi streets.

4. I have read the status report(s) and heard counsel for the parties. Mr. Lalit Kumar Sehgal, Advocate for the petitioner handed over a photocopy of a certificate dated 11th March 2020, issued by High Commissioner, High Commission of Nigeria, New Delhi, INDIA, which reads as follows:

> " TO WHOM IT MAY CONCERN
>
> IDENTIFICATION: MR. NWOSU THEOPHILUS BDUBUISI
>
> I am directed to confirm that Mr. Nwosu Theophilus Ndubuisi is a bonafide citizen of Nigeria; his Passport No.A09188779 was issued on 23rd August 2018 and will expire on 22nd August, 2023.
>
> 2. The High Commission requests kind assistance for all his transactions and communications.
>
> 3. Warm regards.
>
> -sd-
> Horsfall, Jacob Atannu
> For High Commission
> New Delhi, India"

5. Mr. Nand Lal Thakur, Learned Additional Advocate General, based upon instructions, stated that this certificate is genuine.

FACTS:

6. The allegations in the First Information Report and the gist of the evidence collected by the Investigator are:

a) On 7th December 2019, the Police party was on patrolling duty and erected a barricade as a routine. At 7.15 a.m., one bus of HRTC came from the side of Bhawarna. The police party signaled the bus to stop, and after it came to a halt, started checking the bus and the passengers.

b) When the police party reached the last seat, two persons sitting there became uneasy, which raised suspicion in the mind of the Investigating Officer that they have some stolen property. After that, the Police associated the Driver and Conductor of the bus as independent witnesses. In their presence, the Police checked the bag, which the passenger sitting on seat No.44 was carrying on his lap. On opening it, the Police recovered handkerchief and one transparent polythene pouch containing a brown colored substance. The Police took out the said substance and tested it with the help of Narcotic Drugs Detection Kit, which showed that the substance tested positive for heroin. On inquiry, the said person revealed his name as Nitin Kumar.

c) The person sitting on seat No.43 revealed his name as Jayant Kumar. He confessed to the Police that this heroin belongs to him. After that, the cops weighed the

said Heroin on Electronic Weighing Machine, and it measured 20.5 grams. Subsequently, the Police repacked the heroin in the same manner and sealed the same in the main bag. After that they conducted other procedural formalities under the NDPS Act and CrPC. Subsequently, the Police arrested the accused.

d) During the interrogation, these two accused Nitin and Jayant told the investigator that they had purchased the substance from Delhi, and they have done so many times. In Delhi, one person named Moksha sells substance to him, who further buys it from one Nigerian.

e) On receipt of this information, Police constituted a Special Investigation Team and proceeded towards Delhi. On reaching Delhi, the Police interrogated the said Moksha @ Parikshit, who told the Police that he had purchased the drugs from one Nigerian National, whose name is Mark. The modus operandi was that Moksha would contact Mark on his phone number, and once the deal is struck, Mark would deliver the drugs to Moksha near the Metro pillar of Dwarika Metro Station. Mark would tell Moksha the Pillar number, at which point they would strike a deal.

f) After that, Police made Moksha call the Mark, and after negotiations, Mark conveyed that he will deliver the substance near pillar 720 of Dwarika Metro Station. On reaching there, Mark, on realizing the Police's presence, ran, and after chasing him for about one kilometer, the Police was able to catch him. During this chase, Mark threw away his mobile and the contraband somewhere, which the Police could not recover. On further investigation, Mark revealed his name as Theophilus Ndubulsi Nwosu, the bail petitioner herein.

g) Subsequently, he was arrested and after completing the procedural requirement brought to Himachal and sent to Judicial custody.

PREVIOUS CRIMINAL HISTORY

7. As per the affidavit filed by the wife of the petitioner, a case is pending before Special Judge, NDPS Act, Tis Hazari Court, registered vide FIR No.263/2018, under Section 21 of the NDPS Act, Police Station, Civil Lines.

SUBMISSIONS:

8. The learned counsel for the bail petitioner submits that the allegations are false and concocted.

9. On the contrary, Mr. Ashok Sharma, Advocate General, contends that the investigating officer has collected sufficient prima facie evidence. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to stringent conditions.

ANALYSIS AND REASONING:

10. Pre-trial incarceration needs to be justified depending upon the heinous nature of the offence, terms of the sentence prescribed in the Statute for such a crime, accused fleeing from justice, hampering the investigation, and doing away with witnesses. The Court is under a Constitutional obligation to safeguard the interests of the victim, the accused, the society, and the State.

11. While dealing with the bail applications of foreign nationals, the most significant challenge the Courts face is to secure their presence. Code of Criminal Procedure, 1973, (CrPC), has classified two types of offenses, bailable and non-bailable. Section 2(a) of the CrPC defines bailable offenses shown as the offences listed as 'bailable' in the First Schedule of CrPC or any other law. All the left-out crimes are deemed to be Non-bailable. In bailable offences, a Police officer is under an obligation to release the accused on bail, subject to their furnishing bail bonds. It means that even a foreign national cannot be denied bail in a bailable offence. Therefore, the question of securing their presence is not an absolute condition. However, in heinous and bone-chilling crimes, all which certainly are non-bailable, the presence of the accused must be ensured by the Courts, before granting the bail. Thus, while dealing with bail petitions of accused who are not the citizens of India, one of the most important parameters to keep in mind is the gravity of the offense.

12. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser

than the quantity specified in the schedule of NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offence, also mention the minimum and maximum sentence, depending upon the quantity of the substance. When the substance falls under commercial quantity statute mandates minimum sentence of ten years of imprisonment and a minimum fine of INR One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

13. In the present case, the quantity of substance seized is less than the commercial quantity. Therefore, the bail application stands on different parameters and is similar to bail petitions under regular statutes.

JUDICIAL PRECEDENTS:

14. In *Lachhman Dass v. Resham Chand Kaler,* (2018) 3 SCC 187, Supreme Court holds,

> "10. …The law under section 439 Cr.P.C is very clear and in the eye of the law every accused is the same irrespective of their nationality."

14. In Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows,

> It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail

15. In Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240, Supreme Court holds:

> " "Bail or jail ?" - at the pre-trial or post-conviction stage - belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Article 21 are the life of that human right.
>
> 2. The doctrine of Police power, constitutionally validates punitive processes for the maintenance of public order, security of the State, national integrity and the interest of the public generally. Even so, having regard to the solemn issue involved, deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations relevant to the welfare objectives of society, specified in the Constitution."
>
> 16. …The delicate light of the law favours release unless countered by the negative criteria necessitating that course.

16. In Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42, a three-member bench of Supreme Court holds,

> "18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a

> constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

17. Given the above reasoning, and keeping in view the quantity of contraband, in my considered opinion, the judicial custody of the petitioner/accused is not going to serve any purpose whatsoever, and I am inclined to grant bail on the following grounds, but subject to stringent conditions:

a) As per the FIR, the substance involved is Heroin, mentioned at Sr. No. 56 of the Notification, issued under Section 2(viia) and (xxiiia) of NDPS Act, specifying small and commercial quantities of drugs and psychotropic substances. The quantity of drug involved is less than Commercial Quantity but greater than Small Quantity. As such the rigors of Section 37 of NDPS Act shall not apply in the present case. Resultantly, the present case has to be treated like any other case of grant of bail in a penal offence.

b) The petitioner is in judicial custody since 12.12.2019.

c) The investigation is complete and the report under section 173(2) CrPC stands filed.

d) The petitioner is a Nigerian National, holding a Passport of Nigeria, bearing Passport No. A09188779. The State has already verified from the concerned Embassy about the genuineness of the Passport.

18. As a result, the present petition is allowed. The petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing a personal bond in the sum of INR 1,55,000/, (INR One hundred and fifty-five thousand only), to the satisfaction of the trial Court, by depositing it in the official account, as per the details and directions of the trial Court. The petitioner shall also furnish one surety in the sum of INR 5000 (INR Five thousand only), to the satisfaction of the trial Court. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

a) The concerned Court shall keep the Original Letter issued by the concerned Embassy in the file.

b) The petitioner shall give details of Passport Number, Visa number, phone number(s) (if available), WhatsApp number (if available), e-mail (if available), personal bank account(s) (if available), on the reverse page of the personal bonds and the officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents.

c) The Petitioner shall not leave India without the prior written approval of the Trial Court.

d) The Attesting officer shall mention on the reverse page of personal bonds, the permanent address of the petitioner along with the Passport number with details, email of the petitioner, and WhatsApp number, if any.

e) The petitioner shall not influence, threaten, browbeat, or pressurize the complainant, witnesses, and the Police official(s).

f) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.

g) Once the trial begins, the petitioner shall not, in any manner, try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

h) There shall be a presumption of proper service to the petitioner about the date of hearing

in the concerned Court, even if it takes place through SMS/ WhatsApp message/ E-Mail/ or any other similar medium, by the Court.

i) In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/ E-Mail.

j) In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issue bailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about such Bailable warrants through SMS/ WhatsApp message/ E-Mail.

k) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper.

l) In case of Non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be spent to trace the petitioner and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

m) The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

n) The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within 10 days from such modification, to the police station of this FIR, and also to the concerned Court.

o) The petitioner shall deposit his passport, if not already seized by the Police.

p) The petitioner shall, within ten days of his release from prison, procure a smartphone, and inform its IMEI number and other details to the SHO/I.O. of the Police station mentioned before. He shall keep the phone location always on the "ON" mode. Before replacing his mobile phone, he shall produce the existing phone to the SHO/I.O. of the police station and give details of the new phone. Whenever the Investigating officer asks him to share his location, then he shall immediately do so. The petitioner shall neither clear the location history nor format his phone without permission of the concerned SHO/I.O. He shall also not clear the WhatsApp chats and calls without producing the phone before the concerned SHO/I.O.

q) During the pendency of the trial, if the petitioner commits any offence under NDPS Act, even if it involves small quantity, then it shall be open for the State to apply for cancellation of this bail order.

r) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner, and even the concerned Court shall be competent to cancel the bail. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

s) The learned counsel for the petitioner, as well as the attesting officer, shall explain the conditions of this bail to the petitioner.

19. I have arrived at the amount mentioned above of bond money by converting the annual per capita income of Nigeria, and after converting it in INR and rounding it upwards. As per https://data.worldbank.org/, the per capita GDP of Nigeria is 2028 USD, per annum. As per https://www1.oanda.com/currency/converter/, 1 USD equals INR 75.9180. Thus, the bail amount of personal bonds comes by multiplying it with rate of rupee to USD. This Court makes it clear that these are not guidelines to arrive at the bonds and its value.

20. The logic behind furnishing personal bonds with bank deposits is that we know that Africans hardly have any relatives in India. Even their friends are just acquaintances, and it would be impossible for them to produce the bail petitioner before Court, even if they stand as sureties. When foreign nationals are asked to furnish surety bonds, then the sureties retain at least 100% of the bond amount as security to take care of proceedings under Section 446 of CrPC. However, even after the trial is over, it is practically impossible for the accused to recover the money unless the surety turns out to be an honest person. Even in such a situation, what is returned is the Principal amount, without any interest. It has led to a racket of surety providers in exchange for money. Therefore, the purpose of surety bonds has become an exercise in futility, and the better option is to keep the security deposit.

21. On receipt of the money in the official account, the Trial Court shall issue directions to appropriate Court and all concerned, to keep this amount in an automatically renewable fixed deposit, to be opened in any bank, owned or controlled by the Centre, State or their units. In case any orders are passed under Section 446 CrPC, then the bail amount shall be dealt with as per such directions. After the completion of the Trial, and the period specified in S. 437-A, and subject to the directions of the Appellate Courts, if any, all this money, along with interest, except taxes, shall be refunded to the petitioner, by transferring in his bank account, whether in India or outside, following the law.

22. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be; such Court shall also be competent to modify or delete any condition.

23. The officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in English.

24. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on her/his furnishing bail bonds in the terms described above.

25. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

26. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

27. Although the Court has granted bail in favour of accused, still neither the issue comes to an end, nor do the terms of justice. In the interest of equity and fair play, the matter needs further consideration. Given the following reasoning, this Court is requesting the Trial Court to expedite the trial.

28. Every visitor to our country comes for a specific purpose and for a limited time. However, if during the period of their stay, they get arraigned as an accused in a criminal case, then they get stuck up here. It may be traumatic to them, and to their education, family, friends, business, and number of things, which an ordinary human being cannot even imagine. The answer lies in the speedy disposal of cases of foreign nationals, whether they are in custody or on bail.

29. Mr. Ashok Sharma, Learned Advocate General, assisted by Mr. Nand Lal Thakur, Additional Advocate General, submits that a few Foreign Nationals, while in India, deal in substance trade.

30. The solution to this lies not in denying bail. It lies in verifying the antecedents of these types of suspects, before approving or granting Visa, and once accused in substance abuse, then revoking the Visa. Synergy of law with technology is the next big thing.

31. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

32. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

33. In return for the freedom curtailed by the State for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

34. The petition stands allowed in accordance with the terms mentioned above.

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

Jatinder Kumar ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 727 of 2020
Reserved on : 2nd June, 2020
Date of Decision : 3rd June, 2020

Code of Criminal Procedure, 1973- Section 439- Regular bail- Grant of- Principles summarized- Held, pre-trial incarceration needs justification depending upon nature of offence, terms of the sentence prescribed in the Statute for such crime, probability of accused fleeing from justice, hampering the investigation and doing away with victim(s) and/or witnesses- Court is under

obligation to maintain a balance between all stakeholders and safeguard the interests of victim, accused, society and State. (Para 9)

Coram:

Whether approved for reporting?[12] ***YES***.

For the petitioner : Mr. Rajesh Kumar Parmar, Advocate.

For the respondent : Mr. Ashwani Sharma, Mr. Nand Lal Thakur, Addl. A.Gs., Mr. Ram Lal Thakur, Asstt. A.G. and Mr. Rajat Chauhan, Law Officer, for the State.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge

The petitioner who is under incarceration for last more than eight months for having been arrested for committing coitus with his unmarried distant sister-in-law, who being a minor, aged 15 years 10 months and 9 days, making the sexual intercourse a statutory rape, has come up before this Court, seeking regular bail.

2. The petitioner did not file any power of attorney. To contain the spread of Novel Corona Virus, the Epidemiologists have advised to maintain social distancing in the entire world. Consequently, to avoid unnecessary congregation, this Court exempts the petitioner from filing the power of attorney.
3. While issuing notices to the State, the Court had requested Mr. Nand Lal Thakur, Additional Advocate General to procure status report either through WhatsApp/e-mail and forward the same to this Court on e-mail id highcourt-hp@nic.in and also send the scanned copy or PDF copy of the status report to the learned Counsel for the petitioner on his WhatsApp number.

4. Mr. Nand Lal Thakur, learned Additional Advocate General has filed the status report through e-mail, printout whereof has been placed on record. He further submits that he has sent a copy of the status report to learned counsel for the petitioner on his WhatsApp number.
5. I have read the status report(s) and heard counsel for the parties through video conferencing.

EVIDENCE:
6. The gist of the First Information Report and the status report is that the petitioner was married to cousin sister of the victim and due to such relationship, he was quite close to her. In the beginning of the year 2019, the petitioner had gifted a mobile phone and asked her not to tell anything about this being gifted to her. The petitioner and the victim used to talk to each other on this mobile phone. On 15.6.2019, the petitioner called the victim and told her to come to near the School by stating that his wife wanted to meet her. On this, the victim went to that place, where she found the accused present in his Swift car. The victim asked her brother-in-law about her sister and on this the petitioner asked her to sit in the car. The victim further alleges that she refused to sit in the car, on which, the accused forcibly made her sit in the car and took her towards Ropar from Bunga Sahib, and on reaching an isolated forest, he committed rape upon her. After this, the petitioner dropped her near her village and also carried the mobile phone with him. On reaching home, the victim revealed the incident to her mother and consequentially, FIR got registered against the petitioner. In statement under Section 164 CrPC, recorded on oath before the JMIC, the victim re-iterated her version recorded in the FIR. The police took her for medical examination, where doctor did not rule out sexual intercourse and obtained fluids from her vaginal swabs and sent them for testing for Forensic Science Laboratory, which gave a negative report about the presence of semen.

PREVIOUS CRIMINAL HISTORY
7. As per the status report, there is no previous criminal history of the bail petitioner.

SUBMISSIONS:
8. Mr. Rajesh Kumar Parmar, learned counsel for the bail petitioner submits that the allegations are false, which is proved by the scientific evidence, which did not detect any semen for her vaginal swabs. To the contrary, Mr. Nand Lal Thakur, Additional Advocate General, contended that the victim reiterated her allegations on oath in her statement under Section 164 CrPC, which is a sufficient prima facie evidence.

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[12] **Whether reporters of Local Papers may be allowed to see the judgment?**

ANALYSIS AND REASONING:

9. Pre-trial incarceration needs justification depending upon the heinous nature of the offence, terms of the sentence prescribed in the Statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with victim(s) and/or witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

10. Any detailed discussions about the evidence may prejudice the case of the prosecution or the accused. Suffice it to say that keeping in view the nature of allegations and the victim traveling in the car to a distant place and alleged rape having been taken place in the car itself, coupled with the fact that in the Laboratory, the expert did not deduct any semen on the clothes as well as vaginal swab of the victim and further coupled with the fact that perusal of the physical examination of the victim in clinic, the Doctor having noticed old healed tears, further incarceration may not be justified subject to imposition of stringent conditions.

11. Thus, keeping in view the fact that the DNA report did not find presence of any semen on the swabs obtained from the victim and looking into her over all conduct, this Court is of the opinion that further incarceration of the accused during the period of trial is not warranted, especially keeping if view the fact that he is in jail for more than one year and nine months, and also for the following reasons:

(a) The material aspect of the investigation is complete.

(b) The petitioner is in judicial custody since 18.9.2019.

(c) The petitioner is a permanent resident of Village Kadayan, P.O. Bhurain, Police Station & Tehsil Bagana, District Una, H.P., therefore, his presence can always be secured.

(d) Before releasing the petitioner from custody, his AADHAR and other proofs of identity to secure presence during trial, be procured.

12. Given the above reasoning, in my considered opinion, the judicial custody of the petitioner is not going to achieve any significant purpose. Thus, the Court is granting bail, subject to the following conditions, irrespective of the contents of the bonds, and the furnishing of bail bonds shall be deemed acceptance of all stipulations, terms and conditions of this bail order:

(a) The petitioner shall furnish personal bond in the sum of Rs. 10,000/- (rupees ten thousand only) with one surety in the like amount, to the satisfaction of the Sessions Court/Special Court/ Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court exercising jurisdiction over the concerned Police Station where FIR is registered.

(b) The bail bonds shall continue to remain in force throughout the trial and even after that in terms of Section 437-A of the CrPC.

(c) The petitioner shall join investigation as and when called by the Investigating officer or any superior officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree treatment, indecent language etc.

(d) The petitioner shall not influence, threaten, browbeat or pressurize the complainant, witnesses, and the Police official(s).

(e) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade her from disclosing such facts to the Police, or the Court, or tamper with the evidence.

(f) The petitioner shall appear before the trial Court, on issuance of summons/warrants by such Court.

(g) There shall be a presumption of proper service to the petitioner about the date of hearing in the trial Court, even if such service takes place through phone/mobile/SMS/ WhatsApp/E-Mail/ or any other similar medium, by the trial Court, or by the Prosecution. In case the petitioner does not appear before the trial Court on such date of hearing, then the trial Court may issue bailable warrants, and if the petitioner still fails to put in appearance, then the trial Court may issue Non-Bailable warrants to procure the presence of the petitioner, and send the petitioner to the Judicial custody for the period for which the trial Court may deem fit and proper, without being unduly harsh towards him.

(h) The petitioner shall attend the trial on each date, unless exempted.

(i) In case of Non-appearance on the intimated date, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds,

subject to the provisions of Sections 446 & 446-A of CrPC. The failure of the petitioner to reimburse the State shall entitle the trial Court to order transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be only to trace the petitioner and relates to the exercise undertaken solely to nab the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

(j) The petitioner shall abstain from all criminal activities, if he does so, then in the fresh FIR, the Court shall take into account that even earlier the Court had cautioned the accused not to repeat the offence.

(k) The petitioner shall surrender all firearms along with ammunitions, if any, and the arms license to the concerned authority within 30 days from today.

(l) The petitioner shall not enter within a radius of five kilometers, the distance being measured from the shortest route from the residence of the victim(s), until the recording of her statement(s). However, irrespective of these conditions, the petitioner is permitted to visit her/his workplace, chambers of her/his Lawyer(s), Courts, Hospitals and other places of essential services, if not available elsewhere.

(m) In case, the petitioner needs to visit within the above mentioned 5 km area, then she/he shall take permission of the I.O. or any Police Officer superior to her, of the concerned Police Station; or Pradhan/Up-Pradhan/ Ward Member/ of the area, in whose jurisdiction the residence of the victim(s) falls, or of any MP, MLA, or any Gazetted Officer. Such permission shall be reasoned, and shall mention the period for its grant, and may be on a paper, voice recording, e-mail, or WhatsApp etc. The Court is putting this condition to ensure that the victim(s) suffer no trauma, at least till the time of recording of statement(s) in Court. In case the petitioner needs modification of this condition, then she/he may file a reasoned application before this Court, and after taking cognizance, before the Court taking cognizance or the trial Court, as the case may be. (Applicable only in the cases of sexual offences, assault or social unrest).

(n) The petitioner shall intimate about the change of residential address, and change of phone numbers, within 30 days from such change, to the police station, and after filing of the Police report also to the trial Court.

(o) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may file an application for cancellation of bail of the petitioner, and even the trial Court shall be competent to cancel the bail.

13. In case the petitioner finds the bail condition(s) as violating fundamental or other rights, including any human rights, or faces any other difficulty due to any condition, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, before the Court taking cognizance or the trial Court, as the case may be and the trial Court shall also be competent to modify or delete any condition.

14. The Counsel representing the accused and the Judicial officer accepting the bail bonds, shall explain all conditions of this bail order to the petitioner, in vernacular.

15. The petitioner undertakes to comply with all directions given in this order, and the furnishing of bail bonds by the petitioner is acceptance of all such conditions.

16. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing bail bonds in the aforesaid terms.

17. The Court attesting the bail bonds shall ascertain the identity of the bail-petitioner, his family members, through AADHAR Card. The petitioner shall give details of AADHAR Card, phone number(s), WhatsApp number, e-mail, Facebook account, etc., Pan Card and Passport if available, on the reverse page of the bonds. The petitioner shall also furnish details of personal bank account(s).

18. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation.

19. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in all other cases, if any, registered against the petitioner.

20. The SHO/Additional SHO of the concerned Police Station or the Investigating Officer shall send a copy of this order, preferably a soft copy, to the complainant.

21. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

22. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the bonds shall not insist upon the certified copy of this order, and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for the purposes of the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner, and to the Learned Advocate General, if they ask for the same.

23. The petition stands allowed in the terms mentioned above.

BEFORE HON'BLE MR. ANOOP CHITKARA, J.

Prem Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 115 of 2020
Reserved on: May 22 , 2020
Date of Decision: May 30 , 2020

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Sections 20, 29 & 37- Recovery of commercial quantity of 'charas' from co-accused while he was travelling in a bus- Petitioner arraigned accused for brokering its sale in his own car and taking his commission out of sale proceeds from seller- Regular bail- Grant of- Held, quantity involved in the case is the commercial quantity- Conspiracies are hatched in secrecy- Material in the shape of telephonic conversation between petitioner and co-accused on record suggesting involvement of accused in the commission of offence – Special case for grant of bail is not made out- Rigors of Section 37 of Act are attracted in this case- Petition dismissed. (Para 22 to 27)

Cases referred;

Gudi Kanti Vs Public Prosecutor of Andhra Pradesh, (1978)1 SCC 240,
Sanjay Chander Khanna v. CBI; (2012)1 SCC 40,
Vaman Narain Ghiya vs. State of Rajasthan; (2009) 2 SCC 281,
Noor Aga vs State of Punjab & Anr; (2008)16 SCC 417,
Madan Lal & Anr. vs State of H.P. ;(2003)7 SCC 465,
Ram Singh Vs CBN; (2011)11 SCC 347, Hon'ble Supreme Court
Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798,
State of Karnataka v. J. Jayalalitha, (2017) 6 SCC 263, Supreme Court
Ashok Debbarma v. State of Tripura ; (2014) 4 SCC 747,
State v. Anup Kumar Srivastava, (2017) 15 SCC 560,
State (Govt. of NCT of Delhi) v. Nitin Gunwant Shah, (2016) 1 SCC 472,
Subramanian Swamy v. A. Raja, (2012) 9 SCC 257 at page 283,
Yash Pal Mittal v. State of Punjab (1977) 4 SCC 540,
Vijayan Versus State of Kerala, (1999) 3 SCC 54,
Surinder Kumar Khanna v. Directorate of Revenue Intelligence, (2018) 8 SCC 271,
Supreme Court Legal Aid Committee v. Union of India (1994) 6 SCC 731,
Babua v. State of Orissa (2001) 2 SCC 566,
Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (2005) 5 SCC 294,
Francis Stanly v. Intelligence Officer, NCB (2006) 133 SCC 210.
Satpal Singh v. State of Punjab (2018) 13 SCC 813,

Whether approved for reporting?[1] *YES.*

For the petitioner : Mr. Vaibhav Tanwar, Advocate.

For the respondent : Mr. Nand Lal Thakur, Addl. A.G., Mr. Ram Lal Thakur, Asstt. A.G. and Mr. Rajat Chauhan, Law Officer, for the State.

Dr. Ashwani Sharma and Ms. Shradha Karol, Advocates, Amicus Curiae.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge

For possessing 2.369 kilograms of Charas, the petitioner, who is under arrest, on being arraigned as an accused of brokering its sale, in FIR Number 346/19, dated 11.12.2019, registered under Sections 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called "NDPS Act"), in Police Station Sundernagar, District Mandi, HP, disclosing non-bailable offenses, has come up before this Court under Section 439 CrPC, seeking regular bail.

2. While issuing notices to the State, the Court had requested Mr. Nand Lal Thakur, Additional Advocate General to procure status report either through WhatsApp/e-mail and forward the same to this Court on e-mail id highcourt-hp@nic.in and also send the scanned copy or PDF copy of the status report to the learned Counsel for the petitioner on his WhatsApp number.

3. Mr. Nand Lal Thakur learned Additional Advocate General states that he has filed the status report through e-mail. He further submits that he has sent a copy of the status report to learned Counsel for the petitioner on his WhatsApp number. A printout of the status report is available on file.

4. I have read the status report(s) and heard Mr. Vaibhav Tanwar, learned counsel for the petitioner, Mr. Nand Lal Thakur, learned Additional Advocate General, for the respondent/State and Mr. Ashwani Sharma & Ms. Shradha Karol, learned Advocates as *Amicus* Curiae, through video conferencing.

FACTS

5. The gist of the First Information Report and the status report is that on Dec 11, 2019, a Police party was conducting patrolling and traffic checking at a place known as Pungh within the jurisdiction of Police Station Sundernagar, Distt. Mandi, HP. During day time at around 2 O'clock, one bus bearing Punjab registration number, came from Sundernagar side, and it was bound from Manikaran to Chandigarh. Head Constable Lalit Kumar signaled the driver of the bus to halt on which he stopped the bus and parked it on the side. After that, the police started conducting checking the bus, and when they reached near seat No. 25, then they noticed that a person sitting on seat No. 25 was holding a back-pack on his lap. The police officials asked the said person to get his bag checked, and on this, he became perplexed and stated that there was nothing in his bag. This aroused suspicion in Head Constable Lalit Kumar's mind that this person might be having some articles of theft. After that, the police inquired from the passengers sitting in the adjoining seats, but all of them refused to associate as witnesses. Subsequently, the police associated the bus driver and the conductor as witnesses and, in their presence, inquired from the said person about his name, who revealed his name as Kuldeep Kaushik, resident of Rohtak Haryana. On checking the bag, police recovered Charas which, when weighed, measured 2.369 kilograms. Subsequently, the police party seized the contraband, complied with the procedural requirements under the NDPS Act, and the CrPC and arrested the said person, namely Kuldeep Kaushik. The Forensic Science Report tested the said substance to be cannabis.

6. After the arrest of Kuldeep, Kaushik police conducted his interrogation. He revealed to the police that he had befriended one Lalit @ Shivnath Baba in Rohtak Math. He also told that he, along with Lalit @ Shivnath Baba, would smoke cannabis, after now called as 'charas'. Two-three months ago, he said that Baba had visited Himachal Pradesh and told Kuldeep Kaushik that he had befriended one who smokes marijuana, and the said person had told Shivnath Baba that in case he needs charas then he would arrange for the same. On Dec 5/6, 2019,

the said Shivnath @ Baba had called Kuldeep Kaushik on his mobile phone and asked him to bring rupees 1.5 to 2 lacs to purchase charas.

7. On Dec 10, 2019, said Kuldeep Kaushik reached Bhuntar along with the money and said Lalit @ Shivnath Baba was also there. They talked to each other on the phone and decided the place to meet each other. After the meeting, the said Lalit @ Shivnath Baba made a phone call to Prem Singh (petitioner herein) on his Mobile No. 88948 49311 from his Mobile No. 86838 12506. Prem Singh told Lalit @ Shivnath that he could not come on that day. Consequently, both Lalit @ Shivnath and Kuldeep Kaushik stayed in a hotel at Bhuntar.

8. On Dec 11, 2019, said Shivnath Baba again made a phone call to Prem Singh, and on this Prem Singh told him that he is reaching Bhuntar in his car bearing No. HP49A 0837. On reaching there, he took Lalit @ Shivnath Baba and Kuldeep Kaushik in his vehicle towards a place known as Ropa. On reaching Ropa, Prem Singh made a phone to Nika Ram on his Mobile No. 9816607114 and asked him to bring the cannabis. After some time, said Nika Ram reached Ropa and sat inside the car mentioned above.

9. After that, inside the car of Prem Singh (petitioner), the said Nika Ram negotiated sale of the charas to him and agreed to sell the same for a sum of rupees 1.49 lacs. Subsequently, on payment of the amount, Nika Ram handed over the charas to Prem Singh. On receiving the money, Prem Singh took out rupees eight thousand as his commission and also gave rupees two thousand to Lalit @ Shivnath as his commission. Subsequently, all these four persons reached near Ropa bus stand where Prem Singh (petitioner) dropped Lalit @ Shivnath and Kuldeep Kaushik near the bus stand Ropa and himself along with Nika Ram proceeded further towards Sainj.

10. On reaching the bus stand, Ropa, Lalit @ Shivnath, and Kuldeep Kaushik boarded a private bus and arrived towards Aut where Kuldeep got down from the bus, and Lalit @ Shivnath went in the different direction.

11. The police procured the call details of these phone numbers and found that there were telephonic conversations between them. The police could not arrest Nika Ram and consequently moved an application under Section 82 CrPC for declaring him as a Proclaimed Offender.

PREVIOUS CRIMINAL HISTORY

12. Petitioner has no previous criminal history.

SUBMISSIONS:

13. Mr. Vaibhav Tanwar, the Counsel for the petitioner submits that the evidence collected by the Investigator is insufficient to fasten his guilt.

14. Mr. Nand Lal Thakur, Additional Advocate General submits that the quantity recovered is Commercial Quantity and the petitioner must cross the riders of S. 37 of NDPS Act. Once he is able to satisfy the twin conditions of S. 37 of NDPS Act, only after that he may be entitled for bail.

15. Dr. Ashwani Sharma, Ld. Amicus Curiae contends that the object of Bail is to Secure Appearance during the trial. Resultantly the mechanical detention should be demoted.

Presumption of innocence is a Human Right and the statement of co-accused just has a probative value.

16. Dr. Ashwani Sharma, Ld. Amicus Curiae refers to the following Judicial precedents:

1. That jurisprudence and principles of bail have been laid down in the case titled as **Gudi Kanti Vs Public Prosecutor of Andhra Pradesh, (1978)1 SCC 240** the Hon'ble Supreme Court has held that the court is cryptic on this topic and the court prefers to be tacit, be the orders custodial or not. And yet, the issue is one of liberty justice, public safety and burden of the public treasury, all of which insists that a developed jurisprudence of bail is integral to a socially sensitized judicial process.....Article 21 that the curial power to negate it is a greater trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community...after all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in term of procedure established by law. Further, the public justice is to be promoted, mechanical detention should be demoted. Public justice is central to the whole scheme of bail law. ...Fleeing justice must be forbidden but punitive harshness should be minimized.

2. **In Sanjay Chander Khanna v. CBI; (2012)1 SCC 40,** Supreme Court holds that the object of the bail is to secure the appearance of the accused person at his trail and the object the bail is neither punitive nor preventive. Deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon.... The jurisdiction on Criminal court to grant bail is discretionary, it has be exercised with great care and caution by balancing the valuable right and liberty of an individual and the interest of the society in general. Further held that when the under-trial prisoner is detained in jail custody to an indefinite period, article 21 of the Constitution is violated.

3. In **Vaman Narain Ghiya vs. State of Rajasthan; (2009) 2 SCC 281,** the apex court held "Philosophy of bail was discussed by the apex court wherein it was held that "Bail" remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term "baiulare", meaning "to bear a burden". Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states that when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sum of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance. Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

4. In **Noor Aga vs State of Punjab & Anr; (2008)16 SCC 417,** the apex court held that the presumption of innocence is a human right as envisaged under Article 14(2) of the International Covenant on Civil and Political Right. If, however, cannot per se be equated with the fundamental right and liberty adumbrated in Article 21 of the Constitution of India. It, having regard to the extent thereof, would not militate against other statuary provisions (which of course, must be read in the light of the constitutional guarantee as adumbrated in Articles 20 and 21 of the Constitution of India. The Court further holds that the Act specifically provides for the exceptions. It is trite law that presumption of innocence being a human right cannot be thrown aside, but it has to be applied subject to exceptions.

17. Dr. Ashwani Sharma, Advocate, on the point of determination of the Conscious Possession, placed reliance upon the following precedents of law:

1. In Madan Lal & Anr. vs State of H.P. ;(2003)7 SCC 465 the apex court held that it is highlighted that unless the possession was coupled with requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, section 20 is not attracted.

2. In Ram Singh Vs CBN; (2011)11 SCC 347, Hon'ble Supreme Court held that it is trite that to hold a person guilty, possession has to be conscious, control over the goods is one of the tests to ascertain conscious possession so also the title.

3. In Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798 the apex court held that the expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

18. On S. 29 of NDPS Act, Dr. Ashwani Sharma submitted that the Prosecution need not to prove its case with mathematic accuracy, and referred to the following Judicial precedents:

1. In **State of Karnataka v. J. Jayalalitha,** (2017) 6 SCC 263, Supreme Court referred to the judgment in **Ashok Debbarma v. State of Tripura ; (2014) 4 SCC 747,** wherein it was expounded that "in our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty but only beyond reasonable doubt and the criminal courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt" even though the courts are convinced of the accused persons' guilt beyond reasonable doubt.

2. In **State v. Anup Kumar Srivastava, (2017) 15 SCC 560** apex court held that the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do.

3. In **State (Govt. of NCT of Delhi) v. Nitin Gunwant Shah, (2016) 1 SCC 472** the apex court held that it is now, however, well settled that a conspiracy ordinarily is hatched in secrecy. The court for the purpose of arriving at a finding as to whether the said offence has been committed or not may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that meeting of mind is essential; mere knowledge or discussion would not be sufficient. Yet, the prosecution has failed to prove the evidence which establishes any prior meeting of minds of the accused….Needless to say that the entire foundation of the prosecution story was never established.

4. In **Subramanian Swamy v. A. Raja, (2012) 9 SCC 257 at page 283** the apex court held that Criminal conspiracy cannot be inferred on the mere fact that there were official discussions between the officers of the MoF and that of DoT and between two Ministers, which are all recorded and suspicion, however, strong, cannot take the place of legal proof

5. **In Yash Pal Mittal v. State of Punjab (1977) 4 SCC 540,** Supreme Court held that the offence of criminal conspiracy under Section 120-A is a distinct offence introduced for the first time in 1913 in Chapter V-A of the Penal Code. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy."

6. In **Vijayan Versus State of Kerala, (1999) 3 SCC 54**, Apex court held it is necessary to establish that there was an agreement between the parties for doing an unlawful act. It is no doubt true that it is difficult to establish conspiracy by direct evidence, therefore, from the established facts an inference could be drawn but there must be some material from which it would be reasonable to establish between the alleged conspiracy and the act done pursuant to the said conspiracy.

19. Dr. Ashwani Sharma, Advocate, on the statement of co-accused and its probative value placed reliance on the Judicial pronouncement in **Surinder Kumar Khanna v. Directorate**

of Revenue Intelligence, (2018) 8 SCC 271, wherein the apex court held that **i**n the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court, such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilised in order to lend assurance to the Court.

20. Ms. Shradha Karol, Ld. Amicus Curiae submitted as follows:

SECTION 29- PUNISHMENT FOR ABETMENT AND CRIMINAL CONSPIRACY

1) Abetment as defined under Section 107 IPC. The essential ingredients of the Section are: -

1. A person instigates any person to do that thing;
2. A person engages with or more other persons in any conspiracy for the doing of that thing;
3. Intentionally aids, by act or illegal omission, the doing of that thing.

2) The prosecution to prove the case under Section 107 IPC would have to prove both instigation and *mens rea*. It shall have to prove that the person is said to instigate the other person by doing an act which makes the other person to do any such act as possible, either directly and indirectly. Furthermore, it shall have to prove active conscious of the person and that there was not any negligence or carelessness.

3) Criminal conspiracy as defined under Section 120 B IPC. The essential ingredients of the Section are: -

1. Object to be accomplished;
2. A plan or scheme to accomplish the object;
3. An agreement or understanding between two persons for the accomplishing the object;
4. Acts are committed in the jurisdiction.

4) Abatement and Conspiracy has been defined under Section 109 IPC and the essential ingredients are:

1. Instigation
2. Conspiracy
3. With the aid constituting abetment.

5) It is not necessary for the prosecution to prove that the actual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor.

6) The instigation must be with reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is the only condition that must be fulfilled for a person to be guilty of abetment by instigation.

21. Ms. Shradha Karol, Ld. Amicus Curiae refers to the following judicial precedents:

1. **Supreme Court Legal Aid Committee v. Union of India (1994) 6 SCC 731**- The Hon'ble Court while dealing with the issue of under trials in NDPS matters stated that in such cases considering the gravity of the offence deprivation of personal liberty to some extent is justified. However, what is not justified is that refusing bail due to strict provisions on one day and delaying trial of the case on the other hand.

2. **Babua v. State of Orissa (2001) 2 SCC 566**- The Hon'ble Court while dealing with bail under the provisions of the NDPS Act has held that what needs to be considered by the court is that if the prosecution statements are to be believed they will result in conviction. If the court couldn't give an answer in negative, the bail could not have been granted. Furthermore, these statements need to examine carefully till the evidence has not be completely adduced before the trial court. The Court further held that liberty of the person seeking bail has to be balanced with the interest of the society. In cases where narcotic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such person behind the bars during the pendency of the proceedings.

3. **Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (2005) 5 SCC 294**- The Hon'ble Court while dealing with a matter under MACOCA wherein Section 21 is *pari materia* to Section 37 of the NDPS, stated that restriction on the power of the court to grant bail is not to be pushed too far but if the court is satisfied with the material placed on record that in all probability the accused may not be ultimately convicted, an order of rant of bail ought to be passed. Hon'ble Court further observed that the wording of the Section didn't lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the act since at that time it may not be possible for the prosecution to obtain a judgement of conviction or acquittal. Thus, the intention of the legislature must be construed reasonably so that the court is able to maintain a delicate balance between judgement of acquittal and conviction and an order of granting of bail before the commencement of trial.

4. **Francis Stanly v. Intelligence Officer, NCB (2006) 133 SCC 210**- The Hon'ble Court while dealing in appeal against conviction based on confession of the co-accused which was later retracted, held that the confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an authority shall have to be closely scrutinized. Furthermore, such confession shall be required to be corroborated with independent sources.

5. **Satpal Singh v**. **State of Punjab (2018) 13 SCC 813 (3 Judges)**- The Hon'ble Court while dealt with the interplay of Section 37 NDPS Act and 439 of CrPC stated that condition under Section 37(1)(b)(ii) are in addition to the limitation of the CrPC. and liberal approach in matter of bail under NDPS Act is uncalled for.

ANALYSIS AND REASONING:

22. The main allegation against the Petitioner is that co-accused called up Prem Singh on his mobile no. 8894849311 and the exchange of the cannabis took place in his car HP 49A0837.

Furthermore, he took an amount of Rs. 8000/- from the total cash amount for brokering the deal.

23. Pre-trial incarceration needs justification depending upon the heinous nature of the offence, terms of the sentence prescribed in the Statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with victim(s) and/or witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

24. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule of NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offense, also mention that minimum and maximum sentence, depending upon the quantity of the substance. Commercial quantity mandates minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

25. The law is well settled that the two conditions that need to be satisfied are that the prosecution must be given the opportunity to oppose the application and that court must be satisfied that there are reasonable grounds for believing that he is not guilty of such and offence. If either of these two conditions are not satisfied, the ban of granting bail operates. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence.

26. In other words, Section 37(1)(b)(ii) mandates twin conditions to be satisfied before a person/ accused to be released on bail the first is when the public prosecutor does not oppose the bail. Secondly, the court must be satisfied that there exists a reasonable ground for believing that the person/ accused is not guilty of such offense and is not likely to commit any crime while on bail.

27. Criminal conspiracies are hatched in secrecy. Learned Additional Advocate General submits that at this stage, it has come in the investigation about telephonic conversations. Suffice to say that the quantity involved in this case is the commercial quantity, and the petitioner has failed to cross the riders of Section 37 of the NDPS Act.

28. Therefore, at this stage, the petitioner has not made a special case to get bail. However, the petitioner shall be at liberty to file a fresh bail application either before this Court or before the trial Court after the filing of the police report prepared under Section 173(2) CrPC. Needless to say, that at that time, the Court considering the bail application shall not get influenced by the observations made hereinbefore.

29. Resultantly, there is no merit in the present petition and the same is accordingly dismissed.

Before parting, this Court expresses its appreciation and gratitude to learned Amicus Curiae, Dr. Ashwani Sharma and Ms. Shradha Karol, Advocates, for the excellent assistance rendered by both of them.

1 **Whether reporters of Local Papers may be allowed to see the judgment?**

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE AND HO'BLE MS. JUSTICE JYOTSNA REWAL DUA, Judge.

Bhagwati Prashad and others .....Petitioners.

Versus

The State of H.P. and another .....Respondents.

CWP No.1449 of 2020.
Date of decision: 16.06.2020.

Constitution of India, 1950- Articles 14 & 226- Executive powers of State- Exercise of and challenge thereto by way of writ jurisdiction- Held, in exercise of its executive powers, State has wide discretion to change the existing policy when not trammeled by any Statute or Rule- However, change in policy must be done fairly and should not give an impression that it was done arbitrarily or by any ulterior criteria. (Para 7)

Constitution of India, 1950- Articles 14 & 226- Doctrine of legitimate expectation- Applicability- Held, a legitimate expectation even when made out does not always enable the expectant to a relief- Public interest, change in administrative policy, conduct of expectant or any other valid or bonafide reason given by decision maker may be sufficient to negative the legitimate expectation. (Para 8)

Constitution of India, 1950- Articles 14 & 226- **Himachal Pradesh Transport Service Providers Scheme, 2013 (Scheme)**- Petitioners were given licences to act as service providers in office of Registering and Licensing Authority to provide services to persons visiting said office- Scheme abolished vide Government Notification dated 21.04.2020- Challenge thereto on grounds of arbitrariness and legitimate expectation that petitioners would continue to work as Service Providers- Held, Scheme of 2013 nowhere suggests for its continuation till perpetuity- State has freedom to change the policy in public interest- Petitioners did not make any considerable investment- Purpose of abolishing Scheme is to reduce footfall of general public in the offices and such change in policy is not arbitrary- Petition dismissed. (Para 10 to 14)

Cases reffered;

Kerala State Beverages (M and M) Corporation Limited vs. P.P. Suresh and others, (2019) 9 SCC 710
Punjab Communications Ltd. vs. Union of India and others, AIR 1999 SC 1801

Whether approved for reporting?[13] ***Yes***

For the Petitioners : **Mr. Kul Bhushan Khajuria, Advocate.**

For the Respondents: **Mr. Ashok Sharma, Advocate General with Mr. Ranjan Sharma, Mr. Vikas Rathore, Mr. Vinod Thakur and Mr. Desh Raj Thakur, Additional Advocate Generals.**

Tarlok Singh Chauhan, Judge (Oral)

On 01.01.2014, the State Government notified the 'Himachal Pradesh Transport Service Providers Scheme, 2013' (for short 'Scheme') wherein parameters were fixed for eligibility for having licenses. The licensees were made competent to provide transport service after qualifying the special examination prescribed under the scheme. The scheme also made provisions for renewal/suspension/ cancellation and validity of such licenses.

2. The basic idea to frame the scheme was to provide easy access to the public by providing them various transport services in the Office of the Registering and Licensing Authority in Himachal Pradesh and to make the working of the Transport Department efficient because at that time 'VAHAN' and 'SARTHI' applications were offline and lesser number of people were using online service.

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13 *Whether the reporters of the local papers may be allowed to see the Judgment?Yes*

3. The petitioners after qualifying the written examination were granted licenses and were working as 'Transport Service Providers' (for short TSPs). However, the aforesaid scheme came to be abolished vide notification dated 21.04.2020, constraining the petitioners to file the instant petition for grant of the following substantive reliefs:

> "i) That in view of the above mentioned facts and circumstances, the impugned order dated 21.4.2020 (Annexure P-4) may kindly be quashed and set aside, in the interest of justice and fair play.
>
> ii) That the respondents may kindly be directed to allow the petitioners to work as TSPs continuously under the scheme Annexure P-1 or in the alternative they may be given license to work as Parivahan Mitter Kender by providing the requisite infrastructure as provided to Lok Mitter Kender."

4. It is vehemently contended by Shri Kul Bhushan Khajuria, learned counsel for the petitioners that the action of the respondents in issuing the impugned notification dated 21.04.2020, apart from resulting in the loss of livelihood of the petitioners, is contrary to the legitimate expectations of the petitioners, especially, when there was no financial burden on the State Government in executing and continuing with the earlier scheme.

5. On the other hand, Shri Ashok Sharma, learned Advocate General assisted by Shri Ranjan Sharma, learned Additional Advocate General, for the respondents, has argued that the notification dated 21.04.2020 has been issued in public interest and to reduce the footfall of the general public in the transport offices. It is submitted that over the past five years the Information Technology Sector has undergone developmental changes necessitating the conversion of offline mode service under the Scheme 2013 into a online mode by the respondents by developing and thereafter launching the software i.e. 'VAHAN' and 'SARTHI' portal.

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

7. It is more than settled that discretion to change the policy in exercise of executive powers when not trammelled by any statute or rule is wide enough. However, it is imperative and implicit in terms of Article 14 that a change in policy must be done fairly and should not give an impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 of the Constitution of India and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically or for any ulterior motive.

8. As observed by the Hon'ble Supreme Court in ***Punjab Communications Ltd.*** *vs.* ***Union of India and others, AIR 1999 SC 1801*** that the change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury reasonableness". The decision-maker has a choice in the balancing of the pros and cons relevant to the change in policy. It is, therefore, clear that the choice of the policy is for the decision-maker and not for the Court. The legitimate substantive expectation merely permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made. A claim based on merely legitimate expectation without anything more cannot ipso facto give a right. Its uniqueness lies in the fact that it covers the entire span of time "present, past and future". A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bonafide reason given by the decision-maker may be sufficient to negative the "legitimate expectation".

9. The concept of substantive legitimate expectation was the subject-matter in a fairly recent judgment of the Hon'ble Supreme Court in ***Kerala State Beverages (M and M) Corporation Limited*** *vs.* ***P.P. Suresh and others, (2019) 9 SCC 710*** wherein it was observed as under:

> "*19. An expectation entertained by a person may not be found to be legitimate due to the existence of some countervailing consideration of policy or law.[9] H.W.R. Wade & C.F. forsyth, Administrative Law (Eleventh Edn., Oxford University Press, 2014) Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government.[10]Hughes v. Department of Health and Social Security, 1985 AC 776, 788.*

20. The decision makers' freedom to change the policy in public interest cannot be fettered by applying the principle of substantive legitimate expectation.[11] Findlay, In re, 1985 AC 318. So long as the Government does not act in an arbitrary or in an unreasonable manner, the change in policy does not call for interference by judicial review on the ground of a legitimate expectation of an individual or a group of individuals being defeated.

21. The assurance given to the respondents that they would be considered for appointment in the future vacancies of daily wage workers, according to the Respondents, gives rise to a claim of legitimate expectation. The Respondents contend that there is no valid reason for the Government to resile from the promise made to them. We are in agreement with the explanation given by the State Government that the change in policy due was to the difficulty in implementation of the Government order dated 20.02.2002. Due deference has to be given to the discretion exercised by the State Government. As the decision of the Government to the change policy was to balance the interests of the displaced Abkari workers and a large number of unemployed youth in the State of Kerala, the decision taken on 07.08.2004 cannot be said to be contrary to public interest. We are convinced that the overriding public interest which was the reason for change in policy has to be given due weight while considering the claim of the Respondents regarding legitimate expectation. We hold that the expectation of the Respondents for consideration against the 25 per cent of the future vacancies in daily wage workers in the Corporation is not legitimate."

10. Judged in light of the aforesaid exposition of law, we do not find any ground for interference. The plea of legitimate expectation is totally unfounded as firstly the Scheme of 2013 nowhere suggests much less provides for continuing of the scheme in perpetuity. The petitioners can have no legitimate expectation as the decision-makers i.e. the respondents have freedom to change the policy in public interest.

11. That apart, the petitioners have not made any considerable investment under the scheme and most of the amount that was deposited by them towards license fee (Rs. 10,000/-) and security for license (Rs.20,000/-) are refundable and in addition thereto only a nominal fee of Rs.10,000/- over for a period of five years is the amount which is paid by the petitioners for renewal of license.

12. Lastly and more-importantly, the decision of the Government in bringing about the change in the policy cannot be termed to be arbitrary, irrational, unreasonable or perverse, calling for any interference by judicial review.

13. Not only the State and the Country, but the World is grappling with the COVID-19 Pandemic and one of the purpose of amending the scheme is to reduce the footfall of the general public in the offices.

14. Moreover, the principle of legitimate expectation would only apply if a promise made by an authority which is clear, unequivocal and unambiguous and a person can claim that the authority in all fairness should not act contrary to the promise. This is not the fact situation obtaining in the present case.

15. As observed above, the change brought about in the scheme by the respondents in issuing impugned notification cannot either be termed to be unreasonable or arbitrary so as to call for interference in this petition by this Court.

16. Consequently, we see no merit in the instant writ petition and the same is dismissed, so also the pending application, if any.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, JUDGE.

Raj Kumar Jaswal .....Petitioner.

Versus

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

CWP No.1721 of 2019.
Date of decision: 26.06.2020.

Constitution of India, 1950- Articles 14 & 21- Release on parole- Denial on police report on ground that petitioner is involved in serious and heinous offences- Nature of- Held, parole is not a right vested with prisoner- It is a privilege available to him on fulfilling certain conditions- This discretionary power has to be exercised by the Authorities under the relevant Rules and Regulations- Once powers are exercised, Court may hold that exercise of powers is not in accordance with Rules. (Para 7)

Constitution of India, 1950- Articles 14 & 21- Release on parole- Purpose of granting parole- Held, though purpose of granting parole is ingrained in reformatory theory of sentencing however other competing public interest has to be kept in mind- Public interest demands that those who are habitual offenders and may have tendency to commit crime again after their release on parole or become threat to law and order should not be released on parole- Petitioner involved in so many other cases as well – Rejection of this prayer for release on parole valid- Petition dismissed. (Para 6, 9 & 10)

Cases referred;

Asfaq versus State of Rajasthan and others, (2017) 15 SCC 55,
State of Maharashtra and Another v. Suresh Pandurang Darvakar (2006) 4 SCC 776;
State of Haryana and Others v. Mohinder Singh, (2000) 3 CC 394;
Maneka Gandhi v. Union of India (1978) 1 SCC 248
Charles Sobraj v. Superintendent Central Jai, Tihar, New Delhi, (1978) 4 SCC 104.

Whether approved for reporting?[14] **Yes**

For the Petitioner : **Ms. Salochna Rana, Advocate, through video conferencing.**

For the Respondents: **Mr. Ashok Sharma, Advocate General with Mr. Vikas Rathore, Mr. Vinod Thakur, Mr. Desh Raj Thakur, Additional Advocate Generals and Mr. Bhupinder Thakur, Deputy Advocate General, through video conferencing.**

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE.

Tarlok Singh Chauhan, Judge (Oral)

The petitioner has filed the instant petition for grant of the following substantive reliefs:

> "i) That the impugned rejection letter dated 11.06.2019 (Annexure P-1) may kindly be quashed and set aside.
>
> ii) That the respondents may kindly be directed to release the petitioner on parole for a period of one month."

2. Records reveal that the petitioner has been convicted for an offence punishable under Section 306 IPC wherein he was sentenced to undergo imprisonment for four years and the same was upheld by this Court in the appeal preferred by the petitioner which was registered as Criminal Appeal No. 663 of 2008.

3. The request of the petitioner for release on parole has been rejected for want of recommendations by the competent authority.

4. It was in this background that this Court on 07.08.2019 while issuing notice to the respondents passed the following directions:

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14 *Whether the reporters of the local papers may be allowed to see the Judgment?Yes*

"Notice. Mr. J.K. Verma, learned Additional Advocate General takes notice for the respondents. He is directed to get a copy of the letter of the District Magistrate on the basis of which the impugned order is passed. Post on 13th August, 2019."

5. It was in compliance to the aforesaid directions that the respondents placed on record the details of the cases in which the petitioner was/has been involved in the cases enumerated hereinbelow.

"1	18/2014 dated 09-02-2014 u/s 451, 504, 506, 427 IPC, PS Gagret	Kailash Kumari W/O Late Sh. Desh Raj R/o Kaloh, Tehsil Amb, District Una(HP).	Raj Kumar Jaswal S/o Sh. Ram Kishan, Caste Rajput, R/O Kaloh, Tehsil Amb, District Una(HP).	Pending with the Ld. Court ACJM-II, Amb on 15-05-2014.
2	68/2014 dated 20-05-2014 u/s 279, 283, 504, 506 IPC, PS Gagret	Munish Sharma S/O Sh. Bhaghi Rath R/O VPO Gagret, Tehsil Amb, District Una (HP).	Raj Kumar S/o Sh. Ram Kishan, R/O Kaloh, Tehsil Amb, District Una(HP) age 51 years.	Pending with the Ld. Court JMIC-II, Amb from 10-07-2014.
3	78/2014 dated 12-06-2014 u/s 452, 323, 504, 506 IPC, PS Gagret	Kailash Kumari W/O Late Sh. Desh Raj R/o Kaloh, Tehsil Amb, District Una(HP).	Raj Kumar S/o Sh. Ram Kishan, Caste Rajput, R/O Kaloh, Tehsil Amb, District Una(HP), age 53 years.	Pending with the Ld. Court ACJM, Amb from 08-09-2014.
4	105/2014 dated 04-08-2014 u/s 325, 323 IPC, P.S. Gagret	Kanwar Rohit Jaswal S/O Sh. Raj Kumar, R/O Kaloh, Tehsil Amb, District Una (HP).	Raj Kumar S/o Late Sh. Ram Kishan, Caste Rajput, R/O Kaloh, Tehsil Amb, District Una(HP), age 53 years.	Acquitted due to compromise between the both parties in the Ld. Court JMIC-II, Amb on 20-09-2016.
5	81/2005 dated 03-05-2005 u/s 341, 323, 506, 427 IPC, PS Gagret	Manohar Lal S/O Sh. Sant Ram, Caste Brahmin, R/O Indra Nagar, Gagret, Tehsil Amb, District Una (HP).	Raj Kumar S/o Sh. Ram Kishan, Caste Rajput, R/O Kaloh, Tehsil Amb, District Una(HP).	Pending with JMIC, Amb.
6	15/2011 dated 23-01-2011 u/s 384, 506 IPC, PS Amb	Information of Challani	Raj Kumar @ Raju S/o Late Sh. Ram Kishan Jaswal, R/O Kaloh, Tehsil Amb, District Una(HP), age 50 years.	Information of Challani.
7	28/85 dated 26-06-85 u/s 324, 325, 323, 34 IPC, PS Gagret	Dharam Singh S/O Sh. Sher Singh Caste Rajput, R/o Kaloh,Tehsil Amb, District Una (HP), age	1. Raj Kumar S/o Sh. Ram Kishan, Caste Rajput, R/O Kaloh, Tehsil Ghanari, District	Acquitted by the Ld. Court SDJM, Amb, on 20-05-1987.

		35 years.	Una(HP). 2.Angad Singh S/O Sh. Kehar Singh, R/o Kaloh, Tehsil Ghanari, District Una (HP). 3. Harminder Pal Singh @ Pali, R/O Kaloh, Tehsil Ghanari, District Una (HP). 4. Amrit Lal Soni S/O Sh. Mangat Ram, Caste Khatri, R/O Kaloh, Tehsil Ghanari, District Una, (HP).	
8.	30/2004 dated 16-02-2004 u/s 498 A, 323, 506 IPC, PS Gagret	Sushma Jaswal W/O Sh. Raj Kumar, Caste Rajput, R/O Kaloh, Tehsil Amb, District Una (HP), age 39 years.	Raj Kumar S/o Sh. Ram Krishan, Caste Rajput, R/O Kaloh, Tehsil Amb, District Una(HP), age 41 years.	Acquitted by the Ld. Court ACJM, Amb, on 10-12-2004.
9	106/2005 dated 29-06-2005 u/s 452, 323, 506 IPC, PS Gagret	Leela Devi, W/O Late Sh. Ram Kishan, Caste Rajput, R/O W. No. 6, Kaloh, Tehsil Amb, District Una (HP).	Raj Kumar S/o Sh. Ram Kishan, Caste Rajput, R/O Ward No.6, Kaloh, Tehsil Amb, District Una(HP).	Convicted with fine to Rs.1000/- along with one year simple imprisonment by the Ld. Court JMIC-II, Amb on 22-12-2006.
10	121/2006 dated 13-07-2006 u/s 306 IPC, PS Gagret	Raman Kumari, W/O Sh. Sudarshan Singh, Caste Rajput, R/O Kaloh, Tehsil Amb, District Una (HP), age 47 years.	Raj Kumar S/O Sh. Ram Kishan, Caste Rajput, R/O Kaloh, Tehsil Amb, District Una(HP).	Convicted with fine to Rs.10,000/- along with one year rigorous imprisonment by the Ld. Sessions Judge, Una, on 07-11-2008.
11	28/2010 dated 24-02-2010 u/s 364, 342, 324, 323, 506, 34, 326 IPC, PS. Gagret	Mohan Lal S/O Sh. Bakeel Chand R/O Pambra, Tehsil Amb, District Una (HP).	1. Raj Kumar S/O Sh. Ram Kishan Jaswal, Caste Rajput, R/O Kaloh, Tehsil Amb, District Una (HP), age 45 years. 2. Sushma Jaswal W/O Sh. Raj Kumar Jaswal, R/O Kaloh, Tehsil	Pending with the Ld. Court JMIC-II, Amb from 30-04-2010.

			Amb, District Una (HP), age 42 years. 3.Rohit Jaswal S/O Sh. Raj Kumar Jaswal, Caste Rajput, R/O Kaloh, Tehsil Amb, District Una (HP), age 21 years.	
12	15/2011 dated 28-02-2011 u/s 323 IPC, PS Gagret	Chanan Singh S/O Sh. Ramu Ram, R/O Kaloh, Tehsil Amb, District Una (HP).	Raj Kumar S/O Sh. Ram Kishan Jaswal @ Gorkha, R/O Kaloh, Tehsil Amb, District Una (HP).	Acquitted due to compromise between the both parties in the Ld. Court JMIC-II, Amb, on 03-11-2012."

6. Now, the moot question is whether in view of the involvement of the petitioner in so many cases, can he still be released on parole.

7. It is more than settled that th*e grant of remission or parole is not a right vested with the prisoner. It is a privilege available to the prisoner on fulfilling certain conditions. This is a discretionary power which has to be exercised by the authorities conferred with such powers under the relevant rules/regulations. The Court cannot exercise these powers, though once the powers are exercised, the Court may hold that the exercise of powers is not in accordance with rules.*

8. The Hon'ble Supreme Court has considered in detail the nature, object, purpose and parameters for grant of parole subject to which parole can be granted in ***Asfaq*** *versus* ***State of Rajasthan and others, (2017) 15 SCC 55***, wherein it was observed as under:

> "14. Furlough, on the other hand, is a brief release from the prison. It is conditional and is given in case of long term imprisonment. The period of sentence spent on furlough by the prisoners need not be undergone by him as is done in the case of parole. Furlough is granted as a good conduct remission.
>
> 15. A convict, literally speaking, must remain in jail for the period of sentence or for rest of his life in case he is a life convict. It is in this context that his release from jail for a short period has to be considered as an opportunity afforded to him not only to solve his personal and family problems but also to maintain his links with society. Convicts too must breathe fresh air for at least some time provided they maintain good conduct consistently during incarceration and show a tendency to reform themselves and become good citizens. Thus, redemption and rehabilitation of such prisoners for good of societies must receive due weightage while they are undergoing sentence of imprisonment.
>
> 16. This Court, through various pronouncements, has laid down the differences between parole and furlough, few of which are as under:
>
> (i) Both parole and furlough are conditional release.
>
> (ii) Parole can be granted in case of short term imprisonment whereas in furlough it is granted in case of long term imprisonment.
>
> (iii) Duration of parole extends to one month whereas in the case of furlough it extends to fourteen days maximum.
>
> (iv) Parole is granted by Divisional Commissioner and furlough is granted by the Deputy Inspector General of Prisons.

(v) For parole, specific reason is required, whereas furlough is meant for breaking the monotony of imprisonment.

(vi) The term of imprisonment is not included in the computation of the term of parole, whereas it is vice versa in furlough.

(vii) Parole can be granted number of times whereas there is limitation in the case of furlough.

(viii) Since furlough is not granted for any particular reason, it can be denied in the interest of the society.

{See State of Maharashtra and Another v. Suresh Pandurang Darvakar (2006) 4 SCC 776; and State of Haryana and Others v. Mohinder Singh, (2000) 3 SCC 394.

17. From the aforesaid discussion, it follows that amongst the various grounds on which parole can be granted, the most important ground, which stands out, is that a prisoner should be allowed to maintain family and social ties. For this purpose, he has to come out for some time so that he is able to maintain his family and social contact. This reason finds justification in one of the objectives behind sentence and punishment, namely, reformation of the convict. The theory of criminology, which is largely accepted, underlines that the main objectives which a State intends to achieve by punishing the culprit are: deterrence, prevention, retribution and reformation. When we recognise reformation as one of the objectives, it provides justification for letting of even the life convicts for short periods, on parole, in order to afford opportunities to such convicts not only to solve their personal and family problems but also to maintain their links with the society. Another objective which this theory underlines is that even such convicts have right to breathe fresh air, al beit for periods. These gestures on the part of the State, along with other measures, go a long way for redemption and rehabilitation of such prisoners. They are ultimately aimed for the good of the society and, therefore, are in public interest.

18. The provisions of parole and furlough, thus, provide for a humanistic approach towards those lodged in jails. Main purpose of such provisions is to afford to them an opportunity to solve their personal and family problems and to enable them to maintain their links with society. Even citizens of this country have a vested interest in preparing offenders for successful re-entry into society. Those who leave prison without strong networks of support, without employment prospects, without a fundamental knowledge of the communities to which they will return, and without resources, stand a significantly higher chance of failure. When offenders revert to criminal activity upon release, they frequently do so because they lack hope of merging into society as accepted citizens. Furloughs or parole can help prepare offenders for success.

19. Having noted the aforesaid public purpose in granting parole or furlough, ingrained in the reformation theory of sentencing, other competing public interest has also to be kept in mind while deciding as to whether in a particular case parole or furlough is to be granted or not. This public interest also demands that those who are habitual offenders and may have the tendency to commit the crime again after their release on parole or have the tendency to become threat to the law and order of the society, should not be released on parole. This aspect takes care of other objectives of sentencing, namely, deterrence and prevention. This side of the coin is the experience that great number of crimes are committed by the offenders who have been put back in the street after conviction. Therefore, while deciding as to whether a particular prisoner deserves to be released on parole or not, the aforesaid aspects have also to be kept in mind. To put it tersely, the authorities are supposed to address the question as to whether the convict is such a person who has the tendency to commit such a crime or he is showing tendency to reform himself to become a good citizen.

20. Thus, not all people in prison are appropriate for grant of furlough or parole. Obviously, society must isolate those who show patterns of preying upon victims. Yet administrators ought to encourage those offenders who demonstrate a commitment to reconcile with society and whose behaviour shows that aspire to live as law-abiding citizens. Thus, parole program should be used as a tool to shape such adjustments.

21. To sum up, in introducing penal reforms, the State that runs the administration on behalf of the society and for the benefit of the society at large cannot be unmindful of safeguarding the legitimate rights of the citizens in regard to their security in the matters of life and liberty. It is for this reason that in introducing such reforms, the authorities cannot be oblivious of the obligation to the society to render it immune from those who are prone to criminal tendencies and have proved their susceptibility to indulge in criminal activities by being found guilty (by a Court) of having perpetrated a criminal act. One of the discernible purposes of imposing the penalty of imprisonment is to render the society immune from the criminal for a specified period. It is, therefore, understandable that while meting out humane treatment to the convicts, care has to be taken to ensure that kindness to the convicts does not result in cruelty to the society. Naturally enough, the authorities would be anxious to ensure that the convict who is released on furlough does not seize the opportunity to commit another crime when he is at large for the time-being under the furlough leave granted to him by way of a measure of penal reform.

22. Another vital aspect that needs to be discussed is as to whether there can be any presumption that a person who is convicted of serious or heinous crime is to be, ipso facto, treated as a hardened criminal. Hardened criminal would be a person for whom it has become a habit or way of life and such a person would necessarily tend to commit crimes again and again. Obviously, if a person has committed a serious offence for which he is convicted, but at the same time it is also found that it is the only crime he has committed, he cannot be categorized as a hardened criminal. In his case consideration should be as to whether he is showing the signs to reform himself and become a good citizen or there are circumstances which would indicate that he has a tendency to commit the crime again or that he would be a threat to the society. Mere nature of the offence committed by him should not be a factor to deny the parole outrightly. Wherever a person convicted has suffered incarceration for a long time, he can be granted temporary parole, irrespective of the nature of offence for which he was sentenced. We may hasten to put a rider here, viz. in those cases where a person has been convicted for committing a serious office, the competent authority, while examining such cases, can be well advised to have stricter standards in mind while judging their cases on the parameters of god conduct, habitual offender or while judging whether he could be considered highly dangerous or prejudicial to the public peace and tranquillity etc.

23. There can be no cavil in saying that a society that believes in the worth of the individuals can have the quality of its belief judged, at least in part, by the quality of its prisons and services and recourse made available to the prisoners. Being in a civilized society organized with law and a system as such, it is essential to ensure for every citizen a reasonably dignified life. If a person commits any crime, it does not mean that by committing a crime, he ceases to be a human being and that he can be deprived of those aspects of life which constitute human dignity. For a prisoner all fundamental rights are an enforceable reality, though restricted by the fact of imprisonment. {See – Sunil Batra (II) v. State (UT of Delhi) (1980) 3 SCC 488 , Maneka Gandhi v. Union of India (1978) 1 SCC 248 and Charles Sobraj v. Superintendent Central Jai, Tihar, New Delhi, (1978) 4 SCC 104.

24. It is also to be kept in mind that by the time an application for parole is moved by a prisoner, he would have spent some time in the jail. During this period, various reformatory methods must have been applied. We can take judicial note of this fact, having regard to such reformation facilities available in modern jails. One would know by this time as to whether there is a habit of relapsing into crime in spite of having administered correctional treatment. This habit known as “recidivism” reflects the fact that the correctional therapy has not brought in the mind of the criminal. It also shows that criminal is hardcore who is beyond correctional therapy. If the correctional therapy has not made in itself, in a particular case, such a case can be rejected on the aforesaid ground i.e. on its merits.”

9. Bearing in mind the aforesaid exposition of law, it is evidently clear that even though the purpose of granting parole is ingrained in the reformatory theory of sentencing, however, the other competing public interest has also to be kept in mind while deciding as to whether in a particular case parole is to be granted or not. This public interest also demands that those who are habitual offenders and may have the tendency to commit the crime again after their release on parole or have the tendency to become threat to the law and order of the society, should not be released on parole.

10. The grant of parole is not a right vested with the prisoner and is rather a privilege available to the prisoner on fulfilling certain conditions and in view of the long history of cases as set out hereinabove, we really do not find any infirmity with the order passed by the respondents rejecting the claim of the petitioner for grant of parole.

11. Consequently, we find no merit in the instant writ petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stand disposed of.

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

1. RFA No. 258 of 2008

The General Manager, Ranjit Sagar (Thein Dam). ...Appellant.

Versus

Sh. Mohinder Kumar & others. ...Respondents.

2. RFA No. 261 of 2008

The General Manager, Ranjit Sagar (Thein Dam). ...Appellant.

Versus

Sh. Raj Kumar & others. ...Respondents.

3. RFA No. 262 of 2008

The General Manager, Ranjit Sagar (Thein Dam). ...Appellant.

Versus

Sh. Bishamber & others. ...Respondents.

4. Cross-Objection No. 47 of 2018 in RFA No. 258 of 2008

The General Manager Rajneet Sagar Dam . ...Non-objector/Appellant.

Versus

Shri Mohinder Kumar & others. ...Objector/Respondents.

5. Cross-Objection No. 95 of 2018 in RFA No. 261 of 2008

The General Manager Rajneet Sagar Dam . ...Non-objector/Appellant.

Versus

Shri Raj Kumar & others. ...Objector/Respondents.

6. Cross-Objection No. 46 of 2018 in RFA No. 262 of 2008

The General Manager Rajneet Sagar Dam. ...Non-objector/Appellant.

Versus

Bishamber & others. ...Objector/Respondents.

RFA No. 258 of 2008 along with RFA Nos. 261 and 262 of 2008 along with Cross-Objections No. 47, 95 and 46 of 2018

Date of decision: 5.6.2020

Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose i.e. construction of Dam in three villages, 'Khairi', 'Lahari' and 'Bhotan'- Reference petitions before District Judge qua land situated in village 'Khairi'- Petitioners relying upon award regarding land of village 'Lahari' determining market value of land at Rs.5 lakh per Bigha- Held, equivalency in nature and potential of land of village 'Khairi' vis-à-vis land of village 'Lahari' not shown- 'Khairi' and

'Bhotan', however both are adjoining to village 'Lahari'- In previous award pertaining to village 'Bhotan', Reference Court made deduction of 40% from value determined qua land of village "Lahari' and awarded compensation- Award affirmed by High Court in appeal- Petitioners entitled for compensation qua their acquired land after deduction of 40% from market value of land of village 'Lahari' i.e. Rs. 3.00 lakh per bigha- Appeals dismissed- Cross-objections allowed. (Para 12 & 17 to 19)

Cases referred;

Narendra and others Vs. State of Uttar Pradesh, reported in (2017) SCC 426,

Whether approved for reporting? Yes.

For the Appellants: *Mr. Aman Sood, Advocate, for the appellant(s)/Non-objector.*

For the Respondents*:* *Mr.Jyotirmay Bhatt, Advocate, for respondents/cross-objectors.*

Mr.Shiv Pal Manhans, Additional Advocate General with Mr.R.P. Singh and Mr.Raju Ram Rahi, Deputy Advocate Generals, for respondent-State/Non-Objector.

Vivek Singh Thakur, Judge (Oral)

For construction of Ranjit Sagar (Thein Dam) Project, land in Village Khairi and adjoining Villages Bhotan, Lahari and Chuhan etc. was acquired by the State by initiating process under Land Acquisition Act, 1894 (herein after referred to as "the Act" for short) by issuing notification under Section 4 of the Act in the months of March/April, 1997.

2. Land owners of these villages had preferred Reference Petitions under Section 18 of the Act for enhancement of compensation, determined by the Land Acquisition Collector in various awards.

3. In present case, award passed by Land Acquisition Collector pertaining to village Khairi was assailed by land owners by preferring Land Acquisition Petition Nos. 83 of 2000, titled Rattan Chand Vs. The General Manager, Ranjit Sagar (Thien Dam) and others; 84 of 2000, titled Balia through LRS Vs. The General Manager Ranjit Sagar Project (Thien Dam), 85 of 2000, titled Giano Vs. The General Manager, Ranjit Sagar (Thien Dam) and others; and 86 of 2000, titled Brahmi Vs. The General Manager Ranjit Sadar (Thien Dam) and others. All these Reference Petitions were clubbed by the Reference Court by making Land Acquisition Petition No. 85 of 2000 Giano Vs. The General Manager, Rajnit Sagar (Thien Dam) and others as a lead case.

4. On the basis of evidence produced before the Reference Court, compensation awarded to the land owners in these cases was enhanced by awarding increase of 30% on the price of land i.e. `8358/- per biswa assessed by Land Acquisition Collector.

5. Being aggrieved by the award passed by the Reference Court, appellant-beneficiary had preferred 6 separate appeals against the impugned award dated 23.6.2007 passed by Reference Court in aforesaid Land Acquisition Petitions.

6. Out of these 6 appeals, 2 appeals bearing RFA Nos. 257 of 2008, titled General Manager, Ranjit Sagar (Thien Dam) Vs. Rattan Chand and RFA No. 259 of 2008, titled General Manager, Ranjit Sagar (Thien Dam) Vs. Giano and others were dismissed by this High Court vide order dated 20.10.2008 on the ground that as enhanced amount of compensation was meager and the amount involved in these appeals was less than `50,000/- , there was no justification in issuing notice to the respondents (land owners), particularly when appeals were time barred by more than 383 days.

7. Third appeal bearing RFA No. 260 of 2008, titled General Manager, Ranjit Sagar (Thien Dam) Vs. Brahmi and others was also dismissed by another Bench of this High Court on 3.12.2010 being abated for failure in taking steps by appellant for bringing on record legal heirs of respondent No. 1 in the said appeal.

8. Now remaining three appeals being RFA No. 258 of 2008, titled General Manager, Ranjit Sagar (Thein Dam) Vs. Mohinder Kumar and others; 261 of 2008, titled General Manager, Ranjit Sagar (Thein Dam) Vs. Raj Kumar and others; and 262 of 2008, titled General Manager, Ranjit Sagar (Thein Dam) Vs. Bishamber and others along with respective cross-objections therein bearing cross-objection Nos. 47, 95 and 46 of 2018 are being decided by this common judgment, as common question of law and fact based on common evidence recorded by Reference Court is to be adjudicated therein.

9. Land in present cases was acquired by issuing notification dated 9.4.1997 under Section 4 of the Act, which was lastly published on 10.7.1997, whereafter Land Acquisition Collector had determined the value of land by passing award dated 25.8.1998 by determining different rates of the acquired land on the basis of its classification after giving 25% decrease on the sale of land in village Khairi , as according to Land Acquisition Collector, no sale deed in village Khairi was executed during the relevant period for determining the value of land during acquisition. The rate determined by Land Acquisition Collector was ranging from `19,539/- to `1,82,362/- per bigha.

10. Land owners in present case have examined five witnesses, claiming compensation at the rate of `25,000/- per biswa, i.e. `5,00,000/- per Bigha, mainly on the basis of sale deed Ex. PW-2/A, wherein on 27.7.1997 vide sale deed No. 17 of 1997, PW-3 Chaman Lal had sold 1 biswa of land at the rate of `25,000/- to PW-4 Kulwant Singh in village Lahari. The land owners have also placed reliance upon award passed by Reference Court i.e. award dated 27.2.2002 passed in LAC Petition No. 44 of 2000, titled Ajay Kumar Vs. General Manager, Ranjit Sagar (Thein Dam) Project (Ex. PW-5/A) and award dated 6.9.2006 passed in Land Acquisition Petition No. 21 of 2000, titled Natha Singh Vs. General Manager, Ranjit Sagar (Thien Dam) and others (Ex. PW-5/D). Land owners by filing an application under Order 41 Rule 27 of the Code of Civil Procedure have also placed on record award dated 10.12.2009 passed by Reference Court in LAC Petition No. 1 of 1999, titled Amro Vs. The General Manager, Ranjit Sagar Dam, Thein Dam and others. Copy of judgment passed by this High Court in RFA No. 127 of 2010, dated 6.4.2016, dismissing the appeal preferred by The General Manager, Ranjit Sagar Dam, Thien Dam against the award dated 10.12.2009 passed in LAC Petition No. 1 of 1999, has also been placed on record.

11. Appellant/beneficiary Project proponent has also examined one witness and has placed reliance upon award dated 31.8.2001 (Ex. RX), passed in LAC Petition No. 51 of 2000, titled Jai Shree Vs. The General Manager, Rajnit Sagar (Thien Dam) and others.

12. Sale deed Ex. PW-2/A, pertains to land situated in village Lahari, on the basis of which, value of land in village Lahari is `5,00,000/- per bigha. Award dated 10.12.2009 passed in LAC Petition No. 1 of 1999, Amro Vs. General Manager, Ranjit Sagar (Thien Dam) and others, affirmed by this High Court, pertains to village Bhotan, wherein notification under Section 4 of the Act was issued on 7.4.1997 for acquisition of land in the said village for construction of Ranjit Sagar Dam i.e. for the same purpose. In this case, on the basis of sale deed dated 27.3.1997, which has also been relied upon in present case as Ex. PW-2/A, value of land in village Bhotan was determined at the rate of `3,00,000/- per bigha after making deduction of 40% value of land pertaining to village Lahari.

13. In present case as well as in cases decided vide award Ex. PW-5/A pertaining to village Khairi, land Acquisition Collector has taken the value of land on the basis of value of land situated in village Lahari but after deducting 25% there from. In present case it has come on record that highest value of land in village Lahari awarded by Land Acquisition Collector was at the rate of `25,000/- per biswa. The said value of land in village Lahari was also arrived at on the basis of sale deed Ex. PW-2/A.

14. In award Ex. PW-5/D, value of land in village Bhotan has also been determined on the basis of sale deed of village Lahari after making deduction of 40% in `5,00,000/- per bigha and compensation has been awarded at the rate of `15,000/- per biswa, i.e. `3,00,000/- per bigha.

15. The value of land in award Ex. RX, relied upon by appellant-Project proponent, has been determined by the Reference Court for the land situated in village Lahari at the rate of `2,77,026/- per bigha after giving enhancement of 10% value in the value determined by Land Acquisition Collector. It is pertinent to notice that in this case Land Acquisition Collector had determined the value of land in village Lahari at the rate of `2,51,842/- per bigha. Section 4 notification in this case was issued on 19.4.1997.

16. There are two values of land of village Lahari available on record. One is at the rate of `2,77,026/- per bigha and another is `5,00,000/- per bigha. Amount of compensation is to be assessed on the basis of highest value of land, therefore, for the purpose of calculation of compensation in present case, value of land in village Lahari is taken as `5,00,000/- per bigha, as

also taken in award dated 10.12.2009 passed in LAC Petition No. 1 of 1999, Amro Vs. General Manager, Ranjit Sagar (Thien Dam) and others and award dated 6.9.2006 passed in Land Acquisition Petition No. 21 of 2000, titled Natha Singh Vs. General Manager, Ranjit Sagar (Thien Dam) and others (Ex. PW-5/D).

17. Land in present case is situated in village Khairi, whereas evidence of value of land, available on record, is of land situated in village Lahari. There is nothing on record to suggest that nature and potential of land situated in village Khairi is identical or equivalent to the land situated in village Lahari. However, it has come on record that village Khairi is adjoining to village Lahari. In aforesaid facts and circumstances, it would be appropriate to make deduction in the value of land to arrive at a fair and just compensation.

18. In award passed in LAC Petition No. 1 of 1999, Amro Vs. General Manager, Ranjit Sagar (Thien Dam) and others and in Land Acquisition Petition No. 21 of 2000, titled Natha Singh Vs. General Manager, Ranjit Sagar (Thien Dam) and others (Ex. PW-5/D), for determining the value of land in village Bhotan, which is also a village adjoining to village Lahari, 40% of deduction has been made by the Reference Court, therefore, it would be fair to make 40% deduction in present case also and accordingly, value of land in village Khairi is determined at the rate of `3,00,000/- per bigha.

19. In view of above discussion, land owners in present case are held entitled for compensation to be calculated at the rate of `3,00,000/- per Bigha along with all statutory benefits.

20. Land owners in three appeals have not preferred any appeal for enhancement. Appeals filed by Project Proponent in those cases were dismissed by this Court at initial stage even without service of land owners. Section 28-A of the Act provides redetermination of amount of compensation in case of all those land owners whose land under acquisition is also covered by the same notification. The Apex Court in ***Narendra and others Vs. State of Uttar Pradesh,*** reported in ***(2017) SCC 426*** has held as under:-

> *6. The matter can be looked into from another angle as well, viz., in the light of the spirit contained in Section 28A of the Act. This provision reads as under:*
>
> > *"**28-A. Re-determination of the amount of compensation on the basis of the award of the court.** - (1) Wherein an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section II, the persons interested in all the other land covered by the same notification under Section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under Section 18, by written application to the Collector within three months from the date of the award of the court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the court:"*
>
> *7. It transpires from the bare reading of the aforesaid provision that even in the absence of exemplars and other evidence, higher compensation can be allowed for others whose land was acquired under the same notification.*
>
> *8. The purpose and objective behind the aforesaid provision is salutary in nature. It is kept in mind that those land owners who are agriculturist in most of the cases, and whose land is acquired for public purpose should get fair compensation. Once a particular rate of compensation is judicially determined, which becomes a fair compensation, benefit thereof is to be given even to those who could not approach the court. It is with this aim the aforesaid provision is incorporated by the Legislature. Once we keep the aforesaid purpose in mind, the mere fact that the compensation which was claimed by some of the villagers was at lesser rate than the compensation which is ultimately determined to be fair compensation, should not be a ground to deny such persons appropriate and fair compensation on the ground that they claimed compensation at a lesser rate. In such cases, strict rule of pleadings are not be made applicable and rendering substantial justice to the parties has to be the paramount consideration. It is to be kept in mind that in the matter of compulsory acquisition of lands by the Government, the villagers whose land gets acquired are not willing parties. It was not their voluntary act to sell of their land. They were compelled to give the land to the State for public purpose. For this purpose, the consideration which is to be paid to them is also not of their choice.*

On the contrary, as per the scheme of the Act, the rate at which compensation should be paid to the persons divested of their land is determined by the Land Acquisition Collector. Scheme further provides that his determination is subject to judicial scrutiny in the form of reference to the District Judge and appeal to the High Court etc. In order to ensure that the land owners are given proper compensation, the Act provides for 'fair compensation'. Once such a fair compensation is determined judicially, all land owners whose land was taken away by the same Notification should become the beneficiary thereof. Not only it is an aspect of good governance, failing to do so would also amount to discrimination by giving different treatment to the persons though identically situated. On technical grounds, like the one adopted by the High Court in the impugned judgment, this fair treatment cannot be denied to them.

9. No doubt the judicial system that prevails is based on adversarial form of adjudication. At the same time, recognizing the demerits and limitations of adversarial litigation, elements of social context adjudication are brought into the decision making process, particularly, when it comes to administering justice to the marginalized section of the society."

21. Keeping in view the principle propounded in aforesaid pronouncement, land owners in appeals i.e. RFA Nos. 257 of 2008, titled General Manager, Ranjit Sagar (Thien Dam) Vs. Rattan Chand, RFA No. 259 of 2008, titled General Manager, Ranjit Sagar (Thien Dam) Vs. Giano and others and RFA No. 260 of 2008, titled General Manager, Ranjit Sagar (Thien Dam) Vs. Brahmi and others, are also held entitled to get the compensation at the rate of `3,00,000/- per bigha, but subject to payment of court fees on enhanced compensation on or before **30th September, 2020**, failing which their right to claim the enhanced compensation shall be forfeited by deeming that they are satisfied with the compensation of land determined by the Reference Court.

22. Appeals are dismissed and cross-objections are allowed in the aforesaid terms. Pending application(s), if any, also stand disposed of.

BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Sanjeev Kumar and others

.....Appellants/Plaintiffs

Versus

Salochna Devi and others

Respondents/Defendants

RSA No.447 of 2007
Decided on: 04.12.2019

Code of Civil Procedure, 1908- Order XXXII Rule 3(4)- **Specific Relief Act, 1963**- Sections 34 & 38- Suit for declaration that decree passed in first round of litigation is not binding on plaintiffs as they being minor at that time were not duly represented in that suit- Held, previous suit was filed against predecessor in interest of present plaintiffs and on his death, all his legal heirs were brought on record- Plaintiffs being minor were represented by their mother 'SD' in suit- On death of 'SD' before Appellate Court, plaintiffs were already on record and were represented by their elder major brother 'RK'- No objection to appointment of 'RK' as their guardian was raised at that point of time or even during Regular Second Appeal before the High Court- No evidence on record that 'RK' ever expressed his unwillingness in continuing as guardian of his minor siblings- There was no infraction of Order XXXII Rule 3(4) of Code in previous suit- No pleadings in present suit that their guardian did not contest previous suit properly or that he acted in collusion with present defendants- RSA dismissed- Decrees of Lower Courts dismissing plaintiffs suit, upheld. (Para 4)

Cases referred;

Amrik Singh and another Vs. Karnail Singh and others, AIR 1974 P&H 315 "21. Kidambi Tirumalcharyulu v. Amisetti Venkiah, 80 Ind Cas 541
Inder Pal Singh Vs. Babu Singh, AIR 1956 All 218,
Kameshwari Devi & others Vs.Barhani and others, 1997 (10) SCC 273,

Whether approved for reporting?1 Yes.

For the appellants: Mr. N.K Thakur, Sr. Advocate, with Mr. Karan Veer Singh, Advocate, for the appellants.
For the respondents: Mr. Bhupinder Gupta,Sr. Advocate with Mr. Janesh Gupta, Advocate, for respondents No.1, 2 and 4 to 7.

Jyotsna Rewal Dua, J *(Oral)*

Civil suit was filed by the present appellants, primarily seeking declaration to the effect that judgment and decree dated 2.1.1989, passed by learned District Judge, Una, H.P., in Civil Appeal No. 302 of 1985 as affirmed by this Court on 11.5.1989 in RSA No.19 of 1989 was null & void and non binding upon them. This suit has beenconcurrently dismissed by both the learned Courts below. Aggrieved, instant second appeal has been preferred.

[1] *Whether reporters of the local papers may be allowed to see the judgment?*

Appellants & respondents were plaintiffs and defendants respectively before the learned trial Court. Parties are referred hereinafter as they were before the learned trial Court.

2. Bare minimum facts required for adjudication of thisappeal are being noticed hereinafter:-

First Round Of Litigation.

2(i) Civil Suit No.118 of 1981 was instituted by the defendants for declaration that the land denoted by letters ABCDEF comprised in Khewat No.477, Khatauni No.917, 918, Khasra No. 4044/904 and 4045/904, situated in Una as shown in jamabandi for the year 1976-77 was owned and possessed by them, over which, thepresent plaintiffs had no right title or interest. Defendants in that suit further prayed for decree of possession of the suit land. This civil suit was originally instituted by the predecessor-in-interest of defendants against Sh. Gurbax Rai, predecessor-in-interest of the present plaintiffs.

2(ii) During the pendency of the civil suit, Sh. Gurbax Rai, the original defendant died, whereafter, his legal heirs i.e. his widow Smt. Sheela Devi alongwith their children were brought on record in the civil suit. Order dated 12.11.1982 (Ext.D-3) was passed by the learned Sub-Judge 1st Class, Una, in this regard, allowing the application moved by defendants under Order 22 Rule 4 CPC, for bringing on record the legal heirs of deceased-defendant Sh. Gurbax Rai after noticing no objection by the legal heirs. Accordingly, Sh. Gurbax Singh, was represented by his wife Smt. Sheela Devi, who also represented her children being their mother & as such their natural guardian.

2(iii) This civil suit was dismissed vide judgment & decree dated 29.11.1985 (Ext. D2). Aggrieved against this, the defendants- preferred a Civil Appeal No.302 of 1985, before the learned District Judge, Una. During pendency of the appeal, Smt. Sheela Devi died. Applications under Order 1 Rule 10 and under Order 32 Rule 3 of the Code of Civil Procedure were moved by the defendants for deletion of name of Smt. Sheela Devi from the array of parties. Noticing that her all legal heirs/children were already on record; two children of Sh. Gurbax Rai and Smt. Sheela Devi had also attained majority-namely Sh. Rajinder Kumar and Ms. Neelam Kumari; accordingly, learned District Judge vide order dated 13.2.1987 (Ext.D5) allowed the applications, which were not even opposed by the plaintiffs. Name of Smt. Sheela Devi was deleted from the array of parties and Sh. Rajinder Kumar-the eldest brother being major was appointed as guardian of his minor brothers and sisters. The order dated 13.2.1987, being relevant is extracted hereinafter:-

"It is stated at the bar by the learned counsel for the L.Rs that the respondents/L.Rs have no objection in allowing the application of the plaintiff to bring on record the L.Rs. of deceased defendant Gurbax Rai. Therefore, application dated 17.2.1982 of the plaintiff under Order 22 Rule 4 C.P.C. allowed. To come up for amended plaint on 15.12.1985."

Learned District Judge allowed the appeal filed by the defendants vide judgment and decree dated 2.1.1989. The suit filed by the defendants was decreed and they were declared as owners of the suit land. The present plaintiffs were directed to deliver the vacant possession of the suit land to the present defendants.

2(iv) Aggrieved against the decreeing of the suit, Sh. Rajender Kumar himself and on behalf of his minor siblings namely S/Sh. Kamal Kumar, Sanjiv Kumar, Rajiv Kumar and Sandhya Devi, in capacity as their guardian, moved this Court in RSA No. 19 of 1989. The Regular Second Appeal No. 19 of 1989, was dismissed on 11.05.1989. No further appeal was carried forward by any of the parties. The judgment & decree dated 2.1.1989 thus attained finality.

PRESENT LITIGATION:

2(v) Instant suit was filed by S/Sh. Sanjeev Kumar, Rajeev Kumar and Ms. Sandhya Devi, minor children of late Sh. Gurbax Rai through their maternal grand mother against Sh. Mehar Chand, predecessor-in-interest of the present defendants. In this civil suit (94/1989), defendants No.5,6,7 and 8, were Sh. Rajinder Kumar, Sh. Kamal Kumar, Smt. Neelam Kumari and Smt. Surinder Kumari i.e. major sons and daughters of late Sh. Gurbax Rai.The primary prayer of the plaintiffs in the suit is that the judgment and decree dated 2.1.1989, passed by learned District Judge in Civil Appeal No.302 of 1985, as affirmed in RSA No.19 of 1989, vide judgment dated 11.05.1989, was null and void. It had been pleaded that plaintiffs were not properly represented, their interests were not protected therefore this judgment and decree had no binding effect on the tenancy rights of the plaintiffs over the suit land and therefore, the same is un-executable. The plaintiffs have therefore, asserted their right to remain in possession over the suit land as tenants, even after the passing of the decree, till the time they are evicted by the learned Rent Controller under the H.P. Urban Rent Control Act. The civil suit has been opposed by the present defendants on the ground that judgment and decree passed by learned District Judge on 2.1.1989, as affirmed by this Court in RSA No.19/1989, has attained finality. It is legal and binding upon the plaintiffs, who were duly represented by their guardian in all the proceedings and therefore, the plaintiffs are estopped from raising the plea at this stage that they were not represented properly before the learned Courts in earlier round of litigation. After considering the pleadings and evidence adduced by the parties, learned Trial Court dismissed the suit vide judgment & decree dated 26.11.1999. The judgment & decree has been affirmed by the learned First Appellate Court on 30.06.2007. The suit of the plaintiffs having been dismissed concurrently by two Courts below, instant Regular Second Appeal has been preferred.

3. I have heard Mr. N.K. Thakur, learned senior counsel, assisted by Mr. Karan Veer Singh, learned counsel for the appellants and Mr. Bhupinder Gupta, learned senior counsel, assisted by Mr. Janesh Gupta, learned counsel, for the respondents and gone through the record.

4. This appeal was admitted on 8.4.2009 on following substantial question of law:-

" Whether the impugned judgments passed in violation of the mandatory provisions of Order 32 Rule 3 CPC would operate res-judicata in the susbequent suit filed by the minors assailing the correctness of those judgments?"

Question of law:

4(i) Learned senior counsel for the appellants-plaintiffs has urged that the judgment and decree dated 2.1.1989, passed by the learned District Judge in Civil Appeal No.302/1985 as affirmed by this Court on 11.5.1989 in RSA No.19/1989 in the first round of litigation is null & void, as the present appellants-plaintiffs were not properly represented before the learned Courts in those proceedings. In support of his assertions, learned senior counsel has relied upon the provisions of Order 32 Rule 3(4), which being relevant for adjudication of substantial question of law is reproduced hereinafter:-

> "4. No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, [upon notice to the father or where there is no father, to the mother, or where there is no father or mother, to other natural guardian] of the minor, or, where there is [no father, mother or other natural guardian], to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule."

Learned counsel relying upon the above rule has contended that notice was not issued to either Sh. Rajinder Kumar or to his minor siblings before former's appointment as guardian. Therefore, interests of minor children were not watched properly.

4(ii) The record of the case shows that the appellants-plaintiffs were duly represented before the learned Trial Court, learned First Appellate Court as well as before this Court, in earlier round of litigation. Following facts become germane in this regard:-

(a) Civil Suit No.118/1981 was filed by Sh. Mehar Chand, predecessor-in-interest of the defendants against Sh. Gurbax Rai. Sh. Gurbax Rai had died during the pendency of the civil suit before the learned trial Court, whereafter, all his legal heirs inclusive of his wife Smt. Sheela Devi, his four sons and three daughters were brought on record. In this regard, an application under Order 22 Rule 4 of CPC moved by the defendants was allowed on 12.11.1982. The plaintiffs had raised no objection at that point of time. All the minor children were represented by their mother Smt. Sheela Devi as their natural guardian.

(b) Smt. Sheela Devi, died during the pendency of the Civil Appeal No.302/1985, before the learned District Judge. Two separate applications moved in this regard by the defendants, under Order 1 Rule 10 and under Order 32 Rule 3 of CPC were allowed on 13.2.1987. These applications were not contested by the present appellants-plaintiffs. Accordingly, name of Smt Sheela Devi was ordered to be deleted. Her children/legal heirs were already on record. Sh. Rajender Kumar-the eldest child of late Sh. Gurbax Rai, being major and competent to watch interest of his minors siblings was appointed as their guardian. No objection to his appointment as guardian was taken at that point of time. Civil Appeal No.302/1985 filed by the defendants was decreed by the learned District Judge, Una, on 2.1.1989.

(c) Regular Second Appeal No.19/1989 was preferred by Sh. Rajinder Kumar, on his behalf and on behalf of his four minor siblings i.e. Sh. Kamal Kumar, Sh. Sanjiv Kumar, Sh. Rajiv Kumar and Smt. Sandhya Devi in the capacity as their guardian. Even in this appeal, no ground was taken that the interest of minors have not been adequately protected**;** they were not properly represented or that Sh. Rajinder Kumar was thrust upon the responsibility of becoming the guardian of his minor siblings without his wishes. There is no document available on record or any oral evidence to the effect that Sh. Rajinder Kumar at any point of time expressed his un-

willingness in continuing as guardian of his minor siblings & vice versa or raised any grievance whatsoever against the order dated 13.2.1987, appointing him as guardian.

4(iii) Learned senior counsel for the present respondents-defendants has relied upon AIR 1956 All 218, titled **Inder Pal Singh Vs. Babu Singh and others**, relevant segment whereof is extracted hereinafter:-

"8. Order 32, Rule 3(4) also requires that the order appointing a guardian-ad-litem shall be passed only after notice to the father or other natural guardian of the minor. Admittedly the plaintiff's mother was his natural guardian alive at the time when Brij Bhukhan Singh was appointed his guardian-ad-litem. There is no proof that notice was issued to her. Learned counsel urges that this provision is imperative and inasmuch as the notice required was not issued to the plaintiff's mother, Brij Bhukhan Singh's appointment is invalid in law.

Consequently it is argued that the plaintiff cannot be said to have been properly represented in the execution proceedings & the sale is not operative so far as his interest in the property is concerned. It is also contended that the Court below has erred in treating the defect in Brij Bhukhan Singh's appointment as merely an irregularity but the plaintiff is entitled to treat the sale relied upon by the other side as a mere nullity.

9. .....

The person who is sought to be affected by it need not proceed to have it set aside, he may merely discard it. In order to establish that the appointment of Sri Brij Bhukhan Singh was an order which could be ignored as a mere nullity, the plaintiff ought to have shown that the Court had no jurisdiction to pass that order. Once it is found that the Court making the appointment- had Jurisdiction to do so, the error made by him in not following the rules prescribed by the Code of Civil Procedure cannot have the effect of taking away that jurisdiction.

The rules prescribed do nothing more than lay down the mode in which the jurisdiction is to be exercised. It would be certainly proper to follow these rules. Not following them would be evidently irregular. It is well- settled that a mere irregularity in procedure or error in deciding a case or passing an order will not make the decision or order absolutely inoperative in law. In considering the question a distinction has to be drawn between the .existence of Jurisdiction and the exercise of jurisdiction.

....."

In AIR 1983 J&K 44, titled **Mushtaq Ahmad Vs. Mohd. Shafi Bhat and others**, held as under:-

"14. A similar view was taken by a Division Bench of the Patna High Court in Ramachandra Pd. Singh v. Rampunit Singh*, AIR 1968 Pat 12. These decisions no doubt support the contention of Mr. S. L. Kaul, but with utmost respect to the learned Judges who constituted the aforesaid two benches, I find it difficult to agree with them. Irrespective of the fact whether Sub-rules (3) & (4) are mandatory or merely directory in character, the fact remains that these are rules of procedure and are always subject to the provisions of Section 99. The decree passed in violation of these sub-rules shall not be open to question except on proof of prejudice. Section 578 of the Code of 1882 controlled not only the procedural provisions that existed in the Code when it came to be enacted, but would have controlled all such provisions which*

would be included in the Code even thereafter. The distinction drawn in the aforesaid two bench decisions was therefore clearly unreal.

18. The law is thus well settled that where a minor defendant is substantially and effectively represented by a guardian with the assent of the court, who is not shown to have any interest adverse to him, and who has done all that he could possibly do to safeguard his interest in the subject matter of the suit, the decree passed against the minor shall not be open to challenge either because the plaintiff failed to make any application for appointment of his guardian, or because the court failed to pass a formal order appointing the guardian for him or because the guardian did not expressly consent to his appointment as such, or because the plaintiff failed to make a statement in the application for appointment of the guardian, or in the plaint that the proposed guardian did not have any interest adverse to that of the minor, unless prejudice is shown to have occurred to him on that account."

Hon'ble Apex Court in 1997 (10) SCC 273, titled Kameshwari Devi & others Vs.Barhani and others, held as under:-

"4. It is true, as rightly contended by Dr. Shankar Ghosh,learned senior counsel that in a case where the estate of the minor is involved in an action for partition or any other suit, the estate of the minor is required to be properly represented taking all diligent steps by either guardian ad litem or the court guardian. If the interest of the estate of the minor are not protected, necessarily, the minor on his attaining majority or within three years thereafter is entitled to file the suit under Section 7 of the Limitation Act, after cessation of the disability to question the correctness of a decree which is sought to be made binding on him. But in that case, the limited defence that could be open to him is that either the decree in the earlier suit was obtained by fraud/collusion or by negligence by the court guardian or that the guardian ad litem did not safeguard the interest of the estate of the minor. On proof of those facts, necessarily, the decree does not bind him and it is open to the court to go behind the decree and consider the right of the minor de hors the decree. But, in this case, whether that question arises for decision is to beseen... "

In AIR 1974 P&H 315, titled Amrik Singh and another Vs. Karnail Singh and others, held as under:-

"21. In Kidambi Tirumalcharyulu v. Amisetti Venkiah, 80 Ind Cas 541 =(AIR 1924 Mad (763) Mr. Justice Wallace observed as follows:--

"No irregularity by way of an omission to send a notice as required by Order XXXII, Rule 3 of the Civil P. C. can operate to render void the presumed representation of minor defendants in a suit, unless such omission has in fact prejudiced their defence, and such prejudice is not a matter of assumption or presumption but of proof.

The question as to whether the omission has in fact prejudiced the defence will depend on the further question whether the minors had a good defence and whether the omission to obey the rules and the appointment of a Court guardian, had the effect of shutting out that defence."

23. After going through the case law cited before me, I have come to the conclusion that each case must be settled on its own facts and it would not be appropriate to lay down any general rule. The crux of the matter is that it has to be seen whether the minor was effectively represented in the litigation. If he was, then the non-compliance with the provisions of Order 32, Rule 3, which are mandatory, would not render the decision void. But if the non-compliance has caused prejudice to the minor or he was not effectively represented, the decision will be void, i.e., the minor can

either ignore it or avoid it. This approach is in consonance with justice because where the matter has been properly contested and no prejudice has been caused to the minor, it will be sheer injustice to the other side to re-open the matter again. Litigation is a very expensive affair and the general principle of law is that it should not be encouraged. In this view of the matter, so far as the facts of the present case are concerned, there can be no two opinions that the minors were effectively represented and no prejudice has been caused to them. Their interests were effectively safeguarded by their brothers, who were co- defendants with them and whose interests were identical. They contested the suit on all conceivable grounds. The learned counsel for the minors has been unable to bring to our notice any evidence or any contention which would enable us to hold that a wrong decree was obtained."

4(iv) Considering the facts of the case, in the backdrop of above legal position, it can be safely concluded that judgment and decree dated 2.1.1989, passed by learned District Judge in Civil Appeal No.302/1985 as affirmed by this Court vide judgment dated 11.5.1989 delivered in RSA No.19/1989, does not suffer from any infraction of procedure prescribed under Order 32 Rule 3(iv) of CPC. Plaint does not disclose any pleadings to the effect that Sh. Rajinder Kumar did not contest the civil suit properly or did not safeguard the interest of the minors adequately or that he had acted in collusion with respondents-defendants. Requisite pleadings for setting aside the judgments and decrees are lacking in the plaint filed in the instant case. Substantial question of law is answered accordingly.

4(v) Interestingly none of the plaintiffs have appeared in the witness box in support of their assertions made in the plaint. One Sh. Rattan Singh appeared as PW3, allegedly as a holder of special power of attorney on behalf of plaintiff No.1. He expressed ignorance of all material facts and his entire statement is based upon heresay.

Against the judgments and decrees impugned in the present appeal, one RSA No.437/2007 was instituted in this Court by Smt. Ranju Bala, Sh. Sahil Kumar, Sh. Kunal Kumar, Sh. Kamal Kumar, Sh. Sanjiv Kumar, Sh. Rajiv Kumar, Sh. Rajinder Kumar, and Smt. Neelam Kumari. This RSA No.437/2007 was dismissed as withdrawn on 4.10.2007. S/Sh. Sanjiv Kumar and Rajeev Kumar, who were appellants in RSA No.437/2007, are also the appellants in the instant RSA No.447/2007. Whether the instant appeal could be maintained by them after the withdrawal of RSA No.437/2007 is also another question; answer of which goes against them.

5. In view of the above discussions, no infirmity can be found in impugned judgments & decrees. Accordingly, the present appeal is devoid of merit and is dismissed as such. Pending application(s), if any, alsostand disposed of accordingly.

6.

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

Ambika S. Nagal ...Petitioner.

Versus

State of Himachal Pradesh ....Respondent.

CRMMO No. : 331 of 2018
Date of Decision: June 10, 2020

Juvenile Justice (Care and Protection of Children) Act, 2000- Sections 4 & 6- **Juvenile Justice (Care and Protection of Children) Act, 2015**- Sections 4 & 8- Offences committed by an adult vis-à-vis a child- Whether such an offender can be sent for inquiry before Juvenile Justice Board (JJB)? - Held, JJB is constituted for conducting proceedings against child/ juvenile in conflict with law- Offences committed by an adult cannot be inquired in to by JJB. (Para 13)

Indian Penal Code, 1860- Sections 88 & 89- Act in good faith for benefit of child by consent of guardian- Locus standi of a class teacher vis-à-vis his students- Held, parent or guardian must be held to have given implied consent of his child being under the discipline and control of Authorities- And of infliction of reasonable punishment necessary for purpose of maintaining school discipline or correcting the child- Teacher who inflicts reasonable punishment necessary for correcting the student is entitled to protection of Sections 88 & 89 of Code- It is only when harm caused is unreasonable or immoderate that teacher would lose the benefit of these provisions. (Para 19 & 22)

Juvenile Justice (Care and Protection of Children) Act, 2015- Section 2(21)- 'Child Care Institution'- 'School', whether a 'Child Care Institution'?- Held, School is not a 'Child Care Institution' as defined under Section 2(21) of the Act. (Para 25)

Cases referred'

Abdul Vaheed v. State of Kerala, 2005 CriLJ 2054;
G.B. Ghatge v. Emperor, AIR 1949 Bom 226;
Ganesh Chandra Saha v. Jiw Raj Somani, AIR 1965 Cal 32;
Joseph v. State of Karala, 2014(3) RCR (Criminal) 825; and
Khalid L.K. v. Sub Inspector of Police & others, 2015 (4) RCR(Cri) 247.
M. Natesan v. State of Madras & another, AIR 1962 Mad 216;
Sankunni v. Venkataramani, AIR 1922 Mad 200;
Vinod S. Panicker v. Sub Inspector of Police, 2013 CriLJ 833;

Whether approved for reporting? Yes.

For the Petitioner	**:**	M/s Amit Kumar Sharma and Rajesh Prakash, Advocates, through Video Conferencing.
For the respondent	**:**	Mr. Desh Raj Thakur, Mr. Shiv Pal Manhans, Additional Advocates General and Mr. R.P. Singh, Mr. Raju Ram Rahi & Mr. Gaurav Sharma, Deputy Advocates General.

Vivek Singh Thakur, Judge

On 24.9.2012 at about 4.25 p.m., after receiving a telephonic call in Police Post, Sanjauli, that near Nav Bahar at Kala Dhaank (Cliff), adjacent to Durga Gas Agency, two school girls had fallen, Assistant Sub Inspector, Incharge Police Chowki, rushed to the spot alongwith Police officials and found blood spread on the spot as by that time both the girls had been taken to Indira Gandhi Medical College & Hospital, Shimla (IGMC). On arriving at IGMC, it came to knowledge of the police that the girls had been declared dead.

32. On 28.9.2012, on the basis of complaint received from parents/guardians of 12 years old deceased girls, FIR No.164/2012 dated 30.9.2012 was registered, under Section 306 of the Indian Penal Code (for short 'IPC'), against the Mathematics Teacher (Petitioner) and Principal of the School, for abetting the girls to commit suicide.

33. After completion of investigation, as per Challan presented in the Court, no case under Section 306 IPC against the Principal as well as the petitioner was made out. However, it was

concluded by the Investigating Officer that there was evidence on record that Class Teacher (petitioner) had slapped deceased girls (two slaps to each deceased girl) and, thus, she had committed an offence under Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as 2000 Act) and Section 323 IPC, for causing unnecessary mental and physical suffering to girls by assault. Challan was presented before the concerned Magistrate, wherein, at the time of consideration of charge, Judicial Magistrate 1st Class (for short 'JMIC') has passed impugned order dated 20.6.2018, concluding that prima facie a case under Section 23 of 2000 Act and Section 323 IPC is made out against the accused (petitioner), but instead of putting Notice of Accusation or framing charge, the JMIC has come to the conclusion that the jurisdiction to deal with the matter under Section 23 of 2000 Act is with Juvenile Justice Board (for short 'Board') and, therefore, the JMIC has directed the petitioner to appear before the Board on date mentioned in order.

34. Being aggrieved and dissatisfied with the impugned order passed by the JMIC, petitioner, by way of instant petition, has approached this Court on two counts.

35. Firstly, it is contended on behalf of the petitioner that the JMIC has wrongly relegated the petitioner to the Board as she is not a juvenile or child in conflict with law but is an adult against whom the Board has no power to proceed.

36. Secondly, on the ground that no case is made out for prosecuting the petitioner (Class Teacher) under Section 23 of 2000 Act and Section 323 IPC, as ingredients for commission of offence under Section 23 of 2000 Act are not existing and further that in view of Sections 88 & 89 IPC, petitioner is protected from being prosecuted not only under Section 323 IPC but also Section 23 of 2000 Act.

37. In present case, at the time of commission of alleged offence 2000 Act was in force, which has now been replaced by the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as '2015 Act'). For determining the issue raised on behalf of the petitioner with respect to jurisdiction, provisions of 2000 Act shall be relevant, however, for deciding the issue to avoid further litigation on this issue under the 2015 Act, corresponding provisions of 2015 Act are also being referred in the discussion hereinafter.

38. Relevant provisions of 2000 Act, necessary to be referred, are as under:

> **2(k)** "Juvenile" or "child" means a person who has not completed eighteenth year of age.
>
> **2(l)** "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.
>
> **4. Juvenile Justice Board.-** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the State Government may, 9 "within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the Official Gazette, constitute for every district", one or more Juvenile Justice Boards <u>for exercising the powers and discharging the duties conferred or imposed on such Boards in relation to juveniles in conflict with law under this Act</u>.
>
> **6. Powers of Juvenile Justice Board.-** (1) Where a Board has been constituted for any district, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, <u>have power to deal exclusively with all proceedings under this Act creating to juvenile in conflict with law</u>.
>
> (2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise.

23. Punishment for cruelty to juvenile or child.- Whoever, having the actual charge of or control over, juvenile or the child, assaults, abandons, exposes or willfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both.

27. Special offence .- The offence punishable under Sections 23, 24, 25 and 26 shall be cognizable.

54. Procedure in inquiries, appeals and revision proceedings.- (1) Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trails in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

39. Corresponding/related similar provisions under 2015 Act are as under:

2(12) "child" means a person who has not completed eighteen years of age.

2(13) "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.

2(20) "Children's Court" means a court established under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court under the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act.

2(21) "child care institution" means Children Home, open shelter, observation home, special home, place of safety, Specialised Adoption Agency and a fit facility recognised under this Act for providing care and protection to children, who are in need of such services.

2(24) "corporal punishment" means the subjecting of a child by any person to physical punishment that involves the deliberate infliction of pain as retribution for an offence, or for the purpose of disciplining or reforming the child.

4. Juvenile Justice Board

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the State Government shall, constitute for every district, one or more Juvenile Justice Boards for exercising the powers and discharging its functions relating to children in conflict with law under this Act.

8. Powers, functions and responsibilities of the Board.

(1) Notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, the Board

constituted for any district shall have the power to deal exclusively with all the proceedings under this Act, relating to children in conflict with law, in the area of jurisdiction of such Board.

75. Punishment for cruelty to child

Whoever, having the actual charge of, or control over, a child, assaults, abandons, abuses, exposes or wilfully neglects the child or causes or procures the child to be assaulted, abandoned, abused, exposed or neglected in a manner likely to cause such child unnecessary mental or physical suffering, shall be punishable with imprisonment for a term which may extend to three years or with fine of one lakh rupees or with both:

PROVIDED that in case it is found that such abandonment of the child by the biological parents is due to circumstances beyond their control, it shall be presumed that such abandonment is not wilful and the penal provisions of this section shall not apply in such cases:

PROVIDED FURTHER that if such offence is committed by any person employed by or managing an organisation, which is entrusted with the care and protection of the child, he shall be punished with rigorous imprisonment which may extend up to five years, and fine which may extend up to five lakhs rupees:

PROVIDED ALSO that on account of the aforesaid cruelty, if the child is physically incapacitated or develops a mental illness or is rendered mentally unfit to perform regular tasks or has risk to life or limb, such person shall be punishable with rigorous imprisonment, not less than three years but which may be extended up to ten years and shall also be liable to fine of five lakhs rupees.

82. Corporal punishment

(1) Any person in-charge of or employed in a child care institution, who subjects a child to corporal punishment with the aim of disciplining the child, shall be liable, on the first conviction, to a fine of ten thousand rupees and for every subsequent offence, shall be liable for imprisonment which may extend to three months or fine or with both.

(2) If a person employed in an institution referred to in sub-section (1), is convicted of an offence under that sub-section, such person shall also be liable for dismissal from service, and shall also be debarred from working directly with children thereafter.

(3) In case, where any corporal punishment is reported in an institution referred to in sub-section (1) and the management of such institution does not cooperate with any inquiry or comply with the orders of the Committee or the Board or court or State Government, the person in-charge of the management of the institution shall be liable for punishment with imprisonment for a term not less than three years and shall also be liable to fine which may extend to one lakh rupees.

86. Classification of offences and designated court

(1) Where an offence under this Act is punishable with imprisonment for a term more than seven years, then, such offence shall be cognizable, non-bailable and triable by a Children's Court.

(2) Where an offence under this Act is punishable with imprisonment for a term of three years and above, but not more than seven years, then, such offence shall be cognizable, non-bailable and triable by a Magistrate of First Class.

(3) Where an offence, under this Act, is punishable with imprisonment for less than three years or with fine only, then, such offence shall be non-cognizable, bailable and triable by any Magistrate.

40. In 2000 Act, word "juvenile" or "child" has been defined in Section 2(k) and Section 2(l) deals with definition of "juvenile in conflict with law". In 2000 Act, in Section 2(k), "juvenile" or "child" means a person who has not completed 18 years of age and Section 2(l) provides that "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed 18 years of age as on the date of commission of such offence, whereas in 2015 Act, in Section 2(12) definition of "child" is the same as that of "juvenile" or "child" in 2000 Act, and "juvenile in conflict with law" (Section 2(l) of 2000 Act) and "child in conflict with law" (Section 2(13) of 2015 Act), in both the Acts, have been defined identically. In both the Acts, Section 4 provides constitution of "Juvenile Justice Board" by the Government for exercising the powers and discharging its functions in relation to juveniles/children in conflict with law under the 2000 Act/2015 Act. In 2000 Act, Section 6 provides that Juvenile Justice Board was having powers to deal exclusively with all proceedings under the Act relating to Juvenile in conflict with law. In 2015 Act, Section 8 provides that the Juvenile Justice Board shall have the power to deal exclusively with all the proceedings under the Act relating to children in conflict with law in the area of jurisdiction of such Board.

41. Section 27 of 2000 Act provides that offence punishable under Section 23 of said Act shall be cognizable, meaning thereby a Police Officer can arrest the accused without warrant. Section 54 of 2000 Act, mandates to follow, as far as may be, the procedure laid down in Code of Criminal Procedure in inquiries, appeals and revision proceedings, as prescribed in this Section.

42. Section 86 of 2015 Act classifies the offence with designation of Court, wherein the offence is triable and it specifically provides that where offence is punishable with imprisonment for a term more than seven years, then such offence shall be cognizable, non-bailable and triable by Children's Court. "Children's Court" has been defined in Section 2(20) of 2015 Act, which is either Court of Sessions or a Special Court or equivalent thereto. In Section 86(2) of 2015 Act, offence punishable with imprisonment for a term of three years and above, but not more than seven years, has been made cognizable, non-bailable and triable by Magistrate of 1st Class, whereas under Section 86(3) of the said Act, an offence punishable with imprisonment of less than three years or with fine only shall be non-cognizable, bailable and triable by any Magistrate. No such corresponding provision is available in the 2000 Act.

43. From the aforesaid provisions of law, it is evidently clear that Juvenile Justice Boards constituted for conducting the proceedings against juvenile or child in conflict with law but not any other person who has committed the offence under these Acts, and for trying such offender who is not child or juvenile under the Acts, there is no provision, like Section 86 of 2015 Act, in 2000 Act. Therefore, for offences under 2000 Act, such person shall be tried by the Courts as prescribed in Code of Criminal Procedure and for commission of offences under 2015 Act, such person shall be tried by the Court as prescribed under Section 86 of said Act

44. It is also a matter of fact that Juvenile Justice Board has no power to award imprisonment even for a single day. Whereas, a person, not juvenile or child under the Acts, guilty of commission of offence can be punished for imprisonment for the period as provided in various Sections of these Acts.

45. In view of the above discussion, it is held that relegation of the petitioner to Juvenile Justice Board by JMIC is illegal and contrary to the law of the land.

46. For deciding second issue, apart from Sections 75 and 82 of 2015 Act, provisions of Sections 88 and 89 of IPC shall also be necessary to be referred, which read as under:

"**88. Act not intended to cause death, done by consent in good faith for persons benefit.-** Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

89. Act done in good faith for benefit of child or insane person, by or by consent of guardian.- Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied,

of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

Provisos – Provided –

First.- That this exception shall not extend to the intentional causing of death, or to the attempting cause death;

Secondly.- That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.- That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly.- That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend."

47. To substantiate his plea on second point, learned counsel for the petitioner has referred the following pronouncements of various High Courts:

1. *Sankunni v. Venkataramani,* AIR 1922 Mad 200;
2. *G.B. Ghatge v. Emperor,* AIR 1949 Bom 226;
3. *M. Natesan v. State of Madras & another,* AIR 1962 Mad 216;
4. *Ganesh Chandra Saha v. Jiw Raj Somani,* AIR 1965 Cal 32;
5. *Abdul Vaheed v. State of Kerala,* 2005 CriLJ 2054;
6. *Vinod S. Panicker v. Sub Inspector of Police,* 2013 CriLJ 833;
7. *Joseph v. State of Karala,* 2014(3) RCR (Criminal) 825; and
8. *Khalid L.K. v. Sub Inspector of Police & others,* 2015 (4) RCR(Cri) 247.

48. In *Sankunni* case, Madras High Court has concluded that for purposes of correction, the school Master may inflict a moderate and reasonable corporal punishment. Applying this principle, Division Bench of Bombay High Court in *G.B. Ghatge* case has held as under:

> "When a child is sent by its parent or its guardian to a school, the parent or guardian must be held to have given an implied consent to its being under the discipline and control of the school authorities and to the infliction of such reasonable punishment as may be necessary for the purpose of school discipline or for correcting the child."

49. Relying upon aforesaid pronouncements, Madras High Court in *M. Natesan* case has observed as under:

> "[3] Apart from that, it appears to be recognised that a person in the position of a teacher or a college principal will for the purpose of enforcing discipline and correction have authority to impose corporal punishment with impunity provided the corporal punishment inflicted is moderate and reasonable.....

> The above principle applicable in respect of children under 12 years of age will also be applicable in the case of children over 12 and when a child over 12 comes to school it may be assumed that the child gives an implied consent to subject itself to the discipline and control of the school authorities and to receive reasonable and moderate corporal punishment as may be necessary for its correction or for maintaining school discipline."

50. In *M. Natensan* case, referring provisions of Section 88 and 89, Madras High Court has observed as under:

> "[4] The protection accorded by section 89 of the Indian Penal Code is no doubt limited to a child under 12 years of age. Section 88 of the same Code contains no such limitation. That section affords protection to a person who in good faith and for the benefit of the person concerned does something to him with his consent expressed or implied which causes harm. The Bombay case appears to extent not only the principle contained in section 89 to a child above the age of 12 years but also considers that the protection under section 88 would equally be available to a school teacher provided of course the act done by him by way of a punishment is moderate and reasonable.
>
> [5] It cannot be denied that having regard to the peculiar position of a school teacher he must in the nature of things have authority to enforce discipline and correct a pupil put in his charge. To deny that authority would amount to a denial all that is desirable and necessary for the welfare, discipline and education of the pupil concerned. It can therefore be assumed that when a parent entrusts a child to a teacher, he on his behalf impliedly consents for the teacher to exercise over the pupil such authority. Of course, the person of the pupil is certainly protected by the penal provisions of the Indian Penal Code. But the same Code has recognised exceptions in the form of section 88 and 89. Where a teacher exceeds the authority and inflicts such harm to the pupil as may be considered to be unreasonable and immoderate, he would naturally lose the benefit of the exceptions. Whether he is entitled to the benefit of the exceptions or not in a given case will depend upon the particular nature, extent and severity of the punishment inflicted."

51. In *Ganesh Chandra Saha* case, the Calcutta High Court, has held as under:

> "[5] Under Section 89 of the Indian Penal Code, nothing, which has been done, in good faith for the benefit of a person under 12 years of age by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause to that person. Here, in this case, the complainant gave his age as 13 years at the time he gave evidence i.e., on July 12, 1962. It would not, therefore, be safe to hold that at the time of the incident he was under 12 years of age. Obviously, therefore, Section 89 of the Indian Penal Code is not attracted to the facts of this case.
>
> [6] Under Section 88 of the Indian Penal Code, nothing which is not intended to cause death, is an offence by reason of any harm which it may cause to any person for whose benefit it is done in good faith, and who has given consent, whether express or implied, to suffer that harm. From the facts it cannot be said that the beating was intended to cause death. The complainant, a boy of very tender age, was found to have stolen a book of another student in the school. Beating was, clearly enough, for correcting him so that he may no more commit theft in future. The beating must, therefore, be said to have been for the benefit of the complainant.
>
> [7] Mr. Sinha, who appears for the complainant, submits that from the nature of the injuries it should be said that the action of the petitioner was not in good faith. There were some strokes with a cane and there were some fists and blows too; from the medical evidence it appears that there were 5 ecchymosis but all of them were of

minor nature. One tooth was found loose and that could have been caused by some blow. But from this it cannot be said that the action of the petitioner was mala fide i.e., not in good faith. The motive for the beating is very relevant for determining if it was in good faith. There is no doubt that the petitioner's motive was to correct the complainant for his future good and to maintain discipline in the school. Mr. Sinha refers to a circular issued by the Board of Secondary Education. This circular does not totally prohibit corporal punishment but directs the Head Master to exercise proper restraint when inflicting corporal punishment. Corporal punishment, according to this circular should be administered to inflict pain only without any bodily injury. There has, however, been some bodily injury in this case. But merely because the petitioner exceeded the limits prescribed by the administrative circular of the Board of Secondary Education, it cannot be said that the petitioner has deprived himself of the protection given to him under Section 88 of the Indian Penal Code, because the circular of the Board of Secondary Education cannot and does not override the provisions of the Penal Code. The mere fact that he exceeded the limits prescribed by the circular of the Board of Secondary Education does not -prove that the petitioner did not act in good faith. I have no doubt that the petitioner acted in good faith.

[8] There is no material from which it can be said that there was express consent of the complainant or his guardian to suffer such beating. I have, however, no doubt that implied consent to suffer such beating should be presumed from the fact that the complainant was sent to the school for his education. When a boy is sent by his parent or guardian to a School, the parent or the guardian must be said to have given an implied consent, to his being under the discipline and control of the School authorities and to the infliction of such reasonable, punishment as may be necessary for the purposes of School discipline or for correcting him. Then again when a boy over 12 years of age himself goes to a school it should be presumed that he gives an implied consent to subject himself to the discipline and control of the School authorities and to receive such reasonable and moderate corporal punishment as may be necessary for his correction or for maintaining School discipline. Under the Indian Penal Code consent can be given by a child not under 12 years of age (vide Section 90 of the Indian Penal Code). The action of the petitioner in administering corporal punishment to the complainant is, therefore, covered by Section 88 of the Indian Penal Code.

[9] The English law recognises that a School master may inflict corporal punishment ton a pupil for purposes of correction or for enforcing School discipline. The English law also recognises that while the child is at School, the school master is in the position of a parent, that the parental authority is delegated to the School master and the School master represents the parent for the purposes of correction (vide Regina v. Hopley, (1860) 2 F and F. 202 and Cleary v. Booth, (1893) 1 QB 465). The Rangoon High Court has held in Emperor v. Maung Ba Thaung, AIR 1926 Rang, 107 that the school master can inflict reasonable corporal punishment. In that case a School master was prosecuted under Section 323 of the Indian Penal Code for beating a boy of the School with a cane. It was held that the School master had committed no offence in view of Section 89 of the Indian Penal Code because the school master acted bona fide in the interest of school discipline."

52. Kerala High Court in *Abdul Vaheed* case, relying upon pronouncements of Madras High Court in *M. Natesan* case, Calcutta High Court in *Ganesh Chandra Saha* case, has held that when a school Teacher beats a student with a cane, who created commotion in the school or showed disobedience to the rules and where act of the Teacher is done in good faith for benefit of student, subject to exceptions provided under Section 89 IPC, such teacher could not be proceeded against under the provisions of IPC, in view of provisions of Sections 88 and 89 of IPC. It is further held that where a Teacher exceeds the authority and inflicts such harm to the student as may be considered to be unreasonable and immoderate, he would naturally lose the benefit of exceptions provided under Sections 88 and 89 of IPC.

53. Referring *Vinod S. Paricker*, *Joseph* and *Khalid* cases, it has been canvassed that in order to attract Section 23 of the 2000 Act, ingredients of provisions of this Section must be present for proceeding against the accused for commission of the offence under this Section and it is further contended that contents to attract the ingredients for commission of offence under this Section are missing in present case.

54. I am in agreement with the exposition of law pronounced in aforesaid decisions.

55. It is also noticeable that in 2015 Act, under Section 82, corporal punishment to a child has also been made an offence but under this Section any person incharge of or employed in 'Child Care Institution' only, who subjects a child to corporal punishment with the aim of disciplining the child, shall be liable for punishment. No such corresponding provision was there under 2000 Act. "Child Care Institution" has been defined in Section 2(21) of 2015 Act, wherein "Children's Home", "open shelter", "observation home", "special home", "place of safety", "Specialized Adoption Agency" and a "fit facility" recognized under this Act, defined under Sections 2(19), 2(41), 2(40), 2(56), 2(46), 2(57) and 2(27) of this Act respectively. In these definitions, "schools" are not included.

56. In present case, even if prosecution story, as mentioned in the challan, is taken to be true as it is, then also it is case of prosecution that two students (deceased girls) studying in 6th class were gossiping by exchanging paper-slips to each other and on complaining by third girl, they were enquired are reprimanded by the class Teacher (petitioner) who was teaching them at that time and during this episode both the girls were slapped twice by the class Teacher to restrain them from indulging in indiscipline in the class.

57. For attracting punishment for cruelty to juvenile or child, under Section 23 of 2000 Act (corresponding Section 75 of 2015 Act), necessary ingredient is to cause or likely to cause to juvenile or child unnecessary mental or physical suffering by assaulting, abandoning, exposing or willfully neglecting the juvenile or child or procuring a juvenile or child for commission of these acts.

58. From the facts brought on record in the challan, I do not find that slapping twice a student for indiscipline may be considered as an assault causing or likely to cause unnecessary mental or physical suffering to them. Therefore, no case under Section 23 of 2000 Act is made out. Otherwise also for provisions of General Exceptions contained in Sections 88 and 89 of IPC, petitioner is protected, as her act, in the given facts and circumstances, cannot be termed as unreasonable and immoderate so as to disentitle her from benefit of these exceptions. Similarly, for aforesaid discussion, petitioner is also not liable to be prosecuted under Section 323 IPC.

59. At this stage, as pointed out by Kerala High Court in *Abdul Vaheed* case, it would be appropriate to observe that the act of Teacher on the student in imposition of corporal punishment, depends upon the circumstances of each case and if a Teacher out of fury or excitement inflicts such injuries on the child which are harmful to a tender-age student and the express or implied authority granted by the parents of that student, does not confer any right on such a Teacher to inflict such punishment. There cannot be a general principle for all situations. Act of a Teacher has to be appreciated and assessed, depending upon the circumstances placed before the Court in each case. It is also duty of the Teachers to have a restrained and controlled imposition of punishments on the students under their care and charge, and unwieldy, uncontrolled and emotional attacks or actions on their part cannot be accepted.

60. The action of petitioner in present case, considering the material on record, appears to be bonafide and, thus, she is entitled for benefit of Exceptions.

61. In view of above discussion, the petition is allowed and consequently FIR No.164 dated 30.9.2012, registered at Police Station Dhalli, District Shimla, Himachal Pradesh, is quashed and the proceedings arising thereto, pending in the trial Court, are set aside.

Petition stands disposed of. Pending application, if any, also stands disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Jagat Ram .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

CWP No. 529 of 2018.
Date of decision: 26.06.2020.

Constitution of India, 1950- Articles 14 & 21- Release on parole- Denial on police report on ground that petitioner is involved in serious and heinous offences- Nature of- Held, parole is not a right vested with prisoner- It is a privilege available to him on fulfilling certain conditions- This discretionary power has to be exercised by the Authorities under the relevant Rules and Regulations- Once powers are exercised, Court may hold that exercise of powers is not in accordance with Rules. (Para 5)

Constitution of India, 1950- Articles 14 & 226- **Himachal Pradesh Good Conduct Prisoners (Temporary Release) Act, 1968**- Release on parole- Denial- Held, mere conviction for serious and heinous offence itself cannot be a ground for denying parole- On previous occasions while on parole, petitioner complied with terms and conditions of order granting such relief to him- Even at that time, his status was that of convict for same offences- In absence of change of circumstances, prayer of grant of parole cannot be rejected on ground of his being a convicted for heinous offences- Petition allowed and petitioner directed be released on parole subject to fulfilling conditions by him. (Para 8, 9 & 12)

Cases referred;

Asfaq versus State of Rajasthan and others, (2017) 15 SCC 55,
State of Maharashtra and Another v. Suresh Pandurang Darvakar (2006) 4 SCC 776;
State of Haryana and Others v. Mohinder Singh, (2000) 3 SCC 394,
Sunil Batra (II) v. State (UT of Delhi) (1980) 3 SCC 488 ,
Maneka Gandhi v. Union of India (1978) 1 SCC 248 ,
Charles Sobraj v. Superintendent Central Jai, Tihar, New Delhi, (1978) 4 SCC 104,
'Mrs. Har Dei versus State of Himachal Pradesh & others', CMP No. 3970 of 2020 in CWP No. 2931 of 2019,
Mrs. Kavita Thakur versus State of H.P. and others, CWP No. 414 of 2020,

Whether approved for reporting?[15] **Yes**

For the Petitioner : Mr. Vikrant Thakur, Advocate, through video conferencing.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Vikas Rathore, Mr. Vinod Thakur, Mr. Desh Raj Thakur, Additional Advocate Generals and Mr. Bhupinder Thakur, Deputy Advocate General, through video conferencing.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE.

Tarlok Singh Chauhan, Judge (Oral)

The petitioner has filed the instant petition for grant of the following substantive reliefs:

"i) Issue a writ of mandamus directing the respondents to release the petitioner on parole.

ii) Issue a writ of mandamus to call for the records pertaining to this case.

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15 *Whether the reporters of the local papers may be allowed to see the Judgment?Yes*

Iii) Direct the Respondent Authorities to follow the proper procedure which they had earlier adopted while releasing the petitioner on parole."

2. The petitioner has been convicted for the offences punishable under Sections 302, 392, 328, 473, 34 IPC and has now sought parole.

3. The only ground taken by the respondents for rejecting the request of the petitioner for grant of parole is that even though the Local Panchayat has no objection for grant of parole, but the Local Police have not recommended the sanction of parole on the ground that the petitioner has been convicted for a serious and heinous offence.

4. Now the moot question is whether the request for grant of parole can be rejected only on the ground that the petitioner has been convicted for a serious and heinous offence.

5. It is more than settled that the grant of remission or parole is not a right vested with the prisoner. It is a privilege available to the prisoner on fulfilling certain conditions. This is a discretionary power which has to be exercised by the authorities conferred with such powers under the relevant rules/regulations. The Court cannot exercise these powers, though once the powers are exercised, the Court may hold that the exercise of powers is not in accordance with rules.

6. The Hon'ble Supreme Court has considered in detail the nature, object, purpose and parameters for grant of parole subject to which parole can be granted in ***Asfaq*** *versus* ***State of Rajasthan and others, (2017) 15 SCC 55***, wherein it was observed as under:

> "*14. Furlough, on the other hand, is a brief release from the prison. It is conditional and is given in case of long term imprisonment. The period of sentence spent on furlough by the prisoners need not be undergone by him as is done in the case of parole. Furlough is granted as a good conduct remission.*
>
> *15. A convict, literally speaking, must remain in jail for the period of sentence or for rest of his life in case he is a life convict. It is in this context that his release from jail for a short period has to be considered as an opportunity afforded to him not only to solve his personal and family problems but also to maintain his links with society. Convicts too must breathe fresh air for at least some time provided they maintain good conduct consistently during incarceration and show a tendency to reform themselves and become good citizens. Thus, redemption and rehabilitation of such prisoners for good of societies must receive due weightage while they are undergoing sentence of imprisonment.*
>
> *16. This Court, through various pronouncements, has laid down the differences between parole and furlough, few of which are as under:*
>
> *(i) Both parole and furlough are conditional release.*
>
> *(ii) Parole can be granted in case of short term imprisonment whereas in furlough it is granted in case of long term imprisonment.*
>
> *(iii) Duration of parole extends to one month whereas in the case of furlough it extends to fourteen days maximum.*
>
> *(iv) Parole is granted by Divisional Commissioner and furlough is granted by the Deputy Inspector General of Prisons.*
>
> *(v) For parole, specific reason is required, whereas furlough is meant for breaking the monotony of imprisonment.*

(vi) The term of imprisonment is not included in the computation of the term of parole, whereas it is vice versa in furlough.

(vii) Parole can be granted number of times whereas there is limitation in the case of furlough.

(viii) Since furlough is not granted for any particular reason, it can be denied in the interest of the society.

{See State of Maharashtra and Another v. Suresh Pandurang Darvakar (2006) 4 SCC 776; and State of Haryana and Others v. Mohinder Singh, (2000) 3 SCC 394.

17. From the aforesaid discussion, it follows that amongst the various grounds on which parole can be granted, the most important ground, which stands out, is that a prisoner should be allowed to maintain family and social ties. For this purpose, he has to come out for some time so that he is able to maintain his family and social contact. This reason finds justification in one of the objectives behind sentence and punishment, namely, reformation of the convict. The theory of criminology, which is largely accepted, underlines that the main objectives which a State intends to achieve by punishing the culprit are: deterrence, prevention, retribution and reformation. When we recognise reformation as one of the objectives, it provides justification for letting of even the life convicts for short periods, on parole, in order to afford opportunities to such convicts not only to solve their personal and family problems but also to maintain their links with the society. Another objective which this theory underlines is that even such convicts have right to breathe fresh air, al beit for periods. These gestures on the part of the State, along with other measures, go a long way for redemption and rehabilitation of such prisoners. They are ultimately aimed for the good of the society and, therefore, are in public interest.

18. The provisions of parole and furlough, thus, provide for a humanistic approach towards those lodged in jails. Main purpose of such provisions is to afford to them an opportunity to solve their personal and family problems and to enable them to maintain their links with society. Even citizens of this country have a vested interest in preparing offenders for successful re-entry into society. Those who leave prison without strong networks of support, without employment prospects, without a fundamental knowledge of the communities to which they will return, and without resources, stand a significantly higher chance of failure. When offenders revert to criminal activity upon release, they frequently do so because they lack hope of merging into society as accepted citizens. Furloughs or parole can help prepare offenders for success.

19. Having noted the aforesaid public purpose in granting parole or furlough, ingrained in the reformation theory of sentencing, other competing public interest has also to be kept in mind while deciding as to whether in a particular case parole or furlough is to be granted or not. This public interest also demands that those who are habitual offenders and may have the tendency to commit the crime again after their release on parole or have the tendency to become threat to the law and order of the society, should not be released on parole. This aspect takes care of other objectives of sentencing, namely, deterrence and prevention. This side of the coin is the experience that great number of crimes are committed by the offenders who have been put back in the street after conviction. Therefore, while deciding as to whether a particular prisoner deserves to be released on parole or not, the aforesaid aspects have also to be kept in mind. To put it tersely, the authorities are supposed to address the question as to whether the convict is such a person who has the tendency to commit such a crime or he is showing tendency to reform himself to become a good citizen.

20. Thus, not all people in prison are appropriate for grant of furlough or parole. Obviously, society must isolate those who show patterns of preying upon victims. Yet administrators ought to encourage those offenders who demonstrate a commitment to

reconcile with society and whose behaviour shows that aspire to live as law-abiding citizens. Thus, parole program should be used as a tool to shape such adjustments.

21. To sum up, in introducing penal reforms, the State that runs the administration on behalf of the society and for the benefit of the society at large cannot be unmindful of safeguarding the legitimate rights of the citizens in regard to their security in the matters of life and liberty. It is for this reason that in introducing such reforms, the authorities cannot be oblivious of the obligation to the society to render it immune from those who are prone to criminal tendencies and have proved their susceptibility to indulge in criminal activities by being found guilty (by a Court) of having perpetrated a criminal act. One of the discernible purposes of imposing the penalty of imprisonment is to render the society immune from the criminal for a specified period. It is, therefore, understandable that while meting out humane treatment to the convicts, care has to be taken to ensure that kindness to the convicts does not result in cruelty to the society. Naturally enough, the authorities would be anxious to ensure that the convict who is released on furlough does not seize the opportunity to commit another crime when he is at large for the time-being under the furlough leave granted to him by way of a measure of penal reform.

22. Another vital aspect that needs to be discussed is as to whether there can be any presumption that a person who is convicted of serious or heinous crime is to be, ipso facto, treated as a hardened criminal. Hardened criminal would be a person for whom it has become a habit or way of life and such a person would necessarily tend to commit crimes again and again. Obviously, if a person has committed a serious offence for which he is convicted, but at the same time it is also found that it is the only crime he has committed, he cannot be categorised as a hardened criminal. In his case consideration should be as to whether he is showing the signs to reform himself and become a good citizen or there are circumstances which would indicate that he has a tendency to commit the crime again or that he would be a threat to the society. Mere nature of the offence committed by him should not be a factor to deny the parole outrightly. Wherever a person convicted has suffered incarceration for a long time, he can be granted temporary parole, irrespective of the nature of offence for which he was sentenced. We may hasten to put a rider here, viz. in those cases where a person has been convicted for committing a serious office, the competent authority, while examining such cases, can be well advised to have stricter standards in mind while judging their cases on the parameters of god conduct, habitual offender or while judging whether he could be considered highly dangerous or prejudicial to the public peace and tranquillity etc.

23. There can be no cavil in saying that a society that believes in the worth of the individuals can have the quality of its belief judged, at least in part, by the quality of its prisons and services and recourse made available to the prisoners. Being in a civilized society organized with law and a system as such, it is essential to ensure for every citizen a reasonably dignified life. If a person commits any crime, it does not mean that by committing a crime, he ceases to be a human being and that he can be deprived of those aspects of life which constitute human dignity. For a prisoner all fundamental rights are an enforceable reality, though restricted by the fact of imprisonment. {See – Sunil Batra (II) v. State (UT of Delhi) (1980) 3 SCC 488 , Maneka Gandhi v. Union of India (1978) 1 SCC 248 and Charles Sobraj v. Superintendent Central Jai, Tihar, New Delhi, (1978) 4 SCC 104.

24. It is also to be kept in mind that by the time an application for parole is moved by a prisoner, he would have spent some time in the jail. During this period, various reformatory methods must have been applied. We can take judicial note of this fact, having regard to such reformation facilities available in modern jails. One would know by this time as to whether there is a habit of relapsing into crime in spite of having administered correctional treatment. This habit known as "recidivism" reflects the fact that the correctional therapy has not brought in the mind of the criminal. It also shows that criminal is hardcore who is beyond correctional therapy. If the correctional therapy

has not made in itself, in a particular case, such a case can be rejected on the aforesaid ground i.e. on its merits."

7. It is evidently clear from the aforesaid judgment that the Hon'ble Supreme Court itself emphasized on the aspect of rehabilitation, continuity of life and constructive hopes for convicts and prisoners and for the reformation even while they are undergoing incarceration.

8. Judged in light of the aforesaid exposition of law, the only ground taken by the respondents to reject the request of parole is that the petitioner has been convicted for a serious and heinous offence and nothing more, cannot itself be a ground for denying the petitioner parole in accordance with the provisions of H.P. Good Conduct Prisoners (Temporary Release) Act, 1968.

9. The petitioner has earlier been released four times on parole for 42 days and on each and every occasion he complied with the terms and conditions of the order granting parole, more particularly, this cannot be a ground when the petitioner was released on parole. Even at that time, the status of the petitioner was that of a convict for the offences set out hereinabove and, therefore, in absence of any changed circumstances, it is too late for the day for the respondents to reject the request of the petitioner merely on the ground that he has been convicted for a serious and heinous offence.

10. The issue in question is otherwise squarely covered by the judgment rendered by a Co-ordinate Bench of this Court in ***CMP No. 3970 of 2020 in CWP No. 2931 of 2019, titled 'Mrs. Har Dei*** *versus* ***State of Himachal Pradesh & others',*** decided on 03.06.2020 and the judgment passed by this Bench in ***CWP No. 414 of 2020****, titled* ***Mrs. Kavita Thakur*** *versus* ***State of H.P. and others,*** decided on 25.06.2020

11. In the instant case also, there is no material to support the conclusion drawn by the District Magistrate to reject the request for grant of parole. Consequently, this Court is left with no other option, but to allow the instant petition.

12. Accordingly, the present writ petition is allowed and the respondents are directed to release the petitioner on parole for a period of 42 days after taking requisite personal and surety bonds.

13. However, before parting, it is clarified that in case the convict violates or breaches any condition of parole order by threatening the family of the complainant or otherwise creating law and order problem, then it shall be a factor to cancel the parole so granted by this Court and shall also be a relevant factor for considering the future request of the convict made in this regard.

14. The writ petition is disposed of as aforesaid, leaving the parties to bear their own costs. Pending application(s), if any, also stand disposed of.

15. The Court Master to provide authenticated copy of the order to the learned counsel for the parties.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, JUDGE.

Pradeep Kumar ....Petitioner.

Versus

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

CWP No.1737 of 2020.
Judgment reserved on : 23.06.2020.
Decided on: 26.06.2020.

Constitution of India, 1950- Articles 14, 16 & 226- Transfer of an employee of State Government- Challenge thereto by way of writ- Scope of Court's interference- Held, State has unfettered powers to effect

transfer of State Government employee holding transferable post in view of administrative exigency and public interest- But such power must be exercised honestly, bonafidely and reasonably- Judicial review of transfer order is permissible when it is made on irrelevant considerations- Court is competent to go in to the matter to find out the real foundation of transfer. (Para 5, 7 & 8)

Fundamental Rules, 1922- Chapter-III- Rule 11- Official duty- Held, whole time of a Government servant is at the disposal of the Government which pays him- He can be employed in any manner required by the Authority. (Para 15)

Cases reffered;

E.P. Royappa vs. State of Tamil Nadu, (1974) 4 SCC 3;
B. Varadha Rao vs. State of Karnataka, (1986) 4 SCC 131;
Union of India and others vs. H.N. Kirtania, (1989) 3 SCC 445;
Shilpi Bose (Mrs.) and others vs. State of Bihar and others, 1991 Supp (2) SCC 659;
Union of India and others vs. S.L. Abbas, (1993) 4 SCC 357;
Chief General Manager (Telecom) N.E. Telecom Circle and another vs. Rajendra CH. Bhattacharjee and others, (1995) 2 SCC 532;
State of M.P. and another vs. S.S. Kourav and others, (1995) 3 SCC 270; Union of India and others vs. Ganesh Dass Singh, 1995 Supp. (3) SCC 214; Abani Kanta Ray vs. State of Orissa and others, 1995 Supp. (4) SCC 169; National Hydroelectric Power Corporation Ltd. vs. Shri Bhagwan and Shiv Prakash, (2001) 8 SCC 574;
Public Services Tribunal Bar Association vs. State of U.P. and another, (2003) 4 SCC 104;
Union of India and others Vs. Janardhan Debanath and another, (2004) 4 SCC 245;
State of U.P. vs. Siya Ram, (2004) 7 SCC 405;
State of U.P. and others vs. Gobardhan Lal, (2004) 11 SCC 402;
Kendriya Vidyalaya Sangathan vs. Damodar Prasad Pandey and others, (2004) 12 SCC 299;
Somesh Tiwari vs. Union of India and others, (2009) 2 SCC 592;
Union of India and others vs. Muralidhara Menon and another, (2009) 9 SCC 304;
Rajendra Singh and others vs. State of Uttar Pradesh and others, (2009) 15 SCC 178;
State of Haryana and others vs. Kashmir Singh and another,(2010) 13 SCC 306,

Whether approved for reporting? [16] Yes

For the Petitioner: Mr. Mandeep Chandel, Advocate, through video conferencing.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Vikas Rathore and Mr. Desh Raj Thakur, Additional Advocate Generals, for respondents No.1 and 2/State, through video conferencing.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE.

Tarlok Singh Chauhan, Judge

The petitioner vide office order dated 09.06.2020 has been transferred from G.S.S.S., Arloo, District Una to G.S.S.S., Mundu, District Shimla and aggrieved thereby has filed the instant writ petition for grant of the following substantive reliefs:

> "i) That in view of the above mentioned facts and circumstances mentioned hereinabove, the impugned order (Annexure P-1) may kindly be quashed and set aside, in the interest of justice and fair play.
>
> ii) That the respondents may kindly be directed to allow the petitioner to work at his present place of posting i.e. GSSS Arloo, District Una, H.P. till the final adjudication of the case."

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16 Whether reporters of the local papers may be allowed to see the judgment? yes

2. The petitioner was appointed as Junior Basic Teacher (for short 'JBT') in the year 2009 and after having served at GPS Batlahu, Education Block, Bijhri, District Hamirpur, H.P., GPS Ram Nagar, Education Block, Galore, District Hamirpur, H.P. was promoted as TGT in the year 2017 and transferred to G.S.S.S., Arloo, District Una, H.P. and now vide order dated 09.06.2020, he has been ordered to be transferred to G.S.S.S., Mundu, District, Shimla.

3. It is contended by learned counsel for the petitioner that the impugned transfer order is illegal, unjust and has been issued only to accommodate respondent No.3. It is further contended that the order of transfer if given effect to would adversely affect the family life of the petitioner, whose wife is working as a Staff Nurse, State Government Employee, at RKGMC, Hamirpur and they have a baby girl, who is about one year and four months old and since the wife of the petitioner has been assigned night duty in the isolation ward of the hospital due to pandemic disease of COVID-19, it is the petitioner, who is to look after this baby during night time.

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

5. It is trite that transfer is an incidence of service and as long as the authority acts keeping in view the administrative exigency and taking into consideration the public interest as the paramount consideration, it has unfettered powers to effect transfer subject of course to certain disciplines. Once it is admitted that the petitioner is State government employee and holds a transferable post then he is liable to be transferred from one place to the other within the District in case it is a District cadre post and throughout the State in case he holds a State cadre post. A government servant holding a transferable post has no vested right to remain posted at one place or the other and courts should not ordinarily interfere with the orders of transfer instead affected party should approach the higher authorities in the department. Who should be transferred where and in what manner is for the appropriate authority to decide. The courts and tribunals are not expected to interdict the working of the administrative system by transferring the officers to "proper place". It is for the administration to take appropriate decision.

6. Even the administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redressal but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. Even if, the order of transfer is made in transgression of administrative guidelines, the same cannot be interfered with as it does not confer any legally enforceable rights unless the same is shown to have been vitiated by mala fides or made in violation of any statutory provision. The government is the best judge to decide how to distribute and utilize the services of its employees.

7. However, this power must be exercised honestly, bonafide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations without any factual background foundation or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, such as on the basis of complaints. It is the basic principle of rule of law and good administration, that even administrative action should be just and fair. An order of transfer is to satisfy the test of Articles 14 and 16 of the Constitution otherwise the same will be treated as arbitrary.

8. Judicial review of the order of transfer is permissible when the order is made on irrelevant consideration. Even when the order of transfer which otherwise appears to be innocuous on its face is passed on extraneous consideration then the Court is competent to go into the matter to find out the real foundation of transfer. The Court is competent to ascertain whether the order of transfer passed is bonafide or as a measure of punishment.

9. The law regarding interference by Court in transfer/posting of an employee, as observed above, is well settled and came up before the Hon'ble Supreme Court in ***E.P.***

Royappa vs. State of Tamil Nadu, (1974) 4 SCC 3; B. Varadha Rao vs. State of Karnataka, (1986) 4 SCC 131; Union of India and others vs. H.N. Kirtania, (1989) 3 SCC 445; Shilpi Bose (Mrs.) and others vs. State of Bihar and others, 1991 Supp (2) SCC 659; Union of India and others vs. S.L. Abbas, (1993) 4 SCC 357; Chief General Manager (Telecom) N.E. Telecom Circle and another vs. Rajendra CH. Bhattacharjee and others, (1995) 2 SCC 532; State of M.P. and another vs. S.S. Kourav and others, (1995) 3 SCC 270; Union of India and others vs. Ganesh Dass Singh, 1995 Supp. (3) SCC 214; Abani Kanta Ray vs. State of Orissa and others, 1995 Supp. (4) SCC 169; National Hydroelectric Power Corporation Ltd. vs. Shri Bhagwan and Shiv Prakash, (2001) 8 SCC 574; Public Services Tribunal Bar Association vs. State of U.P. and another, (2003) 4 SCC 104; Union of India and others Vs. Janardhan Debanath and another, (2004) 4 SCC 245; State of U.P. vs. Siya Ram, (2004) 7 SCC 405; State of U.P. and others vs. Gobardhan Lal, (2004) 11 SCC 402; Kendriya Vidyalaya Sangathan vs. Damodar Prasad Pandey and others, (2004) 12 SCC 299; Somesh Tiwari vs. Union of India and others, (2009) 2 SCC 592; Union of India and others vs. Muralidhara Menon and another, (2009) 9 SCC 304; Rajendra Singh and others vs. State of Uttar Pradesh and others, (2009) 15 SCC 178; and State of Haryana and others vs. Kashmir Singh and another,(2010) 13 SCC 306 and the conclusion may be summarised as under:-

1. Transfer is a condition of service.
2. It does not adversely affect the status or emoluments or seniority of the employee.
3. The employee has no vested right to get a posting at a particular place or choose to serve at a particular place for a particular time.
4. It is within the exclusive domain of the employer to determine as to at what place and for how long the services of a particular employee are required.
5. Transfer order should be passed in public interest or administrative exigency, and not arbitrarily or for extraneous consideration or for victimization of the employee nor it should be passed under political pressure.
6. There is a very little scope of judicial review by Courts/Tribunals against the transfer order and the same is restricted only if the transfer order is found to be in contravention of the statutory Rules or malafides are established.
7. In case of malafides, the employee has to make specific averments and should prove the same by adducing impeccable evidence.
8. The person against whom allegations of malafide is made should be impleaded as a party by name.
9. Transfer policy or guidelines issued by the State or employer does not have any statutory force as it merely provides for guidelines for the understanding of the Department personnel.
10. The Court does not have the power to annul the transfer order only on the ground that it will cause personal inconvenience to the employee, his family members and children, as consideration of these views fall within the exclusive domain of the employer.
11. If the transfer order is made in mid-academic session of the children of the employee, the Court/Tribunal cannot interfere. It is for the employer to consider such a personal grievance.

10. Judged in light of the aforesaid principles, it would be noticed that there is nothing on record to even remotely suggest that the transfer is effected by any illegal and factual malafides or with an intention to accommodate the private respondent. Rather, the records suggest that ever-since the year 2009, the petitioner remained posted in District Hamirpur and came to be transferred only in the year 2017, that too on promotion as TGT, to District Una, where he has already completed his normal tenure of service and is thus liable to be transferred.

11. Now, adverting to the other contentions raised by the petitioner regarding the family life being disturbed. As observed above, it is more than settled that the Court does not

have the power to annul the transfer order only on the ground that it will cause personal inconvenience to the employee, his family members and children, as consideration of these views fall within the exclusive domain of the employer.

12. What we find more shocking is that it is the specific case of the petitioner that he has a baby sitting during night when his wife is attending her duties as a Staff Nurse. We asked the learned counsel for the petitioner whether the petitioner had taken permission to leave the station to which he replied in the negative by stating that the petitioner had been travelling to and fro daily from Hamirpur to Una and thereafter from Una to Hamirpur. If that be so, we really wonder how much of time he is devoting to his job because even by shortest route, the distance between two stations is 70 kilometres and it will take atleast two hours to cover this distance. Now, in case the petitioner had been travelling to and fro, then he is spending atleast four hours only on travelling between two stations, excluding the time the petitioner would take to reach or leave his home, reach/leave the school. The petitioner is working as a TGT and is required to undertake some preparation so as to be in a position to teach the next day.

13. What is further disturbing is the fact that even though the petitioner like other servants is governed by the Service Rules including F.R. & S.R.-Part III, Leave Rules Central Civil Services (Leave) Rules, 1972. But, it appears that the Government itself has ignored the lapse of the government servant when he gets down to leaving the station without due permission.

14. It is more than settled that whole time of the government servant is at the disposal of the Government which pays him and it is for this reason that he can be employed in any manner required by the authority.

15. It shall be apposite to make note of Fundamental Rule 11, Chapter III, General Conditions of Service, which reads as under:

> "F.R. 11. Unless in any case it be otherwise distinctly provided, the whole time of a Government servant is at the disposal of the Government which pays him, and he may be employed in any manner required by proper authority, without claim for additional remuneration, whether the services required of him are such as would ordinarily be remunerated from general revenues, from a local fund or from the funds of a body incorporated or not, which is wholly or substantially owned or controlled by the Government."

16. Equally settled is the proposition that a government servant is required to take proper permission for leaving station/headquarters, but even this provision is being violated with impunity despite the clarifications issued by the Central Government to this effect vide Office Memorandum No. 11013/7/04-Estt. (A) Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training), New Delhi, dated 18th May, 1994 and Office Memorandum No. 11013/8/2000-Estt.(A) Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training), New Delhi, dated 7th November, 2000, wherein it is clarified that it is implicit in these provisions i.e. Fundamental Rule 11 and Article 56 of the Civil Service Regulations that a government servant is required to take permission for leaving station/headquarters. It is, thus, clear that such permission is essential before a government servant leaves his station.

17. It is, therefore, high time that the Government issues certain guidelines by issuing instructions and fixing a limit of travelling by a government servant to and fro in connection with his job, whether by a private or public conveyance including pooled conveyance. Looking to the nature of the terrain and topography of the State, it will be well advised if the limit of one hour of travelling is fixed for one side. Meaning thereby, to and fro journey in no event should invariably not be taking more than two hours. The State may also consider laying down other related guidelines which would ensure not only the attendance of the government servant, but also ensure his maximum output in his job for which he is paid out of the State Exchequer.

18. For the reasons stated above, we find no merit in this writ petition and the same is accordingly dismissed, so also the pending application(s), if any.

19. Let a copy of this judgment be sent to the Chief Secretary to the Government of Himachal Pradesh for issuing appropriate instructions/guidelines in terms of the judgment and report compliance within three months from today.

20. For compliance, to come up on **30th September, 2020.**

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

Madhwa Nand Semwal ...Appellant.

Versus

Girish Gupta ..Respondent.

RSA No. 517 of 2007
Date of Decision: June 9, 2020

Code of Civil Procedure, 1908- Order VI Rules 1 & 15(4)- Requirement of affidavit in support of pleadings- Non-compliance and effect- Held, non-filing of affidavit in support of pleadings may not be fatal in every case- Duly verified written statement without accompanying an affidavit is not incomplete. (Para 16 & 17)

Code of Civil Procedure, 1908- Order VI Rule 15(4)- Omission in filing affidavit in support of pleadings- Doctrine of curability- Held, omission in filing affidavit in support of pleadings is curable. (Para 18)

Code of Civil Procedure, 1908- Order VI Rule 15(4)- Filing of pleadings without accompanying affidavit in support thereof- Effect- Held, written statement without accompanying affidavit was accepted by the Trial Court- Plaintiff did not object to its acceptance on this ground nor raised any objection in replication- He cannot raise such objection at belated stage, when he himself had filed replication without affidavit. (Para 21)

Cases referred;

G.M. Siddeshwar vs. Prasanna Kumar reported in (2013) 4 SCC 776,
K.Laxmanan vs. Thekkayil Padmini and others reported in (2009) 1 SCC 354,
Murarka Radbey Shyam Ram Kumar vs. Roop Singh Rathore, AIR 1964 SC 1545,
R.P. Moidutty vs. P.T. Kunju Mohammad and another reported in (2000) 1 SCC 481,
T.M. Jacob vs. C. Poulose and others reported in (1999) 4 SCC 274,
Whether approved for reporting?[17] *Yes*

For the Appellant: Ms. Seema K. Guleria, Advocate, through Video Conferencing.

For the Respondents: Mr.Romesh Verma, Advocate, through Video Conferencing.

Vivek Singh Thakur, J.

This regular second appeal has been preferred against the judgment of reversal, whereby learned District Judge, Shimla, vide judgment dated 01.09.2007, passed in Civil Appeal No. 23-S/13 of 2007, titled as *Greesh Gupta vs. Madhwa Nand Semwal,* has set aside the judgment and decree dated 01.03.2007, passed in favour of the plaintiff (appellant herein) by learned Civil Judge (Junior Division), Court No.(V), Shimla, H.P., in Civil Suit No.8-1 of 2005, titled as *Madhwa Nand Semwal vs. M/s Girish Gupta,* wherein plaintiff was held entitled for recovery of `1,03,000/- from defendant. Appellant is plaintiff and respondent is defendant in the Civil Suit. For convenience in this judgment they would be referred as plaintiff and defendant respectively.

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17 Whether reporters of the local papers may be allowed to see the judgment?

2. On 12.12.2007, appeal was admitted on following substantial questions of law:-

> "1. Whether the onus to prove a facts can be burdened on plaintiff/appellant when the said fact is alleged by defendant/respondent and the defendant has failed to prove the fact by leading any cogent evidence?
>
> 2. Whether even though the defendant/ respondent has failed to prove the fact that he used to make payments of material by producing any documentary or oral evidence on record can Ld. Court base its findings on sole oral submission/statement of defendant/ respondent?
>
> 3. Whether written statement, which has not been duly supported with an affidavit as required by law be given any credibility for the averments made therein and can Ld. Court base its findings on those averments which is only supported by oral testimony of the respondents?"

3. During hearing, on perusal of the record, it is found that learned District Judge has misconstrued, misread and ignored the oral as well as documentary evidence on record, which has resulted into perversity in the impugned judgment. Therefore, following question of law is also framed:-

> 4. Whether learned District Judge has misconstrued, misread, mis-appreciated and ignored the oral as well as documentary evidence on record, resulting into perversity in the impugned judgment?

It is the case of the appellant (hereinafter referred to as plaintiff) that on demand raised by the respondent (hereinafter referred to as defendant) he had supplied 81 trucks of sand for construction work undertaken by the defendant and the rate was fixed as `2100/- per truck, including cost of the sand. Plaintiff has also placed on record 81 bills alleged to have been issued on behalf of the defendant for receipt of sand. According to the plaintiff, against total amount of `1,70,100/-, defendant had paid only `65,000/-and thus suit for recovery of remaining amount of `1,05,100/-.

4. In written statement, it is denied that defendant had ever agreed for supply of sand @ `2100/- per truck and defendant had always hired the vehicles on the basis of transportation charges and value of the goods, transported, was borne by the defendant and he had hired various vehicles at different times, but all those vehicles were hired on the basis of transportation cost and neither rate @ `2100/- per truck was prevalent at relevant time nor there was any occasion for defendant to agree for the same. Even payment of `65,000/- by defendant to the plaintiff has been denied in response to para-4 of the plaint and it was alleged that entire story put forth by the plaintiff is false. Receipt of notice served upon the defendant by the plaintiff has also been denied.

5. Replication to the written statement has also been filed by the plaintiff reasserting the claim put forth in the plaint.

6. On the basis of pleadings of the parties, following issues were framed by the trial Court on 04.07.2005, which read as under:-

> "1) Whether the plaintiff is entitled for recovery of `1,05,100/-, as prayed? OPP
>
> 2) Whether the plaintiff is estopped from filing the present suit, on account of the his own acts, deeds and conduct, as alleged? OPD

3) Whether the suit of the plaintiff is not maintainable, as alleged? OPD

4) Whether the suit in question has not been filed against proper and authorised person, as alleged? OPD

5) Whether the plaintiff has concealed material facts and not come to Court with clean hands? OPD

6) Relief."

7. Plaintiff, including himself, has examined two witnesses in support of his case and defendant, including himself, has also examined two witnesses.

8. Perusal of issues framed and onus put on parties to prove the same clearly reflects that onus to prove the respective issues has been correctly fixed by the trial Court and there is no defect in determining the onus to prove facts at the time of framing of issues. The substantial question No.1 is answered accordingly.

9. It has been stated by defendant as DW.1 that he used to make payment of the goods directly to the Quarry owner/Incharge, Crusher and Brick-kiln and transporter was only entitled for the payment of transportation charges. In written statement also a passing reference of such practice has been given. In written statement, defendant is silent about the payment of `65,000/- to the plaintiff, but in his deposition in the Court, has claimed that a sum of `65,000/- was paid to the plaintiff as transportation charges of the sand of 81 trucks. It is claimed by the defendant that fare of one truck was ranging from `750/- to `800/-. At the rate of `750/- per truck transportation charges for 81 trucks becomes `60,750/-, whereas at the rate of `800/- it becomes `64,800/-. It is not the case of defendant that `800/- was paid for each truck, rather his claim is that transportation charges per truck were ranging from `750/- to `800/-. In such eventuality, for what purpose the excess amount i.e. `65,000/- was paid by the defendant to the plaintiff is not clear.

10. For evasive reply in the written statement as well as for deposition of defendant in the Court, it is an admitted case that plaintiff had supplied at least 81 truck loads of sand to the defendant, though defendant has tried to avoid his liability by saying that receipts Ex.PW.1/A-1 to Ex.PW.1/A-82 have not been issued by him, but by one Girish Gupta Construction Company and these slips do not bear his signatures. However, he has admitted that on these documents his address has been mentioned. He himself, in examination-in-chief, has stated that he had paid transportation charges of the trucks to the plaintiff. Stands taken by defendant in the written statement as well as in his oral submission are contradictory to each other.

11. Plaintiff, in his deposition as well as in the statement of Laxmi Kant (PW.2), who was his driver, has brought on record the fact that plaintiff had been making payment of sand on the Quarry for the sand and sand was brought from Jaunaji and Deothi Quarries situated in Solan. The said statement is corroborated in the statement of defendant, wherein he has stated that sand for him was brought from Deothi, Solan. Defendant has made an unsuccessful attempt by producing DW.2 Hem Raj to prove that payment of sand was being made directly by the defendant himself. But in cross-examination, this witness has admitted that he was not owner or Contractor of the Quarry, but some Amit Anand was owner of the Quarry and there was no agreement of Amit Anand with him (DW.2). This witness though has stated that they used to maintain record in a register with respect to payments received from the Contractors, but he had not produced any such register or document in the Court to substantiate his oral testimony. Though at one place he has stated that the truck bearing registration number of the plaintiff's truck did not come to his Quarry, but again in the next line he has self stated that vehicle had come. There is no cogent and reliable evidence on record to prove version of the defendant that he used to make payment of sand directly to the Quarry owner or Contractor and for want of such evidence on record, the finding of learned District Judge that the defendant used to pay cost of sand to the Quarry owner directly, is contrary to the evidence on record.

12. Learned District Judge has observed that in general practice transporter is supposed to only transport the goods on behalf of the owner/purchaser and, therefore, very genesis of the case of the plaintiff/respondent seems to be baseless and against the common practice. There is nothing on record wherefrom learned District Judge has drawn inference of existence of such general or common practice. Neither defendant has pleaded such common/general practice nor any evidence to

prove the same has been brought on record. Simple claim of the defendant is that he himself used to purchase the sand which was transported in the truck of the plaintiff, but no convincing and reliable evidence has been brought on record to prove this fact. Therefore, learned District Judge has committed mistake of law in referring general/common practice without any evidence. Accordingly, substantial question No.2 is decided in favour of the plaintiff.

13. It is pleaded on behalf of the plaintiff that for want of filing of affidavit in support of written statement, the same has to be discarded and evidence related thereto is not to be read and thus case of the defendant based on such written statement and oral evidence is liable to be rejected.

14. Undoubtedly Order 6 Rule 15(4) of the Code of Civil Procedure (in short 'CPC') provides that person verifying the pleading shall also furnish an affidavit in support of his pleadings and Order 6 Rule 1 CPC provides that "pleading" shall mean plaint or written statement. Definitely the word "shall" in Order 6 Rule 15(4) CPC makes it mandatory to furnish affidavit in support of his pleadings. However, non-filing of the affidavit in support of pleadings may not be fatal in every case.

15. Order VI Rule 15(4) CPC provides that person verifying the pleadings shall also furnish an affidavit in support of his pleadings which is clear in itself that pleadings are different than an affidavit, and affidavit is to be filed in support of pleadings and therefore, affidavit is not part of pleadings but is an independent document to be filed in support of pleading.

16. It is clarified by the Apex Court in ***G.M. Siddeshwar vs. Prasanna Kumar*** reported in ***(2013) 4 SCC 776,*** that a plain reading of Order 6 Rule 15 CPC suggests that a verification of plaint is necessary and in addition to verification, the person verifying the plaint is "also" required to file an affidavit in support of pleadings and further that requirement of filing of an affidavit also does not mean that verification of pleadings is incomplete if affidavit is not filed, as the affidavit, in this context, is a stand-alone document. Therefore, duly verified written statement filed in present case, without accompanying an affidavit, as required under Order 6 Rule 15(4) CPC does not mean that it is incomplete.

17. For application of doctrine of curability on principles contained in CPC, as introduced by the Apex Court in ***T.M. Jacob vs. C. Poulose and others*** reported in ***(1999) 4 SCC 274,*** omission in filing the affidavit in support of pleadings is curable.

18. Considering its earlier pronouncement in case ***Murarka Radbey Shyam Ram Kumar vs. Roop Singh Rathore*** reported in ***AIR 1964 SC 1545,*** the Apex Court in ***R.P. Moidutty vs. P.T. Kunju Mohammad and another*** reported in ***(2000) 1 SCC 481*** has reiterated that defect in verification is curable defect. Therefore, on the same analogy defect in filing the affidavit or non-filing of affidavit in support of pleadings is also a curable defect.

19. It is also an admitted fact that written statement in present case was filed and accepted by the Court.

20. As discussed supra, affidavit is additional document to the pleadings, but is not part of pleadings. Therefore, non-filing of affidavit in present case that too when written statement was not only accepted by the Court, but plaintiff had also not objected for acceptance of that written statement for want of filing of affidavit in its support. Now plaintiff cannot be permitted to raise such issue at this belated stage. In present case, after filing of the written statement plaintiff has filed replication thereto and the said replication has also been filed with permission of the Court but without affidavit. The Apex Court in ***K.Laxmanan vs. Thekkayil Padmini and others*** reported in ***(2009) 1 SCC 354*** has held that pleadings as defined under the provision of Rule 6 of Order 1 of CPC consist only of a plaint and written statement and plaintiff can file a replication in respect to the plea raised in written statement which also becomes part of pleadings if allowed to be filed by Court. Order 6 Rule 15(4) CPC requires filing of an affidavit in support of pleadings and thus replication is also to be supported by an affidavit. The plaintiff has also not filed an affidavit in support of his pleadings filed by way of replication.

21. Further, in replication filed by the plaintiff, no objection has been taken with respect to non-filing of affidavit in support written statement and not only defendant has been allowed to lead evidence on the basis of written statement but at the time of leading of evidence by the defendant no such objection has been raised on behalf of the plaintiff. Even during cross-examination of the defendant, his competency to file written statement or deposing in the Court for want of filing of affidavit in support of written statement has not been questioned. Had it been so, defendant would have got chance to cure the defect and in such eventuality failure to cure the defect would have been fatal to defendant. Therefore, in the given facts and circumstances of the present case, this objection is not available to the plaintiff at this stage and thus substantial question No.3 is decided accordingly.

22. Learned District Judge has ousted the plaintiff and reversed the judgment and decree passed by the trial Court by appreciating the evidence in para-25 of the impugned judgment. Perusal of record clearly indicates that his findings in this para are perverse in nature being contrary to the evidence on record. Learned District Judge has observed that plaintiff while appearing in the witness box has clearly admitted that his vehicle was taken by the defendant, whereas in the entire statement of the plaintiff, including his cross-examination, plaintiff has no where stated so. Rather he has stated that vehicle was being driven by PW.2 Laxmi Kant and now it had been taken away by the Company, which does not mean that vehicle is taken away by the defendant. Normally vehicles are taken away by Finance Companies and only in that eventuality owner would say that so and so was driver of the vehicle which has been taken away by Company and therefore statement of plaintiff clearly means that vehicle was taken away by the Finance Company.

23. Learned District Judge has also observed that plaintiff has also admitted that he was not aware about Quarry from where sand was brought by the driver, whereas in cross-examination, plaintiff has clearly stated that sand was brought from Solan. To reject claim of the plaintiff, learned District Judge has also picked one another line from the cross-examination of the plaintiff that he never went in the vehicle which has no concern with the payment against the purchase of sand by the plaintiff to the Quarry owner. It has been held by learned District Judge that sand was not being purchased by the plaintiff but was being purchased by the defendant, but he has not referred any reason or evidence for any such finding.

24. Perusal of statement of DW.1 Girish Gupta, as discussed herein-above, does not inspire confidence for the reason that it is contrary to the stand taken in the written statement. Defendant in reply to para-4 of the plaint has denied its contents, wherein plaintiff had stated that a sum of `65,000/- was paid by the defendant to him and thus the said fact has been denied by the defendant in his written statement. But in his deposition in the Court he has stated that he has paid a sum of `65,000/- for transportation charges to the plaintiff.

25. So far as payment of sand to the Quarry owner is concerned, defendant has examined DW.2 Hem Raj. As discussed supra, he is neither Quarry owner nor the Contractor and has also not produced any record relating thereto. Therefore, learned District Judge has wrongly concluded that it has been proved on record that sand was being purchased by defendant Girish Gupta.

26. Lastly, by referring general practice and common practice without any evidence on record, learned District Judge has given weightage to the statement of defendant which is without any basis. Learned District Judge has picked up selective lines from the statements and has failed to consider the entire evidence in its totality and even the meaning of those lines construed by him is actually incorrect. Therefore, for mis-construction, misreading and mis-appreciation of evidence on record impugned judgment suffers perversity, hence liable to be set aside. Substantial question No.4 is answered accordingly.

27. In view of above findings, impugned judgment and decree passed by learned District Judge, Shimla, is set aside and judgment and decree passed by trial Court is upheld. Plaintiff is entitled to recover a sum of `1,03,000/- with cost.

28. Accordingly, appeal is allowed in the aforesaid terms. Pending application(s), if any, also stand disposed of.

Registry to prepare decree sheet accordingly.